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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 894

RIN 3206–AN58

Federal Employees Dental and Vision Insurance Program: Extension of Eligibility to Certain TRICARE-Eligible Individuals; Effective Date of Enrollment; Corrections

AGENCY: Office of Personnel Management.

ACTION: Correcting amendments.

SUMMARY: On November 19, 2018, the Office of Personnel Management (OPM) published revisions to its Federal Employees Dental and Vision Insurance Program regulations. That document discussed the term ''TEI family member'' but did not include the term in the instructions as a term to be added to the definitions section, so the definition could not be incorporated into the CFR. This document corrects the interim final regulations by adding the definition for ''TEI family member'' and also amending an incorrect reference regarding the restriction on dual enrollments.

DATES: This document is effective February 5, 2019.

FOR FURTHER INFORMATION CONTACT: For information, please contact Julia Elam, Program Analyst, at *julia.elam@opm.gov* or (202) 606–2128.

SUPPLEMENTARY INFORMATION: OPM has statutory responsibility to administer the Federal Employees Dental and Vision Insurance Program (FEDVIP) in accordance with 5 U.S.C. chapters 89A and 89B and implementing regulations (5 CFR part 894). Section 715 of Public Law 114–328, authorizes the Secretary of Defense to enter into an agreement with the OPM Director to allow certain TRICARE-eligible individuals to enroll, or to be covered under an enrollment in FEDVIP, and amends 5 U.S.C. 8951 and 8958(c) (dental benefits) and 5 U.S.C. 8981 and 8988(c) (vision benefits), to establish eligibility of certain TRICARE-eligible individuals to enroll so that they and their eligible family members may obtain dental and vision benefits under FEDVIP.

On November 19, 2018, OPM published *Federal Employees Dental and Vision Insurance Program: Extension of Eligibility to Certain TRICARE-Eligible Individuals; Effective Date of Enrollment,* interim final rule in the **Federal Register** (83 FR 58175) to amend 5 CFR part 894. This document corrects the regulations to include the term ''TEI family member'' that is referenced in § 894.101 (Definitions). This document also amends an incorrect cross reference in § 894.804 regarding the restriction on dual enrollments from § 894.203 to § 894.204.

Regulatory Impact Analysis

OPM has examined the impact of this rule as required by Executive Order 12866 and Executive Order 13563, which directs 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 must be prepared for major rules with economically significant effects of $100 million or more in any one year. This rule is not a ''significant regulatory action,'' under Executive Order 12866.

Reducing Regulation and Controlling Regulatory Costs

This rule is not E.O. 13771 regulatory action because this rule is not significant under E.O. 12866.

List of Subjects in 5 CFR Part 894

Administrative practice and procedure, Government employees, Health facilities, Health insurance, Health professions, Hostages, Iraq, Kuwait, Lebanon, Military personnel, Reporting and recordkeeping requirements, Retirement.

Accordingly, 5 CFR part 894 is corrected by making the following correcting amendments:

PART 894—FEDERAL EMPLOYEES DENTAL AND VISION INSURANCE PROGRAM

■ 1. The authority citation for part 894 continues to read as follows:

Authority: 5 U.S.C. 8962; 5 U.S.C. 8992; Subpart C also issued under section 1 of Pub. L. 110–279, 122 Stat. 2604; Pub. L. 114–328.

Subpart A—Administration and General Provisions

■ 2. Amend § 894.101 by adding a definition for ''TEI family member'' in alphabetical order to read as follows:

§ 894.101 Definitions.

* * * * *

TEI family member means a TEI who is a dependent with respect to a sponsor, as defined in 10 U.S.C. 1072(2)(A) (spouse), 10 U.S.C. 1072(2)(B) (unremarried widow), 10 U.S.C. 1072(2)(C) (unremarried widower), 10 U.S.C. 1072(2)(D) (child), or 10 U.S.C 1072(2)(I) (unmarried person).

* * * * *

Subpart H—Special Provisions for TRICARE-Eligible Individuals (TEI)

■ 3. Amend § 894.804 by revising paragraph (a) to read as follows:

§ 894.804 Am I a sponsor for a FEDVIP dental or vision plan?

(a) Generally, the sponsor is the individual who is eligible for medical or dental benefits under 10 U.S.C. chapter 55 based on his or her direct affiliation with the uniformed services, including military members of the National Guard and Reserves. Relationship to a sponsor conveys TEI status to a TEI family member. If two parents of a TEI child are entitled to be a sponsor, see restriction on dual enrollment at § 894.204.

* * * * *

Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

[FR Doc. 2019–00799 Filed 2–4–19; 8:45 am]

BILLING CODE 6325–64–P

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

5 CFR Part 1655

TSP Loan Eligibility During Government Shutdowns

AGENCY: Federal Retirement Thrift Investment Board.

ACTION: Interim rule.

SUMMARY: This interim rule amends the Thrift Savings Plan (TSP) regulations to allow certain TSP participants to request a loan during government shutdowns without regard to whether they are in pay status.

DATES: This interim rule is effective February 5, 2019. Comments must be received by March 7, 2019.

FOR FURTHER INFORMATION CONTACT: *For press inquiries,* contact Kim Weaver at (202) 942–1641. *For information about commenting on this interim rule,* contact Laurissa Stokes at (202) 942–1645. *For information about how to request a TSP loan,* contact 1–TSP–YOU–FRST (1–877–968–3778).

ADDRESSES: You may submit comments using one of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.*

Follow the instructions for submitting comments.

- *Mail:* Office of General Counsel, Attn: Megan G. Grumbine, Federal Retirement Thrift Investment Board, 77 K Street NE, Suite 1000, Washington, DC 20002.
- *Facsimile:* Comments may be submitted by facsimile at (202) 942–1676.

The most helpful comments explain the reason for any recommended change and include data, information, and the authority that supports the recommended change.

SUPPLEMENTARY INFORMATION:

Type of Rulemaking

Generally, Federal regulations are first published in proposed form to allow the public to make comments before the rule becomes effective. An interim rule is a way to make a rule effective immediately, without public comment, when doing so is necessary to respond to an emergency situation. Interim rules are usually followed by a more permanent rulemaking which confirms that the interim rule will be adopted as final. Although this rule is effective immediately, the FRTIB will consider public comments before publishing the final rule.

Background

The FRTIB administers the Thrift Savings Plan (TSP), which was established by the Federal Employees' Retirement System Act of 1986 (FERSA), Public Law 99–335, 100 Stat. 514. The TSP is a tax-deferred retirement savings plan for Federal civilian employees and members of the uniformed services. The TSP is similar to cash or deferred arrangements established for private-sector employees under section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)).

The Internal Revenue Code (*i.e.,* the tax code) offers tax subsidies to people who save for their own retirement. For example, investment earnings on retirement savings are allowed to accrue tax-free while they remain in a retirement account. The tax code establishes restrictions on loans and withdrawals from retirement accounts in order to ensure that those tax subsidies are used for retirement savings.

TSP's Loan Program Prior to This Interim Rule

Subject to restrictions imposed by the tax code and Internal Revenue Service (IRS) regulations, the TSP has, for several decades, offered a loan program that allows participants to borrow from their retirement accounts. The FRTIB is required to report loans to the IRS as taxable income subject to a 10% penalty after a certain number of loan payments are missed. Like many 401(k) plans, the TSP's technology systems and business processes are designed to accept loan payments primarily through payroll deductions to ensure that participants do not suffer the tax consequences of defaulting on their loans. Obviously, loan payments cannot be made through payroll deduction if the participant is not receiving a paycheck. For this reason, the FRTIB regulations contain a provision that makes loan eligibility contingent on pay status.

Necessity of This Interim Rule

Federal employees recently experienced the longest partial government shutdown in United States history. Prolonged shutdowns risk damaging the overall long-term financial well-being of TSP participants and their families. Congress passed a continuing resolution on January 25, 2019 which temporarily ended the shutdown. The continuing resolution only provides funding for 3 weeks which places roughly 800,000 Federal employees under the threat of being furloughed again in the near future.

The FRTIB's loan program was not designed to replace the salaries of Federal employees. A TSP loan is not a costless alternative to paying Federal employees for their work. TSP participants who take loans may miss out on the investment earnings that would have accrued if that money had remained their retirement accounts. A TSP loan will still have to be repaid in order to avoid the loan being declared a taxable distribution. Nevertheless, the FRTIB is publishing this interim rule in the hopes that it might provide some assistance to TSP participants in the event of another government shutdown.

Effect of This Interim Rule

This interim rule amends the TSP regulations to allow certain TSP participants to request a loan during government shutdowns without regard to whether they are in pay status. To address the risk of loan payment default, the FRTIB will permit participants to request a suspension of loan payments to the extent a suspension is permitted under the IRS's interpretation of the Internal Revenue Code.

This interim rule applies only to participants who are furloughed or excepted from furlough (*i.e.,* continuing to work and earn pay, but their pay is delayed until appropriations are authorized) due to a government shutdown. The FRTIB's staff and contractors have designed manual workarounds to highly automated business processes in order to make this interim rule effective immediately so these participants will have access TSP loans in the event of another government shutdown.

Participants who are not receiving pay for other reasons (*e.g.,* administrative furlough, voluntary leave of absence, seasonal work, sabbatical, disciplinary suspension) remain ineligible to request a loan. The FRTIB is considering whether to allow these participants to request loans in nonpay status and will address this subject in the final rule. The FRTIB invites comments on this subject.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities. This regulation will affect Federal employees and members of the uniformed services who participate in the Thrift Savings Plan, which is a Federal defined contribution retirement savings plan created under the Federal Employees' Retirement System Act of 1986 (FERSA), Public Law 99–335, 100 Stat. 514, and which is administered by the FRTIB.

Paperwork Reduction Act

I certify that these regulations do not require additional reporting under the criteria of the Paperwork Reduction Act.

Unfunded Mandates Reform Act of 1995

Pursuant to the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 602, 632, 653, 1501–1571, the effects of this regulation on state, local, and tribal governments and the private sector have been assessed. This regulation will not compel the expenditure in any one year of $100 million or more by state, local, and tribal governments, in the aggregate, or by the private sector. Therefore, a statement under section 1532 is not required.

Submission to Congress and the General Accounting Office

Pursuant to 5 U.S.C. 810(a)(1)(A), the FRTIB submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States before publication of this rule in the **Federal Register**. This rule is not a major rule as defined at 5 U.S.C. 804(2).

List of Subjects

5 CFR Part 1655

Credit, Government employees, Pensions, Retirement.

Ravindra Deo,

Executive Director, Federal Retirement Thrift Investment Board.

For the reasons stated in the preamble, the FRTIB amends 5 CFR chapter VI as follows:

PART 1655—LOAN PROGRAM

■ 1. The authority citation for Part 1655 continues to read as follows:

Authority: 5 U.S.C. 8432d, 8433(g), 8439(a)(3) and 8474.

■ 2. Revise § 1655.2 to read as follows:

§ 1655.2 Eligibility for loans.

A participant can apply for a TSP general purpose or residential loan if:

(a) More than 60 calendar days have elapsed since the participant has repaid in full a TSP loan of the same type.

(b) The participant is in pay status;

(c) The participant is eligible to contribute to the TSP (or would be eligible to contribute but for the suspension of the participant's contributions because he or she obtained a financial hardship in-service withdrawal);

(d) The participant has at least $1,000 in employee contributions and attributable earnings in his or her account; and

(e) The participant has not had a TSP loan declared a taxable distribution within the last 12 months for any reason other than a separation from Government service.

Paragraph (b) of this section shall not apply to loan requests made during a Government shutdown by participants who are furloughed or excepted from furlough due to the Government shutdown.

[FR Doc. 2019–01060 Filed 2–4–19; 8:45 am]

BILLING CODE 6760–01–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 700, 701, 702, 703, 704, 705, 708a, 708b, 709, 710, 715, 717, 723, 725, 741, 745, 746, 747, 748, 749, 750, 760, 790, 791, and 792

RIN 3133–AE61

Technical Amendments

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board (Board) is issuing a final rule to make technical amendments to various provisions of the NCUA's regulations. These technical amendments correct minor drafting errors and inaccurate legal citations and remove unnecessary regulatory provisions no longer applicable to federally insured credit unions (FICUs).

DATES: The final rule is effective on February 5, 2019.

FOR FURTHER INFORMATION CONTACT: Benjamin M. Litchfield, Staff Attorney, Division of Regulations and Legislation, Office of General Counsel, at 1775 Duke Street, Alexandria, VA 22314 or telephone: (703) 518–6540.

SUPPLEMENTARY INFORMATION:

I. Background
II. Legal Authority
III. Section-by-Section Analysis
IV. Regulatory Procedures

I. Background

Occasionally, the Board will issue a technical amendments rule correcting minor drafting errors, inaccurate legal citations, or superfluous regulatory provisions throughout the NCUA's regulations. Because these changes are technical in nature, and do not affect FICUs in a substantive manner, the Board issues these technical amendments rules as final rules without notice and comment typically required by the Administrative Procedure Act (APA).[1] The NCUA's Office of General Counsel has identified a number of minor drafting errors and inaccurate citations and other technical problems throughout the NCUA's regulations for correction. Accordingly, the Board is issuing this final rule to address those matters.

II. Legal Authority

The Board has the legal authority to issue this final rule pursuant to its plenary rulemaking authority under the Federal Credit Union Act (FCU Act)[2] and its specific rulemaking authority under the various acts the Board administers.[3]

III. Section-by-Section Analysis

General Wording, Style, and Cross-Reference Changes

The final rule makes general wording, style, and cross-reference changes throughout the NCUA's regulations. For example, the final rule replaces the term ''federally-insured'' with ''federally insured'' wherever it appears to promote uniformity. Technical amendments of this nature will apply throughout the NCUA's regulations. Therefore, the preamble does not address these types of stylistic changes in the section-by-section analysis below.

Section 700.2—Definitions

The final rule amends the definitions listed in § 700.2 of the NCUA's regulations. These definitions apply throughout chapter VII of title 12 of the Code of Federal Regulations ''unless the context indicates otherwise.''[4]

Specifically, the final rule revises the definition of ''*Act*'' to read ''Federal Credit Union Act (12 U.S.C. 1751, *et seq.*).'' The current definition, which reads ''Federal Credit Union Act (73 Stat. 628, 84 Stat. 944, 12 U.S.C. 1751 through 1790),'' is inaccurate because it fails to include Title III of the FCU Act.[5] The revised citation ensures that the definition of ''*Act*'' covers the entire FCU Act.

The final rule also replaces the term ''*Administration*'' with ''*NCUA*'' to avoid confusion. The term ''*Administration*'' only appears in § 700.2 and one other section of the NCUA's regulations. The final rule makes conforming amendments to the definitions of ''*Regional Director*'' and ''*Regional Office.*''

[1] 5 U.S.C. 553(b)(A), (B).

[2] *See* 12 U.S.C. 1766, 1789.

[3] *See e.g.,* 15 U.S.C. 6801(b) (requiring the NCUA and the federal banking agencies to establish standards for the administrative, technical, and physical safeguards to protect nonpublic personal information).

[4] 12 CFR 700.2.

[5] Public Law 95–630, Tit. XVIII, sec. 1802, 92 Stat. 3641, 3719 (Nov. 10, 1978) (codified as 12 U.S.C. 1795 through 1795k).

Moreover, the final rule amends the definition of ''*credit union*'' to conform to the definition in the FCU Act.[6] Because several of the NCUA's regulations refer to ''federally insured credit unions,'' ''insured credit unions,'' or otherwise reference the insured status of a credit union, the final rule adds definitions for ''*federally insured credit union*'' and ''*noninsured credit union*'' to clarify those terms where they are not separately defined in specific rules. These definitions mirror the definitions of those terms in the FCU Act.[7]

Finally, the final rule combines the definitions of ''*paid-in and unimpaired capital and surplus*'' and ''*unimpaired capital and surplus*'' to avoid repetition. Section 700.2 currently defines ''unimpaired capital and surplus'' as ''the same as 'paid-in and unimpaired capital and surplus,' as defined in paragraph (f) of this section.'' The final rule replaces these separate definitions with a single definition that reads ''*paid-in and unimpaired capital and surplus* or *unimpaired capital and surplus.*''

Section 701.6—Fees Paid by Federal Credit Unions

The final rule replaces references to ''the Administration'' with ''NCUA'' in § 701.6 and simplifies the regulatory text. This provision governs the assessment of operating fees on federal credit unions (FCUs) and the imposition of administrative fees and interest for delinquent payments.[8] While the final rule modernizes the language of this section, the substantive requirements remain the same.

Appendix B to Part 701—Chartering and Field of Membership Manual

The final rule makes technical amendments to the Chartering and Field of Membership Manual (Chartering Manual). The Board recently issued two final rules related to FCU chartering and field of membership. The Board published a final rule in the **Federal Register** on December 7, 2016 (''FOM I'') that, in relevant part, expands the Chartering Manual's definitions of ''well-defined local community'' and ''rural district.''[9] The Board published a second rule in the **Federal Register** on June 28, 2018 (''FOM II'') that, in relevant part, adopts a narrative approach for FCUs seeking to expand or convert to a community charter.[10]

Both of these final rules contain typographical errors in the regulatory text including improperly labelled subheadings and extraneous punctuation. The final rule corrects those mistakes. Furthermore, the final rule reincorporates definitions from FOM I for a ''well-defined local community'' and ''rural district,'' which were inadvertently excluded from the regulatory text of the Chartering Manual when FOM II was published.

Part 702—Capital Adequacy

The final rule removes amendatory instruction 11 from the NCUA's risk-based capital rule.[11] That instruction directs the **Federal Register** to edit a section reference in § 702.504(b)(4) of the NCUA's regulations. However, the Board recently removed § 702.504(b)(4) and redesignated paragraphs (b)(5) and (6) as (b)(4) and (5), respectively, as part of the capital planning and stress testing rule.[12] Accordingly, there is no longer a corresponding section reference for the **Federal Register** to amend. To avoid an editorial note in § 702.504 highlighting this discrepancy, the final rule withdraws instruction 11.

Sections 703.2 and 703.8—Investment and Deposit Activities

The final rule makes technical amendments to §§ 703.2 and 703.8 of the NCUA's regulations to recognize a change in nomenclature. On March 19, 2007, the National Association of Securities Dealers, Inc. (NASD) consolidated with NYSE Regulation, Inc. to create the Financial Industry Regulatory Authority (FINRA), a self-regulatory organization charged with policing the conduct of broker-dealers under federal securities laws.[13] Therefore, the final rule replaces references to ''National Association of Securities Dealers'' with ''Financial Industry Regulatory Authority'' and ''NASD'' with ''FINRA'' wherever they appear.

Part 708a—Bank Conversions and Mergers

Part 708a contains the NCUA's regulations governing the conversion of a FICU into a mutual savings bank and the merger of a FICU into a bank. This final rule updates cross-references in the rule to reflect the redesignation of sections that are now contained in Subpart A of the bank conversions and mergers rule.[14]

Part 717—Fair Credit Reporting

The final rule removes and reserves several subparts and appendices to part 717, the NCUA's regulation implementing the Fair Credit Reporting Act (FCRA).[15] Historically, the federal banking agencies, the NCUA, and the Federal Trade Commission shared rulemaking authority for various aspects of the FCRA. Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) transferred most rulemaking authority for the FCRA to the Bureau of Consumer Financial Protection (BCFP) effective July 21, 2011.[16] The BCFP published a new Regulation V (Fair Credit Reporting), 12 CFR part 1022, on December 21, 2011, implementing those provisions of the FCRA.[17] Therefore, the Board is removing all subparts and appendices to part 717 issued under rulemaking authority in the FCRA that the Dodd-Frank Act transferred to the BCFP.

Part 741—Requirements for Insurance

The final rule corrects an inaccurate cross-reference in § 741.3(b)(5) of the NCUA's regulations.[18] That provision directs stakeholders to Appendix B to part 741 for guidance on how to develop an interest rate risk (IRR) policy and an effective IRR program. The NCUA's equity distribution rule eliminated Appendix A to part 741 and redesignated Appendix B as Appendix A. Accordingly, the Board is amending § 741.3(b)(5) to include the correct cross-reference to current Appendix A to part 741 which contains the NCUA's guidance on IRR policies.

Part 746—Appeals Procedures

The final rule also remedies an inadvertent drafting error in the NCUA's supervisory review committee (SRC) rule.[19] The SRC rule permits a FICU to appeal a material supervisory determination made by the NCUA to various appellate bodies within the agency. The SRC rule provides FICUs

[6] *See* 12 U.S.C. 1752(6).

[7] *See* 12 U.S.C. 1752(7).

[8] *See* 12 CFR 701.6(a).

[9] ''Chartering and Field of Membership Manual,'' 83 FR 30293 (June 28, 2018).

[10] ''Chartering and Field of Membership Manual,'' 81 FR 88412 (Dec. 7, 2016).

[11] ''Risk-Based Capital,'' 80 FR 66626, 66722 (Oct. 29, 2015).

[12] ''Capital Planning and Supervisory Stress Testing,'' 83 FR 17901 (Apr. 25, 2018).

[13] *See* Securities Exchange Act Release No. 34–56145 (July 26, 2007), 72 FR 42169 (Aug. 1, 2007).

[14] *See* ''Fiduciary Duties at Federal Credit Unions; Mergers and Conversions of Insured Credit Unions,'' 75 FR 81378 (Dec. 28, 2010) (redesignating sections 708a.1 through 708a.13 as sections 708a.101 through 708a.113 within Subpart A).

[15] 15 U.S.C. 1681 *et seq.*

[16] Public Law 111–203, tit. X, secs. 1061, 1088, 124 Stat. 1376, 2035–2092 (July 21, 2010).

[17] *See* ''Fair Credit Reporting (Regulation V)'' 76 FR 79307 (Dec. 21, 2011).

[18] 12 CFR 741.3(b)(5).

[19] *See* ''Supervisory Review Committee; Procedures for Appealing Material Supervisory Determinations,'' 82 FR 50270 (Oct. 30, 2017).

with specific deadlines by which the credit union must file an appeal in order for the appellate body to hear an appeal. The SRC rule bases these deadlines on when the FICU receives notice of the material supervisory determination or the decision on appeal. Section 746.106, which governs appeal to the Director of the Office of Examination and Insurance (E&I), inadvertently establishes a deadline based on when the material supervisory determination was rendered by the NCUA rather than when it was received by the FICU.[20] The final rule corrects this drafting error to clarify that the SRC rule bases the deadline to appeal to the Director of E&I on when the FICU receives the material supervisory determination not when the decision is rendered.

Part 790—Description of NCUA; Requests for Agency Action

Part 790 contains a description of the NCUA's organization and the procedures for public requests for action by the Board.[21] This part relates solely to the practices of the NCUA and does not apply to FICU operations. In July 2017, the Board announced a plan to streamline and consolidate certain of the NCUA's functions and offices in an effort to reduce the NCUA's budget and increase efficiency. This plan includes the elimination of two NCUA Regional Offices effective December 31, 2018. The final rule amends part 790 to reflect the closure of those two offices as well as the creation of the Office of Business Innovation.[22]

IV. Regulatory Procedures

Administrative Procedure Act

Generally, the APA requires a federal agency to provide the public with notice and an opportunity to comment on agency rulemakings.[23] The APA, however, creates an exception in cases where an agency for good cause determines ''that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' [24] Because all of the changes in this final rule involve only minor, technical amendments to the NCUA's existing regulations, the Board has determined that notice and comment would be unnecessary and contrary to the public interest.

Furthermore, the APA generally provides that a final rule may not become effective until at least 30 days after its publication in the **Federal Register** unless the agency determines that good cause exists to dispense with this requirement.[25] As noted above, given that the rule does not impose new requirements on federally insured credit unions and only involves minor, technical amendments to existing regulations, the Board finds sufficient good cause exists to dispense with the 30-day effective date requirement. The rule will, therefore, be effective immediately upon publication.

Regulatory Flexibility Act

The Regulatory Flexibility Act requires the NCUA to prepare an analysis of any significant economic impact a regulation may have on a substantial number of small entities (primarily those under $100 million in assets).[26] This final rule will have no economic impact on small credit unions because it only makes minor, technical amendments to NCUA's existing regulations. Accordingly, the NCUA certifies the rule will not have a significant economic impact on a substantial number of small credit unions.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or increases an existing burden.[27] For purposes of the PRA, a paperwork burden may take the form of a reporting or recordkeeping requirement, both referred to as information collections. As the final rule only makes minor, technical amendments to the NCUA's existing regulations, we have determined it does not increase paperwork requirements under the PRA.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) provides generally for congressional review of agency rules.[28] A reporting requirement is triggered in instances where the NCUA issues a final rule as defined by section 551 of the APA. As required by SBREFA, NCUA has submitted this rule to the Office of Management and Budget for it to determine if the final rule is a ''major rule'' for purposes of SBREFA. The NCUA does not believe the rule is major.

Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act.[29]

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests.[30] The NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order to adhere to fundamental federalism principles. The final rule does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The NCUA has therefore determined that this final rule does not constitute a policy that has federalism implications for purposes of the executive order.

List of Subjects

12 CFR Part 700

Credit unions.

12 CFR Part 701

Advertising, Aged, Civil rights, Credit, Credit unions, Fair housing, Individuals with disabilities, Insurance, Marital status discrimination, Mortgages, Religious discrimination, Reporting and recordkeeping requirements, Sex discrimination, Signs and symbols, Surety bonds.

12 CFR Part 702

Credit unions, Reporting and recordkeeping requirements.

12 CFR Part 703

Credit unions, Investments.

12 CFR Part 704

Credit unions, Reporting and recordkeeping requirements, Surety bonds.

12 CFR Part 705

Credit unions, Loans, Grants, Revolving fund, Community programs, Low income.

[20] *See* 12 CFR 746.106(a).

[21] *See* 12 CFR 790.1.

[22] The Board previously amended part 792 to reflect other aspects of the reorganization plan including the creation of the Office of Credit Union Resources and Expansion and the elimination of the Office of Small Credit Union Initiatives. *See* ''Agency Reorganization,'' 82 FR 60290 (Dec. 20, 2017).

[23] 5 U.S.C. 553(b).

[24] 5 U.S.C. 553(b)(B).

[25] 5 U.S.C. 553(d).

[26] 5 U.S.C. 601–612.

[27] 44 U.S.C 3501–3521.

[28] 5 U.S.C. 801–808.

[29] Public Law 105–277, 654, 112 Stat. 2681, 2681–528 (1998).

[30] ''Federalism,'' E.O. 13,132 (Aug. 10, 1999).

12 CFR Part 708a

Credit unions, Reporting and recordkeeping requirements.

12 CFR Part 708b

Bank deposit insurance, Credit unions, Reporting and recordkeeping requirements.

12 CFR Part 709

Claims, Credit unions.

12 CFR Part 710

Administrative practice and procedure, Credit unions, Reporting and recordkeeping requirements.

12 CFR Part 715

Accounting, Credit unions, Reporting and recordkeeping requirements.

12 CFR Part 717

Consumer protection, Credit unions, Information, Privacy, Reporting and recordkeeping requirements.

12 CFR Part 723

Credit, Credit unions, Member business loans, Reporting and recordkeeping requirements.

12 CFR Part 725

Credit unions, Reporting and recordkeeping requirements.

12 CFR Part 741

Bank deposit insurance, Credit unions, Reporting and recordkeeping requirements.

12 CFR Part 745

Administrative practice and procedure, Claims, Credit unions, Share insurance.

12 CFR Part 746

Administrative practice and procedure, Claims, Credit unions, Investigations.

12 CFR Part 747

Administrative practice and procedure, Bank deposit insurance, Claims, Credit unions, Crime, Equal access to justice, Investigations, Lawyers, Penalties.

12 CFR Part 748

Credit unions, Reporting and recordkeeping requirements, Security measures.

12 CFR Part 749

Archives and records, Credit unions, Reporting and recordkeeping requirements.

12 CFR Part 750

Credit unions, Golden parachute payments, Indemnity payments.

12 CFR Part 760

Credit unions, Mortgages, Flood insurance, Reporting and recordkeeping requirements.

12 CFR Part 790

Organization and functions (Government agencies).

12 CFR Part 791

Administrative practice and procedure, Sunshine Act.

12 CFR Part 792

Classified information, Confidential business information, Courts, Freedom of information, Government employees, Privacy.

By the National Credit Union Administration Board on December 13, 2018.

Gerard S. Poliquin,

Secretary of the Board.

For the reasons discussed above, the Board is amending 12 CFR parts 700, 701, 702, 703, 704, 705, 708a, 708b, 709, 710, 715, 717, 723, 725, 741, 745, 746, 747, 748, 749, 750, 760, 790, 791, and 792 as follows:

PART 700—DEFINITIONS

■ 1. The authority citation for part 700 continues to read as follows:

Authority: 12 U.S.C. 1752, 1757(6), 1766.

■ 2. In § 700.2:

■ a. Revise the definitions of ''Act,'' ''Board,'' and ''Credit union'';

■ b. Add definitions for ''Federally insured credit union,'' ''NCUA,'' ''and Noninsured credit union'' in alphabetical order; and

■ c. Revise the definitions of ''Paid-in and unimpaired capital and surplus,'' ''Regional Director,'' and ''Regional Office''.

The revisions and additions read as follows:

§ 700.2 Definitions.

* * * * *

Act means the Federal Credit Union Act (12 U.S.C. 1751, *et seq.*).

* * * * *

Board or *NCUA Board* refer to the Board of the National Credit Union Administration.

Credit union means a nonprofit financial cooperative chartered under the Federal Credit Union Act or under the laws of any State, the District of Columbia, the several territories and possessions of the United States, or the Commonwealth of Puerto Rico, which laws provide for the organization of financial cooperatives similar in principle and objectives to cooperatives chartered under the Federal Credit Union Act.

Federally insured credit union means any credit union whose member accounts are insured by NCUA according to the provisions of Title II of the Federal Credit Union Act (12 U.S.C. 1782 *et seq.*).

* * * * *

NCUA refers to the National Credit Union Administration.

* * * * *

Noninsured credit union means a credit union chartered under the laws of any State, the District of Columbia, the several territories and possessions of the United States, the Panama Canal Zone, or the Commonwealth of Puerto Rico, whose member accounts are not insured by NCUA.

Paid-in and unimpaired capital and surplus or *unimpaired capital and surplus* mean shares plus post-closing, undivided earnings. This does not include regular reserves or special reserves required by law, regulation or special agreement between the credit union and its regulator or share insurer. ''Paid-in and unimpaired capital and surplus'' for purposes of the Central Liquidity Facility is defined in § 725.2(o) of this chapter.

Regional Director means the representative of NCUA in the designated geographical area in which the office of the federally insured credit union is located or, for federally insured credit unions with $10 billion or more in assets, the Director of the Office of National Examinations and Supervision.

Regional Office means the office of NCUA located in the designated geographical areas in which the office of the federally insured credit union is located or, for federally insured credit unions with $10 billion or more in assets, the Office of National Examinations and Supervision.

* * * * *

PART 701—ORGANIZATION AND OPERATION OF FEDERAL CREDIT UNIONS

■ 3. The authority citation for part 701 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1786, 1787, 1789. Section 701.6 is also authorized by 15 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 *et seq.;* 42 U.S.C. 1981 and 3601–3610. Section 701.35 is also authorized by 42 U.S.C. 4311–4312.

■ 4. Revise § 701.6(a) to read as follows:

§ 701.6 Fees paid by federal credit unions.

(a) *Basis for assessment.* Each calendar year, or as otherwise directed by the NCUA Board, each federal credit union shall pay an operating fee to

NCUA for the current fiscal year (January 1 to December 31) in accordance with a schedule fixed by the Board from time to time. The operating fee shall be based on the total assets of each federal credit union (less the assets created on the books of natural person federal credit unions by investments made in a corporate credit union under the Credit Union System Investment Program or the Credit Union Homeowners Affordability Relief Program) as of December 31 of the preceding year or as otherwise determined pursuant to paragraph (b) of this section.

* * * * *

§ 701.21 [Amended]

■ 5. In § 701.21(h)(1), remove ''federally-insured'' and add in its place ''federally insured''.

■ 6. In § 701.22, remove ''Federally insured, state-chartered credit unions'' and add in its place ''Federally insured state-chartered credit unions'' in the introductory text; and remove ''federally insured, state-chartered credit union'' and add in its place ''federally insured state-chartered credit union'' wherever it appears.

§ 701.23 [Amended]

■ 7. Amend § 701.23(b) by removing ''federally-insured'' and adding in its place ''federally insured'' wherever it appears.

■ 8. Amend Appendix B to part 701 as follows:

■ a. Amend Section III of Chapter 1 by removing the bullet after ''and'' but before the sentence beginning with ''The fact that the certificate is made''.

■ b. Amend Section IV.D of Chapter 1 by removing the bullet after ''Continuity plan for directors, committee members and management staff'' but before the sentence beginning ''Operating facilities''.

■ c. Amend Section V.B.1 of Chapter 1 by removing the bullet after ''Organization Certificate, NCUA 4008'' but before ''Report of Official and Agreement to Serve, NCUA 4012''.

■ d. Revise the heading of Section V.B.5 of Chapter 1 titled ''Certification of Resolutions, NCUA 9501'' to read ''V.B.6—Certification of Resolutions, NCUA 9501''.

■ e. Revise the heading of Section I.A. 2 of Chapter 2 to read ''*I.A.2—Special Low-Income Rules*''.

■ f. Amend Section II.A.1 of Chapter 2 by removing the bullet after the sentence beginning with ''Employees of Johnson Soap Company'' but before the sentence beginning ''Employees of MMLLJS contractor''.

■ g. Revise the heading of Section II.A.2 of Chapter 2 to read ''*II.A.2—Trade, Industry, or Profession*''.

■ h. Amend Section II.B.1 of Chapter 2 by removing the bullet after ''A single occupational common bond to a single associational common bond'' but before ''A single occupational common bond to a community charter''.

■ i. Revise the heading of Section II.B of Chapter 2 titled ''Restructuring'' to read ''*II.B.2—Restructuring*''.

■ j. Revise the heading of Section II.B of Chapter 2 titled ''Documentation Requirements'' to read ''*II.B.4—Documentation Requirements*''.

■ k. Revise the heading of Section II.D of Chapter 2 titled ''Emergency Mergers'' to read ''*II.D.2—Emergency Mergers*''.

■ l. Amend newly designated Section II.D.2 by removing the bullet after ''Serious and persistent recordkeeping problems; or'' but before ''Serious and persistent operational concerns''.

■ m. Revise the heading of Section II.D of Chapter 2 titled ''Purchase and Assumption (P&A)'' to read ''*II.D.3—Purchase and Assumption (P&A)*''.

■ n. Revise the heading of Section II.E of Chapter 2 titled ''Organizational Restructuring'' to read ''*II.E.2—Organizational Restructuring*''.

■ o. Amend Section II.H of Chapter 2 by removing the bullet after ''Members of the immediate family or household'' but before the sentence beginning ''Honorably discharged veterans''.

■ p. Amend Section III.A.1.a of Chapter 2 by removing the number ''1.'' after paragraph 2. but before paragraph 3.

■ q. Revise the heading of Section III.A.1 of Chapter 2 titled ''Pre-Approved Groups'' to read ''III.A.1.b—Pre-Approved Groups''.

■ r. Amend Section III.A.1 of Chapter 2 titled ''Pre-Approved Groups'' by removing the number ''(1)'' after paragraph (4) but before paragraph (5).

■ s. Amend Section III.A.1 of Chapter 2 titled ''Pre-Approved Groups'' by redesiganting paragraphs (1) through (12) as 1. through 12.

■ t. Amend Section III.A.3 of Chapter 2 by removing the bullet after ''Members of the Shalom Congregation in Chevy Chase, Maryland'' but before the sentence beginning with ''Regular members of the Corporate Executives Association''.

■ u. Revise the heading of Section III.B of Chapter 2 titled ''Organizational Restructuring'' to read ''*III.B.2—Organizational Restructuring*''.

■ v. Revise the heading of Section III.B of Chapter 2 titled ''Documentation Requirements'' to read ''*III.B.4—Documentation Requirements*''.

■ w. Revise the heading of Section III.C.C.2 of Chapter 2 to read ''*III.C.2—Office of Credit Union Resources and Expansion Director Decision*''.

■ x. Revise the heading of Section III.D of Chapter 2 titled ''Emergency Mergers'' to read ''*III.D.2—Emergency Mergers*''.

■ y. Revise the heading of Section III.D of Chapter 2 titled ''Purchase and Assumption (P&A) to read ''*III.D.3—Purchase and Assumption (P&A)*''.

■ z. Revise the heading of Section III.E of Chapter 2 titled ''Organizational Restructuring'' to read ''*III.E.2—Organizational Restructuring*''.

■ aa. Amend Section III.H of Chapter 2 by removing the bullet after ''Members of the immediate family or household'' but before the sentence beginning ''Honorably discharged veterans''.

■ bb. Revise the heading of Section IV.B of Chapter 2 titled ''Documentation Requirements'' to read ''*IV.B.3—Documentation Requirements*''.

■ cc. Revise the heading of Section IV.B of Chapter 2 titled ''Restructuring'' to read ''*IV.B.4—Restructuring*''.

■ dd. Amend Section IV.C.4 of Chapter 2 by removing the bullet after ''Specific reasons for the action'' but before ''Options to consider, if appropriate, for gaining approval''.

■ ee. Revise the heading of Section IV.D of Chapter 2 titled ''Voluntary Mergers'' to read ''*IV.D.1—Voluntary Mergers*''.

■ ff. Revise the heading of Section IV.D of Chapter 2 titled ''Emergency Mergers'' to read ''*IV.D.3—Emergency Mergers*''.

■ gg. Revise the heading of Section IV.D of Chapter 2 titled ''Purchase and Assumption (P&A)'' to read ''*IV.D.4—Purchase and Assumption (P&A)*''.

■ hh. Revise the heading of Section IV.E of Chapter 2 titled ''Overlap Issues as a Result of Organizational Restructuring'' to read ''*IV.E.2—Overlap Issues as a Result of Organizational Restructuring*''.

■ ii. Revise section V.A.2 of Chapter 2.

■ jj. Revise the heading of Section V.A of Chapter 2 titled ''Business Plan Requirements for a Community Credit Union'' to read ''*V.A.4—Business Plan Requirements for a Community Credit Union*''.

■ kk. Revise the heading of Section V.A of Chapter 2 titled ''Ample Community Fields of Membership'' to read ''*V.A.7—Ample Community Fields of Membership*''.

■ ll. Revise the heading of Section V.D of Chapter 2 titled ''Mergers'' to read ''*V.D.1—Mergers*''.

■ mm. Revise the heading of Section V.D of Chapter 2 titled ''Emergency Mergers'' to read ''*V.D.2—Emergency Mergers*''.

■ nn. Revise the heading of Section V.D of Chapter 2 titled ''Purchase and Assumption (P&A)'' to read ''*V.D.3—Purchase and Assumption (P&A)*''.

■ oo. Revise the heading of Section V.E of Chapter 2 titled ''Exclusionary Clauses'' to read ''*V.E.2—Exclusionary Clauses*''.
■ pp. Revise the heading of Section II.B of Chapter 3 to read ''*II.B—Special Programs*''.
■ qq. Revise the heading of Section II.C of Chapter 3 to read ''*II.C—Low-Income Documentation*''.
■ rr. Revise the heading of Section II.D of Chapter 3 to read ''*II.D—Third-Party Assistance*''.
■ ss. Revise the heading of Section II.E of Chapter 3 to read ''*II.E—Special Rules for Low-Income Federal Credit Unions*''.
■ tt. Revise Section III.A of Chapter 3 by removing ''12'' and adding in its place ''12 U.S.C. 1759(c)(2)'' in the first paragraph and removing ''U.S.C. 1759(c)(2).'' from the second paragraph.
■ uu. Revise the heading of Section III.B.2 of Chapter 3 titled ''Economic Distress Criteria'' to read ''III.B.2.a—Economic Distress Criteria''.
■ vv. Amend Section III.B.2 of Chapter 3 titled ''Economic Distress Criteria'' by removing the bullet after ''*Other Criterion.* Any other economic distress criterion the CDFI Fund may adopt in the future.'' but before the sentence ''*Id.* § 1805.201(b)(3)(ii)(D)(1), (2)(ii) and (3) (2008).''
■ ww. Revise the heading of Section II.C.4 of Chapter 4 to read ''II.C.4—Notification''.
■ xx. Revise the heading of Section II.D of Chapter 4 titled ''Application for a Federal Charter'' to read ''II.D.2—Application for a Federal Charter''.
■ yy. Revise the heading of Section II.E of Chapter 4 titled ''Effective Date of Conversion'' to read ''II.E.1—Effective Date of Conversion''.
■ zz. Revise the heading of Section II.E of Chapter 4 titled ''Reports to NCUA'' to read ''II.E.5—Reports to NCUA''.
■ aaa. Revise the heading of Section III.D.UA of Chapter 4 to read ''III.D.5—Disapproval''.

The revision reads as follows:

Appendix B to Part 701—Chartering and Field of Membership Manual

* * * * *

V.A.2—Definition of Well-Defined Local Community and Rural District

In addition to the documentation requirements in Chapter 1 to charter a credit union, a community credit union applicant must provide additional documentation addressing the proposed area to be served and community service policies.

An applicant has the burden of demonstrating to NCUA that the proposed community area meets the statutory requirements of being: (1) Well-defined, and (2) a local community or rural district.

For an applicant seeking a community charter for an area with multiple political jurisdictions with a population of 2.5 million people or more, the Office of Credit Union Resources and Expansion (CURE) shall: (1) Publish a notice in the **Federal Register** seeking comment from interested parties about the proposed community and (2) conduct a public hearing about this application.

''Well-defined'' means the proposed area has specific geographic boundaries. Geographic boundaries may include a city, township, county (single, multiple, or portions of a county) or a political equivalent, school districts, or a clearly identifiable neighborhood.

The well-defined local community requirement is met if:

• Single Political Jurisdiction—The area to be served is a recognized Single Political Jurisdiction, *i.e.,* a city, county, or their political equivalent, or any single portion thereof.

• Statistical Area—A statistical area is all or an individual portion of a Core-Based Statistical Area (CBSA) designated by the U.S. Census Bureau, including a Metropolitan Statistical Area. To meet the well-defined local community requirement, the CBSA or a portion thereof, must be contiguous and have a population of 2.5 million or less people. An individual portion of a statistical area need not conform to internal boundaries within the area, such as metropolitan division boundaries within a Core-Based Statistical Area.

• Compelling Evidence of Common Interests or Interaction—In lieu of a statistical area as defined above, this option is available when a credit union seeks to initially charter a community credit union; to expand an existing community; or to convert to a community charter. Under this option, the credit union must demonstrate that the areas in question are contiguous and further demonstrate a sufficient level of common interests or interaction among area residents to qualify the area as a local community. For that purpose, an applicant must submit for NCUA approval a narrative, supported by appropriate documentation, establishing that the area's residents meet the requirements of a local community.

To assist a credit union in developing its narrative, Appendix 6 of this Manual identifies criteria a narrative should address, and which NCUA will consider in deciding a credit union's application to: initially charter a community credit union; to expand an existing community, including by an adjacent area addition; or to convert to a community charter. In any case, the credit union must demonstrate, through its business and marketing plans, its ability and commitment to serve the entire community for which it seeks NCUA approval.

An area of any geographic size qualifies as a Rural District if:

• The proposed district has well-defined, contiguous geographic boundaries;

• The total population of the proposed district does not exceed 1,000,000.

• Either more than 50% of the proposed district's population resides in census blocks or other geographic units that are designated as rural by either the Consumer Financial Protection Bureau or the United States Census Bureau, OR the district has a population density of 100 persons or fewer per square mile; and

• The boundaries of the well-defined rural district do not exceed the outer boundaries of the states that are *immediately contiguous* to the state in which the credit union maintains its headquarters (*i.e.,* not to exceed the outer perimeter of the layer of states immediately surrounding the headquarters state).

The common bond affinity groups that apply to well-defined local communities also apply to Rural Districts.

The requirements in Chapter 2, Sections V.A.4 through V.G. also apply to a credit union that serves a rural district.

* * * * *

PART 702—CAPITAL ADEQUACY

■ 9. The authority citation for part 702 is revised to read as follows:

Authority: 12 U.S.C. 1766(a), 1790d.

■ 10. In part 702, revise all references to ''federally-insured'' to read ''federally insured''.

§ 702.504 [Amended]

■ 11. In § 702.504(b)(4), revise the citation ''§ 702.306(c)'' to read ''§ 702.506(c)''.

PART 703—INVESTMENT AND DEPOSIT ACTIVITIES

■ 12. The authority citation for part 703 continues to read as follows:

Authority: 12 U.S.C. 1757(7), 1757(8), 1757(15).

§ 703.2 [Amended]

■ 13. In § 703.2, in the definition of ''Associated personnel,'' remove ''National Association of Securities Dealers (NASD)'' or ''NASD'' and add in their place ''Financial Industry Regulatory Authority (FINRA)'' or ''FINRA'' wherever they appear.

§ 703.8 [Amended]

■ 14. In § 703.8(b)(2) remove ''National Association of Securities Dealers'' and add in its place ''Financial Industry Regulatory Authority''.

PART 704—CORPORATE CREDIT UNIONS

■ 15. The authority citation for part 704 continues to read as follows:

Authority: 12 U.S.C. 1766(a), 1781, 1789.

§ 704.1 [Amended]

■ 16. In § 704.1(a) remove ''Non federally insured corporate credit unions'' and add in its place ''Noninsured corporate credit unions''.

PART 705—COMMUNITY DEVELOPMENT REVOLVING LOAN FUND ACCESS FOR CREDIT UNIONS

■ 17. The authority citation for part 705 continues to read as follows:

Authority: 12 U.S.C. 1756, 1757(5)(D), and (7)(I), 1766, 1782, 1784, 1785 and 1786.

■ 18. In part 705, revise all references to ''non-federally insured, state-chartered credit union'' and ''non-federally insured state-chartered credit union'' to read ''noninsured credit union''.

PART 708a—BANK CONVERSIONS AND MERGERS

■ 19. The authority citation for part 708a continues to read as follows:

Authority: 12 U.S.C. 1766, 1785(b), and 1785(c).

■ 20. Amend § 708a.101 by revising the definitions of ''Credit union,'' ''Federal banking agencies,'' and ''Mutual savings bank and savings association'' to read as follows:

§ 708a.101 Definitions.

* * * * *

Credit union has the same meaning as *insured credit union* in section 101 of the Federal Credit Union Act (12 U.S.C. 1752).

Federal banking agencies have the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

* * * * *

Mutual savings bank and *savings association* have the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

* * * * *

§ 708a.104 [Amended]

■ 22. Amend § 708a.104 as follows:

■ a. In paragraph (a), remove ''§ 708a.3'' and add in its place ''§ 708a.103''; and

■ b. In paragraph (f)(6), remove ''§ 708a.4(f)'' and add in its place ''§ 708a.104(f)''.

§ 708a.105 [Amended]

■ 23. Amend § 708a.105 as follows:

■ a. In paragraph (a)(1), remove ''§§ 708a.3 and 708a.4'' and add in its place ''§§ 708a.103 and 708a.104''.

■ b. In paragraph (a)(3), remove ''§ 708a.5(a)'' and add in its place ''§ 708a.105(a)''.

■ c. In paragraph (b), remove ''§ 708a.6'' and add in its place ''§ 708a.106''.

§ 708a.106 [Amended]

■ 24. In § 708a.106(b), remove ''§ 708a.3'' and add in its place ''§ 708a.103''.

§ 708a.107 [Amended]

■ 25. In § 708a.107(b), by remove ''§ 708a.5'' and add in its place ''§ 708a.105''.

§ 708a.108 [Amended]

■ 26. In § 708a.108(b), by remove ''§ 708a.7'' and add in its place ''§ 708a.107'' and remove ''§ 708a.10'' and add in its place ''§ 708a.110.''

§ 708a.110 [Amended]

■ 27. Amend § 708a.110 as follows:

■ a. In paragraph (a), remove ''§ 708a.8'' and add in its place ''§ 708a.108'' and remove ''§ 708a.9'' and add in its place ''§ 708a.109''.

■ b. In paragraph (b), remove ''§ 708a.8'' and add in its place ''§ 708a.108''.

§ 708a.113 [Amended]

■ 28. In § 708a.113(d)(3), remove ''§ 708a.12 of this part'' and add in its place ''§ 708a.112''.

§ 708a.305 [Amended]

■ 29. Amend § 708a.305 as follows:

■ a. In paragraph (c)(3), remove the phrase ''because of'' the second time it appears; and

■ b. In paragraph (c)(4) remove ''; and'' and add in its place a period.

§ 708a.312 [Amended]

■ 30. In § 708a.312(a), revise ''Federally insured State chartered credit unions'' to read ''Federally insured state-chartered credit unions''.

PART 708b—MERGERS OF INSURED CREDIT UNIONS INTO OTHER CREDIT UNIONS; VOLUNTARY TERMINATION OR CONVERSION OF INSURED STATUS

■ 31. The authority citation for part 708b continues to read as follows:

Authority: 12 U.S.C. 1752(7), 1766, 1785, 1786, 1789.

■ 32. Revise the heading of part 708b to read as set forth above.

■ 33. In part 708b, revise all references to ''federally-insured'', ''Federally-insured'', ''nonfederally-insured'', and ''Nonfederally-insured'' to read ''federally insured'', ''Federally insured'', ''noninsured'', and ''Nonfederally insured'' respectively.

■ 34. Amend § 708b.2 by adding introductory text to read as follows:

§ 708b.2 Definitions.

As used in this part:

* * * * *

Subpart C—[Amended]

■ 35. Amend Subpart C of part 708b by revising all references to ''$100,000'' to read ''$250,000'' wherever they occur.

§ 708b.303 [Amended]

■ 36. In § 708b.303(c), remove the word ''and'' and add in its place the word ''an'' in the first sentence of Item 5 of the form Certification of Vote.

PART 709—INVOLUNTARY LIQUIDATION OF FEDERAL CREDIT UNIONS AND ADJUDICATION OF CREDITOR CLAIMS INVOLVING FEDERALLY INSURED CREDIT UNIONS IN LIQUIDATION

■ 37. The authority citation for part 709 continues to read as follows:

Authority: 12 U.S.C. 1757, 1766, 1767, 1786(h), 1787, 1788, 1789, 1789a.

■ 38. In part 709, revise all references to ''federally-insured'' to read ''federally insured''.

§ 709.4 [Amended]

■ 39. In § 709.4(c)(10), remove ''state-chartered federally insured credit union'' and add in its place ''federally insured state-chartered credit union''.

PART 710—VOLUNTARY LIQUIDATION

■ 40. The authority citation for part 710 continues to read as follows:

Authority: 12 U.S.C. 1766(a), 1786, and 1787.

■ 41. In part 710, revise all references to ''Federally insured state credit union'' or ''Federally insured state credit unions'' to read ''Federally insured state-chartered credit union'' or ''Federally insured state-chartered credit unions'', respectively.

PART 715—SUPERVISORY COMMITTEE AUDITS AND VERIFICATIONS

■ 42. The authority citation for part 715 continues to read as follows:

Authority: 12 U.S.C. 1761(b), 1761d, 1782(a)(6).

§ 715.4 [Amended]

■ 43. In § 715.4(c), remove the phrase ''NCUA form'' and add in its place the phrase ''NCUA Form''.

§ 715.10 [Amended]

■ 44. In § 715.10(a), remove the phrase ''National Credit Union Administration (''NCUA'')'' and add in its place the term ''NCUA''.

PART 717—FAIR CREDIT REPORTING

■ 45. The authority citation for part 717 is revised to read as follows:

Authority: 12 U.S.C. 1766(a), 1789; 15 U.S.C. 1681m(e).

Subpart A—[Removed and Reserved]

■ 46. Remove and reserve subpart A, consisting of §§ 717.1 through 717.3.

Subpart C—[Removed and Reserved]

■ 47. Remove and reserve subpart C, consisting of §§ 717.20 through 717.28.

Subpart D—[Removed and Reserved]

■ 48. Remove and reserve subpart D, consisting of §§ 717.30 through 717.32.

Subpart E—[Removed and Reserved]

■ 49. Remove and reserve subpart E, consisting of §§ 717.40 through 717.43.

Appendix C—[Removed and Reserved]

■ 50. Remove and reserve Appendix C to part 717.

PART 723—MEMBER BUSINESS LOANS; COMMERCIAL LENDING

■ 51. The authority citation for part 723 continues to read as follows:

Authority: 12 U.S.C. 1756, 1757, 1757A, 1766, 1785, 1789.

■ 52. In part 723, revise all references to ''federally insured, state-chartered credit union'' or ''federally insured, state-chartered credit unions'' to read ''federally insured state-chartered credit union'' or ''federally insured state-chartered credit unions'', respectively.

PART 725—NATIONAL CREDIT UNION ADMINISTRATION CENTRAL LIQUIDITY FACILITY

■ 53. The authority citation for part 725 is revised to read as follows:

Authority: 12 U.S.C. 1795f(a)(2).

■ 54. In part 725:

■ a. Revise all references to ''federally-chartered'' or ''federally-insured'' to read ''federally chartered'' and ''federally insured'', respectively; and

■ b. Revise all references to ''central credit union'' or ''central credit unions'' to read ''corporate credit union'' or ''corporate credit unions'', respectively.

§ 725.2 [Amended]

■ 55. In § 725.2(h)(2), remove ''or Federal Savings and Loan Insurance Corporation''.

§ 725.3 [Amended]

■ 56. In § 725.3(a)(2), remove footnote 1.

§ 725.4 [Amended]

■ 57. In § 725.4, remove footnote 3 from paragraph (a)(2) and, in paragraph (f), add the word ''or'' between the words ''chartered'' and ''within''.

PART 741—REQUIREMENTS FOR INSURANCE

■ 58. The authority citation for part 741 continues to read as follows:

Authority: 12 U.S.C. 1757, 1766(a), 1781–1790, and 1790d; 31 U.S.C. 3717.

■ 59. In part 741:

■ a. Revise all references to ''federally-insured'' and ''nonfederally-insured'' to read ''federally insured'' and ''nonfederally insured'' respectively; and

■ b. Revise all references to ''federally insured, state-chartered'' or ''federally-insured state-chartered'' to read ''federally insured state-chartered''.

§ 741.3 [Amended]

■ 60. In § 741.3(b)(5), remove ''Appendix B'' and add in its place ''Appendix A''.

■ 61. Revise § 741.8(c) to read as follows:

§ 741.8 Purchase of assets and assumption of liabilities.

* * * * *

(c) A credit union seeking approval under paragraph (a) of this section must submit a request for approval to the appropriate regional director. The request must state the nature of the transaction and include copies of all relevant transaction documents. The regional director will approve or disapprove the request as soon as possible depending on the complexity of the proposed transaction. Credit unions should submit a request for approval in sufficient time to close the transaction.

§ 741.201 [Amended]

■ 62. In § 741.201(a), remove ''part 713 of this chapter'' and add ''§§ 713.3, 713.5, and 713.6'' in its place.

§ 741.219 [Amended]

■ 63. In § 741.219(b), remove the phrase ''or the Director of the Office of National Examinations and Supervision.''

PART 745—SHARE INSURANCE AND APPENDIX

■ 64. The authority citation for part 745 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1757, 1765, 1766, 1781, 1782, 1787, 1789; title V, Pub. L. 109–351; 120 Stat. 1966.

■ 65. In part 745:

■ a. Revise all references to ''federally-insured'' to read ''federally insured''; and

■ b. Revise all references to ''state credit union'' or ''state credit unions'' to read ''state-chartered credit union'' or ''state-chartered credit unions'', respectively.

■ 66. Revise § 745.202(b) to read as follows:

§ 745.202 Judicial review.

* * * * *

(b) Failure to file an appeal with regard to an initial determination, or a decision rendered on a request for reconsideration within the applicable time periods shall constitute a failure by the accountholder to exhaust available administrative remedies and, due to such failure, any objections to the initial determination or request for reconsideration shall be deemed to be waived and such determination shall be deemed to have been accepted by, and binding upon, the accountholder.

* * * * *

PART 746—APPEALS PROCEDURES

Subpart A—Procedures for Appealing Material Supervisory Determinations

■ 67. The authority citation for part 746, subpart A, continues to read as follows:

Authority: 12 U.S.C. 1766, 1787, and 1789.

■ 68. Revise § 746.106(a) to read as follows:

§ 746.106 Procedures for requesting review by the Director of the Office of Examination and Insurance.

(a) *Request for review.* Prior to filing an appeal with the Committee pursuant to § 746.107, but after receiving a written decision by the appropriate program office in response to a request for reconsideration pursuant to § 746.105, an insured credit union may make a written request for review by the Director of the Office of Examination and Insurance of the program office's material supervisory determination. Such a request must be made within 30 calendar days after receiving a final decision on reconsideration from the appropriate program office. A request for review must be in writing and filed with the Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428.

* * * * *

PART 747—ADMINISTRATIVE ACTIONS, ADJUDICATIVE HEARINGS, RULES OF PRACTICE AND PROCEDURE, AND INVESTIGATIONS

■ 69. The authority citation for part 747 continues to read as follows:

Authority: 12 U.S.C. 1766, 1782, 1784, 1785, 1786, 1787, 1790a, 1790d; 15 U.S.C. 1639e; 42 U.S.C. 4012a; Pub. L. 101–410; Pub. L. 104–134; Pub. L. 109–351; Pub. L. 114–74.

■ 70. In part 747:

■ a. Revise all references to ''federally-insured'' to read ''federally insured''; and

■ b. Revise all references to ''state credit union'' or ''state credit unions'' to read ''state-chartered credit union'' or ''state-chartered credit unions'', respectively.

PART 748—SECURITY PROGRAM, REPORT OF SUSPECTED CRIMES, SUSPICIOUS TRANSACTIONS, CATASTROPHIC ACTS AND BANK SECRECY ACT COMPLIANCE

■ 71. The authority citation for part 748 continues to read as follows:

Authority: 12 U.S.C. 1766(a), 1786(q); 15 U.S.C. 6801–6809; 31 U.S.C. 5311 and 5318.

■ 72. In part 748, revise all references to ''federally-insured'' to read ''federally insured''.

Appendix A to Part 748 [Amended]

■ 73. Amend Appendix A by removing ''G. Implement the Standards'' from the table of contents under section III.

PART 749—RECORDS PRESERVATION PROGRAM AND APPENDICES—RECORD RETENTION GUIDELINES; CATASTROPHIC ACT PREPAREDNESS GUIDELINES

■ 74. The authority citation for part 749 continues to read as follows:

Authority: 12 U.S.C. 1766, 1783 and 1789; 15 U.S.C. 7001(d).

■ 75. In part 749, revise all references to ''federally-insured'' to read ''federally insured''.

PART 750—GOLDEN PARACHUTE AND INDEMNIFICATION PAYMENTS

■ 76. The authority citation for part 750 continues to read as follows:

Authority: 12 U.S.C. 1786(t).

■ 77. In part 750, revise all references to ''Federally insured'' to read ''federally insured''.

PART 760—LOANS IN AREAS HAVING SPECIAL FLOOD HAZARDS

■ 78. Revise the authority citation for part 760 to read as follows:

Authority: 12 U.S.C. 1757, 1784(e), 1789; 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128.

PART 790—DESCRIPTION OF NCUA; REQUESTS FOR AGENCY ACTION

■ 79. The authority citation for part 790 continues to read as follows:

Authority: 12 U.S.C. 1766, 1789, 1795f.

■ 80. In § 790.2, add paragraph (b)(18) and revise paragraph (c) to read as follows:

§ 790.2 Central and field office organization.

* * * * *

(b) * * *

(18) *The Office of Business Innovation.* The Office of Business Innovation (OBI) serves as a central platform and facilitator for critical agency stakeholders to shape achievable solutions and capabilities to manage evolving business demands. This office manages the agency's Information Technology modernization and business process optimization efforts, from the internal and external business stakeholder perspective, of mission related systems that enable the NCUA's core mission of regulating and supervising credit unions. Additionally, OBI provides enterprise information security support in partnership with the Office of the Chief Information Officer (OCIO) and serves as a center point for enterprise data strategy and governance.

* * * * *

(c) *Field Offices.* NCUA's programs are conducted through Regional Offices and the Office of National Examinations and Supervision.

(1) *Regional Offices.* (i) The NCUA has three Regional Offices:

Region name	Area within region	Office address
Eastern	Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, and West Virginia.	1900 Duke Street, Suite 300, Alexandria, VA 22314–3498.
Southern	Alabama, Arkansas, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, Puerto Rico, South Carolina, Tennessee, Texas, and Virgin Islands.	4807 Spicewood Springs Road, Suite 5200, Austin, TX 78759–8490.
Western	Alaska, American Samoa, Arizona, California, Colorado, Guam, Idaho, Illinois, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Nevada, Utah, Washington, Wisconsin, and Wyoming.	1230 West Washington Street, Suite 301, Tempe, AZ 85281.

(ii) A Regional Director is in charge of each Regional Office. The Regional Director manages NCUA's programs in the Region assigned in accordance with established policies. A Regional Director's duties include: Directing examination and supervision programs to promote and assure safety and soundness; assisting other offices in chartering and insurance issues; managing regional resources to meet program objectives in the most economical and practical manner; and maintaining good public relations with public, private, and governmental organizations, federal credit union officials, credit union organizations, and other groups which have an interest in credit union matters in the assigned region. The Regional Director maintains liaison and cooperation with other regional offices of federal departments and agencies, state agencies, city and county officials, and other governmental units that affect credit unions. The Regional Director is aided by Associate Regional Directors. Each region is divided into examiner districts, each assigned to a Supervisory Credit Union Examiner; groups of examiners are directed by a Supervisory Credit Union Examiner, each of whom in turn reports directly to one of the Associate Regional Directors.

(2) *Office of National Examinations and Supervision.* Similar to a Regional Director, the Director of the Office of National Examinations and Supervision manages NCUA's supervisory program

over credit unions; however, it oversees the activities for corporate credit unions and of natural person credit unions with assets totaling $10 billion or more, in accordance with established policies. The Director's duties include directing insurance, examination, and supervision programs to promote and assure safety and soundness; managing office resources to meet program objectives in the most economical and practical manner; and maintaining good public relations with public, private and governmental organizations, credit union officials, credit union organizations, and other groups which have an interest in credit union matters in the assigned office. The Director maintains liaison and cooperation with other regional offices of federal departments and agencies, state agencies, and other governmental units that affect credit unions. The Director is aided by a Deputy Director. Staff working in the office report to the Director of Supervision, who in turn reports to the Deputy Director. Field staff is divided into examiner districts, each assigned to a National Field Supervisor, each of whom in turn reports directly to the Deputy Director.

PART 791—RULES OF NCUA BOARD PROCEDURE; PROMULGATION OF NCUA RULES AND REGULATIONS; PUBLIC OBSERVATION OF NCUA BOARD MEETINGS

■ 81. The authority citation for part 791 continues to read as follows:

Authority: 12 U.S.C. 1766, 1789 and 5 U.S.C. 552b.

§ 791.8 [Amended]

■ 82. In § 791.8(b)(4), revise ''state-chartered federally-insured credit union'' to read ''federally insured state-chartered credit union''.

PART 792—REQUESTS FOR INFORMATION UNDER THE FREEDOM OF INFORMATION ACT AND PRIVACY ACT, AND BY SUBPOENA; SECURITY PROCEDURES FOR CLASSIFIED INFORMATION

■ 83. The authority citation for part 792 continues to read as follows:

Authority: 12 U.S.C. 1766, 1789 and 5 U.S.C. 552b.

§ 792.30 [Amended]

■ 84. In § 792.30, revise ''federally-insured'' to read ''federally insured''.

[FR Doc. 2018–27472 Filed 2–4–19; 8:45 am]

BILLING CODE 7535–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2018–0616; FRL–9988–35–Region 8]

Approval and Promulgation of Implementation Plans; North Dakota; Revisions to Infrastructure Requirements for All National Ambient Air Quality Standards; Carbon Monoxide (CO); Lead (Pb); Nitrogen Dioxide (NO_2); Ozone (O_3); Particle Pollution ($PM_{2.5}$, PM_{10}); Sulfur Dioxide (SO_2); Recodification

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving revisions to the North Dakota State Implementation Plan (SIP) for all National Ambient Air Quality Standards (NAAQS) for the purposes of transferring authority from the North Dakota Department of Health (NDDH) to the North Dakota Department of Environmental Quality (NDDEQ). We are approving the related recodification of the portions of North Dakota's Air Pollution Rules that have been previously approved into the SIP. The EPA is taking this action pursuant to section 110 of the Clean Air Act (CAA).

DATES: This rule is effective on March 15, 2019.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R08–OAR–2018–0616. 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 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 *http://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Kate Gregory, Air Program, EPA, Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129, (303) 312–6175, *gregory.kate@epa.gov.*

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

I. Background

The background for this action is discussed in detail in our October 10, 2018 proposal (83 FR 50865). In that document we proposed to approve revisions to the North Dakota SIP for all NAAQS for the purposes of transferring authority from the NDDH to the NDDEQ. We also proposed to approve the related recodification of the portions of North Dakota's Air Pollution Rules that have been previously approved into the SIP.

Table 1 shows the North Dakota air pollution rules that have been recodified in the North Dakota Administrative Code (NDAC) and indicates their old and new references in the SIP.

TABLE 1—NDAC REFERENCES: PRE/POST RECODIFICATION

Old reference	New reference
33–15–01	33.1–15–01
33–15–02	33.1–15–02
33–15–03	33.1–15–03
33–15–04	33.1–15–04
33–15–05	33.1–15–05
33–15–06	33.1–15–06
33–15–07	33.1–15–07
33–15–08	33.1–15–08
33–15–10	33.1–15–10
33–15–11	33.1–15–11
33–15–14	33.1–15–14
33–15–15	33.1–15–15
33–15–17	33.1–15–17
33–15–18	33.1–15–18
33–15–19	33.1–15–19
33–15–20	33.1–15–20
33–15–23	33.1–15–23
33–15–25	33.1–15–25

We received no comments on our proposal and this rule will be finalized as proposed without revisions.

II. Final Action

We are approving the August 18, 2018 revisions to the North Dakota infrastructure SIP, for all NAAQS, for the purposes of the transfer of authority from NDDH to the NDDEQ. We are also approving the corresponding recodification of the entire SIP. For the basis of our approval, please refer to the October 10, 2018 proposal (83 FR 50865).

All revisions to the SIP program will be federally enforceable as of the effective date of today's approval of the respective revision and recodification of that program. Based on the process outlined in our proposal and our subsequent conversations with the State, we have determined that our approval of the SIP program should become fully effective under federal law on March 15, 2019. The State plans to rely on the date when the EPA signs the final 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. Prior to the effective date of this approval, the State intends to take the necessary additional steps as specified in S.L. 2017, ch. 199, Section 1, to ensure that NDDEQ rules and the NDDEQ would become federally enforceable on the effective date of the EPA's approval. 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 under the North Dakota Department of Health.

III. Incorporation by Reference

In this document, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference the NDDEQ rules regarding definitions and permitting requirements discussed in section I of this preamble. The EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 8 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by the EPA for inclusion in the SIP, have been incorporated by reference by the EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of the EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[1]

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, described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. 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 April 8, 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, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Greenhouse gases, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: December 20, 2018.

Douglas Benevento,

Regional Administrator, Region 8.

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 JJ—North Dakota

■ 2. In § 52.1820, paragraph (c), the table is revised to read as follows:

§ 52.1820 Identification of plan.

* * * * *

(c) * * *

[1] 62 FR 27968 (May 22, 1997).

Rule No.	Rule title	State effective date	EPA effective date	Final rule citation/date	Comments
33.1–15–01. General Provisions					
33.1–15–01–01	Purpose	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–01–01 on 5/12/1989, 54 FR 20574.
33.1–15–01–02	Scope	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–01–02 on 5/12/1989, 54 FR 20574.
33.1–15–01–03	Authority	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–01–03 on 4/2/2004, 69 FR 17302.
33.1–15–01–04	Definitions	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–01–04 on 10/21/2016, 81 FR 72718.
33.1–15–01–05	Abbreviations	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–01–05 on 10/21/2016, 81 FR 72718.
33.1–15–01–06	Entry onto Premises—Authority.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–01–06 on 5/12/1989, 54 FR 20574.
33.1–15–01–07	Variances	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–01–07 on 6/26/1992, 57 FR 28619.
33.1–15–01–08	Circumvention	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–01–08 on 6/26/1992, 57 FR 28619.
33.1–15–01–09	Severability	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–01–09 on 5/12/1989, 54 FR 20574.
33.1–15–01–10	Land use plans and zoning regulations.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–01–10 on 5/12/1989, 54 FR 20574.
33.1–15–01–12	Measurement of emissions of air contaminants.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–01–12 on 2/28/2003, 68 FR 9565.
33.1–15–01–13	Shutdown and malfunction of an installation—Requirement for notification.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–01–13 on 10/21/2016, 81 FR 72718.
33.1–15–01–14	Time schedule for compliance.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–01–14 on 5/12/1989, 54 FR 20574.
33.1–15–01–15	Prohibition of air pollution	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–01–15 on 2/28/2003, 68 FR 9565.
33.1–15–01–16	Confidentiality of records	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–01–16 on 5/12/1989, 54 FR 20574.
33.1–15–01–17	Enforcement	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–01–17 on 10/21/2004, 69 FR 61762.
33.1–15–01–18	Compliance Certifications	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–01–18 on 10/21/2004, 69 FR 61762.
33.1–15–02. Ambient Air Quality Standards					
33.1–15–02–01	Scope	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–02–01 on 5/12/1989, 54 FR 20574.
33.1–15–02–02	Purpose	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–02–02 on 5/12/1989, 54 FR 20574.
33.1–15–02–03	Air quality guidelines	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–02–03 on 5/12/1989, 54 FR 20574.
33.1–15–02–04	Ambient air quality standards.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–02–04 on 5/2/2014, 79 FR 25021.
33.1–15–02–05	Method of sampling and analysis.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], [Insert date of publication in the **Federal Register**].	Originally approved as 33–15–02–05 on 10/8/1996, 61 FR 52865.
33.1–15–02–06	Reference conditions	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–02–06 on 5/12/1989, 54 FR 20574.
33.1–15–02–07	Concentration of air contaminants in the ambient air restricted.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–02–07 on 5/2/2014, 79 FR 25021.
Table 1	Ambient Air Quality Standards.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as Table 1 on 10/21/2016, 81 FR 72718.
Table 2	National Ambient Air Quality Standards.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as Table 2 on 5/2/2014, 79 FR 25021.
33.1–15–03. Restriction of Emission of Visible Air Contaminants					
33.1–15–03–01	Restrictions applicable to existing installations.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–03–01 on 5/12/1989, 54 FR 20574.
33.1–15–03–02	Restrictions applicable to new installations and all incinerators.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–03–02 on 5/12/1989, 54 FR 20574.
33.1–15–03–03	Restrictions applicable to fugitive emissions.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], [Insert date of publication in the **Federal Register**].	Originally approved as 33–15–03–03 on 5/12/1989, 54 FR 20574.
33.1–15–03–03.1	Restrictions applicable to flares.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–03–03.1 on 5/12/1989, 54 FR 20574.
33.1–15–03–04	Exceptions	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–03–04 on 10/21/2016, 81 FR 72718.
33.1–15–03–05	Method of measurement	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–03–05 on 10/10/2017, 82 FR 46919.

Rule No.	Rule title	State effective date	EPA effective date	Final rule citation/date	Comments
33.1–15–04. Open Burning Restrictions					
33.1–15–04–01	Refuse burning restrictions.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–04–01 on 5/27/2008, 73 FR 30308.
33.1–15–04–02	Permissible open burning	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–04–02 on 10/21/2016, 81 FR 72718.
33.1–15–05. Emissions of Particulate Matter Restricted					
33.1–15–05–01	Restriction of emission of particulate matter from industrial processes.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–05–01 on 11/21/2014, 79 FR 63045.
33.1–15–05–02	Maximum allowable emission of particulate matter from fuel burning equipment used for indirect heating.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–05–02 on 10/21/2004, 69 FR 61762.
33.1–15–05–03.2	Refuse incinerators	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–05–03.2 on 11/4/2011, 76 FR 68317.
33.1–15–05–03.3	Other waste incinerators	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–05–03.3 on 10/21/2004, 69 FR 61762.
33.1–15–05–04	Methods of measurement	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–05–04 on 10/21/2016, 81 FR 72718.
33.1–15–06. Emissions of Sulfur Compounds Restricted					
33.1–15–06–01	Restriction of emissions of sulfur dioxide from use of fuel.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–06–01 on 10/21/2004, 69 FR 61762 See 63 FR 45722 (8/27/98) for additional material.
33.1–15–06–02	Restriction of emissions of sulfur oxides from industrial processes.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–06–02 on 10/20/1993, 58 FR 54041.
33.1–15–06–03	Methods of measurement	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–06–03 on 10/21/2004, 69 FR 61762.
33.1–15–06–04	Continuous emission monitoring requirements.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–06–04 on 10/20/1993, 58 FR 54041.
33.1–15–06–05	Reporting and recordkeeping requirements.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–06–05 on 10/21/2016, 81 FR 72718.
33.1–15–07. Control of Organic Compounds Emissions					
33.1–15–07–01	Requirements for construction of organic compounds facilities.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–07–01 on 8/31/1999, 64 FR 47395.
33.1–15–07–02	Requirements for organic compounds gas disposal.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–07–02 on 8/21/1995, 60 FR 43396.
33.1–15–08. Control of Air Pollution From Vehicles and Other Internal Combustion Engines					
33.1–15–08–01	Internal combustion engine emissions restricted.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–08–01 on 11/2/1979, 44 FR 63102.
33.1–15–08–02	Removal and/or disabling of motor vehicle pollution control devices prohibited.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–08–02 on 11/2/1979, 44 FR 63102.
33.1–15–10. Control of Pesticides					
33.1–15–10–01	Pesticide use restricted	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–10–01 on 8/9/1990, 55 FR 32403.
33.1–15–10–02	Restrictions on the disposal of surplus pesticides and empty pesticide containers.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–10–02 on 6/26/1992, 57 FR 28619.
33.1–15–11. Prevention of Air Pollution Emergency Episodes					
33.1–15–11–01	Air pollution emergency	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–11–01 on 5/12/1989, 54 FR 20574.
33.1–15–11–02	Air pollution episode criteria.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–11–02 on 5/12/1989, 54 FR 20574.
33.1–15–11–03	Abatement strategies emission reduction plans.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–11–03 on 5/12/1989, 54 FR 20574.
33.1–15–11–04	Preplanned abatement strategies plans.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–11–04 on 8/9/1990, 55 FR 32403.
Table 6	Air pollution episode criteria.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as Table 6 on 4/21/1997, 62 FR 19224.

Rule No.	Rule title	State effective date	EPA effective date	Final rule citation/date	Comments
Table 7	Abatement strategies emission reduction plans.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as Table 7 on 4/21/1997, 62 FR 19224.
33.1–15–14. Designated Air Contaminant Sources, Permit To Construct, Minor Source Permit To Operate, Title V Permit To Operate					
33.1–15–14–01	Designated air contaminant sources.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–14–01 on 5/2/2014, 79 FR 25021.
33.1–15–14–01.1	Definitions	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–14–01 on 4/21/1997, 62 FR 19224.
33.1–15–14–02	Permit to construct	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–14–02 on 10/10/2017, 82 FR 46919 Excluding subsections 1, 12, 13, 3.c., 13.b.1., 5, 13.c., 13.i(5), 13.o., and 19 (one sentence) which were subsequently revised and approved. See 57 FR 28619 (6/26/92), regarding State's commitment to meet requirements of EPA's ''Guideline on Air Quality Models (revised).''.
33.1–15–14–03	Minor source permit to operate.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–14–03 on 5/2/2014, 79 FR 25021.
33.1–15–14–07	Source exclusion from title V permit to operate requirements.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–14–07 on 2/28/2003, 68 FR 9565.
33.1–15–15. Prevention of Significant Deterioration of Air Quality					
33.1–15–15–01.1	Purpose	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–15–01 on 7/19/2007, 72 FR 39564.
33.1–15–15–01.2	Scope	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–15–01 on 10/21/2016, 81 FR 72718 Except for the revision associated with 40 CFR 52.21(l)(1).
33.1–15–15–02	Reclassification	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–15–02 on 7/19/2007, 72 FR 39564.
33.1–15–17. Restriction of Fugitive Emissions					
33.1–15–17–01	General provisions—applicability and designation of affected facilities.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–17–01 on 2/28/2003, 68 FR 9565.
33.1–15–17–02	Restriction of fugitive particulate emissions.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–17–02 on 10/21/2016, 81 FR 72718.
33.1–15–17–03	Reasonable precautions for abating and preventing fugitive particulate emissions.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–17–03 on 11/2/1979, 44 FR 63102.
33.1–15–17–04	Restriction of fugitive gaseous emissions.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–17–04 on 11/2/1979, 44 FR 63102.
33.1–15–18. Stack Heights					
33.1–15–18–01	General provisions	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–18–01 on 11/14/1988, 53 FR 45763.
33.1–15–18–02	Good engineering practice demonstrations.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–18–02 on 11/14/1988, 53 FR 45763.
33.1–15–18–03	Exemptions	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–18–03 on 11/14/1988, 53 FR 45763.
33.1–15–19. Visibility Protection					
33.1–15–19–01	General provisions	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–19–01 on 9/28/88, 53 FR 37757.
33.1–15–19–02	Review of new major stationary sources and major modifications.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–19–02 on 9/28/88, 53 FR 37757.
33.1–15–19–03	Visibility monitoring	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–19–03 on 9/28/88, 53 FR 37757.
33.1–15–20. Control of Emissions From Oil and Gas Well Production Facilities					
33.1–15–20–01	General provisions	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–20–01 on 8/21/95, 60 FR 43396.
33.1–15–20–02	Registration and reporting requirements.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–20–02 on 8/21/95, 60 FR 43396.
33.1–15–20–03	Prevention of significant deterioration applicability and source information requirements.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–20–03 on 8/21/95, 60 FR 43396.
33.1–15–20–04	Requirements for control of production facility emissions.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–20–04 on 6/26/92, 57 FR 28619.

Rule No.	Rule title	State effective date	EPA effective date	Final rule citation/date	Comments
33.1–15–23. Fees					
33.1–15–23–01	Definitions	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–23–01 on 4/21/97, 62 FR 19224.
33.1–15–23–02	Permit to construct fees	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–23–02 on 10/21/16, 81 FR 72718.
33.1–15–23–03	Minor source permit to operate fees.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–23–03 on 10/21/16, 81 FR 72718.
33.1–15–25. Regional Haze Requirements					
33.1–15–25–01	Definitions	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–25–01 on 4/6/12, 77 FR 20894.
33.1–15–25–02	Best available retrofit technology.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–25–02 on 4/6/12, 77 FR 20894.
33.1–15–25–03	Guidelines for best available retrofit technology determinations under the regional haze rule.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–25–03 on 4/6/12, 77 FR 20894.
33.1–15–25–04	Monitoring, recordkeeping, and reporting.	1/1/2019	3/15/2019	[Insert **Federal Register** citation], 2/5/2019.	Originally approved as 33–15–25–04 on 4/6/12, 77 FR 20894.

* * * * *

[FR Doc. 2019–00712 Filed 2–4–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 70

[EPA–R07–OAR–2018–0642; FRL–9988–94–Region 7]

Air Plan Approval; Iowa; State Implementation Plan and Operating Permits Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving revisions to the Iowa State Implementation Plan (SIP) and the Operating Permits Program. The revisions include updating definitions, clarifying permit rule exemptions and permit-by-rule regulations, revising methods and procedures for performance test/stack test and continuous monitoring systems, and updating the Prevention of Significant Deterioration (PSD) regulations and Operating Permits Program. In addition, the State has removed its rules that implement the Clean Air Interstate Rule (CAIR) and revised their acid rain rules. These revisions will not impact air quality and will ensure consistency between the state and federally approved rules.

DATES: This final rule is effective on March 7, 2019.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R07–OAR–2018–0642. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional information.

FOR FURTHER INFORMATION CONTACT: Stephanie Doolan, Environmental Protection Agency, Air Planning and Development Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219 at (913) 551–7719, or by email at *Doolan.Stephanie@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document ''we,'' ''us,'' and ''our'' refer to EPA. This section provides additional information by addressing the following:

I. Background
II. What is being addressed in this document?
III. Have the requirements for approval of the SIP and Operating Permit Plan revisions been met?
IV. The EPA's Response to Comments
V. What action is the EPA taking?
VI. Incorporation by Reference
VII. Statutory and Executive Order Reviews

I. Background

On October 2, 2018, the EPA proposed to approve in the **Federal Register** revisions to the Iowa State Implementation Plan (SIP) and the Operating Permits Program. *See* 83 FR 49509. The revisions update and clarify rules and make minor revisions and corrections. Approval of these revisions will ensure consistency between the state and federally-approved rules, and ensure Federal enforceability of the state's revised air program rules.

The EPA received comments from two sources prior to the close of the comment period. A detailed discussion of Iowa's SIP revisions and the Operating Permits Program revisions were provided in the proposed rule and will not be restated here, except to the extent relevant to our response to the public comments we received.

II. What is being addressed in this document?

The EPA is taking final action to approve the revisions to the Iowa SIP and the State's Operating Permits Program. These revisions:

- Update the definition for EPA reference method and volatile organic compounds (VOCs);
- Clarify permit rule exemptions and the State's permit-by-rule regulation;
- Update methods and procedures for performance test/stack test and continuous monitoring systems.
- Rescind State rules that implement the CAIR;
- Revise the State's Prevention of Significant Deterioration (PSD) regulations to incorporate the most recent Federal requirements;
- Revise the State's Operating Permits Program by revising the definition for EPA Reference Method, clarifying insignificant activities as applied to internal combustion engines, revising forms used to submit emission inventories and due dates as well as revising the public participation rules; and
- Revise the State's acid rain rules to include the most recent EPA Reference Method.

As noted in the proposed rule, the EPA is not acting on Chapter 25.2—Continuous emission monitoring under

the acid rain program, as these provisions are not approved in the operating permits program. EPA is also not acting on the New Source Performance Standards, emission standards for hazardous air pollutants, emission standards for hazardous air pollutants for source categories, and emission guidelines that were submitted in this SIP revision. These will be addressed separately in a future action.

Chapters with revisions are as follows:

- Chapter 22—Controlling Pollution
- Chapter 25—Measurement of Emissions
- Chapter 30—Fees
- Chapter 33—Special Regulations and Construction Permit Requirements for Major Stationary Sources—Prevention of Significant Deterioration (PSD) of Air Quality
- Chapter 34—Provisions for Air Quality Emissions Trading Programs

III. Have the requirements for approval of the SIP and Operating Permit Plan revisions been met?

The state submittal has met the public notice requirements for SIP submissions in accordance with 40 CFR 51.102. The submittal also satisfied the completeness criteria of 40 CFR part 51, appendix V. In addition, as explained above and in more detail in the proposal published in the **Federal Register** on October 2, 2018, these revisions meet the substantive SIP requirements of the Clean Air Act (CAA), including section 110 and implementing regulations. S*ee* 83 FR 49509. These revisions are also consistent with applicable requirements of title V of the CAA and 40 CFR part 70.

IV. The EPA's Response to Comments

The public comment period for the EPA's proposed rule opened October 2, 2018, the date of its publication in the **Federal Register**, and closed on November 1, 2018. During this period, the EPA received comments from two commenters with three comments. One of the commenters was supportive of the EPA's proposed approval of the State's rescission of its CAIR regulations. Below are adverse comments with the EPA's responses.

First commenter, comment 1: The commenter is opposed to the State's rule revisions that allow PSD permit notices to be published on a website instead of a newspaper. The commenter's concern is that lower income and lower education level communities are not as likely to have internet access and thus are unlikely to learn about the public notices and comment periods. The commenter recommends retaining the requirement to post public notices for PSD permits in local newspapers for the affected areas and posting notices on a public website.

The EPA's response to comment 1: Iowa revised its PSD public participation procedures in 567 Iowa Administrative Code (IAC) 33.3(17) to be consistent with Federal PSD public participation procedures in 40 CFR 51.166(q)(2). The EPA responded to similar concerns such as those raised by the commenter when it promulgated changes to the public notice provisions in CAA Permitting programs in 40 CFR 51.166, and stated that the EPA's final rule did not preclude a permitting authority from providing supplemental notification to the public, such as a supplemental notice in a newspaper (81 FR 71613, October 2, 2018). Accordingly, the changes to the State's PSD permit public notice requirements provide for notification via other means if necessary to ensure adequate notice to the affected public. Because Iowa's PSD permit public notice provisions meet the minimum criteria for notifying the public of the availability of PSD permitting information in 40 CFR 51.166(q)(2), EPA is approving the State's rule revision into the SIP without modification.

Second commenter, comment 2: The second commenter expressed concern that the compound 1,1,2,2-tetrafluoro-1-(2,2,2-trifluoroethoxy) ethane (HFE–347pcf2) is being excluded from the state definition of a ''volatile organic compounds'' (VOC). Specifically, the commenter is concerned about potential adverse health effects from exposure to HFE–347pcf2 and requested that the State be required to continue to monitor levels of this compound for a period of time following the approval of the SIP revisions.

The EPA's response to comment 2: The State excluded HFE–347pcf2 from the definition of VOC in 567 IAC 20.2 to be consistent with the Federal definition of VOC in 40 CFR 51.100. The EPA has removed HFE–347pcf2 from the definition of VOC because this compound makes a negligible contribution to tropospheric ozone formation (81 FR 50330, August 1, 2016). The EPA discussed similar health concerns such as those raised by the commenter when it promulgated changes to the Federal definition of VOC to exclude HFE–347pcf2, and discussed another Federal regulatory program, the Toxic Substances Control Act (TSCA), that allows EPA to evaluate whether an unreasonable risk is expected by the manufacture, processing, distribution in commerce, use, and disposal of HFE–347pcf2. *See id.* Because Iowa's definition of VOC is consistent with the Federal definition of VOC in 40 CFR 51.100, the EPA is approving the State's rule revision into the SIP without modification.

Second commenter, comment 3: The second commenter also commented on the removal of the requirement to post public notices for PSD permits in local newspapers in the affected area. The second commenter advocates that the public notices should be concurrently posted in the local newpapers and on the state's website for an unspecified time until the public becomes familiar with accessing the information online, and then the removal of the requirement to post the public notices in the newspaper could occur.

The EPA's response to comment 3: For the reasons discussed in the EPA's response to comment 1 above, the EPA is approving the state's rule revision into the SIP without modification.

V. What action is the EPA taking?

The EPA is approving revisions to the Iowa SIP and the Operating Permits Program. The revisions clarify rules, make revisions and corrections, and rescind rules no longer relevant to the air program. The EPA has determined that approval of these revisions will not impact air quality and will ensure consistency between the state and federally-approved rules, and ensure Federal enforceability of the State's revised air program rules.

VI. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of the Iowa Regulations described in the amendments to 40 CFR part 52 set forth below. EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 7 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.[1]

[1] 62 FR 27968 (May 22, 1997).

VII. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- 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).

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

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 8, 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

40 CFR Part 52

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

40 CFR Part 70

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

Dated: December 26, 2018.

Edward H. Chu,

Acting Regional Administrator, Region 7.

For the reasons stated in the preamble, EPA is amending 40 CFR parts 52 and 70 as set forth below:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart Q—Iowa

■ 2. Amend § 52.820, paragraph (c), by:

■ a. Revising the table entries ''567–20.2'', ''567–22.1'', ''567–22.8'', ''567–25.1'', ''567–33.1'', and ''567–33.3'', and

■ b. Removing the table entries and the heading for ''Chapter 34—Provisions for Air Quality Emissions Trading Programs'' in its entirety.

The revisions read as follows:

§ 52.820 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED IOWA REGULATIONS

Iowa citation	Title	State effective date	EPA approval date	Explanation
Iowa Department of Natural Resources Environmental Protection Commission [567]				
Chapter 20—Scope of Title—Definitions				
*	*	*	*	*
567–20.2	Definitions	4/18/2018	2/5/2019, [Insert **Federal Register** citation].	The definitions for ''anaerobic lagoon,'' ''odor,'' ''odorous substance,'' ''odorous substance source'' are not SIP approved.

EPA-APPROVED IOWA REGULATIONS—Continued

Iowa citation	Title	State effective date	EPA approval date	Explanation
*	*	*	*	*
Chapter 22—Controlling Pollution				
567–22.1	Permits Required for New or Stationary Sources.	4/18/2018	2/5/2019, [Insert **Federal Register** citation].	In 22.1(3) the following sentence regarding electronic submission is not SIP approved. The sentence is: ''Alternatively, the owner or operator may apply for a construction permit for a new or modified stationary source through the electronic submittal format specified by the department.''
*	*	*	*	*
567–22.8	Permit by Rule	4/18/2018	2/5/2019, [Insert **Federal Register** citation].	
*	*	*	*	*
Chapter 25—Measurement of Emissions				
567–25.1	Testing and Sampling of New and Existing Equipment.	4/18/2018	2/5/2019, [Insert **Federal Register** citation].	
*	*	*	*	*
Chapter 33—Special Regulations and Construction Permit Requirements for Major Stationary Sources—Prevention of Significant Deterioration (PSD) of Air Quality				
567–33.1	Purpose	4/18/2018	2/5/2019, [Insert **Federal Register** citation].	
567–33.3	Special Construction Permit Requirements for Major Stationary Sources in Areas Designated Attainment or Unclassified (PSD).	4/18/2018	2/5/2019, [Insert **Federal Register** citation].	Provisions of the 2010 $PM_{2.5}$ PSD—Increments, SILs and SMCs rule (75 FR 64865, October 20, 2010) relating to SILs and SMCs that were affected by the January 22, 2013, U.S. Court of Appeals decision are not SIP approved. Iowa's rule incorporating EPA's 2007 revision of the definition of ''chemical processing plants'' (the ''Ethanol Rule,'' published May 1, 2007) or EPA's 2008 ''fugitive emissions rule,'' (published December 19, 2008) are not SIP-approved.
*	*	*	*	*

* * * * *

PART 70—STATE OPERATING PERMIT PROGRAMS

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

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

■ 4. Amend appendix A to part 70 by adding paragraph (t) under Iowa to read as follows:

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

* * * * *

Iowa

* * * * *

(t) The Iowa Department of Natural Resources submitted for program approval revisions to rules 567–22.100, 567–22.103, 567–22.106, 567–22.107, and 567–30.4. The state effective date is April 18, 2018. This revision is effective April 8, 2019.

* * * * *

[FR Doc. 2019–00793 Filed 2–4–19; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1 and 30

[GN Docket No. 14–177; FCC 18–180]

Use of Spectrum Bands Above 24 GHz for Mobile Radio Services

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission or FCC) adopts rules for specific millimeter wave bands above 24 GHz in the Fourth Report and Order. This Order establishes an incentive auction that promotes the flexible-use

wireless service rules that the Commission has adopted for services in the Upper 37 GHz (37.6–38.6 GHz), 39 GHz (38.6–40 GHz), and 47 GHz (47.2–48.2 GHz) bands by making spectrum available for fifth-generation (5G) wireless, Internet of Things, and other advanced services in these bands.

DATES: Effective March 7, 2019.

FOR FURTHER INFORMATION CONTACT: Erik Salovaara of the Office of Economics and Analytics, Auctions Division, at (202) 418–7582 or *Erik.Salovaara@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Fourth Report and Order (*Fourth R&O*), GN Docket No. 14–177, FCC 18–180, adopted on December 12, 2018, and released on December 12, 2018. The complete text of this document is available for public inspection and copying from 8 a.m. to 4:30 p.m. Eastern Time (ET) Monday through Thursday or from 8 a.m. to 11:30 a.m. ET on Fridays in the FCC Reference Information Center, 445 12th Street SW, Room CY–A257, Washington, DC 20554. The complete text is available on the Commission's website at *http://wireless.fcc.gov,* or by using the search function on the ECFS web page at *http://www.fcc.gov/cgb/ecfs/.* Alternative formats are available to persons with disabilities by sending an email to *fcc504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (tty).

Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Fourth Further Notice of Proposed Rulemaking (*4th FNPRM*) released in August 2018 in this proceeding. The Commission sought written public comment on the proposals in the *4th FNPRM,* including comments on the IRFA. No comments were filed addressing the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

Paperwork Reduction Act

This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Congressional Review Act

The Commission will send a copy of this *Fourth R&O* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act (CRA), *see* 5 U.S.C. 801(a)(1)(A).

Synopsis

I. Introduction

1. The Commission takes significant steps to make spectrum available for fifth-generation (5G) wireless, Internet of Things (IoT), and other advanced services in the Upper 37 GHz (37.6–38.6 GHz), 39 GHz (38.6–40 GHz), and 47 GHz (47.2–48.2 GHz) bands. The Commission establishes an incentive auction that promotes the flexible-use wireless service rules that the Commission has adopted for these bands. Under the incentive auction approach and consistent with the Commission's statutory authority to conduct incentive auctions, an incumbent 39 GHz licensee may choose to relinquish the spectrum usage rights provided by its existing licenses in exchange for a share of the proceeds from the auction of new licenses. Alternatively, the incumbent may choose to receive modified licenses after the auction that are consistent with the new band plan and service rules and equivalent to its existing authorizations to operate in the 39 GHz band. Ultimately, the incentive auction approach that the Commission adopts will enhance the opportunity for incumbents and new licensees in the Upper 37 GHz and 39 GHz bands to provide valuable next-generation services.

2. The Commission's decisions, along with specific procedures to be adopted in the forthcoming Auction Comment and Auction Procedures Public Notices, will enable the Commission to move forward with an auction of the Upper 37 GHz, 39 GHz, and 47 GHz bands by the end of 2019. In combination, the Upper 37 GHz and the 39 GHz bands offer the largest amount of contiguous spectrum in the millimeter wave bands for flexible-use wireless services—a total of 2,400 megahertz—and the 47 GHz band will provide an additional 1,000 megahertz of millimeter wave spectrum for such services. Together with the pending auctions of licenses in the 28 GHz (27.5–28.35 GHz) and 24 GHz (24.25–24.45 GHz, 24.75–25.25 GHz) bands, the Commission is making substantial progress in assigning high-band spectrum for innovative services, and the Commission will continue to work towards assigning additional spectrum in the mid-band range for the benefit of American consumers.

II. Background

3. In 2016, the Commission adopted Upper Microwave Flexible Use Service (UMFUS) rules for the 28 GHz, Upper 37 GHz, and 39 GHz bands, to make available millimeter wave spectrum for 5G. In 2017, the Commission expanded the UMFUS rules to cover the 24 GHz and 47 GHz bands. In addition to the licensed use opportunities in these bands, the Commission made the Lower 37 GHz (37–37.6 GHz) band available for non-Federal users through a coordination mechanism with Federal users, which the Commission will develop more fully with government and industry collaboration. Earlier this year, the Commission sought further comment on a proposed coordination mechanism and alternatives. The Commission recognizes the importance of the Lower 37 GHz band and commits to working with the National Telecommunications and Information Administration and other federal agencies to develop a sharing approach in 2019.

4. Existing licenses in the 39 GHz band consist of unpaired 50 megahertz blocks licensed by Partial Economic Area (PEA) or by Rectangular Service Area (RSA), which can cross PEA boundaries or be enveloped by them. Commission records show 11 unique incumbent licensees hold about 5,880 active licenses in the 39 GHz band (5,590 PEA licenses and 290 RSA licenses). Measured in terms of ''MHz-pops''—the product of spectrum bandwidth and covered population, only approximately one-third of the 39 GHz band is held in Commission inventory and is not authorized for use by any existing license. Currently, a number of licenses do not fit geographically into the proposed 39 GHz band plan of 100 megahertz licenses by PEA, which results in ''encumbered'' licenses. There are two types of encumbered licenses: (1) RSA licenses that do not conform to PEA boundaries; and (2) PEA licenses that are not authorized to provide service in the entire PEA due to an overlapping RSA license, *i.e.,* PEA licenses that overlap geographically with pre-existing RSA licenses whose frequency assignment they must protect. The Upper 37 GHz and 47 GHz bands currently have no commercial terrestrial wireless incumbent licensees.

5. The Commission has recognized that, with respect to the 39 GHz band, ''[h]olding any auction based on this

fragmented band would likely be inefficient, as bidders would reasonably expect to incur significant transaction costs in assembling contiguous spectrum post-auction.'' To address this issue, the 2016 *Spectrum Frontiers R&O* adopted a voluntary rebanding framework to allow incumbent licenses to be reconfigured to the new band plan and service areas in an effort to clear the band of encumbrances and enable licensees to aggregate licenses for contiguous frequencies. In June 2018, the Wireless Telecommunications Bureau (Bureau) issued a Public Notice announcing that it was accepting license modification applications pursuant to this voluntary rebanding process. Since that time, however, no applications to authorize such swaps have been received. Moreover, conforming existing licenses to the new band plan and service areas may be infeasible for incumbent licensees with only one pair of 50 megahertz licenses in a particular area, one 50 megahertz block in a particular area, or an RSA license.

6. Earlier this year, in *the 4th FNPRM,* the Commission proposed an incentive auction that potentially could clear all existing 39 GHz licenses. In addition, the Commission proposed a ''voucher exchange'' that would allow incumbents to modify existing spectrum usage rights, without increasing them in aggregate. The Commission indicated that this framework would make it easier for incumbents with partial license holdings to retain existing spectrum usage rights without additional license payments. Further, the Commission proposed provisions for a mandatory reconfiguration of incumbents' existing spectrum usage rights, which an incumbent may choose to accept instead of participating in the voluntary incentive auction.

III. Discussion

A. The Need for an Incentive Auction

7. The Commission will conduct an incentive auction that can clear existing 39 GHz licenses and offer new spectrum licenses in the Upper 37 GHz, 39 GHz, and 47 GHz bands. The incentive auction process that the Commission adopts will resolve the persistent difficulties presented by the need for existing 39 GHz licenses to be transitioned efficiently to the new band plan and possibly to new service areas. Absent this process, existing 39 GHz licenses break up blocks of spectrum and fragment frequencies across the 39 GHz band, creating barriers to the deployment of next-generation services in the band. The incentive auction will solve this challenge by offering incumbent licensees the opportunity to participate in the auction to relinquish their existing licensed spectrum usage rights in exchange for a payment determined by the auction and/or to replace existing licenses with new licenses for whole blocks that will be assigned contiguous frequencies within license areas. Further, for each incumbent that does not wish to participate in the auction, the Commission will provide the incumbent with modified licenses for contiguous 100 megahertz blocks covering full PEAs (with possibly up to one partial PEA), leaving these incumbents better able to provide next-generation services. Providing these opportunities is necessary to resolve the difficulties presented by the existing encumbered and unpaired licenses and to clear the way for assignment of a significant number of new licenses for whole blocks with contiguous frequencies within PEAs. The incentive auction thereby substantially furthers the public interest in making available spectrum for the provision of next-generation services.

8. The Commission's action implements its proposal in the *4th FNPRM* for an incentive auction that potentially could clear all existing 39 GHz licenses, assign new licenses under a band plan providing 100 megahertz blocks by PEA, and provide modified 100 megahertz licenses to any incumbents that choose not to participate in the auction. Commenters respond favorably to the proposed incentive auction to resolve the difficulties presented by existing 39 GHz licenses. Consistent with the overall support, commenters also offer suggestions about specific details or request clarifications on particular points.

9. The Commission affirms its conclusion that the Commission has authority under the Communications Act to modify existing licenses in a manner that will allow for a more efficient auction and to conduct the proposed incentive auction for these bands. Commenters agree that the proposed auction is ''well within [the Commission's incentive auction] authority.'' The statute authorizes the Commission to use an incentive auction to encourage licensees to relinquish their holdings voluntarily provided that at least two bidders compete to relinquish spectrum usage rights. The incentive auction, both as proposed in the *4th FNPRM* and adopted, is voluntary. Furthermore, the clock phase of the incentive auction format the Commission plans to use serves as both a reverse auction that will determine the amount of incentive payments as well as a forward auction to assign new flexible use licenses. As such, the Commission will conduct the auction only if there are two competing incumbent participants. As the Commission concluded in the *4th FNPRM,* and no commenter disputes, as long as more than one incumbent licensee commits to relinquish its spectrum usage rights, there will be two licensees competing in the reverse auction portion of the incentive auction.

10. The Commission also decides the defining characteristics of the incentive auction and the related license modification process that will enable deployment of licenses for next-generation services in these bands. Because the clock phase of the incentive auction the Commission adopts serves as both the reverse and forward auctions, the incentive amounts offered to relinquish existing licenses will be based on the final clock phase prices in each PEA. As a result, incumbents will have the opportunity to replace at no additional cost all existing spectrum usage rights equivalent to a full 100 megahertz block with new licenses that are offered in the auction and provide equivalent rights. Further, the Commission concludes that it is necessary that incumbents that choose not to participate in the incentive auction will have their licenses modified based on a reconfiguration of their existing spectrum usage rights that is more consistent with the current band plan. As in the prior broadcast television spectrum incentive auction, and in all Commission auctions, the Commission will develop and detail all the procedures necessary to implement its decisions in a pre-auction process framed by an Auction Comment Public Notice and Auction Procedures Public Notice.[1]

B. Band Plan

11. In the *4th FNPRM,* the Commission proposed to modify the 39 GHz band plan from seven 200 megahertz channels to fourteen 100 megahertz channels, in order to facilitate the repacking of incumbents without compromising the band's potential for supporting 5G services. The Commission also proposed to

[1] In this *Fourth R&O,* the Commission addresses suggestions and requests raised in response to the *4th FNPRM* that are relevant to its decisions in this *Fourth R&O.* The Commission leaves for later discussion details that are more appropriately addressed later in the pre-auction process, such as opening bids. The Commission commits to moving forward expeditiously at the Commission level with public notices seeking comment and adopting detailed procedures to implement the incentive auction, *i.e.,* the ''pre-auction process.''

modify the band plan in the Upper 37 GHz band and the UMFUS portion of the 47 GHz band from 200 megahertz to 100 megahertz channels. Maintaining the same channel width across these bands would avoid creating complexities for bidders should the Commission auction these bands together, and would allow the contiguous Upper 37 GHz and 39 GHz bands to function effectively as one 2,400 megahertz band of spectrum.

12. The Commission adopts its proposal, which is supported by nearly all commenters, to modify the band plans of the Upper 37 GHz, 39 GHz, and 47 GHz bands from 200 megahertz channels to 100 megahertz channels. The Upper 37 GHz band and the 47 GHz band will now consist of ten 100 megahertz channels each, and the 39 GHz band will consist of fourteen channels. Modifying the band plan to 100 megahertz blocks offers multiple benefits for these bands, including facilitation of the repacking of incumbents, consistency with emerging industry and international standards, and the potential for uniform channel sizes across multiple millimeter wave bands to facilitate secondary market transactions and the standardization of equipment. Further, as noted by commenters, there are potential positive auction effects that would result from standardizing the channel width across the Upper 37 GHz, 39 GHz, and 47 GHz bands, which will be auctioned together. Further, the Commission agrees with the commenters that suggest that adopting a uniform channel size for as many millimeter wave bands as possible will promote more efficient use of the spectrum.

13. This new band plan, which is heavily supported by the record, will facilitate the rationalization of existing licenses in the 39 GHz band and enable greater flexibility for licensees while remaining consistent with emerging standards for 5G. Only one commenter, TIA, opposes the proposed change to 100 megahertz channels. TIA argues that wider channels will better support 5G services and that the previously-adopted 200 megahertz channels are sufficient to ensure adequate opportunities for participation by new entrants, due to the large number of channels available. It also offers an alternative to the *4th FNPRM*'s proposal concerning the size of channels. While the Commission agrees with TIA that access to wide swathes of spectrum is an important goal in support of 5G and other bandwidth-intensive services, as other commenters note, licensees would still be able to achieve greater bandwidth through aggregation, particularly if the Commission facilitates aggregation of contiguous spectrum blocks in its auction design.

14. For the 39 GHz band in particular, using 100 megahertz channels will simplify the rationalization process for incumbents and reduce the number of existing licenses that are less than a whole channel block under the new licensing scheme, given that incumbents generally hold non-contiguous paired 50 megahertz blocks (100 megahertz), as opposed to the original band plan consisting of 200 megahertz channels. Further, adopting a band plan using 100 megahertz building blocks does not prevent licensees that prefer channels wider than 100 megahertz from bidding on multiple blocks and aggregating spectrum to achieve that goal. The 100 megahertz channels the Commission adopts in this *Fourth R&O* will not impede carrier aggregation to achieve greater bandwidths, but merely provide additional flexibility, both for licensees for whom 100 megahertz is sufficient and for incumbents who currently hold licenses in multiples of 100 megahertz. The Commission is mindful of the need for multiple 100 megahertz blocks assigned to the same carrier to be contiguous and the Commission considers this factor in its auction design.

C. Preparing for an Incentive Auction

1. Modifying 39 GHz Licenses Based on Reconfigured Spectrum Usage Rights

15. As the Commission noted in the *4th FNPRM,* the Commission has authority to modify the holdings of existing licensees ''if in the judgment of the Commission such action will promote the public interest, convenience, and necessity.'' No commenters dispute the Commission's authority generally or with respect to any aspect of modifications proposed in the *4th FNPRM.*

16. Prior to the incentive auction, each incumbent will be offered a reconfiguration of its existing spectrum usage rights that will conform more closely with the new band plan and service areas. Given that some incumbent licenses may cover geographic areas that do not match the PEA service areas established for the 39 GHz band, the reconfiguration may need to combine an incumbent's spectrum rights in multiple license areas to create full spectrum blocks where possible, retaining at most one partial PEA block. Where such changes are unavoidable, the reconfiguration will maintain the overall value of spectrum usage rights by quantifying those rights by weighted MHz-Pops, as measured pursuant to the procedures established by this *Fourth R&O.*

17. In addition, each incumbent will be given an option to choose an alternate reconfiguration, subject to certain constraints, in order to more closely align the reconfiguration with the incumbent's interests, such as current operations. These modifications should leave each incumbent licensee better able to offer advanced services by providing contiguous frequencies within each PEA, while leaving the value of the incumbent's spectrum usage rights unchanged as measured in weighted MHz-Pops.[2] Each incumbent will decide whether to accept the modifications (which will take effect after the close of the auction), either as proposed by the Commission or an acceptable alternate, or to participate in the incentive auction to relinquish their existing spectrum usage rights in exchange for a share of the auction proceeds. The Commission directs the Wireless Telecommunications Bureau to provide each incumbent with a proposed modification implementing its decisions and to do so well in advance of the application window for the auction.

18. AT&T and Verizon both ask that the Commission clarify that all existing licenses are subject to modification, regardless of whether or not an incumbent participates in the incentive auction. All existing licenses are subject to change, regardless of the licensee's participation in the incentive auction, in order to implement the Commission's transition to a new band plan and service rules for the 39 GHz band.[3] Though affected by an incumbent's decision whether to participate in the incentive auction, the exact form each license will take by the end of the

[2] Existing licensees that choose to accept modified licenses remain subject to FCC Rule 30.104(f), which states that existing 39 GHz licensees are required to make a buildout showing by June 1, 2024. *See* 47 CFR 30.104(f). If a licensee with a modified license is unable to make that showing by the deadline because of an expansion in the boundaries of its service area pursuant to these license modifications, that licensee may request relief from the rule, which the FCC will consider given the specific facts and circumstances of each licensee. The Commission reminds licensees that the FCC will grant waiver requests only if the petitioner can demonstrate special circumstances that warrant a deviation from the general rule and that such a deviation will serve the public interest. *Northeast Cellular Co.* v. *FCC,* 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio* v. *FCC,* 459 F.2d 1203 (D.C. Cir. 1972). *See also* 47 CFR 1.925; Wireless Telecommunications Bureau Reminds Licensees of Construction Obligations, 32 FCC Rcd 4802 (WTB 2017).

[3] The Commission notes that, ultimately, the Internal Revenue Service can determine the tax consequences resulting from direct license modifications or participation in an incentive auction.

incentive auction will be determined by the process discussed herein. Such modifications will include both frequency reassignments and, in many cases, geographical reassignments.

19. *Quantifying Existing Spectrum Usage Rights with Weighted MHz-Pops.* As a preliminary matter, an incumbent's total licensed spectrum usage rights in each PEA will be measured by adding up the MHz-Pops (bandwidth times covered population) for each of an incumbent's licenses in each PEA.[4] To compare MHz-Pops across PEAs, the MHz-Pops in each PEA will be weighted using an index calculated using the relative prices for spectrum licenses in each PEA in other auctions. The Commission proposed a weighting process in the *4th FNPRM.* While not opposing weighting, commenters disagreed on the best data to use to set the relative weights. T-Mobile advocates using price data in imminent auctions of licenses for millimeter wave spectrum, in particular the auction of 24 GHz spectrum licenses. Verizon objects that any data from that auction may be too particular and uncertain to rely upon here, and instead it suggests using price data from Auction 1002, the auction for 600 MHz licenses. AT&T notes the difficulty of arriving at ''correct'' weights but does not suggest looking toward any auction in particular.

20. Data currently available for determining the weights for this incentive auction all pertain to licenses for flexible use in spectrum below 3 GHz. For instance, when preparing for the incentive auction of broadcast television spectrum, the Commission used price data from prior auctions to estimate relative price differences across PEAs for the television spectrum in 600 MHz. The subsequent prices for new 600 MHz licenses in that auction provide further data about relative differences across PEAs. As noted in the *4th FNPRM,* relative spectrum license prices among geographic areas can be substantially more similar across auctions than the spectrum license prices themselves. The Commission notes that the Commission's first auction of flexible use licenses for millimeter wave spectrum is currently ongoing and a second will follow after the first closes. Additional data regarding the prices for licenses in those auctions may be helpful, if available. Accordingly, for this incentive auction, the Commission directs the Wireless Telecommunications Bureau to set the weights considering the relative PEA price data prepared for and resulting from the broadcast television spectrum incentive auction, while also taking into account any additional Commission data regarding prices for millimeter wave spectrum licenses to the extent practicable.

21. As supported by commenters, 2010 Census data will be used to determine the population covered by each license. The two-by-two kilometer cell grid methodology employed to determine population in particular areas in the broadcast incentive auction will be used to calculate the population for licenses for RSAs and for licenses covering a full or partial PEA.

22. To further the Commission's goal of transitioning to the new band plan, separate licenses that are held by entities that control or are controlled by each other and/or have controlling ownership interests in common will be treated as held by one incumbent. For this purpose, the Commission will use the definition of ''controlling interest'' as an entity with *de jure* or *de facto* control that the Commission uses with respect to auction applications, specifically the rule prohibiting an individual or entity from having a controlling interest in more than one application to participate in the auction. Further, it may be appropriate to freeze assignments of these licenses at a future point.[5] The Commission directs the Bureau to address whether or when it is necessary to freeze assignments of 39 GHz licenses prior to calculations of aggregate holdings.

23. In response to the *4th FNPRM,* PVT Networks, Inc. (PVT) presents concerns regarding potentially significant consequences of *de minimis* encumbrances to its licenses. PVT holds several licenses, two of which are encumbered to an extremely small extent. PVT argues that if an RSA encumbrance of a PEA license is so small as to constitute a ''flyspeck'' or *de minimis* encumbrance (as calculated by percentage of population in a PEA), the encumbered PEA license should be treated as unencumbered.

24. The Commission agrees that it should not permit *de minimis* encumbrances, including PVT's, to present unnecessary challenges to incumbents that seek to preserve spectrum usage rights. Where an incumbent holds a license that covers virtually the entire population in a PEA, the Commission concludes it would be in the public interest to allow the licensee to serve the entire license area rather than considering it an encumbered block. Consistent with Commission precedent that has permitted *de minimis* modifications to licenses that further the public interest, the Commission concludes that incumbent licensees with existing licenses that cover at least 99 percent of the MHz-Pops in a PEA will be considered as having the equivalent of an unencumbered whole block prior to the Commission's reconfiguration.

25. *Optimization to Reconfigure Existing Spectrum Usage Rights.* The Commission will propose a reconfiguration of each incumbent's holdings that will reduce the total number of partial PEA block holdings without reducing the incumbent's total weighted MHz-pops across all PEAs, a process the Commission referred to as ''mandatory repacking'' in the *4th FNPRM.* As suggested in the *4th FNPRM,* once the weighted MHz-pops have been calculated for each incumbent's licenses, each incumbent's spectrum holdings will be reconfigured using an optimization procedure to reduce the number of holdings that are equivalent to less than a full 100 megahertz block in a full PEA (*i.e.,* one that covers the entire geographic area of the PEA). The Commission anticipates that the objective of the optimization process will be to minimize the number of weighted MHz-Pops that are left over as unassigned spectrum usage rights (''white space''). This will enable the Commission to offer more contiguous spectrum in the incentive auction. The optimization would ensure that each incumbent's total weighted MHz-pops across all the PEAs in which it has holdings would remain unchanged. In addition, each incumbent would hold at most one partial PEA block, which would be in a PEA in which it has existing holdings. Further, aggregate holdings in a PEA only would be reduced down to the greatest integer less than or equal to the incumbent's aggregate initial holdings or increased up to the least integer greater than or equal to the incumbent's aggregate initial holdings. This last constraint implies that only holdings for a partial PEA block would be moved across PEAs and that the optimization would not modify any license to require service in any PEA in which the licensee does not have existing holdings. The Commission directs the Bureau to determine the best

[4] The incumbent's total spectrum usage rights in a PEA divided by the MHz-pops for a full 100 megahertz block (the bandwidth of a new block) will indicate the equivalent number of blocks (whole and partial) held in the PEA under the new band plan. For RSA licenses, the Commission will consider the portion of the RSA license that falls within each PEA such that an RSA license that crosses a PEA boundary will have the relevant portion of population counted in each PEA.

[5] For example, when the FCC finalizes the procedures for calculating aggregate holdings, it may be necessary to preclude subsequent assignments that might disaggregate those holdings.

methodology for implementing this optimization process.

26. The Commission concludes that a licensee's remaining holdings for a partial PEA block in one PEA following reconfiguration could cover a significant enough percentage of the population such that the remaining uncovered portion would qualify as *de minimis,* entitling the licensee to be considered as holding the entire license. That is, where after reconfiguration, an incumbent would cover nearly all of the population in a PEA, it would be unlikely that any other provider would seek to serve the remaining area in that PEA. Under these circumstances, the Commission concludes that it is reasonable to adopt a five percent *de minimis* standard for an incumbent's remaining partial PEA block following reconfiguration. The Commission finds it is in the public interest to adopt this higher standard for the partial PEA blocks to ensure that the incumbent licensee has the opportunity to serve the entire PEA, rather than leaving the small percentage of the population most likely unserved. As all of the details of the methodology for reconfiguring holdings are not yet final, the Commission directs the Bureau to consider increasing this threshold as appropriate when it finalizes the optimization methodology, to no more than a total of ten percent.

27. *Configuring Partial PEA Blocks.* The Commission intends that the license for an incumbent's one partial PEA block will be configured by adjusting the incumbent's currently licensed area in the PEA so that it corresponds to the incumbent's reconfigured holding in that PEA. For example, if an incumbent's partial PEA block covers one-half of the MHz-pops in the PEA, and the reconfigured holding in that PEA is one-quarter the MHz-pops, the partial PEA block will consist of 100 megahertz covering an area of the PEA fully contained within its current license that encompasses 25 percent of the population in that PEA. Similarly, if the reconfigured fractional holdings are greater than the current MHz-Pops in the PEA, the geographic coverage will be adjusted in a manner that fully contains the currently licensed area but remains within the boundaries of the PEA. The geography of a current encumbered license will be adjusted to conform to an incumbent's new fractional holdings, rather than adjusting the bandwidth, because the Commission recognizes that licensees of millimeter wave spectrum prefer 100 megahertz blocks at a minimum for advanced services, and incumbent licensees may better be able to provide service in an area closer to the footprints of their original licenses. The proposed geographic boundaries for the partial PEA block will be as similar as possible to the incumbent's original holdings in that PEA, recognizing that the remaining partial PEA block may cover a larger or smaller percentage of pops than the existing license.

28. In addition, a whole PEA block will be removed from the auction inventory when providing for licensing partial blocks based on reconfigured holdings. As a consequence, licenses for partial PEA blocks will be accompanied by unassigned white space in the remainder of the block. Licenses for partial PEA blocks will be needed only for an incumbent that both chooses to receive modified licenses and that chooses not to relinquish its rights to a partial PEA block in exchange for an incentive payment. Leaving the rest of the block unassigned will help to preserve the structure of the new band plan going forward. Although this approach potentially will result in unassigned white space, the total white space that will result is extremely low relative to the total 39 GHz band. The Commission will seek comment in the Auction Comment Public Notice regarding assignment of the remaining unassigned white space.

2. Incumbent Options Following Reconfiguration

29. After the results of the reconfiguration process are announced, an incumbent 39 GHz licensee will have three options. It can choose to: (1) Have its licenses modified based on the Commission's proposed reconfiguration of its holdings; or (2) have its licenses modified based on its proposed alternative reconfiguration that yields the same or fewer weighted MHz-pops and satisfies certain specified conditions; or (3) commit to relinquish its licenses in exchange for an incentive payment and/or the ability to bid for new licenses.

30. *Incumbents Not Participating in the Incentive Auction.* The Commission recognizes that an incumbent licensee may wish not to participate in the incentive auction to relinquish its existing spectrum usage rights, but may have existing holdings that do not correspond to full new blocks; in such cases the licensee may benefit from an alternative reconfiguration of its existing licenses. The Commission will allow each incumbent, once it reviews the results of the Commission's reconfiguration, to propose modifications to its existing licenses before it decides whether it will participate in the auction. If the incumbent ultimately decides to participate in the auction, however, any proposed modifications to its existing licenses will not have any effect.

31. To be an acceptable alternative reconfiguration, the Commission anticipates that the incumbent's proposal must satisfy the same requirements as the Commission's modification proposal, except that, in contrast to the Commission's proposed reconfiguration, an incumbent's proposal need not minimize the weighted MHz-Pops remaining as white space in the one PEA in which the incumbent is left with the equivalent of a partial PEA block. That is, in a proposed reconfiguration, an incumbent can hold at most one partial PEA block, which would be in a PEA in which it has existing holdings. In addition, proposed 100 megahertz full PEA licenses must be in PEAs in which it has existing holdings. Finally, aggregate holdings in a PEA can only be reduced down to the greatest integer less than or equal to the incumbent's aggregate initial holdings or increased up to the least integer greater than or equal to the incumbent's aggregate initial holdings. If a licensee chooses an acceptable alternate reconfiguration proposal, the incumbent can indicate that it will not participate in the incentive auction and instead opt to have its licenses modified after the auction based on its reconfiguration proposal. The Commission directs the Bureau to announce the methodology and process for each incumbent to propose alternate reconfigurations and to elect how to proceed, and to educate incumbents about the process.

32. Even though an incumbent choosing to have its licenses modified, either as configured by the Commission or under an acceptable alternative proposal, cannot bid on new licenses in the incentive auction, it will be allowed to relinquish the licensed spectrum usage rights associated with its single partial PEA block holding in exchange for an incentive payment. The payment amount will be determined in the auction and will be equivalent to the incumbent's fractional share of the block times the final clock phase price of a generic spectrum block in that PEA. For example, an incumbent that relinquishes a reconfigured partial PEA holding of .6 may receive 60% of the final clock phase price for generic blocks in that PEA. If an incumbent relinquishes holdings for a partial PEA block, the incentive auction can offer an additional full block of spectrum in the auction inventory. An incumbent that accepts reconfigured holdings and therefore does not fully participate in the incentive auction will not have the

option of relinquishing any full block licenses in exchange for incentive payments however, nor will it be able to bid on new licenses in the auction.

33. An incumbent that chooses not to participate in the auction and instead chooses to accept reconfigured holdings, either corresponding to the results of the FCC optimization or to an acceptable alternative reconfiguration, will have frequency-specific licenses assigned for its reconfigured holdings after the incentive auction has concluded. New frequencies for the modified licenses will be determined in the assignment phase of the incentive auction. Incumbent licensees that accept reconfigured holdings will not be permitted to place bids for specific frequencies in the assignment phase, however. As described as part of the assignment phase, all licensees should be issued licenses with contiguous frequencies within a category of a PEA regardless of whether they participate in the auction or bid in the assignment phase.

34. *Incumbents Participating in the Incentive Auction.* Incumbents that commit to relinquishing all of their existing licenses will receive ''vouchers'' sufficient to win blocks in the auction equivalent to their existing PEA holdings.[6] Such incumbents do not need to rebid on spectrum blocks equivalent to their existing holdings, however, unless they want to continue to hold licenses in those areas. Participating incumbents can apply the vouchers toward payments for blocks in other PEAs and receive a cash incentive payment if the value of their vouchers exceeds their net auction obligations. Auction participants can also simply relinquish their holdings and choose not to bid on any new licenses, in which case they will receive a cash incentive payment for their vouchers.

35. Vouchers for existing holdings in a PEA will be valued at the final clock phase price of a generic spectrum block in the PEA. As a result, a participating incumbent with holdings equivalent to a full block in a PEA can retain the block without making any additional payment or can receive an incentive payment equal to the final clock phase price of a block in that PEA if it no longer wishes to hold the block. The incumbent then will have the option of bidding an additional amount in the assignment phase to obtain a particular frequency for its new license, but it will receive contiguous frequency blocks within a category regardless of whether it makes an additional assignment phase bid.

36. In addition to having the opportunity to modify its existing spectrum holdings through participation in the incentive auction, an incumbent that chooses to participate in the auction also will be able to make pre-bidding exchanges in its existing holdings of partial PEA blocks, subject to constraints (described below as ''Round Zero'' of the auction). As described below, this will encourage auction participation by enabling an incumbent to manage uncertain costs associated with retaining spectrum holdings in the incentive auction.

D. Incentive Auction Structure

1. Spectrum Available for New Licenses

37. Following the choices made by incumbent 39 GHz licensees to accept modified licenses based on reconfigured holdings or to relinquish their existing spectrum usage rights, the Commission will offer new licenses in the incentive auction for all available spectrum in the Upper 37 GHz, 39 GHz, and 47 GHz bands.[7] The available spectrum will consist of spectrum throughout these bands, less any quantity of spectrum that must be retained to provide non-participating incumbents with modified licenses. If all incumbent licensees choose to participate, that quantity will be zero and the Commission will offer new licenses for 3,400 megahertz of spectrum, or 34 licenses in every PEA. New licenses in the auction, whether won by incumbents relinquishing existing licenses or by new applicants, will authorize only the use of whole spectrum blocks in 100 megahertz blocks.

2. Eligibility

38. Any party eligible to hold a license in these bands will be eligible, subject to meeting the Commission's application requirements, to participate in the auction for new licenses, except for incumbent 39 GHz licensees that accept modified licenses as reconfigured and decline to relinquish all existing licenses. The Commission proposed this qualification in the *4th FNPRM.* The Commission noted that the contrary approach of allowing an incumbent to retain existing licenses that might encumber the band while also bidding for whole blocks would appear to give incumbents an unfair advantage. Requiring incumbents to relinquish all existing licenses as a prerequisite to bidding on new licenses will facilitate the assignment of licenses to the entities that value them most highly, thus serving the public interest. All commenters addressing this issue support this requirement.

3. Round Zero Adjustments to Incumbent Spectrum Usage Rights—Voucher Exchange

39. Prior to round one of the incentive auction clock phase, the Commission will offer incumbent licensees that decide to participate in the auction a limited opportunity to redistribute their initial voucher holdings across the PEAs in which they hold rights for a partial PEA block (Round Zero). In the *4th FNPRM,* the Commission proposed such a ''voucher exchange'' to address concerns that an incumbent with existing licenses covering RSAs or partial PEAs may face significant uncertainty about the cost of obtaining full licenses in the incentive auction that cover its current partial PEA block holdings.

40. More specifically, after the FCC quantifies and aggregates existing usage rights in each PEA, an auction participant can exchange any vouchers equivalent to a partial PEA block among the PEAs where it has such vouchers, subject to two restrictions. First, the total value of its holdings, in weighted MHz-Pops using the FCC weights, following the exchange must be less than or equal the total weighted MHz-Pops of its initial holdings. Second, aggregate holdings in a PEA can only be reduced down to the greatest integer less than or equal to its aggregate initial holdings or increased up to the least integer greater than or equal to its aggregate initial holdings.[8] As a result,

[6] For ease of discussion, the Commission describes incentive payments for incumbents relinquishing spectrum usage rights as ''vouchers.'' *See 4th FNPRM* at para. 20. Notwithstanding short-hand descriptions of the process, incumbents do not ''exchange'' licenses for vouchers or at any point receive a ''voucher'' that has any independent substance.

[7] The Commission does not make any decision regarding suggestions to auction licenses for additional bands of spectrum with the three bands already identified. Though licenses for the Upper 37 GHz, 39 GHz, and 47 GHz bands in one auction will provide up to 3,400 megahertz in every PEA for advanced services, various commenters encourage the Commission to consider adding other bands. For example, commenters argue that because the 42 GHz band is in the same tuning range as the Upper 37 GHz and 39 GHz bands, the Commission should auction all of these bands together, which would generate economies of scale and reduce equipment costs. The Commission may consider whether other bands are in fact ready and suitable for inclusion in the auction of licenses for these three bands, after notice and comment, in the Auction Procedures Public Notice.

[8] The Commission clarifies, as AT&T requests, that an incumbent may adjust its spectrum usage rights without necessarily creating an amount equivalent to a whole number of blocks. The Commission also proposed limiting the ability of an incumbent to make adjustments in a PEA in which all incumbents could not do so. *4th FNPRM* at para. 34. In response, AT&T proposes prioritizing the rights of incumbents to make adjustments in such

an incumbent thus can increase or decrease its vouchers in a PEA by strictly less than one, *i.e.,* it may increase a partial holding of 0.5 to 0.75 or to 1, but cannot increase it to 1.2. No adjustments may be made in a PEA in which an incumbent has no existing licenses or has spectrum usage rights equivalent to a whole number of whole blocks.

41. These restrictions are similar to the constraints that the Commission contemplates using in the FCC reconfiguration optimization, except that in this case incumbents could hold vouchers equivalent to partial PEA blocks in more than one of its PEAs. Allowing an incumbent in the auction to hold vouchers equivalent to partial PEA blocks enables the incumbent to better hedge against uncertainty about auction prices relative to the FCC weights. An incumbent in the auction already has committed to relinquish its current licenses, so there is no need to limit vouchers that are equivalent to partial PEA blocks, in contrast to the need to limit reconfigured holdings equivalent to partial PEA blocks when the holdings may become the basis for modified licenses.

42. Commenters differ on the question of permitting incumbents to redistribute their existing spectrum usage rights prior to bidding for new licenses. CCA cautions against the risk of creating unwarranted advantages for incumbent licensees. T-Mobile is concerned that establishing the process to allow incumbents to adjust their holdings prior to the auction will delay the determination of actual auction procedures. T-Mobile also raises concerns over the risk that the Commission may err in setting the relative weights of incumbent holdings in different PEAs. This could inadvertently create windfalls for incumbents that incumbents might further amplify through any pre-auction adjustments. T-Mobile further argues that there is no need to allow incumbents to modify their holdings if all the holdings will be relinquished in exchange for incentive payments. The Commission finds, however, that the limitations the Commission imposes on potential modifications will minimize any potentially unfair advantages to incumbents in the voluntary exchange.

situations. Initial analysis of the data indicates that there are no PEAs in which each incumbent could not make adjustments that otherwise comply to the limitations the Commission proposes. Accordingly, the Commission need not adopt any limitation or prioritization for such a scenario.

4. Other Structural Issues

43. *Incumbent Bidding Credits for New Licenses.* Incumbents, like any other applicant in the Commission's auctions for spectrum licenses, may seek designated entity bidding credits as small businesses or rural service providers.[9] In the *4th FNPRM,* the Commission noted the potential for a scenario in which an incumbent licensee entitled to bidding credits for new licenses might participate in the incentive auction, win licenses that replace its existing spectrum holdings for which it would owe no additional payment, and be entitled to a bidding credit. This scenario effectively would leave a surplus payment that this incumbent might receive as a cash incentive payment, despite also receiving new licenses that replicate its prior holdings. The Commission proposed to address this anomaly by crediting such incumbents with a bidding credit only with respect to any outstanding cash payments for new licenses that offer spectrum usage rights beyond its aggregate spectrum usage rights prior to the auction. All commenters addressing this issue agree with the Commission's proposal. Accordingly, bidding credits for participating incumbent licensees will apply only to cash payments for new licenses.

44. *Incumbents Bidding Up Incentive Payments.* The Commission noted in the *4th FNPRM* that the structure of the proposed incentive auction appeared to allow incumbents to bid up new licenses in order to increase the amounts of corresponding incentive payments. The Commission sought comment on this scenario. The Commission agrees with commenters that the concern is largely theoretical and that no action is needed to address it. Incumbent licensees that bid up new licenses will risk winning the new license rather than receiving the corresponding incentive payment. That risk should deter insincere bidding to increase incentive payments.

45. *Assuring Full Incentive Payments.* The Commission sought comment in the *4th FNPRM* about whether incumbents may relinquish spectrum if the demand for new licenses in a PEA may be met without relinquished spectrum. The Commission discussed several alternatives for prioritizing among incumbent relinquished spectrum blocks, either relinquished rights to full 100 megahertz PEA blocks or partial PEA blocks, as well as prioritizing Commission-held spectrum blocks. The Commission noted that satisfying limited demand with Commission spectrum could minimize payments to incumbents. The Commission also observed, however, that regardless of ''the proceeds or relinquishments in a particular PEA'' the incentive auction could proceed ''[p]rovided that the total auction proceeds exceed the total incentive payments[.]'' That is, the level of demand in a single PEA need not determine whether the Commission can make incentive payments for spectrum relinquished in that PEA. Commenters favor the Commission making all incentive payments even where incumbent spectrum is not needed for new licenses in a particular PEA, *i.e.,* if there is a shortfall in demand in that PEA relative to the supply of spectrum made available in the auction. The Commission agrees that, so long as the total auction proceeds are sufficient, making all incentive payments irrespective of the level of demand in each PEA will serve the public interest. Accordingly, the Commission will adopt a net revenue requirement for this auction that, if met, will ensure that the auction proceeds are sufficient to cover all incentive payments.

46. Making all incentive payments even when demand in a PEA falls short of the supply of available blocks serves the public interest in several ways. Assuring incumbents that all incentive payments will be made, irrespective of the demand in any given PEA, will encourage incumbents to relinquish their licenses and participate in the auction, which will facilitate the smooth transition of the 39 GHz band. Moreover, incumbent auction participants will have greater certainty about their respective auction budgets, including incentive payments, if they know they will receive a payment for usage rights they wish to relinquish,

[9] The Commission also offers a bidding credit when a winning bidder provides service to qualifying tribal land with a license won at auction. 47 CFR 1.2110(f)(3). Commission rules already address the possibility that auction proceeds net of both other designated entity bidding credits and other commitments reflected in an auction reserve price may not be sufficient to pay all tribal land bidding credits that winning bidders seek after the auction. 47 CFR 1.2110(f)(3)(v). In this case, the Commission adopts a net revenue requirement for this auction to assure that auction proceeds will be sufficient to make all incentive payments owed. Accordingly, the Commission specifies that this provision shall apply to the incentive auction. *Id.* (''in any auction with reserve price(s) in which the Commission specifies that this provision shall apply''). The Commission's action allows tribal land bidding credits to be paid in full so long as aggregate auction proceeds net of all applicable bidding credits and aggregate incentive payments are greater than the total amount of tribal bidding credits sought. If not, however, the Commission's action applies established procedures for reducing a tribal land bidding credit sought by any incentive auction winning bidder in proportion to the ratio of available proceeds and the total amount of tribal land bidding credits sought.

rather than being required to retain such rights. Incumbents then will be able to bid with more certainty for the licenses they value most highly. As a result, the auction will be more likely to assign new licenses to bidders that will use the licenses most effectively, enhancing benefits to consumers.

47. Separately, there is an additional public interest benefit to ensuring that an incumbent that otherwise chooses to accept modified licenses will receive an incentive payment if it also chooses to relinquish its spectrum usage rights in its one partial PEA block. Providing this assurance makes it more likely that the incumbent will relinquish its partial PEA rights, thereby allowing a new license to be issued for a full 100 megahertz block covering the entire PEA and facilitating the transition to the new 39 GHz band plan. Accordingly, the Commission concludes that it will make all incentive payments, so long as there are sufficient auction proceeds available.

48. Incentive payments for relinquished spectrum usage rights in a PEA where there is insufficient demand will be low. As the Commission noted in the *4th FNPRM,* the final clock phase price for a whole block, and the corresponding incentive payment, will equal the minimum opening bid when demand does not exist for all the available blocks in a PEA. Absent demand for all available blocks in a PEA, the price for a whole block in the PEA cannot rise above the minimum opening bid. Consequently, auction proceeds as low as the sum of all minimum opening bids would assure that any shortfall in demand would not prevent making all incentive payments in full.

49. A net revenue requirement to address much higher incentive payments could be necessary, however, due to another reason. Specifically, auction proceeds otherwise may not be sufficient to make all incentive payments in full. In the *4th FNPRM,* the Commission sought comment on the possibility that bidding credits might reduce auction proceeds to less than the amount needed to pay all incentive payments owed incumbents.[10] In response, commenters propose that in such a case all incentive payments should be proportionally reduced. The Commission concludes, however, that it should instead adopt procedures to help assure incumbent auction participants that all incentive payments will be paid in full.

50. In the broadcast incentive auction, the Commission adopted a ''final stage rule'' to assure that auction proceeds would be sufficient to satisfy specified conditions. In part, that rule implemented a net revenue requirement for the auction based on the incentive payments set in the auction and that took into account bidding credits available to bidders for new licenses. Under such a net revenue requirement, the auction will not close unless auction proceeds are sufficient to cover all incentive payments owed. The Commission will establish procedures in this auction implementing a net revenue requirement based on auction bids that will assure that auction proceeds are sufficient to cover all incentive payments owed, including potential discounts to new licensees that qualify for bidding credits. The Commission will specify the procedures through the Auction Comment Public Notice and Auction Procedures Public Notice.

51. *Incumbent Upfront Payments.* Verizon advocates for crediting participating incumbent licensees with upfront payments for existing licenses that they agree to relinquish. Verizon appears to suggest that an incumbent that might win licenses without making additional cash payments for winning bids should be credited with an upfront payment sufficient to obtain the bidding eligibility needed to make such bid(s). Verizon observes that payment defaults cannot occur if an incumbent can cover the auction price with its incentive payment. While Verizon is correct about one typical purpose of upfront payments—to mitigate against defaults for lack of payment—the Commission notes that a winning bidder may default for reasons other than failing to make a winning bid payment. Accordingly, the Commission does not grant Verizon's request at this time, and it will address upfront payments through the Auction Comment Public Notice and the Auction Procedures Public Notice.

E. Incentive Auction Bidding

52. As proposed in the *4th FNPRM,* the Commission will use a two-phase auction procedure. Commenters generally support the proposal for how bidding will be conducted. Accordingly, in the first phase, participants will bid for generic spectrum blocks by PEA in the Upper 37, 39, and 47 GHz Bands using an ascending clock auction. The second phase will assign frequency-specific licenses to the winners of generic blocks in the bands.

1. Auction Clock Phase

53. In the clock phase of the incentive auction, bidders will indicate their demand for quantities of spectrum blocks in two generic bidding categories in each PEA. The clock phase will set a uniform price for generic blocks in each category in each PEA. Bidding for generic spectrum blocks by category will facilitate a speedier auction than if bidding were conducted for large numbers of unique licenses that nonetheless are reasonably substitutable. Where blocks are sufficiently similar, bidders can bid for a quantity of blocks rather than bidding separately for unique licenses, enabling the auction to reach a clearing price for all available blocks in a shorter time.

54. *Categories of Spectrum Blocks.* The Commission will offer 100 megahertz blocks of spectrum in two bidding categories. The first category will consist of generic blocks in the Upper 37 GHz and 39 GHz bands. The Commission effectively has treated the Upper 37 GHz and 39 GHz bands as one contiguous 2,400 megahertz band of spectrum. The bands are adjacent. In addition, both are subject to the same service rules and operability requirement. Accordingly, it is appropriate to consider blocks in these two bands as interchangeable and offer them as one category in the auction.

55. The Commission will offer 100 megahertz blocks of 47 GHz spectrum as a second generic bidding category. In contrast to the Upper 37 GHz and 39 GHz bands, the 47 GHz band is not contiguous with the other two and does not share the same operability requirement with respect to equipment for using the band. Consequently, the Commission will treat 47 GHz blocks distinctly from Upper 37 GHz and 39 GHz blocks and offer 47 GHz blocks as a separate category in the auction.

56. *Bidding Process.* The rules for bidding in the first phase of the forward auction will be similar to those used in the clock portion of the forward auction in the broadcast incentive auction and in the auction of licenses for 24 GHz spectrum blocks. The clock price for a category of blocks in a PEA will increase as long as the demand for blocks exceeds the supply of blocks.

57. Bidding will continue until the number of blocks demanded by bidders in each category of generic blocks in each PEA does not exceed the number of such blocks available. At that point, bidders demanding blocks in a category at the current price will be deemed clock phase winning bidders. The

[10] Incentive payments will be determined by prices set in the auction. Winning bidders eligible for bidding credits, however, will pay less than the full auction price. Any such reductions will reduce the auction proceeds regardless of the Commission's decision to apply bidding credits for incumbent winning bidders only to net cash payments.

Commission will determine the exact procedures for clock phase bidding in the Auction Comment and Auction Procedures Public Notices.

2. Auction Assignment Phase

58. As proposed in the *4th FNPRM,* the incentive auction will include a second phase that will determine the frequencies for licenses to be assigned to the winners of generic spectrum blocks. The Commission anticipates being able to assign contiguous frequencies within a category and a PEA to winners of multiple blocks in a category and a PEA. In the assignment phase, winning bidders for generic blocks will have an opportunity to submit sealed bids by PEA specifying additional amounts, if any, that they would be willing to pay for licenses on particular frequencies. Winning clock phase bidders would not be required to bid in the assignment phase or otherwise pay more than the price for generic blocks in the clock phase and would still be assured to have contiguous frequencies assigned to all of their licenses in the same category in a PEA. Incumbents that elect to receive modified licenses instead of bidding for new licenses in the auction will be assigned frequencies in the assignment phase but cannot bid for particular frequencies in the assignment phase. The Commission will detail the exact procedures for bidding in the assignment phase in the Auction Comment Public Notice and Auction Procedures Public Notice. The Commission expects that the final procedures will be similar to those used in the assignment portion of the auction of licenses for 24 GHz spectrum blocks.

F. Post-Auction Transition

59. Incumbents will retain their existing licenses until after the auction, when either the existing licenses are modified or relinquished, and new licenses are issued. New licenses will be assigned based on the results of bidding in the incentive auction.

60. *Existing Secondary Licenses.* Diversified Communications, Inc. (DCI) asks the Commission to include secondary local television transmission service (LTTS) licensees in any transition plan and reimbursement program it creates for primary licensees in the band. DCI argues that in analogous situations in the past, the Commission has made accommodations for secondary services.

61. It is a well-established principle under Commission precedent and its rules that secondary operations cannot cause harmful interference to primary operations nor claim protection from harmful interference from primary operations. As such, secondary users are not entitled to relocation or reimbursement from new entrants. Indeed, as T-Mobile points out, in the broadcast incentive auction, the Commission specifically considered LPTV and TV translator stations television stations ineligible to participate in the reverse auction or to receive compensation because they had not been granted primary status. These secondary users were later granted compensation rights only by Congressional directive. Accordingly, T-Mobile, Verizon, and AT&T argue the Commission need not utilize the incentive auction structure to reclaim DCI's spectrum rights, pay for DCI's repacking, or reimburse its investment in equipment purchased for 39 GHz operations. In consideration of the above, the Commission declines to create any specific transition plan or reimbursement program for secondary operations as part of the 39 GHz auction. Such users were fully aware of their secondary status at the time of establishing these secondary operations with the knowledge that they would be required to modify their operations at any time to protect licensees.

IV. Final Regulatory Flexibility Analysis

62. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Fourth Further Notice of Proposed Rulemaking (4th FNPRM)* released in August 2018 in this proceeding. The Commission sought written public comment on the proposals in the *4th FNPRM,* including comments on the IRFA. No comments were filed addressing the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

A. Need for, and Objectives of, the Fourth R&O

63. In the *Fourth R&O,* the Commission takes major steps to make spectrum available for 5G, IoT, and other advanced services in the Upper 37 GHz (37.6–38.6 GHz), 39 GHz (38.6–40 GHz), and 47 GHz (47.2–48.2 GHz) bands. The Commission adopts the proposal set forth in the *4th FNPRM* to conduct an incentive auction that can clear existing 39 GHz licenses and offer new spectrum licenses in the Upper 37 GHz, 39 GHz, and 47 GHz bands.

64. The *Fourth R&O* also modifies the band plans for the 39 GHz, Upper 37 GHz, and 47 GHz bands from 200 megahertz to 100 megahertz channels for the part 30 UMFUS. The incentive auction that the Commission adopts will promote the flexible-use wireless services rules that the Commission has adopted for these bands. Moreover, the incentive auction process will resolve the persistent difficulties presented by the need for existing 39 GHz licenses to be transitioned efficiently to the new band plan and possibly new service areas.

65. In the *Fourth R&O* the Commission decides that it will make all existing licenses conform more closely with the new band plan and service rules by proposing modifications based on reconfigurations to each incumbent's spectrum usage rights under existing licenses. The reconfiguration will preserve the existing spectrum rights of incumbents as much as possible, and where variations are unavoidable, maintain overall spectrum usage rights. An incumbent can choose to accept the reconfiguration, propose an alternative reconfiguration, or instead elect to participate in the auction. An incumbent that chooses not to participate in the incentive auction will have frequencies assigned for modified licenses based on reconfigured spectrum usage rights after the incentive auction has concluded.

66. The *Fourth R&O* sets forth details about incumbents that choose to participate in the incentive auction. Incumbents that choose to participate in the incentive auction will relinquish existing spectrum licenses and receive ''vouchers'' sufficient to win blocks in the auction equivalent to their existing Partial Economic Area (PEA) holdings. A participating incumbent will be able to make pre-bidding exchanges in its existing holdings of partial PEA blocks, subject to constraints.

67. The *Fourth R&O* emphasizes that auction participants do not need to rebid on spectrum blocks equivalent to their existing holdings, however, but can apply the vouchers toward payments for blocks in other PEAs, receiving a cash incentive payment if the value of their vouchers exceeds their net auction obligations. Auction participants can also simply relinquish their holdings and choose not to bid on any new licenses, in which case they will receive a cash incentive payment for their vouchers.

68. The *Fourth R&O* also adopts the proposal to implement a two-phase incentive auction that will offer new licenses. In the first phase, participants would bid to win generic spectrum blocks using an ascending clock auction that would determine a uniform price in each category in each PEA. Any party eligible to hold a license in these bands will be eligible to participate in the

auction for new licenses, except for incumbent 39 GHz licensees that decline to relinquish existing licenses. The second phase would assign specific-frequency licenses by PEA that would aim to ensure contiguity within each PEA. Because the spectrum blocks in the Upper 37 GHz and 39 GHz bands can be treated as largely interchangeable within a PEA, they will be offered as one category of generic blocks in a clock auction. The Commission will treat 47 GHz blocks distinctly from Upper 37 GHz and 39 GHz blocks and offer 47 GHz blocks as a separate category in the auction. Winning bidders for generic blocks in the clock phase would have an opportunity to submit sealed bids by PEA specifying additional amounts, if any, that they would be willing to pay for licenses in the PEA on particular frequencies in the assignment phase. Winning clock phase bidders would participate in the assignment phase only if they so choose. Consequently, they would not be required to bid in the assignment phase or otherwise pay more than the price for generic blocks in the clock phase. Regardless of participation in the assignment phase, the assignment phase would aim to assign contiguous frequency blocks within a category in a PEA to a bidder that wins multiple blocks. Incumbents that elect to receive modified licenses instead of bidding for new licenses in the auction will be assigned frequencies in the assignment phase but cannot bid.

69. Overall, the decisions in the *Fourth R&O* are designed to facilitate broadband deployment, including 5G services, by providing opportunities to make it easier for licensees in the band to rationalize their existing holdings into contiguous swathes of spectrum, and by offering new licenses of contiguous spectrum at auction while protecting incumbents' existing spectrum usage rights. This will ensure that this spectrum is used efficiently and will foster the development of new and innovative technologies and services, as well as encourage the growth and development of a wide variety of services, ultimately leading to greater benefits to consumers.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

70. There were no comments filed that specifically addressed the proposed rules and policies presented in the IRFA.

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

71. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.

72. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

73. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.'' A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

74. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* The Commission's actions, over time, may affect small entities that are not easily categorized at present. The Commission therefore describes here, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States which translates to 28.8 million businesses.

75. Next, the type of small entity described as a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' Nationwide, as of August 2016, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).

76. Finally, the small entity described as a ''small governmental jurisdiction'' is defined generally as ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' U.S. Census Bureau data from the 2012 Census of Governments indicate that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number there were 37,132 general purpose governments (county, municipal and town or township) with populations of less than 50,000 and 12,184 special purpose governments (independent school districts and special districts) with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category show that the majority of these governments have populations of less than 50,000. Based on this data, the Commission estimates that at least 49,316 local government jurisdictions fall in the category of ''small governmental jurisdictions.''

77. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census Bureau data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1,000 employees or more. Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities.

78. *Fixed Microwave Services.* Microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. They also include the Upper Microwave Flexible Use Service, the Millimeter Wave Service, Local Multipoint Distribution Service (LMDS), the Digital Electronic Message Service (DEMS), and the 24 GHz Service, where licensees can choose between common carrier and non-common carrier status. At present, there are approximately 66,680 common carrier fixed licensees, 69,360 private and public safety operational-fixed

licensees, 20,150 broadcast auxiliary radio licensees, 411 LMDS licenses, 33 24 GHz DEMS licenses, 777 39 GHz licenses, and five 24 GHz licensees, and 467 Millimeter Wave licenses in the microwave services. The Commission has not yet defined a small business with respect to microwave services. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) and the appropriate size standard for this category under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census Bureau data for 2012 shows that there were 967 firms that operated for the entire year. Of this total, 955 had employment of 999 or fewer, and 12 firms had employment of 1,000 employees or more. Thus under this SBA category and the associated standard, the Commission estimates that the majority of fixed microwave service licensees can be considered small.

79. The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 36,708 common carrier fixed licensees and up to 59,291 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies proposed herein. The Commission notes, however, that both the common carrier microwave fixed and the private operational microwave fixed licensee categories includes some large entities.

80. *All Other Telecommunications.* The ''All Other Telecommunications'' category is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing internet services or voice over internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.'' The SBA has developed a small business size standard for ''All Other Telecommunications,'' which consists of all such firms with gross annual receipts of $32.5 million or less. For this category, U.S. Census Bureau data for 2012 shows that there were a total of 1,442 firms that operated for the entire year. Of these firms, a total of 1,400 firms had gross annual receipts of under $25 million and 42 firms had gross annual receipts of $25 million to $49, 999,999. Thus, the Commission estimates that a majority of ''All Other Telecommunications'' firms potentially affected by the Commission's actions can be considered small.

81. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: Transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.'' The SBA has established a size standard for this industry of 1,250 employees or less. U.S. Census Bureau data for 2012 shows that 841 establishments operated in this industry in that year. Of that number, 828 establishments operated with fewer than 1,000 employees, 7 establishments operated with between 1,000 and 2,499 employees and 6 establishments operated with 2,500 or more employees. Based on this data, the Commission concludes that a majority of manufacturers in this industry is small.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

82. The Commission expects the rules adopted in the *Fourth R&O* will impose new or additional reporting or recordkeeping and/or other compliance obligations on small entities as well as other applicants and licensees. The projected reporting, recordkeeping, and other compliance requirements in the *Fourth R&O* will apply to entities slightly differently depending on whether they accept modified licenses, relinquish spectrum usage rights entirely, relinquish spectrum rights and seek new licenses to continue to operate in the band, or are new entrants seeking new licenses. The requirements the Commission adopts should benefit small entities by giving them more information, more flexibility, and more options for gaining access to wireless spectrum.

83. The Commission has designed the process of applying to participate in auctions involving spectrum license auctions generally, including the incentive auction, to minimize reporting and compliance requirements for applicants, including small business applicants. The Commission expects that the filing, recordkeeping and reporting requirements associated with the demands described below will require small businesses as well as other entities that intend to utilize these new UMFUS licenses to use professional, accounting, engineering or survey services in order to meet these requirements. Incumbent licensees that volunteer to relinquish spectrum usage rights will make a binding commitment to do so in a submission to the Commission. Parties desiring to participate in an auction for new licenses, including incumbents and new entrants, either of which may be small entities, will begin by filing streamlined, short-form applications in which they certify under penalty of perjury as to their qualifications. The Commission will provide detailed instructions for each auction applicant to maintain the accuracy of its respective short-form application electronically using the FCC Auction Application System and/or by direct communication with the Auctions Division. The Commission also will provide detailed instructions for any incumbent eligible to be paid an incentive payment regarding financial information that must be provided to the Commission, as well as instructions for any winning bidder for new licenses regarding the license application process. As with other winning bidders, any small entity that is a winning bidder will be required to comply with paying the net amount of its winning bids and electronically submitting a properly completed long-form application (FCC Form 601) and required exhibits for each license won. A winning bidder claiming eligibility for a bidding credit must demonstrate its eligibility in its FCC Form 601 post-auction application for the bidding credit sought.

84. Small entities and other applicants for UMFUS licenses will be required to file license applications using the Commission's automated Universal Licensing System (ULS). ULS is an online electronic filing system that also serves as a powerful information tool, one that enables potential licensees to research applications, licenses, and antenna structures. It also keeps the public informed with weekly public notices, FCC rulemakings, processing utilities, and a telecommunications glossary. Small entities, like all other

entities who are UMFUS applicants, must submit long-form license applications through ULS using Form 601, FCC Ownership Disclosure Information for the Wireless Telecommunications Services using FCC Form 602, and other appropriate forms.

F. Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

85. The RFA requires an agency to describe any significant alternatives for small businesses that it has considered in reaching its approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.

86. The Commission believes that the incentive auction mechanism adopted in the *Fourth R&O* will result in both operational and administrative cost savings for small entities, as well as other participants. At the outset, because participating in the auction is voluntary, the Commission allows incumbent licensees, including small entities, to have their existing licenses modified instead of having to participate in an auction if they so choose. The incentive auction will give incumbent licensees, including small entities, an opportunity to receive incentive payments for their spectrum licenses that are based on a market price, while providing opportunities to obtain additional licenses. Moreover, should new licenses match the spectrum usage rights of an incumbent's current licenses, the incentive payments will be enough so that the incumbents can win new licenses without making additional payments, regardless of how high bids for those new licenses may go in the auction. Furthermore, adopting a two-phase auction procedure will benefit all participants by resulting in a quick auction, due to the first clock phase, followed by an assignment phase. This benefits small entities, as they may not have the same flexibility as larger entities to devote time to participating in the auction. In addition, winning bidders do not have to bid in the assignment phase. Furthermore, the Commission anticipates being able to assign contiguous frequencies within a PEA category, even where a clock phase winning bidder does not bid in the assignment phase. This benefits smaller entities that otherwise might have difficulty aggregating contiguous licenses through transactions in the secondary market. In addition, the Commission has adopted bidding credits for applicants for new licenses who qualify as small businesses. An entity with average annual gross revenues for the preceding three years not exceeding $55 million will qualify as a ''small business'' and be eligible to receive a 15 percent discount on its winning bid. An entity with average annual gross revenues for the preceding three years not exceeding $20 million will qualify as a ''very small business'' and be eligible to receive a 25 percent discount on its winning bid.

87. The Commission also believes that its actions modifying the band plan from 200 megahertz to 100 megahertz channels in the 39 GHz, Upper 37 GHz, and 47 GHz bands will help small entities by making spectrum available in smaller license sizes that may be more attractive to small entities. Similarly, the Commission believes the proposed mechanism for auctioning the 39 GHz and Upper 37 GHz bands will facilitate access to spectrum by small businesses. Accordingly, the Commission does not believe that its adopted changes will have a significant economic impact on small entities. Nevertheless, to the extent applying the rules equally to all entities results in the cost of complying with these burdens being relatively greater for smaller businesses than for large ones, this approach is necessary to effectuate the purpose of the Communications Act, namely to further the efficient use of spectrum and to prevent spectrum warehousing.

V. Ordering Clauses

88. Accordingly, *it is ordered* that, pursuant to Sections 4(i), 201(b), 303, 308, 309, 316, 324, 332, and 337 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 201(b), 303, 308, 309, 316, 324, 332, 337, this *Fourth Report and Order is hereby adopted.*

89. *It is further ordered* that the amendments of the Commission's rules as set forth below *are adopted,* effective thirty days from the date of publication in the **Federal Register**.

90. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *Fourth Report and Order,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

91. *It is further ordered* that the Commission *shall send* a copy of this Fourth *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Parts 1 and 30

Administrative practice and procedures, Communications common carriers.

Federal Communications Commission.

Cecilia Sigmund,

Federal Register Liaison Officer, Office of the Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 1 and 30 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. 151, 154(i) and (j), 155, 157, 160, 201, 224, 225, 227, 303, 309, 310, 332, 1403, 1404, 1451, 1452, and 1455.

■ 2. Revise § 1.2101 to read as follows:

§ 1.2101 Purpose.

The provisions of §§ 1.2101 through 1.2115 implement section 309(j) of the Communications Act of 1934, as added by the Omnibus Budget Reconciliation Act of 1993 (Pub. L. 103–66) and subsequent amendments.

■ 3. Add § 1.2115 to read as follows:

§ 1.2115 Public notice of incentive auction related procedures.

The provisions of this subpart may be used to conduct an incentive auction pursuant to 47 U.S.C. 309(j)(8)(G), including either or both a reverse auction to determine the incentive payment a licensee would be willing to accept in exchange for relinquishing spectrum usage rights and a forward auction to assign flexible use licenses for any spectrum made available as the result of such relinquishments. The Commission shall provide public notice of any procedures necessary for the implementation of an incentive auction that are not otherwise provided for pursuant to the rules of this Subpart. The Commission may do so in one or more such public notices. The Commission's procedures may include, without limitation:

(a) *Spectrum usage rights relinquishment procedures.* The procedures pursuant to which a licensee may make an unconditional, irrevocable

offer to relinquish spectrum usage rights in exchange for an incentive payment, including any terms the offer must include and procedures pursuant to which the Commission may accept such an offer.

(b) *Information required from a licensee.* (1) The procedures for a licensee to provide any identifying information and or certifications that the Commission may require from any licensee that seeks to relinquish spectrum usage rights in the incentive auction.

(2) The procedures for a licensee that is relinquishing spectrum usage rights to provide any financial information that the Commission may require to facilitate the disbursement of any incentive payment.

PART 30—UPPER MICROWAVE FLEXIBLE USE SERVICE

■ 4. The authority citation for part 30 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 303, 304, 307, 309, 310, 316, 332, 1302.

■ 5. Amend § 30.4 by redesignating paragraphs (b), (c), (d), and (e) as paragraphs (c), (d), (f), and (g) respectively, adding and reserving new paragraphs (b) and (e), and revising redesignated paragraphs (d)(1), (f), and (g) to read as follows:

§ 30.4 Frequencies.

* * * * *

(b) [Reserved]

* * * * *

(d) * * *

(1) New channel plan:

Channel No.	Frequency band limits (MHz)
1	38,600–38,700
2	38,700–38,800
3	38,800–38,900
4	38,900–39,000
5	39,000–39,100
6	39,100–39,200
7	39,200–39,300
8	39,300–39,400
9	39,400–39,500
10	39,500–39,600
11	39,600–39,700
12	39,700–39,800
13	39,800–39,900
14	39,900–40,000

* * * * *

(e) [Reserved]

(f) 37–38.6 GHz band: 37,600–37,700; 37,700–37,800 MHz; 37,800–37,900 MHz; 37,900–38,000 MHz; 38,000–38,100 MHz; 38,100–38,200 MHz; 38,200–38,300 MHz; 38,300–38,400 MHz; 38,400–38,500 MHz, and 38,500–38,600 MHz. The 37,000–37,600 MHz band segment shall be available on a site-specific, coordinated shared basis with eligible Federal entities.

(g) 47.2–48.2 GHz band—47.2–47.3 GHz; 47.3–47.4 GHz; 47.4–47.5 GHz; 47.5–47.6 GHz; 47.6–47.7 GHz; 47.7–47.8 GHz; 47.8–47.9 GHz; 47.9–48.0 GHz; 48.0–48.1 GHz; and 48.1–48.2 GHz.

[FR Doc. 2018–27975 Filed 2–4–19; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 140722613–4908–02]

RIN 0648–XG734

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Coastal Migratory Pelagic Resources of the Gulf of Mexico and Atlantic Region; Commercial Closure for Spanish Mackerel

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS implements an accountability measure (AM) for commercial Spanish mackerel in the Atlantic southern zone of the exclusive economic zone (EEZ) through this temporary rule. NMFS has determined that the commercial quota for Spanish mackerel in the Atlantic southern zone will be reached by February 5, 2019. Therefore, NMFS closes the Atlantic southern zone of the EEZ to commercial harvest of Spanish mackerel on February 5, 2019. This closure is necessary to protect the Spanish mackerel resource in the Atlantic.

DATES: The closure is effective at 6:00 a.m., local time, on February 5, 2019, until 12:01 a.m., local time, on March 1, 2019.

FOR FURTHER INFORMATION CONTACT: Mary Vara, NMFS Southeast Regional Office, telephone: 727–824–5305, or email: *mary.vara@noaa.gov.*

SUPPLEMENTARY INFORMATION: The fishery for coastal migratory pelagic fish includes king mackerel, Spanish mackerel, and cobia, and is managed under the Fishery Management Plan for the Coastal Migratory Pelagic Resources of the Gulf of Mexico and Atlantic Region (FMP). The FMP was prepared by the Gulf of Mexico and South Atlantic Fishery Management Councils and is implemented by NMFS under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622. All weights described for Spanish mackerel in the Atlantic EEZ apply as either round or gutted weight. The fishing year for the Atlantic migratory group of Spanish mackerel (Atlantic Spanish mackerel) is March through the end of February each year.

Framework Amendment 1 to the FMP (79 FR 69058; November 20, 2014) implemented a commercial annual catch limit (equal to the commercial quota) of 3.33 million lb (1.51 million kg) for Atlantic Spanish mackerel. Atlantic Spanish mackerel are divided into a northern and southern zone for management purposes. The southern zone consists of Federal waters off South Carolina, Georgia, and the east coast of Florida. The northern boundary for the southern zone for Atlantic Spanish mackerel extends from the state border of North Carolina and South Carolina along a line beginning at 33°51′07.9″ N lat. and 78°32′32.6″ W long. and extending in a direction of 135°34′55″ from true north to the intersection point with the outward boundary of the EEZ. The southern boundary for the southern zone is 25°20′24″ N lat., which is the boundary between Miami-Dade and Monroe Counties, Florida.

The southern zone commercial quota for Atlantic Spanish mackerel is 2,667,330 lb (1,209,881 kg). Seasonally variable commercial trip limits are based on an adjusted commercial quota of 2,417,330 lb (1,096,482 kg), with the adjusted commercial quota calculated to allow continued harvest in the southern zone at a set rate for the remainder of the current fishing year, in accordance with 50 CFR 622.385(b)(2). Regulations at 50 CFR 622.385(b)(1)(ii) require NMFS to reduce the commercial trip limit for Atlantic Spanish mackerel in the southern zone when specified percentages of the adjusted commercial quota are reached or are projected to be reached. Accordingly, on December 27, 2018, NMFS published a temporary rule in the **Federal Register** to reduce the commercial trip limit from 3,500 lb (1,588 kg) to 1,500 lb (680 kg) for Atlantic Spanish mackerel in the southern zone (83 FR 66635). On January 28, 2019, NMFS published a subsequent temporary rule in the **Federal Register** that further reduced the commercial trip limit for Atlantic Spanish mackerel in the southern zone to 500 lb (227 kg) (84 FR 407).

Regulations at 50 CFR 622.388(d)(1)(i) require NMFS to close the commercial sector for Atlantic Spanish mackerel in the southern zone when the commercial quota is reached, or is projected to be reached, by filing a notification to that effect with the Office of the Federal Register. NMFS has determined the commercial quota of 2,667,330 lb (1,209,881 kg) for Atlantic Spanish mackerel in the southern zone will be reached by February 5, 2019. Accordingly, the commercial sector for Atlantic Spanish mackerel in the southern zone is closed effective at 6:00 a.m., local time, on February 5, 2019, through February 28, 2019, the end of the current fishing year. Commercial harvest of Atlantic Spanish mackerel for the 2019–2020 fishing year begins on March 1, 2019.

During the commercial closure, a person on board a vessel that has been issued a valid Federal permit to harvest Atlantic Spanish mackerel may continue to retain this species in the southern zone under the recreational bag and possession limits specified in 50 CFR 622.382(a)(1)(iii) and (a)(2), as long as the recreational sector for Atlantic Spanish mackerel is open (50 CFR 622.384(e)(1)).

Also during the closure, Atlantic Spanish mackerel from the closed zone, including those harvested under the bag and possession limits, may not be purchased or sold. This prohibition does not apply to Atlantic Spanish mackerel from the closed zone that were harvested, landed ashore, and sold prior to the closure and were held in cold storage by a dealer or processor (50 CFR 622.384(e)(2)).

Classification

The RA for the NMFS Southeast Region has determined this temporary rule is necessary for the conservation and management of Atlantic Spanish mackerel and is consistent with the Magnuson-Stevens Act and other applicable laws.

This action is taken under 50 CFR 622.8, 622.384(e), and 622.388(d)(1)(i) and is exempt from review under Executive Order 12866.

These measures are exempt from the procedures of the Regulatory Flexibility Act, because the temporary rule is issued without opportunity for prior notice and opportunity for comment.

This action responds to the best scientific information available. The Assistant Administrator for NOAA Fisheries (AA) finds good cause to waive the requirements 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 procedures are unnecessary and contrary to the public interest. Such procedures are unnecessary because the rule implementing the commercial quota and the associated AM has already been subject to notice and public comment, and all that remains is to notify the public of the closure. Additionally, allowing prior notice and opportunity for public comment is contrary to the public interest because of the need to immediately implement this action to protect the Atlantic Spanish mackerel stock, because the capacity of the fishing fleet allows for rapid harvest of the commercial quota. Prior notice and opportunity for public comment would require time and could potentially result in a harvest well in excess of the established commercial quota.

For the aforementioned reasons, the AA also finds good cause to waive the 30-day delay in effectiveness of this action under 5 U.S.C. 553(d)(3).

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

Dated: January 31, 2019.

Karen H. Abrams,

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

[FR Doc. 2019–01117 Filed 1–31–19; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 180921861–8861–01]

RIN 0648–XG503

Revisions to Framework Adjustment 57 to the Northeast Multispecies Fishery Management Plan and Sector Annual Catch Entitlements; Updated Annual Catch Limits for Sectors and the Common Pool for Fishing Year 2018

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

ACTION: Final rule; adjustment to specifications.

SUMMARY: Under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), this final rule adjusts the 2018 fishing year allocations to sectors and the common pool specified in Framework Adjustment 57 to the Northeast Multispecies Fishery Management Plan; makes other minor adjustments based on final 2017 catch information; and distributes sector allocation carried over from fishing year 2017 into fishing year 2018 as required by the sector regulations. The revisions are necessary to account for changes to 2018 sub-annual catch limits based on final 2018 sector rosters. These adjustments are routine and formulaic and are intended to ensure that final allocations are based on the best scientific information available.

DATES: Effective February 4, 2019, through April 30, 2019.

FOR FURTHER INFORMATION CONTACT: Claire Fitz-Gerald, Fishery Management Specialist, (978) 281–9255.

SUPPLEMENTARY INFORMATION: We recently approved Framework Adjustment 57, which set annual catch limits for 20 groundfish stocks for the 2018 fishing year. This action became effective on May 1, 2018 (83 FR 18985; May 1, 2018). Framework 57 included preliminary allocations for sectors and the common pool based on final sector enrollment for the 2017 fishing year. A sector receives an allocation of each stock, or annual catch entitlement (referred to as ACE, or allocation), based on its members' catch histories. State-operated permit banks also receive an allocation that can be transferred to qualifying sector vessels. The sum of all sector and state-operated permit bank allocations is referred to as the sector sub-annual catch limit (sub-ACL). The groundfish allocations remaining after sectors and state-operated permit banks receive their allocations are then allocated to the common pool (*i.e.,* vessels not enrolled in a sector), which is referred to as the common pool sub-ACL.

The MSA at section 305(d) gives us the responsibility and authority to carry out fishery management plans. Using this authority, this rule adjusts the 2018 fishing year sector and common pool sub-ACLs and sector ACEs based on final sector membership as of May 1, 2018. Permits enrolled in a sector and the vessels associated with those permits have until April 30, the last day prior to the beginning of a new fishing year, to withdraw from a sector and fish in the common pool. As a result, the actual sector enrollment for the new fishing year is unknown when the final specifications are published. Each year, we subsequently publish an adjustment rule modifying sector and common pool allocations based on final sector enrollment. The Framework 57 proposed and final rules both explained that sector enrollments may change and that there would be a need to adjust the sub-ACLs and sector ACEs accordingly. Table 1 shows the changes to the sub-

ACLs between Framework 57 and this adjustment rule.

In contrast to Framework 57, this year's sector rule provided sector ACE for 17 sectors based on preliminary fishing year 2018 potential sector contributions and the preliminary fishing year 2018 sector rosters that were submitted on March 26, 2018 (83 FR 18965; May 1, 2018). An interim final sector rule allocated ACE to the 2 remaining sectors on July 20, 2018 (83 FR 34492; July 20, 2018). There were no changes to sector enrollment following submission of the preliminary rosters. Therefore, the sector-specific allocations described in the sector rules are correct and do not require adjustment.

TABLE 1—SUB-ACL COMPARISON BETWEEN FRAMEWORK 57 FINAL RULE AND ADJUSTMENT RULE (mt)

Stock	Final Framework 57 sector sub-ACL	Final adjusted sector sub-ACL	Final Framework 57 common pool sub-ACL	Final adjusted common pool sub-ACL
GB Cod	1,335	1,170	25	24
GOM Cod	377	357	13	12
GB Haddock	44,348	44,340	311	319
GOM Haddock	8,643	8,641	95	98
GB Yellowtail Flounder	167	167	3	3
SNE/MA Yellowtail Flounder	34	34	8	8
CC/GOM Yellowtail Flounder	381	381	18	17
American Plaice	1,550	1,552	29	28
Witch Flounder	830	811	19	18
GB Winter Flounder	725	725	6	6
GOM Winter Flounder	339	339	18	18
SNE/MA Winter Flounder	456	456	62	62
Redfish	10,696	10,705	59	50
White Hake	2,713	2,715	22	21
Pollock	37,163	37,170	237	230
N. Windowpane Flounder	na	na	63	63
S. Windowpane Flounder	na	na	53	53
Ocean Pout	na	na	94	94
Atlantic Halibut	na	na	77	77
Atlantic Wolffish	na	na	82	82

Sector regulations at 50 CFR 648.87(c) require us to adjust ACE carryover to ensure that the total unused ACE combined with the overall sub-ACL does not exceed the acceptable biological catch (ABC) for the fishing year in which the carryover may be harvested. We have completed 2017 fishing year data reconciliation with sectors and determined final 2017 fishing year sector catch and the amount of allocation that sectors may carry over from the 2017 to the 2018 fishing year. A sector may carry over up to 10 percent of unused ACE for each stock, except in instances where the amount of unused ACE was reduced so as not to exceed the ABC. Accordingly, fishing year 2017 carryover to 2018 was reduced for the following stocks: Georges Bank haddock; Gulf of Maine haddock; Southern New England/Mid-Atlantic yellowtail flounder; Cape Cod/Gulf of Maine yellowtail flounder; American plaice; witch flounder; Georges Bank winter flounder; Gulf of Maine winter flounder; Southern New England/Mid-Atlantic winter flounder; redfish; white hake; and pollock. Complete details on carryover reduction percentages can be found at: *https://www.greateratlantic.fisheries.noaa.gov/ro/fso/reports/Groundfish_Catch_Accounting.htm.* Table 2 includes the maximum amount of allocation that sectors may carry over from the 2017 to the 2018 fishing year.

Table 3 includes the *de minimis* amount of carryover for each sector for the 2018 fishing year. If the overall ACL for any allocated stock is exceeded for the 2018 fishing year, the allowed carryover harvested by a sector, minus the pounds in the sector's *de minimis* amount, will be counted against its allocation to determine whether an overage subject to an accountability measure occurred. Tables 4 and 5 list the final ACE available to sectors for the 2018 fishing year, including finalized carryover amounts for each sector, as adjusted down when necessary to equal each stock's ABC.

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Table 2. Maximum Carryover ACE from Fishing Year 2017 to Fishing Year 2018 (lb)

	GB Cod East	GB Cod West	GOM Cod	GB Haddock East	GB Haddock West	GOM Haddock	GB Yellowtail Flounder	SNE/MA Yellowtail Flounder	CC/GOM Yellowtail Flounder	Plaice	Witch Flounder	GB Winter Flounder	GOM Winter Flounder	SNE/MA Winter Flounder	Redfish	White Hake	Pollock
FGS	0	7,196	1,843	0	540,838	13,338	0	110	1,402	1,382	2,570	12	10,785	1,988	36,319	21,211	170,062
MCCS	0	145	2,832	0	81,933	41,083	0	382	1,489	17,417	8,922	288	2,468	1,264	77,548	38,093	226,469
NCCS	0	45	418	0	29,965	4,900	0	210	868	601	1,493	23	1,698	150	13,000	7,015	36,244
NEFS 1	0	0	3	0	0	1	0	0	1	3	0	0	1	0	0	0	0
NEFS 2	0	6,851	9,269	0	909,738	110,485	0	519	9,007	16,367	3,655	1,383	14,891	2,979	193,330	23,400	241,455
NEFS 3	0	858	4,716	0	4,310	44,069	0	20	2,784	424	1,457	5	5,542	316	9,818	11,760	84,025
NEFS 4	0	4,874	6,559	0	456,352	12,258	0	706	1,236	11,602	4,952	298	5,514	1,091	41,930	15,176	134,736
NEFS 5	0	562	0	0	69,557	22	0	6,288	94	727	667	188	14	10,190	189	342	900
NEFS 6	0	2,577	1,829	0	249,627	24,854	0	1,583	1,710	3,133	6,217	649	3,618	1,647	69,157	14,211	70,085
NEFS 7	0	1,468	497	0	115,352	3,820	0	742	1,038	1,301	1,118	552	1,892	682	4,648	2,025	9,636
NEFS 8	0	7,626	96	0	507,233	441	0	1,568	1,189	3,671	2,915	9,128	539	7,625	6,600	1,692	13,001
NEFS 9	0	13,949	1,864	0	958,954	47,832	0	2,620	3,445	8,586	0	14,047	2,336	15,255	117,873	23,156	134,875
NEFS 10	0	396	1,450	0	14,040	8,066	0	164	1,835	1,559	2,018	4	7,100	414	4,233	2,229	14,758
NEFS 11	0	475	6,323	0	3,174	19,925	0	5	1,081	2,755	1,876	1	1,652	17	25,586	17,157	191,196
NEFS 12	0	565	859	0	8,018	6,764	0	3	2,750	886	679	0	6,078	171	2,310	1,072	17,491
NEFS 13	0	14,254	379	0	1,715,481	6,798	0	6,318	4,046	14,921	11,106	7,688	2,418	14,110	55,775	7,801	55,533
SHS1	0	3,127	3,686	0	215,159	30,836	0	94	1,474	11,052	5,092	1,678	3,706	568	71,461	30,544	154,465
SHS2	0	337	181	0	34,257	463	0	674	306	1,258	734	96	737	495	3,399	1,100	5,619
SHS3	0	19,251	5,680	0	2,551,754	208,259	0	2,234	3,918	50,054	30,501	5,839	3,959	9,373	496,994	121,517	507,374
Total	**0**	**84,556**	**48,484**	**0**	**8,465,742**	**584,214**	**0**	**24,240**	**39,673**	**147,699**	**85,972**	**41,879**	**74,948**	**68,335**	**1,230,170**	**339,501**	**2,067,924**

Georges Bank Cod Fixed Gear Sector (FGS), Maine Coast Community Sector (MCCS), Maine Permit Bank (MPB), New Hampshire Permit Bank (NHPB), Northeast Coastal Communities Sector (NCCS), Northeast Fishery Sectors (NEFS), and Sustainable Harvest Sector (SHS)

Table 3. *De Minimis* Carryover ACE from Fishing Year 2017 to Fishing Year 2018 (lb)

	GB Cod East	GB Cod West	GOM Cod	GB Haddock East	GB Haddock West	GOM Haddock	GB Yellowtail Flounder	SNE/MA Yellowtail Flounder	CC/GOM Yellowtail Flounder	Plaice	Witch Flounder	GB Winter Flounder	GOM Winter Flounder	SNE/MA Winter Flounder	Redfish	White Hake	Pollock
FGS	0	7,196	335	0	64,475	6,253	0	8	400	464	530	12	1,189	325	7,942	4,199	76,366
MCCS	0	145	776	0	11,973	12,349	0	12	260	3,619	1,434	117	214	173	14,706	6,419	89,210
NCCS	0	45	87	0	1,312	1,108	0	2	49	48	27	4	81	39	1,081	495	3,917
NEFS 1	0	0	2	0	0	1	0	0	1	3	0	0	0	0	0	0	0
NEFS 2	0	1,645	1,735	0	105,241	36,838	0	18	1,957	3,709	2,618	518	1,717	461	35,620	4,596	104,093
NEFS 3	0	90	568	0	274	8,957	0	0	307	260	109	1	317	34	1,364	1,246	22,549
NEFS 4	0	1,097	862	0	52,680	12,258	0	21	532	3,270	1,592	111	547	99	15,939	4,878	52,424
NEFS 5	0	127	0	0	8,030	7	0	197	18	151	103	70	1	1,383	34	57	350
NEFS 6	0	760	240	0	28,867	7,411	0	50	328	1,358	953	243	359	225	12,607	2,362	27,275
NEFS 7	0	1,468	245	0	110,945	3,820	0	80	927	1,301	1,118	552	232	682	4,648	2,025	9,636
NEFS 8	0	1,981	67	0	71,367	441	0	74	424	1,003	630	3,483	230	1,158	2,041	618	8,869
NEFS 9	0	10	0	0	256	0	0	0	1	0	0	14	0	1	0	0	6
NEFS 10	0	138	200	0	1,740	2,470	0	5	375	376	374	2	716	69	794	395	6,292
NEFS 11	0	107	1,010	0	366	5,949	0	0	221	725	363	1	168	2	4,659	2,852	74,409
NEFS 12	0	166	232	0	923	1,953	0	0	687	175	104	0	593	25	538	170	6,391
NEFS 13	0	3,208	74	0	198,029	2,027	0	197	776	2,955	1,700	2,871	240	1,896	10,156	1,296	21,608
SHS1	0	554	255	0	23,550	7,437	0	1	275	1,679	680	921	355	63	10,060	2,621	22,994
SHS2	0	305	181	0	7,956	463	0	21	93	1,258	551	75	114	126	3,399	1,100	5,619
SHS3	0	4,193	617	0	289,108	57,303	0	69	739	8,941	4,280	2,169	365	1,972	86,150	18,452	181,265
Total	**0**	**23,235**	**7,486**	**0**	**977,092**	**167,045**	**0**	**755**	**8,370**	**31,295**	**17,166**	**11,164**	**7,438**	**8,733**	**211,738**	**53,781**	**713,273**

Table 4. Total ACE Available to Sectors in Fishing Year 2018 with Finalized Carryover (mt)

	GB Cod East	GB Cod West	GOM Cod	GB Haddock East	GB Haddock West	GOM Haddock	GB Yellowtail Flounder	SNE/MA Yellowtail Flounder	CC/GOM Yellowtail Flounder	Plaice	Witch Flounder	GB Winter Flounder	GOM Winter Flounder	SNE/MA Winter Flounder	Redfish	White Hake	Pollock
FGS	74	272	16	1,022	2,148	290	1	0	19	22	25	1	59	16	377	200	3,541
MCCS	3	11	36	190	391	579	3	1	12	172	69	5	11	8	702	308	4,149
MPB	0	1	4	7	13	98	0	0	1	18	6	0	2	0	88	45	634
NCCS	0	2	4	21	52	52	0	0	3	2	2	0	4	2	55	26	194
NEFS 1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
NEFS 2	16	62	83	1,668	3,519	1,721	3	1	93	176	120	24	85	22	1,703	219	4,831
NEFS 3	1	4	28	4	10	426	0	0	15	12	6	0	17	2	66	62	1,061
NEFS 4	11	41	42	835	1,762	758	4	1	25	154	74	5	27	5	742	228	2,439
NEFS 5	1	5	0	127	269	0	2	12	1	7	5	3	0	67	2	3	16
NEFS 6	7	28	12	457	965	347	5	3	16	63	46	11	18	11	603	114	1,269
NEFS 7	34	124	11	1,758	3,327	649	43	4	43	152	78	244	11	91	976	175	2,378
NEFS 8	19	74	3	1,131	2,336	50	23	4	20	47	30	162	11	56	96	29	408
NEFS 9	0	7	1	4	443	22	0	1	2	4	0	7	1	7	53	11	61
NEFS 10	1	5	10	28	58	116	0	0	18	18	18	0	36	3	38	19	292
NEFS 11	1	4	49	6	12	279	0	0	11	34	17	0	8	0	223	137	3,462
NEFS 12	2	6	11	15	31	92	0	0	32	8	5	0	30	1	25	8	298
NEFS 13	31	121	4	3,138	6,623	95	58	12	37	141	82	134	12	92	486	62	1,005
NHPB	0	0	4	0	0	3	0	0	0	0	0	0	0	0	2	2	42
SHS1	5	21	13	373	793	351	2	0	13	81	33	43	18	3	489	133	1,113
SHS2	3	11	17	126	250	284	4	1	4	78	25	3	6	6	403	196	2,462
SHS3	41	158	31	4,581	9,690	2,694	19	4	35	428	208	101	18	94	4,133	892	8,452
Total	**252**	**957**	**379**	**15,489**	**32,691**	**8,906**	**167**	**45**	**399**	**1,619**	**850**	**744**	**373**	**487**	**11,263**	**2,869**	**38,108**

Table 5. Total ACE Available to Sectors in Fishing Year 2018 with Finalized Carryover (1,000 lb)

	GB Cod East	GB Cod West	GOM Cod	GB Haddock East	GB Haddock West	GOM Haddock	GB Yellowtail Flounder	SNE/MA Yellowtail Flounder	CC/GOM Yellowtail Flounder	Plaice	Witch Flounder	GB Winter Flounder	GOM Winter Flounder	SNE/MA Winter Flounder	Redfish	White Hake	Pollock
FGS	163	600	35	2,252	4,736	639	3	1	41	48	56	1	130	34	831	441	7,807
MCCS	7	24	80	418	861	1,276	6	2	28	379	152	12	24	19	1,548	680	9,148
MPB	1	3	9	15	28	217	0	0	3	41	13	0	3	0	195	100	1,397
NCCS	1	4	9	46	115	116	0	0	6	5	4	0	10	4	121	57	428
NEFS 1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
NEFS 2	35	136	183	3,676	7,758	3,794	7	2	205	387	265	53	187	49	3,755	483	10,651
NEFS 3	2	8	61	10	22	940	0	0	33	26	12	0	37	4	146	136	2,339
NEFS 4	24	91	93	1,840	3,884	1,671	8	3	54	339	164	11	60	11	1,636	503	5,377
NEFS 5	3	10	0	280	592	1	5	26	2	16	11	7	0	148	4	6	36
NEFS 6	16	62	26	1,008	2,128	766	10	7	35	139	101	25	40	24	1,330	250	2,798
NEFS 7	75	274	25	3,875	7,334	1,430	95	9	94	336	172	537	25	201	2,151	387	5,242
NEFS 8	43	163	7	2,493	5,151	110	51	9	44	104	66	357	24	123	211	63	900
NEFS 9	0	15	2	9	976	48	0	3	4	9	0	15	2	15	118	23	135
NEFS 10	3	11	21	61	127	255	0	1	39	39	39	0	79	7	84	42	644
NEFS 11	2	9	107	13	27	615	0	0	23	75	38	0	18	0	491	302	7,632
NEFS 12	4	14	24	32	68	202	0	0	71	18	11	0	65	3	56	18	657
NEFS 13	69	266	8	6,918	14,601	209	129	26	82	310	181	295	26	204	1,071	137	2,216
NHPB	0	0	9	0	0	6	0	0	0	1	0	0	0	0	5	5	92
SHS1	12	47	29	823	1,748	775	4	0	29	179	73	94	39	7	1,078	293	2,454
SHS2	7	24	37	278	552	626	8	3	10	172	56	8	12	13	889	431	5,429
SHS3	90	348	67	10,099	21,364	5,939	41	9	78	944	458	223	40	207	9,112	1,967	18,634
Total	**555**	**2,109**	**835**	**34,147**	**72,072**	**19,634**	**368**	**100**	**880**	**3,569**	**1,875**	**1,640**	**822**	**1,074**	**24,830**	**6,324**	**84,014**

This rule also adjusts the common pool allocation based on fishing year 2018 final rosters. The common pool sub-ACL for each stock (except for SNE/

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MA winter flounder, windowpane flounder, ocean pout, Atlantic wolffish, and Atlantic halibut) is divided into trimester total allowable catches (TAC). In addition, Framework 57 specified incidental catch limits (or incidental total allowable catches, ''Incidental TACs'') applicable to the common pool and groundfish Special Management Programs for the 2018 fishing year, including the B day-at-sea (DAS) Program. Because the Trimester and incidental TACs are based on the common-pool allocation, they also must be revised to match the final common pool allocation. Final common pool trimester quotas and incidental catch limits are included in Tables 6–10 below.

TABLE 6—FINAL FISHING YEAR 2018 COMMON POOL TRIMESTER TACS

Stock	Percentage of sub-ACL			2018 Trimester TAC (mt)		
	Trimester 1	Trimester 2	Trimester 3	Trimester 1	Trimester 2	Trimester 3
GB Cod	28	34	38	6.8	8.2	9.2
GOM Cod	49	33	18	5.8	3.9	2.1
GB Haddock	27	33	40	86.1	105.2	127.5
GOM Haddock	27	26	47	26.3	25.4	45.9
GB Yellowtail Flounder	19	30	52	0.5	0.8	1.3
SNE/MA Yellowtail Flounder	21	28	51	1.7	2.3	4.2
CC/GOM Yellowtail Flounder	57	26	17	9.7	4.4	2.9
American Plaice	74	8	18	20.6	2.2	5.0
Witch Flounder	55	20	25	10.1	3.7	4.6
GB Winter Flounder	8	24	69	0.5	1.4	4.1
GOM Winter Flounder	37	38	25	6.5	6.7	4.4
Redfish	25	31	44	12.5	15.5	22.1
White Hake	38	31	31	7.8	6.4	6.4
Pollock	28	35	37	64.4	80.5	85.1

TABLE 7—FISHING YEAR 2018 COMMON POOL INCIDENTAL CATCH TACS

Stock	Percentage of common pool sub-ACL	2018 (mt)
GB cod	2	0.55
GOM cod	1	0.12
GB yellowtail flounder	2	0.05
CC/GOM yellowtail flounder	1	0.17
American Plaice	5	1.39
Witch Flounder	5	0.92
SNE/MA winter flounder	1	0.62

TABLE 8—DISTRIBUTION OF COMMON POOL INCIDENTAL CATCH TACS TO EACH SPECIAL MANAGEMENT PROGRAM

Stock	Regular B DAS program (%)	Closed area I hook gear haddock SAP (%)	Eastern U.S./CA haddock SAP (%)	Southern closed area II haddock SAP
GB cod	50	16	34	NA
GOM cod	100	NA	NA	NA
GB yellowtail flounder	50	NA	50	NA
CC/GOM yellowtail flounder	100	NA	NA	NA
American Plaice	100	NA	NA	NA
Witch Flounder	100	NA	NA	NA
SNE/MA winter flounder	100	NA	NA	NA

TABLE 9—FISHING YEAR 2018 COMMON POOL INCIDENTAL CATCH TACS FOR EACH SPECIAL MANAGEMENT PROGRAM (mt)

Stock	Regular B DAS program	Closed area I hook gear haddock SAP	Eastern U.S./Canada haddock SAP
GB cod	0.28	0.09	0.19
GOM cod	0.12	n/a	n/a
GB yellowtail flounder	0.03	n/a	0.03
CC/GOM yellowtail flounder	0.17	n/a	n/a
American Plaice	1.39	n/a	n/a
Witch Flounder	0.92	n/a	n/a

TABLE 9—FISHING YEAR 2018 COMMON POOL INCIDENTAL CATCH TACS FOR EACH SPECIAL MANAGEMENT PROGRAM (mt)—Continued

Stock	Regular B DAS program	Closed area I hook gear haddock SAP	Eastern U.S./Canada haddock SAP
SNE/MA winter flounder	0.62	n/a	n/a

TABLE 10—FISHING YEAR 2018 COMMON POOL REGULAR B DAS PROGRAM QUARTERLY INCIDENTAL CATCH TACS (mt)

Stock	1st quarter (13%)	2nd quarter (29%)	3rd quarter (29%)	4th quarter (29%)
GB cod	0.04	0.08	0.08	0.08
GOM cod	0.02	0.03	0.03	0.03
GB yellowtail flounder	0.003	0.007	0.007	0.007
CC/GOM yellowtail flounder	0.02	0.05	0.05	0.05
American Plaice	0.18	0.40	0.40	0.40
Witch Flounder	0.12	0.27	0.27	0.27
SNE/MA winter flounder	0.08	0.18	0.18	0.18

This action adjusts the New Hampshire Permit Bank's (NHPB) fishing year 2018 initial allocation. The NHPB ended fishing year 2017 with a 3-pound (1.36-kg) Georges Bank West cod overage and a 1-pound (0.45-kg) Georges Bank West haddock overage. Table 11 shows the adjustments to the NHPB's initial allocation for fishing year 2018 to account for these overages.

TABLE 11—ADJUSTMENTS TO NEW HAMPSHIRE PERMIT BANK'S INITIAL ALLOCATIONS FOR FISHING YEAR 2018 (lb)

Stock	Fishing year 2017 year-end balance	Fishing year 2018 initial allocation	Fishing year 2018 adjusted allocation
GB Cod West	−3	16	13
GB Haddock West	−1	21	20

Last, this rule confirms the Northeast Fishery Sector IX's (NEFS 9) initial allocation of witch flounder for the 2018 fishing year. On July 20, 2018, NOAA Fisheries published an interim final rule that approved sector operations plans and allocated ACE to NEFS 7 and 9 for the 2018 fishing year (83 FR 34492; July 20, 2018). The interim final rule described the requirement for NEFS 9 to payback 72,224-lb (32.7-mt) of witch flounder to account for the quota overage incurred in fishing year 2017. The data used to determine the payback amount announced in the interim final rule were preliminary. After finalizing the year-end catch data for sectors, we determined that NEFS 9 ended the 2017 fishing year with a 71,716 lb (32.5 mt) overage of witch flounder. NEFS 9 transferred in 71,716 lb (32.5 mt) of witch flounder quota to reconcile the overage during the fishing year 2017 post-year ACE trading window. NEFS 9 does not have any witch flounder to carry over into fishing year 2018 and the permits enrolled in NEFS 9 for fishing year 2018 have zero ACE for witch flounder. Therefore, the sector's initial allocation of witch flounder for fishing year 2018 remains at zero pounds.

Classification

The NMFS Assistant Administrator has determined that this final rule is consistent with the Northeast Multispecies Fishery Management Plan, other provisions of the Magnuson-Stevens Fishery Conservation and Management Act, and other applicable law.

This action is exempt from the procedures of Executive Order 12866 because this action contains no implementing regulations.

Pursuant to 5 U.S.C. 553(b)(3)(B), we find good cause to waive prior public notice and opportunity for public comment on the catch limit and allocation adjustments because allowing time for notice and comment is impracticable, unnecessary, and contrary to the public interest. We also find good cause to waive the 30-day delay in effectiveness pursuant to 5 U.S.C. 553(d)(3), so that this final rule may become effective upon filing.

There are several reasons that notice and comment and a 30-day delay in effectiveness are impracticable, unnecessary, and contrary to the public interest. First, the proposed and final rules for Framework 57 explained the need and likelihood for adjustments of sector and common pool allocations based on final sector rosters. No comments were received on the potential for these adjustments, which provide an accurate accounting of a sector's or common pool's allocation. Second, this is an annual adjustment action that is expected by industry. These adjustments are routine and formulaic, required by regulation, or necessary to match allocations to sector enrollment. Finally, immediate implementation corrects the information published in Framework 57 and provides sector and common pool vessels with catch limit information that reflects their actual final allocations. Delaying these adjustments, which provide an accurate accounting of the sector and common pool allocations, could cause confusion to both sectors and the common pool.

Also, because advanced notice and the opportunity for public comment are not required for this action under the

Administrative Procedure Act, or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.SC. 601, *et seq.,* do not apply to this rule. Therefore, no final regulatory flexibility analysis is required and none has been prepared.

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

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2019–00979 Filed 2–4–19; 8:45 am]

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Proposed Rules

Federal Register
Vol. 84, No. 24
Tuesday, February 5, 2019

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 54

[No. AMS–LP–16–0080]

Amendments to the Regulations Governing Meats, Prepared Meats, and Meat Products (Grading, Certification, and Standards)

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: The U.S. Department of Agriculture's (USDA) Agricultural Marketing Service (AMS) proposes to amend its regulations to update a number of outdated administrative and organizational references, clarify agency action as it relates to the withdrawal or denial of service, update the official shields and grademarks associated with the grading service, and make reference to the use of instrument grading equipment as a means of determining official grades on beef and lamb carcasses.

DATES: Comments must be received by April 8, 2019.

ADDRESSES: Comments should be submitted electronically at *www.regulations.gov.* Comments may also be submitted to: Dana K. Stahl, Chief, Grading Services Branch, Quality Assessment Division (QAD); Livestock and Poultry Program, AMS, USDA; 1400 Independence Avenue SW; Room 3932–S, STOP 0258; Washington, DC 20250–0258. Comments will be made available for public inspection at Room 3932–S of the above address during regular business hours or electronically at *www.regulations.gov.* Comments received will be posted without change, including any personal information provided. All comments should reference the docket number AMS–LP–16–0080, the date of submission, and the page number of this issue of the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Dana K. Stahl, Chief, Grading Services Branch, QAD, Livestock and Poultry Program, AMS, USDA; 1400 Independence Avenue SW; Room 3932–S, STOP 0258; Washington, DC 20250–0258; (202) 690–3169; or email to *dana.stahl@ams.usda.gov.*

SUPPLEMENTARY INFORMATION:

Executive Orders 12866 and 13771, and Regulatory Flexibility Act

This rulemaking does not meet the definition of a significant regulatory action contained in section 3(f) of Executive Order 12866 and is not subject to review by the Office of Management and Budget (OMB). Additionally, because this rule does not meet the definition of a significant regulatory action it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled ''Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs''' (February 2, 2017).

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA) [5 U.S.C. 601 *et seq.*], the Administrator of AMS has considered the economic effect of this action on small entities and has determined that this proposed rule does not have a significant economic impact on a substantial number of small business entities. The purpose of RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly burdened.

AMS has determined that this proposed rule will not have a significant impact on a substantial number of small entities, as defined by RFA, because the user-fee services are not subject to scalability based on the business size.

Currently, approximately 235 applicants subscribe to AMS's voluntary, fee-for-services that are subject to the requirements of this regulation. The U.S. Small Business Administration's Table of Small Business Size Standards matched to the North American Industry Classification System (NAICS) Codes identifies small business size by average annual receipts or by the average number of employees at a firm. This information can be found at 13 CFR parts 121.104, 121.106, and 121.201.

AMS requires that all applicants for service provide information about their company for the purpose of processing bills. Information collected from an applicant includes company name, address, billing address, and similar information. AMS does not collect information about the size of the business. However, based on working knowledge of these operations, AMS estimates that roughly 72 percent of current applicants may be classified as small entities. It is not anticipated that this action would impose additional costs to applicants, regardless of size. Current applicants will not be required to provide any additional information to receive service. The effects of this proposed rule are not expected to be disproportionately greater or lesser for small applicants than for large applicants.

AMS is committed to complying with the E-Government Act of 2002 to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to government information and services, and for other purposes. Accordingly, AMS developed options for companies requesting service to do so electronically.

The USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this proposed rule.

Executive Order 13175

This action has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The review reveals that this regulation would not have substantial and direct effects on Tribal governments and would not have significant Tribal implications.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule is not intended to have retroactive effect. The Act prohibits states or political subdivisions of a state to impose any requirement that is in addition to, or inconsistent with, any requirement of the Act. There are no civil justice implications associated with this proposed rule.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. Chapter 35], this proposed rule would not change the information collection and recordkeeping requirements previously approved and would not impose additional reporting or recordkeeping burden on users of these voluntary services.

The information collection and recordkeeping requirements of this part have been approved by OMB under 44 U.S.C. Chapter 35 and have been assigned OMB Control Number 0581–0128.

In September 2014, three separate OMB collections—OMB 0581–0127, OMB 0581–0124, and OMB 0581–0128—were merged, such that the current OMB 0581–0128 pertains to Regulations for Voluntary Grading, Certification, and Standards and includes 7 CFR parts 54, 56, 62, and 70.

Background and Proposed Revisions

The Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), herein after referred to as the ''Act,'' directs and authorizes the Secretary of Agriculture to facilitate the competitive and efficient marketing of agricultural products. AMS programs support a strategic marketing perspective that adapts product and marketing decisions to consumer demands, changes domestic and international marketing practices, and incorporates emerging technology. AMS provides impartial grading and certification services that ensure agricultural products meet specified requirements. These services are voluntary, with users paying for the cost of the requested service. AMS grading services verify that product meets USDA grade standards (*e.g.,* USDA Choice) and certify that products meet requirements defined by the company or another third-party. Product characteristics such as manner of cut, color, and other quality attributes can be directly examined by an AMS employee or an authorized agent to determine if product requirements have been met. The product can be identified as ''USDA Prime,'' ''USDA Choice,'' ''USDA Select,'' ''USDA Certified,'' ''USDA Accepted as Specified,'' or ''USDA Further Processing Certification Program.''

Administrative and Organizational Revisions

In 2012, an organizational merger within AMS combined the Livestock and Seed Program and Poultry Programs into the Livestock, Poultry, and Seed (LPS) Program. Subsequently, the LPS Program created the Quality Assessment Division (QAD) to oversee services carried out by the Audit Services Branch, Grading Services Branch, Standardization Branch, and the Business Operations Branch. The Grading Services Branch administers grading and certification services that were performed by the former Meat Grading and Certification Branch of the former Livestock and Seed Program and the former Grading Branch of Poultry Programs. In 2018, another organizational change caused the LPS Program to be renamed the Livestock and Poultry (LP) Program.

Meat grading and certification activities are carried out under 7 CFR 54, while poultry and shell egg grading and certification activities are carried out under 7 CFR 70 and 7 CFR 56, respectively.

AMS proposes to update a number of administrative and organizational references to reflect the current terminology and structure of AMS. These amendments would include amending § 54.1 to change the LPS Program to the Livestock and Poultry Program. Certain terms and definitions would be added to, updated in, or deleted from § 54.1 to reflect the current organizational structure within the Agency. The term and definition for *Livestock* would be removed from the regulation because the use of this definition was fundamentally the same as the definition of *Animals.* The term and definitions for *Contract Verification Service* would be removed from § 54.1 because this service is no longer provided, a conforming change would be made to § 54.4 *Kind of Service.* The definition for *Animals* would be revised to add ''bison,'' as the Agency certifies bison; *Chief* would be revised to identify the Grading Services Branch Chief; *Division* would be revised to identify QAD and appropriately reflect its level within the organization; *Meat by-products* would be revised to exclude brain derived from ruminant animals, which is no longer allowed per food safety regulations; and the term *Standards* would be replaced with *Official Standards* and its definition would be revised for consistency within the regulation. The terms *Yield Grade* and *Appeal Service* and their respective definitions would be added to identify the different types of grading service offered under the regulations. The terms *Program* and *Deputy Administrator* and their respective definitions would be added to appropriately recognize the office and leadership within the current organizational structure of the Agency.

Since this regulation has not received significant revisions for some time, AMS proposes to bring it into compliance with The Plain Writing Act of 2010, which requires all Federal agencies to write clear Government communication that the public can understand and use. To accomplish this, AMS is focusing on appropriate pronoun use, omitting unnecessary words, and writing short sentences.

To reflect organizational changes and for consistency with other changes to this regulation, AMS proposes to amend § 54.4 *Kind of Service,* § 54.6 *How to Obtain Service,* § 54.7 *Order of Furnishing Service,* § 54.8 *When Request for Service Deemed Made,* § 54.9 *Withdrawal of Application or Request for Service,* and § 54.10 *Authority of Agent.*

AMS also proposes to amend § 54.5 *Availability of Service* by removing language that states service will be provided without discrimination, as this is a duplicative statement of a requirement that is mandated through Departmental regulations, not by AMS. AMS proposes to amend § 54.6 *How to obtain service* by increasing the length of time between cancellation of commitment service and reapplication for commitment service from 1 to 2 years, and the applicant is responsible for reimbursing relocation costs incurred by the Agency to transfer the grader.

AMS proposes to remove the reference to the Medium grade for lamb, yearling lamb, mutton, and pork carcasses in § 54.11 (a)(1)(vii). The official standards for grades of lamb and mutton carcasses were amended in October 1940 (Amendment No. 1 to S.R.A. 123) to change the grade designations Medium and Common to Commercial and Utility, respectively. In April 1968, the official standards for pork carcasses were revised and the former Medium and Cull grades were combined and renamed U.S. Utility. Removing the reference to Medium in § 54.11 (a)(1)(vii) aligns the regulatory language with the language contained within the official standards.

Clarify Agency Action on Denial or Withdrawal of Service

AMS proposes to create a stair-stepped approach regarding denial or withdrawal of Grading Branch services. As written, § 54.11 requires AMS to go before an administrative law judge to hear a case for an applicant accused of misconduct before any action can be taken; the process and actions currently identified in this part limit AMS's ability to effectively manage its services, including denying, withdrawing, or suspending services in a timely manner when warranted for reasons of

misconduct. Therefore, AMS is clarifying that it relies first on the Supplemental Rules of Practice in 7 CFR 50 and then, if necessary, uses the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statues set forth in 7 CFR 1.130 through 1.151 when denying, withdrawing, or suspending services to applicants. An applicant would still have an opportunity for a hearing before an administrative law judge before any permanent action occurs.

The regulations outlined in this part are intended to describe to the public how AMS provides grading and certification services and the related processes, not provide instruction to employees or repeat requirements covered by another Federal regulation. In this vein, AMS proposes to remove and reserve for future use § 54.12 *Financial interest of official grader.* USDA graders and other employees are required to meet and maintain Departmental ethics requirements; therefore, AMS has determined that it is unnecessary to maintain this administrative item in this regulation. AMS also proposes to remove and reserve § 54.14 *Official certificates,* which removes the Agricultural Products Certificate Form LS–5–3 and the Applicant Charges Certificate Form LS–5–5 that were discontinued in 2009; instead, the information contained on these forms is entered into a database. If applicants require an official certificate from USDA, an official memorandum is issued containing the pertinent information.

In 2001, vision-based instrument technology was approved for use in the official determination of the size of the ribeye area. In 2007, it was approved for yield grade determination, and in 2009, it was approved for marbling assessment. Although this technology has been used as an aid in the application of official USDA beef grades in since 2001, the current regulations make no mention of it. AMS considers the use of instrument technology to be an important option for determining degrees of marbling in meat carcasses and yield and, therefore, is adding a reference to it in § 54.15.

AMS proposes to appropriately identify and reference figures within § 54.17. Currently, multiple figures in that section contain the same reference, Figure 1, which makes it difficult to appropriately reference a particular figure. AMS proposes to remove the Carcass Data Service orange ear tag from § 54.17, because the Agency no longer prints or maintains them and instead allows cattle enrolled in the Carcass Data Service to be identified through other approved methods. AMS proposes to appropriately identify and reference in § 54.17 the USDA Further Processing Certification Program shield used to identify product produced under the USDA Further Processing Certification Program. Additionally, AMS proposes to amend language within this section to accurately identify the USDA Hold tag that is now used in place of the USDA Product Control tag; the tag is now ''red'' in color as opposed to ''orange.''

With § 54.19, AMS proposes to remove the heading APPEAL SERVICE, rename § 54.19 as Appeal of a grading service decision, reassign amended language from §§ 54.20 through 54.26 under § 54.19 (a) through (h), and subsequently reserve §§ 54.21 through 54.26.

AMS proposes to rename § 54.20, *Exemptions.* The proposed amendments would identify the requirements within the regulation where exemptions are most commonly provided and identify an option for exemptions as seen fit by the Director. It also would require the Director to approve all exemptions to this regulation. In doing so, AMS proposes to amend language pertaining to grading exemptions from §§ 54.4, *Kind of service,* 54.5 *Availability of service,* and 54.13, *Accessibility and refrigeration of products; access to establishments.*

AMS proposes to remove and reserve § 54.30 *Errors in service.* AMS proposes that § 54.30 is most appropriately covered under a policy or procedure rather than a regulation; therefore, AMS proposes that it is unnecessary to maintain this administrative item in this regulation.

Lastly, AMS proposes to replace the title and language of § 54.31 *Uniforms* with the title *OMB Control Number.* AMS believes the subject of uniforms is more appropriate under a policy rather than a regulation. AMS proposes to add language under this section that clearly identifies the OMB control number, OMB 0581–0128, assigned to this regulation in accordance with the Paperwork Reduction Act.

List of Subjects in 7 CFR 54

Food grades and standards, Food labeling, Meat and meat products, Poultry and poultry products.

For the reasons set forth in the preamble, AMS proposes to amend 7 CFR 54 as follows:

PART 7 CFR 54–MEATS, PREPARED MEATS, AND MEAT PRODUCTS (GRADING, CERTIFICATION, AND STANDARDS)

■ 1. The authority citation for 7 CFR 54 continues to read as follows:

Authority: 7 U.S.C. 1621–1627.

■ 2. Amend § 54.1 by:
■ a. Revising the definitions of *Administrator* and *Animals*;
■ b. Adding in alphabetical order the term *Appeal service*;
■ c. Revising the definitions of *Branch* and *Chief*;
■ d. Removing the term and definition for *Contract verification service*;
■ e. Adding in alphabetical order the term *Deputy Administrator*;
■ f. Revising the definitions of *Director, Division,* and *Institutional Meat Purchase Specifications*;
■ g. Removing the term and definition for *Livestock*;
■ h. Revising the definition of *Meat by-products*;
■ i. Adding in alphabetical order the terms *Official standards* and *Program*;
■ j. Revising the definition of *Service*;
■ k. Removing the term and definition for *Standards*.

The additions and revisions read as follows:

§ 54.1 Meaning of words and terms defined.

* * * * *

Administrator. The Administrator of the Agricultural Marketing Service (AMS), or any officer or employee of the AMS to whom authority has been or may be delegated to act in the Administrator's stead.

* * * * *

Animals. Bison, cattle, goats, sheep, swine, or other species identified by the Administrator.

* * * * *

Appeal service. Appeal service is a redetermination of the class, grade, other quality, or compliance of product when the applicant for the appeal service formally challenges the correctness of the original determination.

* * * * *

Branch. The Grading Services Branch of the Division.

* * * * *

Chief. The Chief of the Grading Services Branch, or any officer or employee of the Branch to whom authority has been or may be delegated to act in the Chief's stead.

* * * * *

Deputy Administrator. The Deputy Administrator of the Program, or any

other officer or employee of the Program to whom authority has been or may be delegated to act in the Deputy Administrator's stead.

Director. The Director of the Division, or any officer or employee of the Division to whom authority has been or may be delegated to act in the Director's stead.

* * * * *

Division. The Quality Assessment Division of the Livestock and Poultry Program.

* * * * *

Institutional Meat Purchase Specifications. Specifications describing various meat cuts, meat products, and meat food products derived from species covered in the definition of *Animals* above, commonly abbreviated ''IMPS,'' and intended for use by any meat procuring activity. For labeling purposes, only product certified by the Grading Services Branch may contain the letters IMPS on the product label.

* * * * *

Meat by-products. All edible parts, other than meat and prepared meats, and except as otherwise limited by 9 CFR 310.22, intended for human food, derived from one or more animals, and including but not limited to such organs and parts as livers, kidneys, sweetbreads, lungs, spleens, stomachs, tripe, lips, snouts, and ears.

* * * * *

Official standards. Official standards refer to the United States Standards for Grades of Carcass Beef; the United States Standards for Grades of Veal and Calf Carcasses; the United States Standards for Grades of Lamb, Yearling Mutton, and Mutton Carcasses; and/or the United States Standards for Grades of Pork Carcasses.

* * * * *

Program. The Livestock and Poultry Program of the Agricultural Marketing Service.

Service. Services offered by the Grading Services Branch such as Grading Service, Certification Service, and Carcass Data Service.

* * * * *

■ 3. Revise § 54.4 to read as follows:

§ 54.4 Kind of service.

(a) Grading Service consists of the determination, certification, and identification of the class, grade, or other quality attributes of products under applicable official standards.

(b) Certification Service consists of the determination, certification, and identification of products to an approved specification. Determination of product compliance with specifications for ingredient content or method of preparation may be based upon information received from the inspection system having jurisdiction over the products involved.

(c) Carcass Data Service consists of the evaluation of carcass characteristics of animals identified with an approved ear tag to applicable official standards or specifications, and the recording and transmitting of the associated data to the applicant or a party designated by the applicant.

■ 4. Revise § 54.5 to read as follows:

§ 54.5 Availability of service.

Service under these regulations may be made available to products shipped or received in interstate commerce. It also may be made available to the products not shipped or received if the Director or Chief determines that the furnishing of service for such products would facilitate the marketing, distribution, processing, or utilization of agricultural products through commercial channels. Service will be furnished for products only if they were derived from animals slaughtered in federally inspected establishments or operated under state meat inspection in a state other than one designated in 9 CFR 331.2. Service may be furnished for imported meat only if an exemption to do so is granted by the Director as described in § 54.20.

■ 5. Revise § 54.6 to read as follows:

§ 54.6 How to obtain service.

(a) *Application.* Any person may apply for service with respect to products in which he or she has a financial interest by completing the required application for service. In any case in which the service is intended to be furnished at an establishment not operated by the applicant, the application shall be approved by the operator of such establishment and such approval shall constitute an authorization for any employee of the Department to enter the establishment for the purpose of performing his or her functions under the regulations. The application shall include:

(1) Name and address of the establishment at which service is desired;

(2) Name and post office address of the applicant;

(3) Financial interest of the applicant in the products, except where application is made by representative of a Government agency in the representative's official capacity;

(4) Signature of the applicant (or the signature and title of the applicant's representative);

(5) Indication of the legal status of the applicant as an individual, partnership, corporation, or other form of legal entity; and

(6) The legal designation of the applicant's business as a small or large business, as defined by the U.S. Small Business Administration's North American Industry Classification System (NAICS) Codes.

(b) *Notice of eligibility for service.* The applicant will be notified whether the application is approved or denied.

(c) *Request by applicant for service:* (1) *Noncommitment.* Upon notification of the approval of an application for service, the applicant may, from time-to-time as desired, make oral or written requests for service to be furnished with respect to specific products. Such requests shall be made at an office for grading either directly or through an AMS employee.

(2) *Commitment.* If desired, the applicant may request to enter into an agreement with AMS to furnish service on a weekly commitment basis, where the applicant agrees to pay for 8 hours of service per day, 5 days per week, Monday through Friday, excluding Federal legal holidays occurring Monday through Friday on which no grading and certification services are performed, and AMS agrees to make an official grader available to provide service for the applicant. However, AMS reserves the right to use any official grader assigned to a commitment applicant to perform service for other applicants when, in the opinion of the Chief, the official grader is not needed to perform service for the commitment applicant. In those instances, the applicant will not be charged for the work of the grader assigned to his or her facility.

(3) If an applicant who terminates commitment grading service requests service again within a 2-year period from the date of the initial termination, the applicant will be responsible for all relocation costs associated with the grader assigned to fulfill the new service agreement. If more than one applicant is involved, expenses will be prorated according to each applicant's committed portion of the official grader's services.

■ 6. Revise § 54.7 to read as follows:

§ 54.7 Order of furnishing service.

Service shall be furnished to applicants in the order in which requests are received. Preference will be given, when necessary, to requests made by any government agency or any regular user of the service, and to requests for appeal service under § 54.19.

■ 7. Revise § 54.8 to read as follows:

§ 54.8 When request for service deemed made.

A request for service is considered made when received by the designated office as identified on the Application for Service form. Records showing the date and time of the request shall be made and maintained in the designated office.

■ 8. Revise § 54.9 to read as follows:

§ 54.9 Withdrawal of application or request for service.

An application or a request for service may be withdrawn by the applicant at any time before the application is approved or prior to performance of service. In accordance with §§ 54.27 and 54.28, any expenses already incurred by AMS in connection with the review of an application or fulfilling a request for service is the responsibility of the applicant.

■ 9. Revise § 54.10 to read as follows:

§ 54.10 Authority of agent.

Proof that any person making an application or a request for service on behalf of any other person has the authority to do so may be required at the discretion of the Director or Chief.

■ 10. Amend § 54.11 by revising paragraph (a)(1) introductory text, and paragraphs (a)(1)(i) through (iii), (vii), (x), and (a)(2) to read as follows:

§ 54.11 Denial, conditional withdrawal, or suspension of service.

(a) * * * (1) *Basis for denial or withdrawal.* An application or a request for service may be rejected, or the benefits of the service may be otherwise denied to, or withdrawn from, any person who, or whose employee or agent in the scope of the individual's employment or agency:

(i) Has willfully made any misrepresentation or has committed any other fraudulent or deceptive practice in connection with any application or request for service;

(ii) Has given or attempted to give, as a loan or for any other purpose, any money, favor, or other thing of value, to any employee of the Department authorized to perform any function;

(iii) Has interfered with or obstructed, or attempted to interfere with or to obstruct, any employee of the Department in the performance of his or her duties under the regulations by intimidation, threats, assaults, abuse, or any other improper means;

* * * * *

(vii) Has applied the designation ''US'' or ''USDA'' and ''Prime,'' ''Choice,'' ''Select,'' ''Good,'' ''Standard,'' ''Commercial,'' ''Utility,'' ''Cutter,'' ''Canner,'' ''Cull,'' ''No. 1,'' ''No. 2,'' ''No. 3,'' ''No. 4,'' ''Yield Grade 1,'' ''Yield Grade 2,'' ''Yield Grade 3,'' ''Yield Grade 4,'' ''Yield Grade 5,'' ''USDA Accepted as Specified,'' by stamp or text enclosed within a shield, or brand directly on any carcass, wholesale cut, or retail cut of any carcass, or has applied the afore mentioned designations including ''USDA Certified,'' and ''USDA Further Processing Certification Program'' on the marketing material associated with any such product as part of a grade designation or product specification;

* * * * *

(x) Has in any manner not specified in this paragraph violated subsection 203(h) of the Act: *Provided,* that paragraph (a)(1)(vi) of this section shall not be deemed to be violated if the person in possession of any item mentioned therein notifies the Director or Chief without delay that the person has possession of such item and, in the case of an official device, surrenders it to the Chief, and, in the case of any other item, surrenders it to the Director or Chief or destroys it or brings it into compliance with the regulations by obliterating or removing the violative features under supervision of the Director or Chief: *And provided further,* that paragraphs (a)(1) (ii) through (ix) of this section shall not be deemed to be violated by any act committed by any person prior to the making of an application of service under the regulations by the principal person. An application or a request for service may be rejected or the benefits of the service may be otherwise denied to, or withdrawn from, any person who operates an establishment for which that person has made application for service if, with the knowledge of such operator, any other person conducting any operations in such establishment has committed any of the offenses specified in paragraphs (a)(1) (i) through (x) of this section after such application was made. Moreover, an application or a request for service made in the name of a person otherwise eligible for service under the regulations may be rejected, or the benefits of the service may be otherwise denied to, or withdrawn from, such a person:

(A) In case the service is or would be performed at an establishment operated:

(*1*) By a corporation, partnership, or other person from whom the benefits of the service are currently being withheld under this paragraph; or

(*2*) By a corporation, partnership, or other person having an officer, director, partner, or substantial investor from whom the benefits of the service are currently being withheld and who has any authority with respect to the establishment where service is or would be performed; or

(B) In case the service is or would be performed with respect to any product with which any corporation, partnership, or other person within paragraph (a)(1)(x)(A)(*1*) of this section has a contract or other financial interest.

(2) *Procedure.* All cases arising under this paragraph shall be initially conducted in accordance with the Supplemental Rules of Practice in part 50 of this chapter. Any issue unable to be resolved under part 50 shall be resolved or handled in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes set forth in §§ 1.130 through 1.151 of this title.

* * * * *

§ 54.12 [Removed and Reserved]

■ 11. Remove and reserve § 54.12.

■ 12. Revise § 54.13 to read as follows:

§ 54.13 Accessibility and refrigeration of products; access to establishments; suitable work environment; and access to records.

(a) The applicant shall make products easily accessible for examination, with appropriate and adequate illuminating facilities, in order to disclose their class, grade, other quality characteristics, and compliance with official standards or other contractual requirements for which service is being provided. Supervisors of grading and other employees of the Department responsible for maintaining uniformity and accuracy of service shall have access to all parts of establishments covered by approved applications for service under the regulations, for the purpose of examining all products in the establishments that have been or are to be graded or examined for compliance with specifications or which bear any marks of grade or compliance.

(b) Grading service will be furnished only for meat that an official grader determines is chilled so that grade factors are developed to the extent that a proper grade determination can be made in accordance with the official standards. Meat that is presented in a frozen condition is not eligible for a grade determination.

(c) Applicants are responsible for providing a work environment where official graders are not subjected to physical and/or verbal abuse, or other elements that could have a negative effect on providing an unbiased, third-party evaluation. Applicants shall designate primary company

representatives to discuss grade placements and certification determinations with official graders.

(d) Applicants will make products and related records (approved labeling, technical proposals, quality plans, specifications, end product data schedules, grade volume information, etc.) easily accessible and provide assistance and any equipment necessary to accomplish the requested services. Equipment may include storage lockers/cabinets, branding ink, certified scales, food blenders, processors, grinders, sampling containers, sanitation equipment, thermometers, adequate lighting, weight tags, display monitors, video equipment for monitoring live animal schedules, etc. When offering product for grading or certification, applicants must ensure a minimum of 90 percent acceptable product.

(e) Applicants will provide a metal cabinet(s) or locker(s) for the secure storage of official meat grading equipment and identification devices for each official meat grader assigned to their establishment. Such cabinet(s) or locker(s) must be capable of being locked with a Government-owned lock and be located in an easily-accessible and secure location within the applicant's establishment.

§ 54.14 [Removed and reserved]

■ 13. Remove and reserve § 54.14.

■ 14. Revise § 54.15 to read as follows:

§ 54.15 Instrument grading.

(a) Applicants may use USDA-approved technologies to augment the official USDA grading process for approved species presented for official grading. This voluntary program may be utilized by a plant at its discretion but must comply with QAD procedures to be recognized and relied upon by the official grader in conducting official duties.

(b) Applicants have the option to augment quality and yield grading services through the use of vision-based instrument technology. Instrument grading may be used as an option for determining degrees of marbling and yield factors for meat carcasses. AMS approves the grading instrument itself and its use within individual applicant facilities. Applicants may contact grading supervision to initiate the process for in-plant approval. The process for instrument grading approval at an applicant's facility is dictated through internal procedures. Final determination of quality and yield grades is made by the official grader.

■ 15. Revise § 54.16 to read as follows:

§ 54.16 Marking of products.

All products examined for class and grade under the official standards, or the immediate containers and the shipping containers, shall be stamped, branded, or otherwise marked with an appropriate official identification. Except as otherwise directed by the Director, such markings will not be required when an applicant desires only an official memorandum. The marking of products, or their containers, as required by this section shall be done by official graders or under their immediate supervision.

■ 16. Revise § 54.17 to read as follows:

§ 54.17 Official identifications.

(a) A shield enclosing the letters ''USDA'' and identification letters assigned to the grader performing the service, as shown in Figure 1 to paragraph (a), constitutes a form of official identification under the regulations for preliminary grade of carcasses. This form of official identification may also be used to determine the final quality grade of carcasses; one stamp equates to ''USDA Select'' or ''USDA Good''; two stamps placed together vertically equates to ''USDA Choice''; and three stamps placed together vertically equates to ''USDA Prime.''

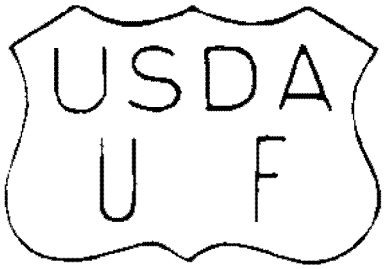

Figure 1 to Paragraph (a). Preliminary Grademark.

(b) A shield enclosing the letters ''USDA'' as shown in Figure 2 to paragraph (b) with the appropriate quality grade designation ''Prime,'' ''Choice,'' ''Select,'' ''Good,'' ''Standard,'' ''Commercial,'' ''Utility,'' ''Cutter,'' ''Canner,'' or ''Cull,'' as provided in the United States Standards for Grades of Carcass Beef, the United States Standards for Grades of Veal and Calf Carcasses, and the United States Standards for Grades of Lamb, Yearling Mutton, and Mutton Carcasses; and accompanied by the class designation ''Bullock,'' ''Veal,'' ''Calf,'' ''Lamb,'' ''Yearling Mutton,'' or ''Mutton,'' constitutes a form of official identification under the regulations to show the quality grade, and where necessary, the class, under said standards, of steer, heifer, and cow beef, veal, calf, lamb, yearling mutton, and mutton. The identification letters assigned to the grader performing the service will appear underneath and outside of the shield.

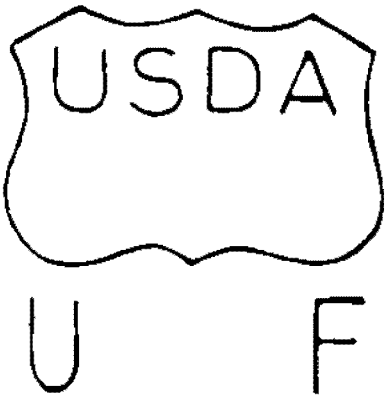

Figure 2 to paragraph (b). Official Quality Grademark and/or Official Class Designation Mark.

(c) A shield enclosing the letters ''USDA'' and the words ''Yield Grade,'' as in Figure 3 to paragraph (c), with the appropriate yield grade designation ''1,'' ''2,'' ''3,'' ''4,'' or ''5'' as provided in the United States Standards for Grades of Carcass Beef and the United States Standards for Grades of Lamb, Yearling Mutton, and Mutton Carcasses, constitutes a form of official identification under the regulations to show the yield grade under said standards. When yield graded, bull and bullock carcasses will be identified with the class designation ''Bull'' and ''Bullock,'' respectively. The identification letters assigned to the grader performing the service will appear underneath and outside of the shield.

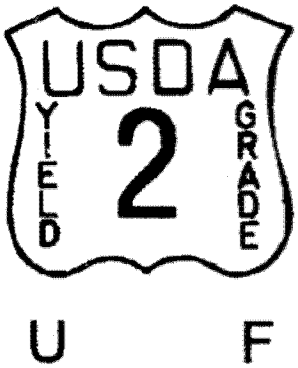

Figure 3 to paragraph (c). Official Yield Grademark.

(d) For combined quality and yield grade identification purposes only, a shield enclosing the letters ''US'' on one side and ''DA'' on the other, with the appropriate yield grade designation number ''1,'' ''2,'' ''3,'' ''4,'' or ''5,'' and with the appropriate quality grade designation of ''Prime,'' ''Choice,'' ''Select,'' ''Good,'' ''Standard,'' ''Commercial,'' ''Utility,'' ''Cutter,'' ''Canner,'' or ''Cull'' shown in Figure 4 to paragraph (d) constitutes a form of official identification under the regulations to show the quality and yield grade under said standards. The identification letters assigned to the grader performing the service will appear underneath and outside of the shield.

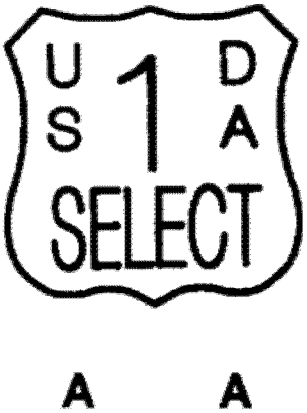

Figure 4 to paragraph (d). Official Combined Quality and Yield Grademark.

(e) Under the regulations, for yield grade identification purposes only, a shield enclosing the letters ''US'' on one side and ''DA'' on the other, and with the appropriate yield grade designation number ''1,'' ''2,'' ''3,'' ''4,'' or ''5'' as shown in Figure 5 to paragraph (e) constitutes a form of official identification under the regulations to show the yield grade under said standards. The identification letters assigned to the grader performing the service will appear underneath and outside of the shield.

Figure 5 to paragraph (e). Official Yield Grade Identification Mark.

(f) For quality grade identification only, a shield enclosing the letters ''US'' on one side and ''DA'' on the other with the appropriate quality grade designation of ''Prime,'' ''Choice,'' ''Select,'' ''Good,'' ''Standard,'' ''Commercial,'' ''Utility,'' ''Cutter,'' ''Canner,'' or ''Cull'' as shown in Figure 6 to paragraph (f) constitutes a form of official identification under the regulations to show the yield grade under said standards. The identification letters assigned to the grader performing the service will appear underneath and outside of the shield.

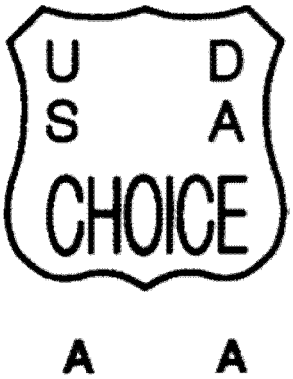

Figure 6 to paragraph (f). Official Quality Grade Identification Mark.

(g) The letters ''USDA'' with the appropriate grade designation ''1,'' ''2,'' ''3,'' ''4,'' ''Utility,'' enclosed in a shield as shown in Figure 7 to paragraph (g), as provided in the Official United States Standards for Grades of Pork Carcasses, constitutes a form of official identification under the regulations to show the grade under said standards of barrow, gilt, and sow pork carcasses.

Figure 7 to paragraph (g). Official Grade Designation for Pork Carcasses

(h) The following constitute forms of official identification under the regulations to show compliance of products:

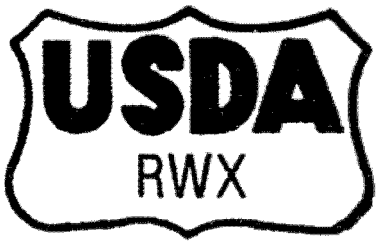

Figure 8 to paragraph (h). USDA Product Control Mark.

Figure 9 to paragraph (h). USDA Accepted As Specified Mark.

(i) The following, as shown in Figure 10 to paragraph (i), constitutes official identification to show quality system certification.

Figure 10 to paragraph (i). USDA Process Verified Shield.

(j) The following, as shown in Figure 11 to paragraph (j), constitutes official identification to show that products produced under USDA AMS supervision that meet specified requirements may carry the ''USDA Certified'' statement and/or ''USDA Certified'' shield, so long as each is used in direct association with a clear description of the standard or other requirement(s) to which the product claims to be certified.

(1) The ''USDA Certified'' shield must replicate the form and design of the example in Figure 11 and must be printed legibly and conspicuously:

(i) On a white background, with the term ''USDA'' in white overlaying a blue upper third of the shield and the term ''Certified'' in black overlaying a white middle third of the shield, with no terms in the red lower third of the shield; or

(ii) On a white or transparent background with a black trimmed shield, with the term ''USDA'' in white overlaying a black upper third of the shield and the term ''Certified'' in black overlaying the white or transparent remaining two-thirds of the shield.

(2) Use of the ''USDA Certified'' statement and the ''USDA Certified'' shield shall be approved in writing by the Director prior to use by an applicant.

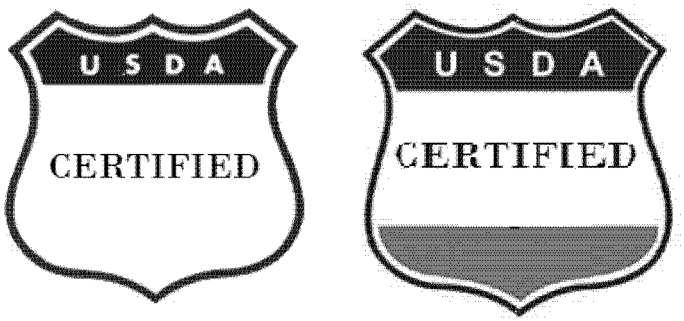

Figure 11 to paragraph (j). USDA Certified Mark.

(k) The following, as shown in Figure 12 to paragraph (k), constitutes official identification to show product or services produced under an approved USDA Further Processing Certification Program (FPCP):

(1) Products produced under an approved USDA FPCP may use the ''USDA Further Processing Certification Program'' statement and the ''USDA Further Processing Certification Program'' shield, and

(2) The USDA Further Processing Certification Program shield must replicate the form and design of the example in Figure 12 and must be printed legibly and conspicuously:

(i) On a white background, with the term ''USDA'' in white overlaying a blue upper third of the shield and the terms ''USDA Further Processing Certification Program'' in black overlaying a white middle third of the shield, with no terms in the red lower third of the shield; or

(ii) On a white or transparent background with a black trimmed shield, with the term ''USDA'' in white overlaying a black upper third of the shield and the terms ''USDA Further Processing Certification Program'' in black overlaying the white or transparent remaining two-thirds of the shield.

(3) Use of the ''USDA Further Processing Certification Program'' statement and the ''USDA Further Processing Certification Program'' shield shall be approved in writing by the Director prior to use by an applicant.

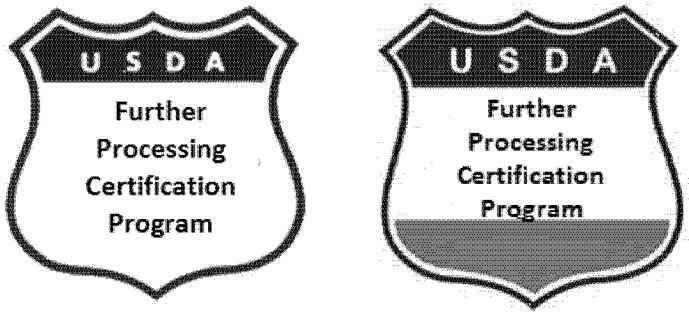

Figure 12 to paragraph (k). USDA Further Processing Certification Program Mark.

(l)(1) One device used by official graders is the LP–36 Form, a rectangular, serially numbered, red tag on which a shield encloses the words ''USDA Hold,'' constitutes a form of official identification under the regulations for meat and meat products.

(2) Official graders and supervisors of grading may use ''USDA Hold'' tags or other methods and devices as approved by the Administrator for the identification and control of meat and meat products that are not in compliance with the regulations or are held pending the results of an examination. Any such meat or meat product identified shall not be used, moved, or altered in any manner; nor shall official control identification be removed, without the expressed permission of an authorized representative of the USDA.

■ 17. Revise § 54.18 to read as follows:

§ 54.18 Custody of identification devices.

All identification devices used in marking products or their containers, including those indicating compliance with approved specifications, shall be kept in the custody of the Branch, and accurate records shall be kept by the Branch of all such devices. Such devices shall be distributed only to persons authorized by the Department, who will keep the devices in their possession or control at all times.

■ 18. Remove undesignated center heading APPEAL SERVICE.

■ 19. Revise § 54.19 to read as follows:

§ 54.19 Appeal of a grading service decision.

Appeal service is a redetermination of the class, grade, other quality, or compliance of product when the applicant for the appeal service formally challenges the correctness of the original determination.

(a) *Authority to request appeal service.* A request for appeal service with respect to any product may be made by any person who is financially interested in the product when that person disagrees with the original determination as to class, grade, other quality, or compliance of the product as shown by the markings on the product or its containers, or as stated in the applicable official memorandum.

(b)*Requesting appeal service.* A request for appeal service shall be filed

with the Chief. The request shall state the reasons for appeal and may be accompanied by a copy of any previous official report, or any other information that the applicant may have received regarding the product at the time of the original service. Such request may be made orally (including by telephone) or in writing (including by email). If made orally, the person receiving the request may require that it be confirmed in writing.

(c) *Determining original service from appeal service.* Examination requested to determine the class, grade, other quality, or compliance of a product that has been altered or has undergone a material change since the original service, or examination of product requested for the purpose of obtaining an official memorandum and not involving any question as to the correctness of the original service for the product involved shall be considered equivalent to original service and not appeal service.

(d) *Not eligible for appeal service.* Grade determinations cannot be appealed for any lot or product consisting of less than 10 similar units or carcasses. Moreover, appeal service will not be furnished with respect to product that has been altered or has undergone any material change since the original service.

(e) *Withdrawal of appeal service.* A request for appeal service may be withdrawn by the applicant at any time before the appeal service has been performed; however, the applicant is responsible for payment of any expenses incurred by the Branch towards providing the appeal service prior to withdrawal.

(f) *Denial or withdrawal of appeal service.* A request for appeal service may be rejected or such service may be otherwise denied to or withdrawn from any person, without a hearing, in accordance with the procedure set forth in § 54.11(b), if it appears that the person or product involved is not eligible for appeal service under § 54.19(a) and (b), or that the identity of the product has been lost; or for any of the causes set forth in § 54.11(b). Appeal service may also be denied to, or withdrawn from, any person in any case under § 54.11(a).

(g) *Who performs appeal service.* Appeal service shall be performed by the National Meat Supervisor or his or her designee.

(h) *Appeal service report.* Immediately after appeal service has been performed for any products, a report shall be prepared and issued referring specifically to the original findings and stating the class, grade, other quality, or compliance of the products as shown by the appeal service.

■ 20. Revise § 54.20 to read as follows:

§ 54.20 Exemptions.

Any exemption to the regulations must be approved by the Director. Exemptions may include but are not limited to:

(a) Grading the meat of animals in other than carcass form if the class, grade, and other quality attributes may be determined under the applicable standards.

(b) Grading in an establishment other than where the animal was slaughtered or initially chilled if the class, grade, and other quality attributes can be determined under the applicable standards, and if the identity of the carcasses can be maintained.

(c) If the Branch is unable to provide grading service in a timely manner and the meat can be identified in conformance with the standards.

(d) Grading in the establishment other than where the hide is removed, provided the meat can be identified in conformance with the standards.

(e) Grading meat of imported animals, provided:

(1) The imported meat is marked so that the name of the country of origin is conspicuous to the USDA grader. The mark of foreign origin shall be imprinted by roller brand, handstamp, tag, or other approved method.

(2) The imprints of the mark of foreign origin have been submitted to the Chief for the determination of compliance with these regulations prior to use on meats offered for Federal grading.

(3) The applicant notifies the official grader performing the service whenever imported meat is offered for grading.

(f) For good cause and provided that the meat can be identified in conformance with the standards.

§§ 54.21–54.26 [Removed and reserved]

■ 21. Remove and reserve §§ 54.21 through 54.26.

§ 54.30 [Removed and reserved]

■ 22. Remove and reserve § 54.30.

■ 23. Revise § 54.31 to read as follows:

§ 54.31 OMB control number.

The information collection and recordkeeping requirements of this part have been approved by OMB under 44 U.S.C. Chapter 35 and have been assigned OMB Control Number 0581–0128.

Dated: January 29, 2019.

Bruce Summers,

Administrator.

[FR Doc. 2019–00869 Filed 2–4–19; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF ENERGY

10 CFR Part 431

[EERE–2018–BT–STD–0003]

Appliance Standards and Rulemaking Federal Advisory Committee: Notification of Public Meetings for the Variable Refrigerant Flow Multi-Split Air Conditioners and Heat Pumps Working Group To Negotiate a Notice of Proposed Rulemaking for Test Procedures and Energy Conservation Standards

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

ACTION: Notification of public meetings and webinar.

SUMMARY: The U.S. Department of Energy (DOE or the Department) announces public meetings for the variable refrigerant flow multi-split air conditioners and heat pumps (VRF multi-split systems) working group. The Federal Advisory Committee Act (FACA) requires that agencies publish notice of an advisory committee meeting in the **Federal Register**.

DATES: DOE will hold a public meeting on Thursday, February 21, 2019 from 9:00 a.m. to 5:00 p.m. and on Friday, February 22, 2019 from 9:00 a.m. to 1:00 p.m. in Washington, DC. The meetings will also be broadcast as a webinar.

ADDRESSES: The public meetings will be held at Federal Mediation & Conciliation Services, Room 7008, 250 E Street, SW, Washington, DC 20427. Please see the PUBLIC PARTICIPATION section of this notification for additional information on attending the public meeting, including webinar registration information, participant instructions, and information about the capabilities available to webinar participants.

FOR FURTHER INFORMATION CONTACT: John Cymbalsky, U.S. Department of Energy, Office of Building Technologies (EE–5B), 950 L'Enfant Plaza, SW, Washington, DC 20024. Telephone: (202) 287–1692. Email: *ASRAC@ee.doe.gov.*

SUPPLEMENTARY INFORMATION: On January 10, 2018, the Appliance Standards and Rulemaking Federal Advisory Committee (ASRAC) met and passed the recommendation to form a VRF multi-split systems working group to meet and discuss and, if possible, reach a consensus on proposed Federal test procedures and standards for VRF multi-split systems. On April 11, 2018, DOE published a notification of intent to establish a working group for VRF multi-split systems to negotiate a notice

of proposed rulemaking for test procedures and energy conservations standards. That notification also solicited nominations for membership to the working group. (83 FR 15514) This notification announces the next round of meetings for this working group.

DOE will host a public meeting and webinar on Thursday, February 21, 2019 from 9:00 a.m. to 5:00 p.m. and on Friday, February 22, 2019 from 9:00 a.m. to 1:00 p.m. in Washington, DC.

The purpose of these meetings will be to negotiate in an attempt to reach consensus on proposed Federal test procedures and energy conservation standards for VRF multi-split systems.

Public Participation

Attendance at the Public Meeting

The time, date, and location of the public meeting are listed in the **DATES** and **ADDRESSES** sections of this document. If you plan to attend the public meeting, please notify the ASRAC staff at *asrac@ee.doe.gov.*

Due to the REAL ID Act implemented by the Department of Homeland Security (DHS), there have been recent changes regarding ID requirements for individuals wishing to enter Federal buildings from specific States and U.S. territories. DHS maintains an updated website identifying the State and territory driver's licenses that currently are acceptable for entry into DOE facilities at *https://www.dhs.gov/real-id-enforcement-brief.* A driver's license from a State or territory identified as not compliant by DHS will not be accepted for building entry, and one of the alternate forms of ID listed below will be required. Acceptable alternate forms of Photo-ID include U.S. Passport or Passport Card; an Enhanced Driver's License or Enhanced ID-Card issued by States and territories as identified on the DHS website (Enhanced licenses issued by these States and territories are clearly marked Enhanced or Enhanced Driver's License); a military ID or other Federal government-issued Photo-ID card.

In addition, you can attend the public meeting via webinar. Webinar registration information, participant instructions, and information about the capabilities available to webinar participants will be published on DOE's website: *https://energy.gov/eere/buildings/appliance-standards-and-rulemaking-federal-advisory-committee.* Participants are responsible for ensuring their systems are compatible with the webinar software.

Procedure for Submitting Prepared General Statements for Distribution

Any person who has plans to present a prepared general statement may request that copies of his or her statement be made available at the public meeting. Such persons may submit requests, along with an advance electronic copy of their statement in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format, to the appropriate address shown in the **FOR FURTHER INFORMATION CONTACT** section of this notification. The request and advance copy of statements must be received at least one week before the public meeting and may be emailed, hand-delivered, or sent by postal mail. DOE prefers to receive requests and advance copies via email. Please include a telephone number to enable DOE staff to make a follow-up contact, if needed.

Conduct of the Public Meeting

ASRAC's Designated Federal Officer will preside at the public meeting and may also use a professional facilitator to aid discussion. The meeting will not be a judicial or evidentiary-type public hearing, but DOE will conduct it in accordance with section 336 of EPCA (42 U.S.C. 6306). A court reporter will be present to record the proceedings and prepare a transcript. A transcript of the public meeting will be included on DOE's website: *https://energy.gov/eere/buildings/appliance-standards-and-rulemaking-federal-advisory-committee.* In addition, any person may buy a copy of the transcript from the transcribing reporter. Public comment and statements will be allowed prior to the close of the meeting.

Docket

The docket is available for review at *https://www.regulations.gov/docket?D=EERE-2018-BT-STD-0003,* including **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials. All documents in the docket are listed in the *https://regulations.gov* index. However, not all documents listed in the index may be publically available, such as information that is exempt from public disclosure.

Signed in Washington, DC, on January 18, 2019.

Steven Chalk,

Acting Deputy Assistant Secretary for Energy Efficiency and Renewable Energy.

[FR Doc. 2019–00885 Filed 2–4–19; 8:45 am]

BILLING CODE 6450–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 365 and 390

RIN 3064–AE22

Removal of Transferred OTS Regulations Regarding Lending and Investment; and Conforming Amendments to Other Regulation

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking.

SUMMARY: In order to streamline FDIC regulations and reduce regulatory burden, the FDIC proposes to rescind and remove from the Code of Federal Regulations rules entitled ''Lending and Investment'' (part 390, subpart P) that were transferred to the FDIC from the Office of Thrift Supervision (OTS) on July 21, 2011, in connection with the implementation of Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act); amend certain sections of existing FDIC regulations governing real estate lending standards to make it clear that such rules apply to all insured depository institutions for which the FDIC is the appropriate Federal banking agency; and amend part 365 by rescinding in its entirety the subpart concerning registration requirements for residential mortgage loan originators because supervision and rulemaking authority in this area was transferred to the Bureau of Consumer Financial Protection (Bureau) by the Dodd-Frank Act.

DATES: Comments must be received on or before April 8, 2019.

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

- *FDIC Website: http://www.fdic.gov/regulations/laws/federal/* Follow instructions for submitting comments on the agency website.
- *FDIC Email: Comments@fdic.gov.* Include RIN 3064–AE22 on the subject line of the message.
- *FDIC Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivery to FDIC:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Please include your name, affiliation, address, email address, and telephone number(s) in your comment. All statements received, including attachments and other supporting materials, are part of the public record

and are subject to public disclosure. You should submit only information that you wish to make publicly available.

Please note: All comments received will be posted generally without change to *http://www.fdic.gov/regulations/laws/federal/,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT:

Karen J. Currie, Senior Examination Specialist, (202) 898–3981, email address *kcurrie@fdic.gov,* Division of Risk Management Supervision; Cassandra Duhaney, Senior Policy Analyst, (202) 898–6804, Division of Depositor and Consumer Protection; Rodney D. Ray, Counsel, Legal Division, (202) 898–3556 or Linda Hubble Ku, Counsel, Legal Division, (202) 898–6634.

SUPPLEMENTARY INFORMATION:

I. Policy Objectives

The policy objectives of the proposed rule are twofold. The first is to simplify the FDIC's regulations by removing unnecessary regulations, or realigning existing regulations in order to improve the public's understanding and to improve the ease of reference. The second is to promote parity between State savings associations and State nonmember banks by making both classes of institutions subject to the same requirements regarding real estate lending standards. Thus, as further detailed in this **SUPPLEMENTARY INFORMATION** Section, the FDIC proposes to rescind and remove from the CFR rules entitled ''Lending and Investment'' (part 390, subpart P) that were transferred to the FDIC from OTS in connection with the implementation of Title III the Dodd-Frank Act. The FDIC takes the view that other existing regulations that concern permissible activities, safety and soundness standards, and real estate lending standards replicate the current requirements in part 390, subpart P. In addition, the proposal would amend certain sections of part 365 of the FDIC's existing regulations on real estate lending standards to make it clear that part 365, subpart A, applies to all insured depository institutions for which the FDIC is the appropriate Federal banking agency. Not only would this approach simplify the FDIC's regulations by removing unnecessary provisions, but it would have the added benefit of creating parity between state savings associations and state nonmenber banks by ensuring that both classes of institutions are subject to the same requirements regarding safety and soundness and real estate lending standards. Finally, the FDIC proposes to amend part 365 by rescinding in its entirety subpart B concerning registration requirements for residential mortgage loan originators because supervision and rulemaking authority in this area was transferred to the Bureau by the Dodd-Frank Act and the Bureau has issued its own regulation, Regulation G.

II. Background

A. The Dodd-Frank Act

The Dodd-Frank Act, signed into law on July 21, 2010, provided for a substantial reorganization of the regulation of State and Federal savings associations and their holding companies.[1] Beginning July 21, 2011, the transfer date established by section 311 of the Dodd-Frank Act,[2] the powers, duties, and functions formerly performed by the OTS were divided among the FDIC, as to State savings associations, the Office of the Comptroller of the Currency (OCC), as to Federal savings associations, and the Board of Governors of the Federal Reserve System (FRB), as to savings and loan holding companies. Section 316(b) of the Dodd-Frank Act[3] provides the manner of treatment for all orders, resolutions, determinations, regulations, and other advisory materials that have been issued, made, prescribed, or allowed to become effective by the OTS. The section provides that if such materials were in effect on the day before the transfer date, they continue in effect and are enforceable by or against the appropriate successor agency until they are modified, terminated, set aside, or superseded in accordance with applicable law by such successor agency, by any court of competent jurisdiction, or by operation of law.

Pursuant to section 316(c) of the Dodd-Frank Act,[4] on June 14, 2011, the FDIC's Board of Directors approved a ''List of OTS Regulations to be Enforced by the OCC and the FDIC Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act.'' This list was published by the FDIC and the OCC as a Joint Notice in the **Federal Register** on July 6, 2011.[5]

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act,[6] granted the OCC rulemaking authority relating to both State and Federal savings associations, nothing in the Dodd-Frank Act affected the FDIC's existing authority to issue regulations under the Federal Deposit Insurance Act (FDI Act)[7] and other laws as the ''appropriate Federal banking agency'' or under similar statutory terminology. Section 312(c)(1) of the Dodd-Frank Act[8] revised the definition of ''appropriate Federal banking agency'' contained in section 3(q) of the FDI Act,[9] to add State savings associations to the list of entities for which the FDIC is designated as the ''appropriate Federal banking agency.'' As a result, when the FDIC acts as the designated ''appropriate Federal banking agency'' (or under similar terminology) for State savings associations, as it does here, the FDIC is authorized to issue, modify, and rescind regulations involving such associations, as well as for State nonmember banks and insured branches of foreign banks.

As noted above, on June 14, 2011, operating pursuant to this authority, the FDIC's Board of Directors (Board) issued a list of regulations of the former OTS that the FDIC would enforce with respect to State savings associations. Also on June 14, 2011, the FDIC's Board reissued and redesignated certain regulations transferred from the former OTS. These transferred OTS regulations were published as new FDIC regulations in the **Federal Register** on August 5, 2011.[10] When the FDIC republished the transferred OTS regulations as new FDIC regulations, it specifically noted that its staff would evaluate the transferred OTS rules and might later recommend incorporating the transferred OTS regulations into other FDIC regulations, amending them, or rescinding them, as appropriate.[11]

B. Transferred OTS Regulations (Transferred to the FDIC's Part 390, Subpart P)

A subset of the regulations transferred to the FDIC from the OTS concern lending and investment provisions applicable to State savings associations. The OTS regulations, formerly found at 12 CFR part 560, sections 560.1, 560.3, 560.100, 560.101, 560.120, 560.121, 560.130, 560.160, 560.170, and 560.172, were transferred to the FDIC with only nomenclature changes and now comprise part 390, subpart P. Each provision of part 390, subpart P is discussed in Part III of this **SUPPLEMENTARY INFORMATION** section, below.

The FDIC has conducted a careful review and comparison of part 390,

[1] Public Law 111–203, 124 Stat. 1376 (2010).
[2] Codified at 12 U.S.C. 5411.
[3] Codified at 12 U.S.C. 5414(b).
[4] Codified at 12 U.S.C. 5414(c).
[5] 76 FR 39246 (July 6, 2011).
[6] Codified at 12 U.S.C. 5412(b)(2)(B)(i)(II).
[7] 12 U.S.C. 1811 *et seq.*
[8] Codified at 12 U.S.C. 5412(c)(1).
[9] 12 U.S.C. 1813(q).
[10] 76 FR 47652 (Aug. 5, 2011).
[11] *See* 76 FR at 47653.

subpart P and other FDIC regulations concerning permissible activities for State savings associations (12 CFR part 362, subpart C (part 362, subpart C)), activities implicating safety and soundness (12 CFR part 364 (part 364 and its appendix A)), and activities implicating real estate lending standards (part 365, subpart A and its appendix A). As discussed in Part III of this **SUPPLEMENTARY INFORMATION** section, the FDIC proposes to rescind part 390, subpart P because the FDIC considers the provisions contained in part 390, subpart P to be unnecessary because of the applicability of other FDIC regulations.

C. Part 365, Subpart A, Real Estate Lending Standards

The FDIC proposes to further effectuate the transfer of supervisory authority for State savings associations from the former OTS to the FDIC by amending certain parts of part 365 of the FDIC's regulations to clarify that part 365, subpart A applies to all insured depository institutions, including State savings associations, for which the FDIC is the appropriate Federal banking agency. As discussed in Part IV of this **SUPPLEMENTARY INFORMATION** section, the FDIC proposes to amend part 365, subpart A in order to make part 365, subpart A applicable to all insured depository institutions, including State savings associations, for which the FDIC is the appropriate Federal banking agency.

D. Part 365, Subpart B, Registration of Residential Mortgage Loan Originators

Simultaneously, the FDIC proposes to take the opportunity to rescind, in its entirety, subpart B of part 365, which relates to registration requirements for residential mortgage loan originators, due to the Bureau's issuance of its [12] regulation, Regulation G, pursuant to the Bureau's authority under the Dodd-Frank Act.[13] As discussed in Part V of this **SUPPLEMENTARY INFORMATION** section, the FDIC considers the provisions contained in part 365, subpart B to be unnecessary, redundant, or otherwise duplicative of the Bureau regulation governing this area.

III. Comparison of FDIC Regulations With the Transferred OTS Regulations To Be Rescinded

A. Permissible Activities for State Savings Associations

1. FDIC's 12 CFR Part 362, Subpart C—Activities of Insured State Savings Associations

Part 362 of the FDIC's regulations governs the activities and investments in which insured State banks and insured State savings associations may engage as principals. Subpart C of part 362 implements section 28 of the FDI Act.[14] Subpart C specifically addresses insured State savings associations and restricts their activities and investments to those permissible for a Federal savings association under any statute, including the Home Owners' Loan Act [15] (HOLA), and to those recognized as permissible for a Federal savings association by the OCC (or former OTS) or in bulletins, orders, or written interpretations of either the OCC or former OTS.[16] The FDIC has indicated that it will allow State savings associations and their service corporations to ''undertake only safe and sound activities and investments that do not present significant risks to the Deposit Insurance Fund and that are consistent with the purposes of Federal deposit insurance and other applicable law.'' [17]

2. Former OTS Part 560, Sections 560.120 and 560.121 (Transferred to the FDIC as Sections 390.267 and 390.268)

a. Section 390.267—Letters of Credit and Other Independent Undertakings To Pay Against Documents

As part of a regulatory reorganization and modernization initiative, section 560.120 was promulgated by the OTS in 1996. At that time, the OTS incorporated the substance of former section 545.48 (authorizing Federal savings associations to issue letters of credit) into new section 560.120 that applied to both Federal and State savings associations.[18] Section 560.120 was designed to provide uniform authority, standards and restrictions for all savings associations to consider before issuing a letter of credit or entering into another independent undertaking that had been recognized in law or approved by the OTS.[19] The former OTS rule largely mirrored the approach taken by the OCC for national banks, which incorporated market standards and international conventions applicable to letters of credit.[20]

Section 560.120 was transferred to the FDIC and redesignated as section 390.267 to cover letters of credit and other independent undertakings to pay against documents issued by or entered into by State savings associations, and it was also transferred to the OCC and redesignated as section 160.120 to cover Federal savings associations that issue letters of credit and enter into other independent undertakings.[21]

Sections 390.267 and 160.120 provide that subject to safety and soundness considerations, ''a [State/Federal] savings association may issue and commit to issue letters of credit within the scope of applicable laws or rules of practice recognized by law. It may also issue other independent undertakings within the scope of such laws or rules of practice recognized by law, that have been approved by the [FDIC/OCC] (approved undertaking).'' [22]

As noted above in Part III.A.1 of this **SUPPLEMENTARY INFORMATION** section, part 362, subpart C of the FDIC's regulations prohibits insured State savings associations and their service corporations from engaging in activities and investments of a type that are not permissible for a Federal savings association and their service corporations.

Under subpart C of part 362, the phrase ''activities and investments of a type that are not permissible for a Federal savings association'' generally means any activity not authorized expressly by HOLA and activities not recognized as permissible by OCC regulation or other written supervisory directive from the OCC or from the OTS to the extent not modified, terminated, set aside, or superseded by the OCC.[23] Federal savings associations are permitted to issue letters of credit and may issue other independent undertakings pursuant to 12 CFR 160.50, as transferred by the OCC from the OTS, subject to standards and restrictions found in 12 CFR 160.120, discussed above.

Because 12 CFR 362.9 allows State savings associations to exercise the power permitted to Federal savings associations by 12 CFR 160.50 and must

[12] The Secure and Fair Mortgage Licensing Act of 2008 (S.A.F.E. Act) was enacted as part of the Housing and Economic Recovery Act of 2008, Public Law 110–289, 122 Stat. 2654, sections 1501–17 (codified at 12 U.S.C. 5101–16) as amended by Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) (Pub. L. 111–203, 124 Stat. 1376). The S.A.F.E. Act requires residential mortgage loan originators employed by depository institutions, subsidiaries that are owned and controlled by a depository institution and regulated by a federal banking agency, and institutions regulated by the Farm Credit Administration to register with the Nationwide Mortgage Licensing System and Registry, obtain a unique identifier, and maintain such registration.

[13] *See* 81 FR 25323 (April 28, 2016).

[14] 12 U.S.C. 1831e.

[15] *See* 12 U.S.C. 1461 *et seq.*

[16] 12 CFR 362.9(a).

[17] 12 CFR 362.9(c).

[18] 61 FR 50951, 50958 (Sept. 30, 1996).

[19] 12 CFR 560.120.

[20] 61 FR at 50958.

[21] *See* 76 FR 48950 (Aug. 9, 2011).

[22] 12 CFR 390.267 (a). A footnote lists examples of laws or rules of practice applicable to letters of credit and other independent undertakings.

[23] 12 CFR 362.9(a).

follow State law, the standards and restrictions applicable to Federal savings associations that issue letters of credit and engage in other independent undertakings set forth in 12 CFR 160.120, and considerations of safety and soundness, the FDIC considers section 390.267 to be unnecessary and proposes that it be rescinded.

b. Section 390.268—Investment in State Housing Corporations

Section 390.268 of part 390, subpart P, formerly designated as OTS section 560.121, applies to all savings associations and addresses investments in or loans to State housing corporations.

Under subpart C of part 362, State savings associations generally are permitted to invest in State housing corporations because Federal savings associations are expressly authorized to invest in State housing corporations pursuant to section 5(c)(1)(P) of HOLA.[24] Because such investments are expressly permissible for Federal savings associations to make under HOLA, State savings associations may rely on part 362 in making such investments consistent with State law and in a safe and sound manner. As such, the FDIC considers section 390.268 to be unnecessary and proposes that it be rescinded.

B. Activities Implicating Safety and Soundness

1. FDIC's 12 CFR Part 364—Standards for Safety and Soundness

The FDIC's standards for safety and soundness were promulgated in the mid-1990s jointly by the FDIC, along with the FRB, the OCC, and the OTS (collectively, ''the Agencies'') pursuant to section 39 of the FDI Act.[25] Section 39(a) of the FDI Act [26] required the Agencies to prescribe standards for safety and soundness relating to the following: (A) Internal controls and information systems; (B) internal audit systems; (C) loan documentation; (D) credit underwriting; (E) interest rate exposure; (F) asset growth; (G) asset quality; (H) earnings; and (I) compensation and benefits, as well as such other operational and managerial standards as appropriate. Section 39(b) of the FDI Act required the Agencies to prescribe standards for insured depository institutions related to asset quality, earnings, and stock valuation.[27] Further, section 39(c) of the FDI Act required the Agencies to develop standards related to preventing unsafe and unsound practices related to compensation arrangements.[28]

In 1995, the Agencies published part 364 as a final rule with an appendix that implements Section 39(a) of the FDI Act regarding standards for safety and soundness (appendix A).[29] Later, part 364, appendix A was amended to reflect subsections 39(b) and (c) of the FDI Act.[30] The OTS's part 570, as amended, implemented section 39 of the FDI Act for all savings associations.[31]

The FDIC's part 364, appendix A (regarding safety and soundness) and appendix B (regarding information security) implement section 39 of the FDI Act.[32] Section 364.101 of part 364 provides that appendix A and appendix B apply to all insured State nonmember banks, State-licensed insured branches of foreign banks, and State savings associations.

Generally, part 364, appendix A addresses operational and managerial standards, compensation standards, and standards related to asset quality, earnings, and stock valuation and also provides that an institution should have internal controls and information systems that are appropriate to the size of the institution and the nature, scope, and risk of its activities and that provide for: (1) An organizational structure that establishes clear lines of authority and responsibility for monitoring adherence to established policies; (2) effective risk assessment; (3) timely and accurate financial, operational, and regulatory reports; (4) adequate procedures to safeguard and manage assets; and (5) compliance with applicable laws and regulations.

With respect to timely and accurate financial, operational and regulatory reports, FDIC-supervised institutions are required to prepare such reports in accordance with generally accepted accounting principles [33] (GAAP) and are also required to file quarterly Reports of Condition.[34]

Appendix A of part 364 also addresses loan documentation, requiring institutions to establish and maintain loan documentation practices that: (1) Enable the institution to make informed lending decisions and to assess risk, as necessary, on an ongoing basis; (2) identify the purpose of a loan and the source of repayment, and assess the ability of the borrower to repay the indebtedness in a timely manner; (3) ensure that any claim against a borrow is legally enforceable; (4) demonstrate appropriate administration monitoring of a loan; and (5) take account the size and complexity of the loan.[35]

Appendix A of part 364 sets standards for asset quality and provides that an insured depository institution ''establish and maintain a system that is commensurate with the institution's size and the nature and scope of its operations to identify problem assets and prevent deterioration of those assets'' [36] by: (1) Conducting periodic asset quality reviews to identify problem assets; (2) estimating the inherent losses in those assets and establish reserves that are sufficient to absorb estimated losses; (3) comparing problem asset totals to capital; (4) taking appropriate corrective action to resolve problem assets; (5) considering the size and potential risks of material asset concentrations; and (6) providing periodic asset reports with adequate information for management and the board of directors to assess the level of asset risk.[37]

Taken together, part 364 and appendix A constitute the FDIC's long-standing expectations for all prudently managed insured depository institutions, but leave specific methods of achieving these objectives to each institution. Specifically, they provide a framework for sound corporate governance and the supervision of operations designed to prompt an institution to identify emerging problems and correct deficiencies before capital becomes impaired. The FDIC uses these standards in its supervisory examination process in order to assess an institution's risk profile and assign an appropriate rating during the supervisory examination process, with

[24] 12 U.S.C. 1464(c)(1)(P); *see* 12 U.S.C. 1469.

[25] 12 U.S.C. 1831p–1. Section 132 of the Federal Deposit Insurance Corporation Improvement Act of 1991, Public Law 102–242, 105 Stat. 2236 (codified at 12 U.S.C. 1831p–1) added section 39 to the FDI Act. Section 39 was later amended by section 956 of the Housing and Community Development Act of 1992, Public Law 102–550, 106 Stat. 3672 and section 318 of the Riegle Community Development and Regulatory Improvement Act of 1994 (CDRI Act), Public Law 103–325, 108 Stat. 2160.

[26] 12 U.S.C. 1831p–1(a).

[27] 12 U.S.C. 1831p–1(b).

[28] 12 U.S.C. 1831p–1(c).

[29] 60 FR 35674 (Jul. 10, 1995).

[30] 61 FR 43948 (Aug. 27, 1996).

[31] *See* 60 FR at 35686; 61 FR at 43952. The FDIC transferred part 570 of the OTS's regulations to part 391, subpart B, of the Code of Federal Regulations. Subsequently, the FDIC rescinded part 391, subpart B and made conforming amendments to 12 CFR part 364 to reflect its applicability to all entities for which the FDIC is the applicable Federal banking agency. *See* 80 FR 65903 (Oct. 28, 2015).

[32] Appendix B was added in accordance with section 501 of the Gramm-Leach-Bliley Financial Modernization Act of 1999, Public Law 106–102, 113 Stat. 1338, codified at 15 U.S.C. 6801, which statute required the Agencies to establish appropriate information security standards in order to protect nonpublic personal information.

[33] 12 U.S.C. 1831n.

[34] 12 U.S.C. 1817 (a)(3); 12 U.S.C. 1464(v).

[35] 12 CFR part 364 app. A, sec. II.C.

[36] *Id.* sec. II.G.

[37] *Id.*

material deficiencies documented in the Report of Examination. Pursuant to section 39(e) of the FDI Act,[38] an FDIC-supervised institution's failure to meet the standards may cause the FDIC to require the institution to submit a safety and soundness compliance plan and if the institution does not comply with its plan, the FDIC will issue an order to correct safety and soundness deficiencies.[39]

2. Former OTS Safety and Soundness—Part 390, Subpart P, Sections 390.260, 390.262, 390.269, 390.270, 390.271, and 390.272

a. Section 390.260—General

Former OTS section 560.1, as modified by the FDIC in transferred section 390.260, provided the general authority and scope for safety-and-soundness-based lending and investment for State savings associations. It is substantively similar to 12 CFR 364.101. Because the two regulations are substantively similar and section 364.101 already applies to State savings associations, the FDIC considers it duplicative to retain section 390.260. Accordingly, the FDIC proposes that section 390.260 be rescinded.

b. Section 390.262—Definitions

Former section 560.3 provided a set of definitions to several commonly used terms related to lending, such as ''consumer loans,'' home loans,'' ''real estate loans,'' and ''credit card,'' and it is not expressly duplicative of or substantively similar to any corresponding FDIC regulation. However, as transferred and redesignated by the FDIC, the definitions contained in section 390.262 are only relevant to the provisions of part 390, subpart P. Specifically, section 390.262 provides a list of definitions ''[f]or purposes of this subpart.''[40] Because the FDIC has concluded that the substantive provisions of part 390, subpart P are unnecessary, redundant, or otherwise duplicative of other FDIC regulations, it follows that the definitions contained in section 390.262 that are only relevant to subpart P are also unnecessary. Accordingly, the FDIC considers section 390.262 to be unnecessary and proposes that it be rescinded.

c. Section 390.269—Prohibition on Loan Procurement Fees

Former section 560.130 addressed loan procurement fees, and is not expressly duplicative of or substantively similar to any corresponding FDIC regulation. This section was originally transferred to the OTS from the Bank Board in 1989[41] and has been the subject of a regulatory clarification and an OTS interpretative letter.[42] Specifically, the provision had applied to affiliated persons of savings associations but, in response to requests for clarification and public comment, the OTS revised it to apply only to natural persons.[43] As transferred to the FDIC, section 390.269 provides,

> If you are a director, officer, or other natural person having the power to direct the management or policies of a State savings association, you must not receive, directly or indirectly, any commission, fee, or other compensation in connection with the procurement of any loan made by the State savings association or a subsidiary of the State savings association.[44]

Although the OTS maintained this provision in its regulations since 1989, of the other Federal banking agencies, only the OCC has a corresponding provision in its regulations, as the OCC also transferred former section 560.130 from the OTS.[45] Rather than identify and prohibit particular types of compensation or fees on a case-by-case basis, the FDIC's approach has been to act against compensation practices that are unsafe or unsound, or represent a breach of an officer's or director's duty not to place his or her own interests ahead of those of the institution; and where necessary, the FDIC can take action under section 8 of the FDI Act.[46] Because the FDIC can act against compensation practices that are demonstrably unsafe or unsound or a breach of fiduciary duty, the FDIC considers section 390.269 to be unnecessary and proposes that it be rescinded.

d. Section 390.270—Asset Classification

Former OTS section 560.160, entitled ''Asset Classification,'' required savings associations to classify their assets on a regular basis in accordance with the OTS's *Thrift Activities Handbook*.[47] The regulation originally was transferred to the OTS from the Bank Board in 1989 and it contained specific accounting classification metrics.[48] It was revised over time in response to initiatives to modernize and streamline Federal banking regulations.[49] Commenters had suggested that the OTS remove the classification metrics from the regulation and move them to the *Thrift Activities Handbook*.[50] In response to these comments, the OTS simplified former section 560.160 but retained portions of the regulation to ensure that a savings association's board of directors would be responsible for monitoring its classification system.

Transferred to the FDIC as section 390.270, the current regulation requires, among other things, State savings associations to classify assets on a regular basis in a manner consistent with the classification system used by the FDIC and to establish adequate valuation allowances or charge-offs, as appropriate, consistent with GAAP and the practices of the Federal banking agencies. The FDIC's implementation of part 364, appendix A provides the FDIC's minimum standards for establishing and maintaining ''a system that is commensurate with the institution's size and the nature and scope of its operations to identify problem assets and prevent deterioration of those assets.''[51]

State savings associations are already expected to maintain an appropriate level of allowance for loan and lease losses in accordance with GAAP. Because safety and soundness principles require all insured depository institutions for which the FDIC is the appropriate Federal banking agency—including State savings associations—to provide timely and accurate financial, operational, and regulatory reports in accordance with GAAP, the FDIC considers section 390.270 to be unnecessary and proposes that it be rescinded.

e. Section 390.271—Records for Lending Transactions

As transferred to the FDIC, section 390.271 requires State savings associations to establish and maintain loan documentation practices that mirror all of the requirements of part 364, appendix A. Because the lending documentation practices and requirements contained in section 390.271 are contained in part 364, appendix A, as discussed above, the

[38] 12 U.S.C. 1831p–1(e).

[39] *See* 12 U.S.C. 1831p–1(e); 12 CFR 308.300, *et seq.*

[40] 12 CFR 390.262.

[41] *See* 54 FR 49411, 49560 (Nov. 30, 1989).

[42] *See* 61 FR 60173, 60176 (Nov. 27, 1996); OTS Interpretative Letter, *Loan Procurement Fees* (Dec. 14, 1994), *available at http://www.occ.gov/static/ots/legal-opinions/ots-lo-12-14-1994a.pdf.* Former section 560.130 was previously listed as section 563.40(a), *see* 61 FR at 60176, and the 1994 OTS interpretive letter references this earlier section number.

[43] 61 FR at 60176.

[44] 12 CFR 390.262.

[45] The OCC prohibition on loan procurement fees is located at 12 CFR 160.130. *See* 76 FR 48950, 49043 (Aug. 9, 2011).

[46] 12 U.S.C. 1818.

[47] 12 CFR 560.160.

[48] *See* 54 FR at 49415.

[49] *See* 61 FR 50951, 50982 (Sept. 30, 1996).

[50] *Id.* at 50963.

[51] 12 CFR 364, app. A, sec. II.G.

FDIC considers section 390.271 to be unnecessary and proposes that it be rescinded.

f. Section 390.272—Re-Evaluation of Real Estate Owned

Former OTS section 560.172 also was part of the transfer to OTS and recodification of Bank Board regulations in 1989.[52] It originally addressed re-evaluation of assets and, among other things, required a savings association to appraise each parcel of real estate owned at the earlier of in-substance foreclosure or at the time of the savings association's acquisition, and at such times thereafter as dictated by prudent management policy or as required by the OTS' regional director.[53] The provision did not apply to real estate owned by the institution that was sold and reacquired less than 12 months subsequent to the most recent appraisal. The form of the regulation transferred to the FDIC as section 390.272 remains substantively the same as the most recent version adopted by the former OTS.[54]

As transferred to the FDIC, section 390.272 is not duplicative of any other existing FDIC regulation. However, as discussed in part III.B.1. of this **SUPPLEMENTARY INFORMATION** section, above, the FDIC relies on part 364, appendix A to convey its expectation that FDIC-supervised institutions should ''establish and maintain a system that is commensurate with the institution's size and the nature and scope of its operations to identify problem assets and prevent deterioration of those assets'' [55] and, as State-chartered institutions, to follow State law with respect to the initial and subsequent valuations of other real estate (ORE).[56] The FDIC expects all supervised institutions to adhere to part 364 with regard to maintaining a system to identify and manage problem assets (including ORE) and to provide for timely and accurate financial, operational, and regulatory reports according to GAAP and the Call Report Instructions as it pertains to the appropriate carrying value of ORE. Further, State law generally provides for when an appraisal is necessary for State-chartered institutions (including savings associations). Therefore, the FDIC considers section 390.272 to be unnecessary and proposes that it be rescinded.

Accordingly, as explained in the analysis above, the FDIC proposes to remove sections 390.260, 390.262, 390.269, 390.270, 390.271 and 390.272 of part 390, subpart P because these sections are unnecessary, redundant of, or otherwise duplicative of the safety and soundness standards delineated in part 364 and its appendix A.

C. Activities Implicating Real Estate Lending Provisions

1. The FDIC's Part 365—Real Estate Lending Standards

Section 304 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) required the Agencies to adopt uniform regulations prescribing standards for extensions of credit that are secured by liens on interests in real estate or made for the purpose of financing the construction of a building or other improvements to real estate.[57] The Agencies published their joint rule and appendices for real estate lending on the last day of 1992, and the rules became effective on March 19, 1993.[58] The FDIC's regulation is found at part 365, subpart A, which includes an appendix A regarding real estate lending.

2. Sections 390.264, 390.265, Including Appendix to 390.265—Real Estate Lending

Former OTS sections 560.100 and 560.101 (including the appendix) implemented real estate lending provisions, as required by FDICIA. Former sections 560.100 and 560.101 were transferred to the FDIC as sections 390.264 and 390.265 (including the appendix to part 365, subpart A). These regulations are nearly identical to 12 CFR 365.1 and 365.2 (including appendix A to part 365, subpart A). However, in order to include State savings associations within the scope of part 365 and its appendix A, it is necessary for the FDIC to make the technical amendment as discussed in section IV of this **SUPPLEMENTARY INFORMATION** section, below.

Because the FDIC considers sections 390.264 and 390.265 (including the appendix to section 390.265) to be duplicative of part 365, subpart A, as proposed to be amended herein, the FDIC proposes to rescind and remove them from the Code of Federal Regulations.

IV. Proposed Amendment to Part 365, Subpart A

As discussed in part III.C of this **SUPPLEMENTARY INFORMATION**, the FDIC's part 365 subpart A addresses real estate lending standards for insured State nonmember banks (including State-licensed insured branches of foreign banks). The Dodd-Frank Act added State savings associations to the list of entities for which the FDIC is designated as the appropriate Federal banking agency.[59] To clarify that part 365 applies to all institutions for which the FDIC is the appropriate Federal banking agency, the FDIC proposes to amend sections 365.1 and 365.2 of part 365 to replace the phrases ''insured state nonmember banks (including state-licensed insured branches of foreign banks)'' and ''state nonmember bank'' throughout subpart A with the phrase ''FDIC-supervised institution.'' Under the proposal, section 365.1 would be revised to add the definition of the term ''FDIC-supervised institution'' to mean any insured depository institution for which the FDIC is the appropriate Federal banking agency pursuant to section 3(q) of the FDI Act.[60]

V. Rescinding Part 365, Subpart B

The FDIC issued part 365, subpart B to implement the Federal registration requirements for mortgage loan originators required by the S.A.F.E. Act. As relevant here, the S.A.F.E. Act required the Agencies, the Farm Credit Administration, and National Credit Union Administration (the ''S.A.F.E. Act Agencies'') to develop and maintain a system for registering mortgage loan originators employed by institutions regulated by the agencies.[61]

However, the Dodd-Frank Act amended the S.A.F.E. Act, transferring that authority from the S.A.F.E. Act Agencies to the Bureau.[62] On December 19, 2011, the Bureau published an interim final rule incorporating the S.A.F.E. Act into its Regulation G. On April 28, 2016, the Bureau finalized the interim final rule, which is substantially duplicative to the FDIC's S.A.F.E. Act regulation at part 365, subpart B. The Bureau's regulation addresses Federal registration requirements for mortgage loan originators and applies to all FDIC-supervised institutions.[63] As such, the FDIC proposes to rescind part 365,

[52] *See* 54 FR at 49587.

[53] 12 CFR 563.172 (1994).

[54] *See* 12 CFR 390.272; *cf* 12 CFR 560.172.

[55] 12 CFR 364, app. A., sec. II.G.

[56] *See* FIL–62–2008.

[57] *See* Public Law 102–242, 105 Stat. 2236 (codified at 12 U.S.C. 1828(o)).

[58] *See* 57 FR 62890, 62900 (Dec. 31, 1992).

[59] *See* section 312(c) of the Dodd-Frank Act, codified at 12 U.S.C. 1813(q).

[60] 12 U.S.C. 1813(q).

[61] 12 U.S.C. 5106.

[62] *See* section 1100 of the Dodd-Frank Act.

[63] 12 CFR 1007.101(c).

subpart B because it is outdated and no longer necessary.

VI. Summary

If the proposal is finalized, 12 CFR part 390, subpart P would be removed because it is largely unnecessary, redundant, or duplicative of existing FDIC regulations; the requirements of part 365, subpart A expressly would apply to all FDIC-supervised insured depository institutions; and part 365 subpart B would be removed because it is outdated and no longer necessary due to the transfer of S.A.F.E. Act rulemaking power to the Bureau. These three initiatives will serve to streamline the FDIC's regulations and reduce the regulatory burden on FDIC-supervised institutions.

VII. Expected Effects

As explained in detail in Section III of this **SUPPLEMENTARY INFORMATION** section, certain OTS regulations transferred to the FDIC by the Dodd-Frank Act relating to lending and investment are either unnecessary or effectively duplicate existing FDIC regulations. This proposal would eliminate those transferred OTS regulations. The proposal also would clarify that the standards in part 365 apply to State savings associations because the FDIC is the ''appropriate Federal banking agency'' pursuant to the FDI Act.

As of June 30, 2018, the FDIC supervises 3,575 depository institutions, of which 41 (1.1%) are State savings associations. The proposed rule primarily would affect regulations that govern State savings associations.

As explained previously, the proposed rule would remove sections 390.260, 390.261, 390.262, 390.263, 390.264, 390.265, 390.266, 390.267, 390.268, 390.269, 390.270, 390.271, and 390.272 of part 390, subpart P because these sections are unnecessary, redundant of, or otherwise duplicative of other FDIC regulations regarding safety and soundness. Because these regulations are redundant to existing regulations, rescinding them will not have any substantive effects on FDIC-supervised institutions.

Thus, for example, as explained previously, part 364 covers State savings associations in section 364.101 and its appendix A. Because the lending documentation practices and standards in part 364, appendix A are substantively similar to existing regulations for State savings associations found in section 390.271, rescission of section 390.271 would not have any substantive effects on FDIC-supervised institutions. The same would be true for the other sections of part 390, subpart P.

The proposed rule would amend part 365, subpart A so that it would expressly apply to State savings associations. Because the real estate lending requirements in sections 365.1 and 365.2 and appendix A to part 365, subpart A are substantively identical to currently applicable regulations for State savings associations found in 390.264 and 390.265 (including the appendix to 390.265), amending part 365, subpart A to include State savings associations would not have any substantive effects on FDIC-supervised institutions.

Finally, as previously explained, the proposed rule would rescind part 365, subpart B because the authority to implement Federal registration requirements for mortgage loan originators has been transferred by statute to the Bureau. Because rulemaking authority for the S.A.F.E. Act was transferred to the Bureau in December 2011, the removal of the FDIC's S.A.F.E. Act regulations would not have any substantive effects on FDIC-supervised institutions.

The FDIC invites comments on all aspects of this analysis. In particular, would the proposed rule have any costs or benefits to covered entities that the FDIC has not identified?

VIII. Alternatives

The FDIC has considered alternatives to the proposed rule but believes that the proposed amendments represent the most appropriate option for covered institutions. As discussed previously, the Dodd-Frank Act transferred certain powers, duties, and functions formerly performed by the OTS to the FDIC. The FDIC's Board reissued and redesignated certain transferred regulations from the OTS, but noted that it would evaluate them and might later incorporate them into other FDIC regulations, amend them, or rescind them, as appropriate. The FDIC has evaluated the existing regulations relating to lending and investment of covered entities, including part 365 and part 390, subpart P. The FDIC considered the status quo alternative of retaining the current regulations but did not choose to do so because it would be needlessly complex for substantively similar regulations regarding lending and investment activities of State nonmember banks and State savings associations to be located in different locations within the Code of Federal Regulations. The FDIC believes it would be procedurally complex for FDIC-supervised institutions to continue to refer to these separate sets of regulations. Therefore, the FDIC is proposing to amend and streamline the FDIC's regulations.

IX. Request for Comments

The FDIC invites comments on all aspects of this proposed rulemaking. In particular, the FDIC requests comments on the following questions:

1. *Are the provisions of 12 CFR parts 362, 364, and 365 sufficient to provide consistent and effective requirements related to permissible lending and investment activities for all insured depository institutions for which the FDIC is the appropriate Federal banking agency? Please provide examples, data, or otherwise substantiate your answer.*
2. *What negative impacts, if any, can you foresee in the FDIC's proposal to rescind part 390, subpart P and part 365, subpart B and remove them from the Code of Federal Regulations?*
3. *As to the OTS's former rule prohibiting loan procurement fees, the FDIC noted above that no other Federal banking agency has a similar rule. Do you believe that a separate rule is necessary for safety and soundness reasons? Please provide examples, data, or otherwise substantiate your answer.*
4. *Please provide any other comments you have on the proposal.*

X. Regulatory Analysis and Procedure

A. The Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA),[64] the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The proposed rule would rescind and remove from FDIC regulations part 390, subpart P. With regard to part 365, subpart A, the proposed rule would amend sections 365.1 and 365.2 to clarify that State savings associations, as well as State nonmember banks and foreign banks having insured branches are all subject to part 365. It would also rescind and remove from the FDIC's regulations part 365, subpart B. The proposed rule will not create any new or revise any existing collections of information under the PRA. Therefore, no information collection request will be submitted to the OMB for review.

B. The Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the

[64] 44 U.S.C. 3501–3521.

impact of the proposed rule on small entities.[65] However, a regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities, and publishes its certification and a short explanatory statement in the **Federal Register** together with the rule. The Small Business Administration (SBA) has defined ''small entities'' to include banking organizations with total assets of less than or equal to $550 million.[66] For the reasons provided below, the FDIC certifies that the proposed rule, if adopted in final form, would not have a significant economic impact on a substantial number of small banking organizations. Accordingly, a regulatory flexibility analysis is not required.

As of June 30, 2018, the FDIC supervised 3,575 insured financial institutions, of which 2,804 are considered small banking organizations for the purposes of RFA. The proposed rule primarily affects regulations that govern State savings associations. There are 38 State savings associations considered to be small banking organizations for the purposes of the RFA.[67]

As explained previously, the proposed rule would remove sections 390.260, 390.261, 390.262, 390.263, 390.264, 390.265, 390.266, 390.267, 390.268, 390.269, 390.270, 390.271, and 390.272 of part 390, subpart P because these sections are unnecessary, redundant of, or otherwise duplicative of other FDIC regulations for safety and soundness standards. Because these regulations are redundant to existing regulations, rescinding them would not have any substantive effects on small FDIC-supervised institutions.

As explained previously, part 364 covers State savings associations in section 364.101 and in appendix A. Because the lending documentation practices and standards in part 364, appendix A are substantively similar to existing regulations for State savings associations found in section 390.271 rescinding section 390.271 and the rest of part 390, subpart P would not have any substantive effects on small FDIC-supervised institutions.

As stated previously, the proposed rule would amend part 365, subpart A so that it would expressly apply to State savings associations. Because the real estate lending requirements in sections 365.1 and 365.2 and part 364, appendix A are substantively identical to currently applicable regulations for State savings associations found in 390.264 and 390.265 (including the appendix to section 390.265), amending part 365, subpart A so that it would apply to all FDIC-supervised institutions would not have any substantive effects on small FDIC-supervised institutions.

As explained previously, the proposed rule would rescind part 365, subpart B because the authority to implement Federal registration requirements for mortgage loan originators has been transferred by statute to the Bureau. Because rulemaking authority for the S.A.F.E. Act was transferred to the Bureau in December 30, 2011, the removal of the FDIC's S.A.F.E. Act regulations would not have any substantive effects on small FDIC-supervised covered institutions.

Based on the information above, the FDIC certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities.

5. *The FDIC invites comments on all aspects of the supporting information provided in this RFA section. In particular, would this rule have any significant effects on small entities that the FDIC has not identified?*

C. Plain Language

Section 722 of the Gramm-Leach-Bliley Act[68] requires each Federal banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. As a federal banking agency subject to the provisions of this section, the FDIC has sought to present the proposed rule to rescind part 390, subpart P and amend part 365 in a simple and straightforward manner.

6. *The FDIC invites comments on whether the proposal is clearly stated and effectively organized, and how the FDIC might make the proposal easier to understand.*

D. The Economic Growth and Regulatory Paperwork Reduction Act

Under section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA), the FDIC is required to review all of its regulations, at least once every 10 years, in order to identify any outdated or otherwise unnecessary regulations imposed on insured institutions.[69] The FDIC, along with the other federal banking agencies, submitted a Joint Report to Congress on March 21, 2017, (EGRPRA Report) discussing how the review was conducted, what has been done to date to address regulatory burden, and further measures that will be taken to address issues that were identified. As noted in the EGRPRA Report, the FDIC is continuing to streamline and clarify its regulations through the OTS rule integration process. By removing outdated or unnecessary regulations, such as part 390, subpart P and part 365, subpart B, and amending part 365, subpart A, this rule complements other actions the FDIC has taken, separately and with the other federal banking agencies, to further the EGRPRA mandate.

List of Subjects

12 CFR Part 365

Banks, banking, Credit, Mortgages, Savings associations.

12 CFR Part 390

Administrative practice and procedure, Advertising, Aged, Civil rights, Conflict of interests, Credit, Crime, Equal employment opportunity, Fair housing, Government employees, Individuals with disabilities, Reporting and recordkeeping requirements, Savings associations.

Authority and Issuance

For the reasons stated in the preamble, the Board of Directors of the Federal Deposit Insurance Corporation proposes to amend title 12 of the Code of Federal Regulations as follows:

PART 365—REAL ESTATE LENDING STANDARDS

Subpart A—Real Estate Lending Standards [Amended]

■ 1. Revise the authority citation for part 365 to read as follows:

Authority: 12 U.S.C. 1828(o), 5412.

■ 2. Revise § 365.1 to read as follows:

§ 365.1 Purpose and scope.

This subpart, issued pursuant to section 304 of the Federal Deposit

[65] 5 U.S.C. 601, *et seq.*

[66] The SBA defines a small banking organization as having $550 million or less in assets, where ''a financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' See 13 CFR 121.201 (as amended, effective December 2, 2014). ''SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.'' See 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the FDIC-supervised institution is ''small'' for the purposes of RFA.

[67] FDIC Call Report, March 31st, 2018.

[68] Public Law 106–102, 113 Stat. 1338, 1471 (codified at 12 U.S.C. 4809).

[69] Public Law 104–208, 110 Stat. 3009 (1996).

Insurance Corporation Improvement Act of 1991, 12 U.S.C. 1828(o), prescribes standards for real estate lending to be used by FDIC-supervised institutions in adopting internal real estate lending policies. For purposes of this subpart, the term ''FDIC-supervised institution'' means any insured depository institution for which the Federal Deposit Insurance Corporation is the appropriate Federal banking agency pursuant to section 3(q) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(q).

■ 3. Amend § 365.2 by revising paragraphs (a), (b)(1)(iii), (2)(iii) and (iv), and (c) to read as follows:

§ 365.2 Real estate lending standards.

(a) Each FDIC-supervised institution shall adopt and maintain written policies that establish appropriate limits and standards for extensions of credit that are secured by liens on or interests in real estate, or that are made for the purpose of financing permanent improvements to real estate.

(b)(1) * * *

(iii) Be reviewed and approved by the FDIC-supervised institution's board of directors at least annually.

(2) * * *

(iii) Loan administration procedures for the FDIC-supervised institution's real estate portfolio; and

(iv) Documentation, approval, and reporting requirements to monitor compliance with the FDIC-supervised institution's real estate lending policies.

(c) Each FDIC-supervised institution must monitor conditions in the real estate market in its lending area to ensure that its real estate lending policies continue to be appropriate for current market conditions.

* * * * *

Subpart B—[Removed and Reserved]

■ 4. Remove and reserve subpart B, consisting of §§ 365.101, 365.102, 365.103, 365.104, 365.105, and appendix A to subpart B.

PART 390—REGULATIONS TRANSFERRED FROM THE OFFICE OF THRIFT SUPERVISION

■ 5. The authority citation for part 390 continues to read as follows:

Authority: 12 U.S.C. 1819.

Subpart P—[Removed and Reserved]

■ 6. Remove and reserve Subpart P, consisting of §§ 390.260, 390.261, 390.262, 390.263, 390.264, 390.265, 390.266, 390.267, 390.268, 390.269, 390.270, 390.271, 390.272.

Dated at Washington, DC, on December 18, 2018.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Valerie Best,

Assistant Executive Secretary.

[FR Doc. 2018–28084 Filed 2–4–19; 8:45 am]

BILLING CODE 6714–01–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. 2018–8]

Noncommercial Use of Pre-1972 Sound Recordings That Are Not Being Commercially Exploited

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Copyright Office (''Copyright Office'' or ''Office'') is issuing a notice of proposed rulemaking regarding the Classics Protection and Access Act, title II of the recently enacted Orrin G. Hatch-Bob Goodlatte Music Modernization Act. In connection with the establishment of federal remedies for unauthorized uses of sound recordings fixed before February 15, 1972 (''Pre-1972 Sound Recordings''), Congress also established an exception for certain noncommercial uses of Pre-1972 Sound Recordings that are not being commercially exploited. To qualify for this exemption, a user must file a notice of noncommercial use after conducting a good faith, reasonable search to determine whether the Pre-1972 Sound Recording is being commercially exploited, and the rights owner of the sound recording must not object to the use within 90 days. After soliciting public comments through a notice of inquiry, the Office is proposing regulations identifying the specific steps that a user should take to demonstrate she has made a good faith, reasonable search. The proposed rule also details the filing requirements for the user to submit a notice of noncommercial use and for a rights owner to submit a notice objecting to such use.

DATES: Written comments must be received no later than 11:59 p.m. Eastern Time on March 7, 2019. Meeting requests must be received no later than 11:59 p.m. Eastern Time on March 18, 2019, and all meetings must take place no later than Friday, March 22, 2019. The Office will not consider requests to hold meetings after that date. So that the Copyright Office is able to meet the statutory deadlines set forth in the Music Modernization Act, no further extensions of time will be granted in this rulemaking.

ADDRESSES: For reasons of government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov.* Specific instructions for submitting comments are available on the Copyright Office's website at *https://www.copyright.gov/rulemaking/pre1972-soundrecordings-noncommercial/.* If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Regan A. Smith, General Counsel and Associate Register of Copyrights, by email at *regans@copyright.gov* or Anna Chauvet, Assistant General Counsel, by email at *achau@copyright.gov.* Each can be contacted by telephone by calling (202) 707–8350.

SUPPLEMENTARY INFORMATION:

I. Background

On October 11, 2018, the president signed into law the Orrin G. Hatch-Bob Goodlatte Music Modernization Act, H.R. 1551 (''MMA''). Title II of the MMA, the Classics Protection and Access Act, created chapter 14 of the copyright law, title 17, United States Code, which, among other things, extends remedies for copyright infringement to owners of sound recordings fixed before February 15, 1972 (''Pre-1972 Sound Recordings''). Under the provision, rights owners may be eligible to recover statutory damages and/or attorneys' fees for the unauthorized use of their Pre-1972 Sound Recordings if certain requirements are met. To be eligible for these remedies, rights owners must typically file schedules listing their Pre-1972 Sound Recordings (''Pre-1972 Schedules'') with the U.S. Copyright Office, which are indexed into the Office's public records.[1] The filing requirement is ''designed to operate in place of a formal registration requirement that normally applies to claims involving statutory damages.'' [2]

The MMA also creates a new mechanism for members of the public to obtain authorization to make noncommercial uses of Pre-1972 Sound

[1] 17 U.S.C. 1401(f)(5)(A)(i)(I)–(II).

[2] H.R. Rep. No. 115–651, at 16 (2018); *see* S. Rep. No. 115–339, at 18 (2018).

Recordings that are not being commercially exploited. Under section 1401, a person may file a notice with the Copyright Office and propose a specific noncommercial use after taking steps to determine whether the recording is, at that time, being commercially exploited by or under the authority of the rights owner.[3] Specifically, before determining that the recording is not being commercially exploited, she must first undertake a ''good faith, reasonable search'' of both the Pre-1972 Schedules indexed by the Copyright Office and music services ''offering a comprehensive set of sound recordings for sale or streaming.''[4] At that point, she may file a notice identifying the Pre-1972 Sound Recording and nature of the intended noncommercial use with the Office (a ''notice of noncommercial use'' or ''NNU'').[5] The Office will index this notice into its public records.[6]

In response, the rights owner of the Pre-1972 Sound Recording may file a notice with the Copyright Office ''opting out'' of (*i.e.,* objecting to) the requested noncommercial use (''Pre-1972 Opt-Out Notice''), and if the user nonetheless engages in the noncommercial use, such use may subject the user to liability under section 1401(a) if no other limitation on liability applies.[7] The rights owner of the Pre-1972 Sound Recording has 90 days from when the NNU is indexed into the Office's public records to file a Pre-1972 Opt-Out Notice.[8] If, however, the rights owner does not opt-out within 90 days, the user may engage in the noncommercial use of the Pre-1972 Sound Recording without violating section 1401(a).[9]

Under the Classics Protection and Access Act, the Copyright Office must issue regulations identifying the ''specific, reasonable steps that, if taken by a [noncommercial user of a Pre-1972 Sound Recording], are sufficient to constitute a good faith, reasonable search'' of the Office's records and music services to support a conclusion that a relevant Pre-1972 Sound Recording is not being commercially exploited.[10] A user following the ''specific, reasonable steps'' identified by the Office will satisfy the statutory requirement of conducting a good faith search, even if the sound recording is later discovered to be commercially exploited.[11] Other searches may also satisfy this statutory requirement, but the user would need to independently demonstrate how she met the requirement if challenged.[12]

The Office must also issue regulations ''establish[ing] the form, content, and procedures'' for users to file NNUs and rights owners to file Pre-1972 Opt-Out Notices.[13]

On October 16, 2018, the Office issued a notice of inquiry (''NOI'') soliciting comments regarding the specific steps a user should take to demonstrate she has made a good faith, reasonable search.[14] The Office also solicited comments regarding the filing requirements for the user to submit an NNU and for a rights owner to submit a Pre-1972 Opt-Out Notice objecting to such use.[15] In response, the Office received ten initial comments and fifteen reply comments, which are discussed further below.[16] Having reviewed and carefully considered the comments, the Office now issues a proposed rule and invites further public comment.

II. Proposed Rule

This document (the ''NPRM'') proposes regulatory language regarding three specific areas: (i) The ''specific, reasonable steps that, if taken by a [noncommercial user of a Pre-1972 Sound Recording], are sufficient to constitute a good faith, reasonable search'' to support a conclusion that a relevant Pre-1972 Sound Recording is not being commercially exploited;[17] (ii) the form, content, and procedures for a user, having made such a search, to file an NNU; and (iii) the form, content, and procedures for a rights owner to file a Pre-1972 Opt-Out Notice.[18]

In proposing the following regulatory language, the Office also confirms, as requested by multiple commenters, that the noncommercial use exception under section 1401(c) is supplementary, and does not negate other exceptions and limitations that may be available to a prospective user, including fair use and the exceptions for libraries and archives.[19] Section 1401(f) separately provides that ''the limitations on the exclusive rights of a copyright owner described in section 107, 108, 109, 110, and 112(f) shall apply to a claim under [section 1401(a)] with respect to a sound recording fixed before February 15, 1972,'' as well as the section 512 limitation on liability relating to material online.[20] Further, section 1401(c) states that whether ''a person files notice of a noncommercial use of a sound recording'' or ''a rights holder opts out of a noncommercial use of a sound recording,'' that ''does not itself enlarge or diminish any limitation on the exclusive rights of a copyright owner described in section 107, 108, 109, 110, or 112(f) as applied to a claim under [section 1401(a)].''[21] These other exceptions and limitations are available to users whether or not they claim the exception for noncommercial use.[22] Regarding fair use specifically, the Office notes that although certain noncommercial uses may constitute fair use, not all may be fair; instead, courts will balance the purpose and character of the use against the other fair use factors.[23]

Similarly, multiple stakeholders commented that the noncommercial use exception should not affect application of the section 108(h) exception available for libraries and archives performing a reasonable investigation regarding the availability of published works in the last twenty years of their copyright term.[24] These commenters rightly note

[3] 17 U.S.C. 1401(c)(1)(A)–(B).

[4] *Id.* at 1401(c)(1)(A).

[5] *Id.* at 1401(c)(1)(B).

[6] *Id.* at 1401(c)(1)(C).

[7] *Id.* at 1401(c)(1).

[8] *Id.* at 1401(c)(1)(C).

[9] *Id.* at 1401(c)(1).

[10] *Id.* at 1401(c)(3)(A).

[11] *Id.* at 1401(c)(4)(B).

[12] *Id.* at 1401(c)(4)(A)–(B).

[13] *Id.* at 1401(c)(3)(B), (5)(A).

[14] 83 FR 52176 (Oct. 16, 2018).

[15] *Id.* at 52176.

[16] The comments received in response to the NOI are available online at *https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=COLC-2018-0008.* References to these comments are by party name (abbreviated where appropriate), followed by either ''Initial'' or ''Reply,'' as appropriate.

[17] 17 U.S.C. 1401(c)(3)(A).

[18] The proposed rule also confirms that 37 CFR 201.4 does not govern the filing of NNUs and Pre-1972 Opt-Out Notices. Similarly, the proposed rule makes a technical edit to reflect that the filing of notices of use of sound recordings under statutory license (17 U.S.C. 112(e), 114) are not governed by 37 CFR 201.4.

[19] *See* ARSC Reply at 1 (addressing interplay between section 1401(c) and section 107); Music Library Association Initial at 1 (same); Electronic Frontier Foundation (''EFF'') Initial at 2 (same); Future of Music Coalition (''FMC'') Reply at 2 (same); Library Copyright Alliance (''LCA'') Initial at 1–2 (addressing interplay between section 1401 and section 108).

[20] 17 U.S.C. 1401(f)(1)(A); (3).

[21] *Id.* at 1401(c)(2)(C), (c)(5)(B).

[22] *See* EFF Initial at 2 (''The Copyright Office should emphasize . . . that fair use will apply (or not) regardless of whether a potential user files a notice of use, and regardless of whether a rightsholder opts out.'').

[23] *See Campbell* v. *Acuff-Rose Music, Inc.,* 510 U.S. 569, 584–85 (1994) (noting ''the commercial or nonprofit educational character of a work is 'not conclusive' '' to fair use (quoting *Sony Corp. of Am.* v. *Universal City Studios, Inc.,* 464 U.S. 417, 448 (1984))); H.R. Rep. No. 94–1476, at 66 (1976) (same).

[24] *See* Copyright Alliance Initial at 2 n.3 (stating that ''any conclusions made in determining what constitutes a 'good faith, reasonable search' for commercial exploitation of a pre-72 sound recording [do] not have any bearing on the meaning or scope of the 'reasonable investigation' requirement within Section 108(h)''); LCA Initial at 1–2 (stating that section 1401 procedures should not apply to libraries and archives employing section 108(h)); American Association of Independent Music (''A2IM'') & Recording Industry Association of America, Inc. (''RIAA'') Reply at 9 (''[W]e agree with LCA that there is not an exact

that sections 1401(c) and 108(h) contain differing statutory criteria regarding the type of search or investigation that must be made before making use of the respective exceptions, and the present rulemaking is focused on administering the exception for Pre-1972 Sound Recordings under section 1401(c).[25] Moreover, section 108(h) is not limited to sound recordings (much less Pre-1972 Sound Recordings); as discussed below, the proposed regulations governing a ''good faith, reasonable search'' for purposes of section 1401(c) specifically consider the various ways sound recordings are brought to market.

Finally, the Copyright Office keenly appreciates that ''some of the users hoping to use [Pre-1972 Sound Recordings] may not have much copyright law background.'' [26] In connection with the Office's overall public information and education initiatives and the promulgation of a final rule, the Office intends to prepare additional public resources regarding Pre-1972 Sound Recordings and the new noncommercial use exception, including potentially a public circular. By the same token, the Office appreciates A2IM and RIAA's view that ''the average person knows full well how to construct an effective internet search designed to uncover a very specific item or information for which they are looking,'' and so while the proposed rule does not presume an expertise in copyright, it does presume a functional search capability on the part of a human user.[27]

A. Good Faith, Reasonable Search

The proposed rule identifies five steps (six in the case of Alaska Native and American Indian ethnographic sound recordings) that, if taken, will support a conclusion that a relevant Pre-1972 Sound Recording is not being commercially exploited.[28] Consistent with the statute's directive to provide ''specific'' steps that are ''sufficient, but not necessary'' to demonstrate a Pre-1972 Sound Recording is not being commercialized, the rule adopts a ''checklist'' [29] approach for users to search across categories rather than an ''open-ended'' approach to better provide certainty to users.[30] The proposed rule divides various types of sources into different categories, and requires users to progressively search in each category (if and until a match is found, with a match evidencing commercial exploitation of the Pre-1972 Sound Recording).[31] Categories to be searched are listed in recommended search order, to reduce the likelihood of duplicative searching.[32] Because in some cases, the type of recording (*e.g.,* classical music, jazz, or ethnographic sound recordings) may warrant searching an additional resource or more particularized search criteria, such additional criteria are included on a tailored basis, as applicable to a particular genre.

In short, the rule proposes searching the following:

1. The Copyright Office's database of Pre-1972 Schedules;
2. One of the following major search engines: Google, Yahoo!, or Bing;
3. One of the following major streaming services: Amazon Music Unlimited, Apple Music, Spotify, or TIDAL;
4. The SoundExchange ISRC database;
5. *Amazon.com*, and, where the prospective user reasonably believes the recording implicates a listed niche genre, an additional listed retailer of physical product; and
6. In the case of ethnographic Pre-1972 Sound Recordings of Alaska Native or American Indian tribes or communities, searching through contacting the relevant tribe, association, and/or holding institution

The NOI generated a wide range of helpful comments from a rich variety of perspectives, and the proposed rule represents a compromise amongst those views. While this NPRM will no doubt draw out additional thoughtful comments, the Office is optimistic that this proposed rule strikes an appropriate balance, achieving the goal of crafting a practical rule with steps that are reasonable to expect of an individual user, yet exhaustive enough to qualify that user for a safe harbor as to the search's sufficiency from the perspective of rights owners' interests. Although a range of stakeholders agreed in principle with this goal,[33] views differed as to how many steps should constitute a ''good faith, reasonable search.'' For example, Public Knowledge suggested that users need only search the Office's database of Pre-1972 Schedules and ''no more than one to two'' streaming services,[34] while A2IM and RIAA proposed nine categories of steps to be searched.[35] In synthesizing the public comments, the Copyright Office notes that the statute expressly contemplates searching on multiple services, including those offering sound recordings ''for sale'' [36] in addition to streaming services, and a congressional report characterizing the search requirement as ''robust.'' [37]

In proposing this rule, the Copyright Office is also mindful of the individual and smaller-group interests from both rights owner and licensee or other user perspectives. The Office is concerned that limiting sources to be searched to only the most commercially popular services might obscure perspectives of ''smaller, less mainstream creators'' and independent services who themselves play a vital role in ensuring that a diverse array of cultural contributions are created and made available to the public.[38] As FMC notes, artists may deliberately ''target niche markets and collectors—sometimes with careful remastering and extensive historical information,'' or may opt not to make their entire catalog available on mainstream streaming services.[39] The proposed rule attempts to account for the diversity of practices and leave room for these competing business models to innovate and flourish. But the proposed

match between the language in Sections 1401(c) and 108(h) regarding the nature of the search that must be conducted before the relevant provision becomes applicable.'').

[25] *See, e.g.,* Copyright Alliance Initial at 3; LCA Initial at 2.

[26] FMC Reply at 6; *see also* AAU Initial at 1.

[27] A2IM & RIAA Reply at 10; *see also* internet Archive Initial at 1 (''Human searchers should be able to search a couple of services quite thoroughly.'').

[28] 17 U.S.C. 1401(c)(3)(A).

[29] Copyright Alliance Initial at 3 (suggesting the checklist ''should represent the *minimum* requirements of a reasonable search and recognize that each individual case will be different and will likely require additional steps'').

[30] EFF Reply at 3 (suggesting that an open-ended rule ''would give potential users no added certainty, making the safe harbor meaningless''); *see* Wikimedia Foundation Reply at 2 (same).

[31] *See* A2IM &RIAA Initial at 4 (describing category-based search structure).

[32] *See id.* at 4, 7 (proposing prioritized search from ''broad'' to ''narrow'' categories and methodology that minimizes ''duplicative searches''); Public Knowledge Initial at 2 (advocating avoidance of ''duplicative'' searching).

[33] *See, e.g.,* Public Knowledge Initial at 2 (''The goal is . . . to strike a practical balance between the interests of rights owners and potential users.''); A2IM & RIAA Reply at 2 (''[T]he Office has an obligation to respect and preserve the careful balance struck by Congress in enacting Section 1401(c).'').

[34] Public Knowledge Initial at 5, App.

[35] A2IM & RIAA Initial at 4–6.

[36] 17 U.S.C. 1401(c)(1)(A)(ii); *see id.* at 1401(c)(3)(A) (directing the Register to issue regulations identifying ''services offering a comprehensive set of sound recordings for sale or streaming'' to be searched).

[37] Report and Section-by-Section Analysis of H.R. 1551 by the Chairmen and Ranking Members of Senate and House Judiciary Committees, at 25 (2018), *https://www.copyright.gov/legislation/mma_conference_report.pdf* (''Conf. Rep.'').

[38] FMC Reply at 1–2; *see also* Copyright Alliance Initial at 1 (discussing relationship between ''existing general and niche markets''); A2IM & RIAA Reply at 9 (listing a variety of specialized storefronts and discussing period or niche recordings ''not previously available through comprehensive streaming services like Spotify and Apple Music''); *IMSLP.ORG* Reply at 2 (classical music storefront).

[39] FMC Reply at 3.

rule also takes into account smaller users. It tries to prioritize services with intuitive search capabilities and minimize resources where a subscription is required to access the search function; further, the categories to be searched—with the potential exception of interactive streaming services, which all commenters agree are statutorily required to be included in a search—are all available at no cost to the user.[40] As noted below, the Office has declined to include various suggestions that might be redundant or overly burdensome, and some criteria are included only as applicable to a particular genre of work. The proposed rule also does not require ''consultation with an experienced music clearance professional,'' although the Office does not discourage such consultation, which may prove helpful to a user planning a wide-scale or complex use case.[41]

In proposing the following search criteria, the Office agrees with various rights holders that the noncommercial use exception is not intended to displace the important role of licensed transactions to facilitate the use of Pre-1972 Sound Recordings.[42] Indeed, a main thrust of Title II is to ''create royalties'' for these works using the same rates and distribution system already applicable for post-72 works, particularly by music services that previously used pre-1972 works ''while paying royalties for post-72 works.'' [43] In this rulemaking, Copyright Alliance has asked the Office to require a user to directly notify a rights owner if that owner can be located.[44] While the Office agrees that, practically speaking, the noncommercial use exception may be unavailable for many works where the rights owner is readily identifiable since those works are more likely to be commercially exploited,[45] the statute does not require users to contact rights owners or determine that they cannot be located before relying on the section 1401(c) exception.[46] Instead, the purpose of the good faith, reasonable search is ''to determine whether the sound recording is being commercially exploited by or under the authority of the rights owner.'' [47] Although the Conference Report states that the noncommercial use exception is ''provided *primarily* to enable use of older recordings where it may not be clear to a user how to contact the rights owner to ask for permission,'' [48] use of the word ''primarily'' indicates that Congress contemplated situations where the rights owner may be known to the user, but the owner has ceased or otherwise refrained from commercially exploiting the sound recording. In any event, comments suggest that a large array of Pre-1972 Sound Recordings do not have an identifiable owner, in which cases a prospective user making use of the section 1401(c) safe harbor and filing an NNU can expect to benefit from this additional exception.[49]

Similarly, multiple commenters pointed out differences between section 1401(c)'s requirement to identify whether a work is being commercially exploited with prior proposals regarding orphan works, including a 2008 bill which provided a description of a ''qualifying search, in good faith, to locate and identify the owner of the infringed copyright'' before making use of an orphan work.[50] For these reasons, while the Office hopes that the MMA's noncommercial use provision may well prove to yield useful insights into the broader orphan works debate, the proposed rule is necessarily tailored to the *sui generis* noncommercial use exception for Pre-1972 Sound Recordings and was not crafted to specifically address that ongoing debate.[51]

Finally, while the proposed rule is intended to take into account the current music marketplace, Congress has provided regulatory flexibility so that the Copyright Office may periodically update its list of specific steps to take into account changes in the music landscape, and the Office expects to exercise that authority as warranted by changes in the marketplace.[52]

i. Required Sources To Search

1. Searching the Copyright Office's Database of Pre-1972 Schedules

First, section 1401(c) requires that for a search to constitute a good faith, reasonable search, the search must include searching for the Pre-1972 Sound Recording in the Copyright Office's database of Pre-1972 Schedules.[53] The Office has issued an interim rule governing how rights owners may file Pre-1972 Schedules and how they are made publicly available through an online database.[54] For each sound recording, the Pre-1972 Schedule

[40] *See* Public Knowledge Initial at 6 (''It would be inappropriate for the Copyright Office to require that a user search the catalog of a service where a subscription is required to access the search function.''). Public Knowledge would include Amazon Music Unlimited and Apple Music as proposed services to search, which are not free, and other services may require a paid subscription to enable more robust search features. *See also* A2IM & RIAA Reply at 5 (''[T]he cost of any necessary subscriptions is not very high, especially when considering the availability of free trials for premium services and free basic tiers for most services.'').

[41] A2IM & RIAA Initial at 9.

[42] *See, e.g., id.* at 1–2 (suggesting that in many cases, voluntary licensing may prove more efficient within a short timeframe than this exception); Copyright Alliance Initial at 2–3 (stating the noncommercial uses exception ''should not be used to circumvent the normal licensing process or as a substitute for requesting permission from rights owners who can be contacted''); SoundExchange Initial at 2.

[43] S. Rep. No. 115–339, at 17–18 (2018); *see* H.R. Rep. No. 115–651, at 15 (2018); 17 U.S.C. 1401(b), (d) (addressing payment of royalties pursuant to the rates and terms adopted under sections 112(e) and 114(f) or direct licensing).

[44] Copyright Alliance Initial at 2–3, 5.

[45] *See, e.g.,* A2IM & RIAA Initial at 1–2; SoundExchange Initial at 2; FMC Reply at 6 (''We largely agree with RIAA's contextualization of 1401(c), as not oriented to cases where the current rights owner is known or 'reasonably capable of discovery.' ''); *but see* LCA Reply at 1.

[46] 17 U.S.C. 1401(c)(1)(A); *see also* EFF Initial Comments at 2.

[47] 17 U.S.C. 1401(c)(1)(A).

[48] Conf. Rep. at 25 (emphasis added).

[49] Association for Recorded Sound Collections (''ARSC'') Reply at 2 (citing data suggesting that rights owner is unidentifiable for 16% of pre-1965 recordings, and up to 26% for certain categories like 1920–1929 or popular and rock recordings); *see also* Public Knowledge Initial at 3 (''The number of pre-1972 sound recordings that are still being commercially exploited are vastly outnumbered by those that have no commercial value or interest.'').

[50] *See* EFF Initial at 2; Public Knowledge Reply at 7; Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. sec. 514(b)(1) (as passed by Senate, Sept. 26, 2008); *see also* U.S. Copyright Office, Orphan Works and Mass Digitization (2015), *https://www.copyright.gov/orphan/reports/orphan-works2015.pdf;* A2IM & RIAA Initial at 10 (agreeing with categorical approach adopted in the 2008 bill, but ''find[ing] the steps outlined there to be too generic'' for section 1401(c)); *IMSLP.ORG* Reply at 1 (maintaining that the ''diligent effort'' requirement in the 2008 bill is too general, and that having a ''detailed list of steps required to satisfy the search requirement for services'' would be more helpful). To the extent commenters suggested that the 2008 bill is helpful to highlight specific aspects of a proposed search step, it is addressed further below.

[51] *See* Conf. Rep. at 15; S. Rep. No. 115–339, at 18 (2018) (noting *sui generis* nature of exception).

[52] *See* Conf. Rep. at 25 (noting search must be based on ''services available in the market at the time of the search''); A2IM & RIAA Initial at 7.

[53] 17 U.S.C. 1401(c)(1)(A)(i), (f)(5)(A). Public Knowledge asks the Office to ''explore whether it possesses the authority to institute a limited renewal requirement, under which entries in [Pre-1972 Schedules] would be subject to a periodic renewal in the same vein as DMCA agent designations.'' Public Knowledge Reply at 17; *see* 37 CFR 201.38(c)(4) (requiring DMCA agent designation to be updated every three years); *see also* 17 U.S.C. 512(c)(2)(B) (requiring the Register to ''maintain a current directory'' of agents). Section 1401 does not explicitly reference the need for periodic renewal of Pre-1972 Schedules, although it does apply different terms of protection to Pre-1972 Sound Recordings depending upon their year of first publication. 17 U.S.C. 1401(a)(2). The Office does not propose such a requirement at this time (and notes that substantive comments in its contemporaneous rulemaking regarding Pre-1972 Schedules did not raise this issue). The Office is open, however, to exploring the need and regulatory authority for such a renewal requirement for Pre-1972 Schedules (or NNUs) at a later date, perhaps in connection with periodic review of the search requirements promulgated under this rule.

[54] 83 FR 52150 (Oct. 16, 2018).

must include the rights owner's name, the sound recording title, and the featured artist, and rights owners may opt to include additional information, such as album title.[55]

For this rulemaking, the proposed rule would require users to search for the title and featured artist(s) of the Pre-1972 Sound Recording. If the user knows any of the following attributes of the Pre-1972 Sound Recording, the search must also include searching: Alternate artist name(s), alternate title(s), album title, and the International Standard Recording Code (''ISRC''). The user may also optionally search any other attributes known to the user of the sound recording, such as label, version, or Universal Product Code (''UPC''). The following fields in the Office's database of Pre-1972 Schedules will be searchable: Rights owner, sound recording title (which includes alternate titles), album, label, featured artist (which includes alternate artist name(s)), and ISRC. In response to comments, the Office is pleased to report that its database of Pre-1972 Schedules already allows for wildcard searching by using an asterisk to fill in partial words.[56] A user can export and download the search results based on those fields into an Excel spreadsheet to view (and search) additional data, such as version or UPC.

2. Searching With a Major Search Engine

Second, the proposed rule asks the user to search for the Pre-1972 Sound Recording using at least one major search engine, namely: Google, Yahoo!, or Bing, to determine whether the sound recording is being commercially exploited.[57] Users are widely accustomed to conducting internet searches, and such searching is free and may render searching on a streaming service or other service unnecessary. For example, a search on the phrase ''rockin around the christmas tree'' using Google—to locate the 1958 recording ''Rockin' Around the Christmas Tree'' featuring artist Brenda Lee—shows, among other things, that the sound recording is available for streaming on Spotify, Google Play Music, Deezer, and Apple Music.[58] Similarly, a search on the combined phrases ''rockin around the christmas tree'' and ''purchase'' using Google shows that the same sound recording is available for sale as an .mp3 file download and on a compact disc through *Amazon.com*. The proposed rule, as well as the Office's form or instructions, will make clear this search is to determine whether the Pre-1972 Sound Recording is being commercially exploited (*i.e.,* by being offered for sale in download form or as a new (not resale) physical product, or through a streaming service), and not simply whether the internet includes web pages discussing the recording, such as musicological, historical, or other commentary about the work.

3. Searching on a Digital Streaming Service

Third, the proposed rule asks the user to search at least one of the following streaming services, each of which offers tens of millions of tracks:[59] Amazon Music Unlimited,[60] Apple Music,[61] Spotify,[62] or TIDAL.[63] The Office proposes these streaming services because, among the commenters who proposed specific streaming services to search, there appears to be agreement on these services in particular.[64] In addition, these services currently offer some of the largest repertoires of tracks and ''receive digital feeds from the major labels, large indie labels and significant distributors.''[65] The Office invites public comment on whether Google Play Music and/or Deezer should be included in the list of streaming services, as they also offer large repertoires of tracks but were not identified as possible sources from as many commenters.

A spectrum of commenters suggested that the rule should require a user to search multiple, but not all, such streaming services.[66] While it is clear that these services' repertoires are not identical—including because some rights owners may engage in exclusive streaming arrangements[67]—commenters also noted that searching multiple streaming services might be duplicative.[68] For example, internet Archive, citing its own efforts to ''automat[e] the process of searching for commercial availability at scale,'' suggests that a good faith, reasonable search ''should entail performing a few high quality searches on a small number of large services rather than performing a low quality search across a large number of services.''[69] The Office invites comment on whether users should be required to search a greater number of these services.

The Office agrees that requiring repetitive searches of all these streaming services would likely be redundant. Instead, as explained further below, because Pre-1972 Sound Recordings can also be expected to be commercially exploited outside of these services, the proposed rule would limit the number of streaming services to be searched, but add qualitatively different sources to

[55] 37 CFR 201.35(d). The Office expects to issue a final rule regarding the filing of Pre-1972 Schedules, which will ask rights owners to provide the International Standard Recording Code (''ISRC'') (if known), and to optionally provide the version, alternate artist name(s), and Universal Product Code (''UPC''). This expansion of fields accommodates comments in that parallel proceeding, and should ease user concerns about disambiguating data. *See* A2IM, RIAA & SoundExchange Comments re Filing of Schedules by Rights Owners and Contact Information by Transmitting Entities Relating to Pre-1972 Sound Recordings at 7–8 (requesting addition of ISRC number, sound recording version, and alternate artist name fields); EFF Initial at 3 (discussing searches of the Office's database of Pre-1972 Schedules).

[56] *See, e.g.,* A2IM & RIAA Initial at 6; Copyright Alliance Initial at 4; EFF Initial at 3. For example, a search for ''light*'' in the title field currently returns, among other titles, ''(In The) Cold Light Of Day,'' ''Harbor Lights,'' ''White Lightnin','' and ''White Lightning.'' *See Schedules of Pre-1972 Sound Recordings,* U.S. Copyright Office, *https://copyright.gov/music-modernization/pre1972-soundrecordings/search-soundrecordings.html* (last visited Jan. 28, 2019). The Office has updated the search instructions on its database web page so users are aware of this search capability. While the current technology does not permit ''fuzzy'' searching, that limitation is also noted on the web page to guide user expectations.

[57] *See* A2IM & RIAA Initial at 5; Copyright Alliance Initial at 4; FMC Reply at 6 (each suggesting that major search engines should be searched).

[58] Google, *https://www.google.com/search?client=firefox-b-1-ab&q=%E2%80%9Crockin+around+thechristmastree%E2%80%9D* (last visited Jan. 28, 2019).

[59] A2IM & RIAA Initial at 5.

[60] Amazon, *Amazon Music: What is Amazon Music Unlimited?, https://www.amazon.com/gp/help/customer/display.html?nodeId=202059460* (last visited Jan. 28, 2019) (stating Amazon Music Unlimited offers 50+ million tracks).

[61] Apple, *Apple Music, https://www.apple.com/apple-music/* (last visited Jan. 28, 2019) (stating Apple Music offers 50+ million tracks).

[62] Spotify, *Spotify Investors, https://investors.spotify.com/home/default.aspx* (last visited Jan. 28, 2019) (stating Spotify offers 40+ million tracks).

[63] TIDAL, *What is TIDAL, https://support.tidal.com/hc/en-us/articles/202992312-About-TIDAL* (last visited Jan. 28, 2019) (stating TIDAL offers 57+ million tracks).

[64] A2IM & RIAA Initial at 7 (identifying Amazon Music Unlimited, Apple Music, Spotify and TIDAL as possible streaming services to search); EFF initial at 4 (identifying Amazon Music, Apple Music, Spotify, and TIDAL as possible streaming services to search); Public Knowledge Initial at 5, App. (identifying Amazon Music Unlimited, Spotify, and Apple Music as possible streaming services to search).

[65] A2IM & RIAA Initial at 5.

[66] *Id.* at 7 (proposing users search on two services including, among others, Amazon Music Unlimited, Apple Music, Spotify and TIDAL); EFF Initial at 4 (contending that ''[r]easonable to include some subset'' of services including, among others, Amazon Music, Apple Music, Spotify, and TIDAL); Public Knowledge Initial at 5, App. (proposing search of ''no more than one to two'' of the following services: Amazon Music Unlimited, Spotify, or Apple Music).

[67] Recording Academy Reply at 4 (suggesting the rule should require searching of more than two services).

[68] A2IM & RIAA Initial at 7; Public Knowledge Initial at 2.

[69] Internet Archive Initial at 1.

search, such as major search engines, the SoundExchange ISRC lookup tool, and, for certain niche genres, other specific resources. By requiring searches on only one of these comprehensive streaming services, the proposed rule also minimizes the potential financial burden on prospective users. To be sure, A2IM and RIAA note that the cost of these subscription services are ''not very high,'' suggesting that it is not unreasonable to ask users ''to take on a handful of short-term subscription payments in order to gain a royalty-free license to valuable sound recordings.'' [70]

IMSLP.ORG contends that users conducting a good faith, reasonable search under section 1401(c) should be able to search streaming services using ''Application Programming Interfaces (APIs) officially supported by the relevant service,'' as APIs ''considerably decrease the cost of performing such searches with no loss of accuracy.'' [71] The Office invites public comment on whether the proposed rule should address whether users should be able to use officially-supported APIs to search and locate a Pre-1972 Sound Recording on a streaming service.

4. Searching With the SoundExchange ISRC Lookup Tool

Fourth, the proposed rule asks the user to search for the Pre-1972 Sound Recording using the free online SoundExchange ISRC lookup tool (located at *https://isrc.soundexchange.com/#!/search*) to search SoundExchange's database, which contains information for more than 27 million sound recordings, including Pre-1972 Sound Recordings.[72] An overwhelming number of stakeholders representing rights owners recommended inclusion of the SoundExchange ISRC lookup tool as an important category of search.[73] For its part, SoundExchange characterizes its database as ''quite possibly the most authoritative and comprehensive database of sound recordings that have otherwise been commercially exploited.'' [74] On the other hand, Public Knowledge objects to including this lookup tool because it is not itself a ''service[ ] offering a comprehensive set of sound recordings for sale or streaming.'' [75]

Because the ISRC lookup tool allows users to freely and easily search a deep trove of sound recording information that rights owners themselves have submitted in connection with commercializing those recordings, including on multiple streaming services, the proposed rule tentatively concludes it is desirable and appropriate to include this tool as a step in a sufficient good faith, reasonable search. A few considerations buttress this conclusion. First, rights owners register and provide these data regarding their sound recordings so they can be paid for their use under the statutory and direct licenses administered by SoundExchange, including the compulsory licenses applicable for internet radio, satellite radio, cable TV music services, streaming into business establishments, and other services.[76] As a result, the database provides indicia of exploitation on a wide expanse of music services that the Office does not otherwise propose searching before a user may qualify for the safe harbor under section 1401(c) (*e.g.,* Pandora, Sirius XM, iHeartRadio, MusicChoice, and over 3,100 other non-interactive digital streaming services).[77] While not disputing that these types of non-interactive services are exploiting Pre-1972 Sound Recordings, Public Knowledge and others propose excluding non-interactive services ''because they are not usefully searchable for specific tracks.'' [78] But unlike other parts of the copyright law, the reference to ''services'' in section 1401(c) does not distinguish between non-interactive and ''interactive services.'' [79] Given the acknowledged commercial exploitation on non-interactive services, it seems reasonable for a good faith search to cover this broader array of services. Second, this database appears to offer user friendly and granular results available for these recordings. Using the lookup tool is free, without requiring the user to establish an account, take a subscription, or convey any personal information.[80] It also apparently receives high marks regarding search confidence and ease, employing fuzzy matching and wildcard searching that a broad spectrum of commenters concur is helpful in gauging the accuracy of results.[81] Third, the information in the ISRC database is populated and verified by rights owners themselves, allaying concerns that inaccurate information may lead prospective users astray.[82] The uneven quality of publicly accessible music repertoire data is well-documented and indeed, an animating issue that the Music Modernization Act seeks to address in the context of the section 115 license.[83] As SoundExchange attests, ''even when SoundExchange learns

[70] A2IM & RIAA Reply at 5–6 (noting similar requirement in 2008 Shawn Bentley Orphan Works Bill).

[71] *IMSLP.ORG* Reply 2.

[72] SoundExchange Initial at 2–3.

[73] *See* A2IM & RIAA Initial at 5 (rights owners provide metadata to SoundExchange ''for royalty collection, which is a form of commercial exploitation''); Copyright Alliance Initial at 5 (''SoundExchange's ISRC search tool should be searched, as it provides a vast library of information concerning sound recordings that are submitted by rights owners and their authorized representatives to SoundExchange for the purpose of collecting royalties, which is a form of commercial exploitation''); SoundExchange Initial at 2–14; FMC Reply at 6 (stating that the SoundExchange ISRC lookup tool is ''eminently useful'' and that inclusion of a sound recording in this database ''is an unambiguous indicator that a recording is being commercially exploited''); Recording Academy Reply at 3 (''SoundExchange's ISRC Search tool is indispensable to a good faith, reasonable search.'').

[74] SoundExchange Initial at 2.

[75] Public Knowledge Reply at 10 (citing 17 U.S.C. 1401(c)(1)(A)(ii)).

[76] SoundExchange Initial at 2–3 (''[R]ights owners and their representatives made a conscious choice to register with SoundExchange and submit their repertoire metadata to allow them to be paid for uses of their works under the statutory licenses and direct licenses administered by SoundExchange.'').

[77] *See* SoundExchange, *Who Pays SoundExchange: Q3 2018, https://www.soundexchange.com/wp-content/uploads/2016/09/2018-Jan-Sept-Licensee-List.pdf.*

[78] Public Knowledge Initial at 6; *see also* EFF Initial at 4 (proposing to exclude ''services like Pandora and Sirius XM'' because they ''do not offer granular searches for particular recordings'' but supporting a potential search requirement of music distribution services that supply works to such services); *cf.* Recording Academy Reply at 3 (''Excluding entirely non-interactive services that utilize the Section 114 statutory license would immediately render a search to determine if a track is being commercially exploited both unreasonable and in bad faith.'').

[79] *Compare* 17 U.S.C. 1401(c)(1), (3) *with* 17 U.S.C. 114(d)(2)–(3), (e)(2) (j)(6)–(7) (various provisions distinguishing between interactive and non-interactive services).

[80] *See* Public Knowledge Initial at 6 (advocating ''free-to-search''); EFF Initial at 4 (sources should be ''searchable without a paid subscription, and without requiring users to disclose personal information''); Wikimedia Foundation at 5 (same).

[81] *See, e.g.,* Wikimedia Foundation at 5 (discussing potential ''deficiencies in the searchability of the specified databases,'' such as errors or ''the presence of absence of 'the' in names or titles''); EFF Initial at 3 (search results are limited by characteristics of the software as well as search terms used); Internet Archive Initial (stressing importance of ''high quality'' searches); A2IM & RIAA at 2 (importance of fuzzy matching and wildcard searching); Copyright Alliance Initial at 4 (same regarding Office's database).

[82] *See, e.g.,* Internet Archive Initial at 2 (expressing concern that Spotify database includes ''unlicensed'' recordings); Public Knowledge Reply at 11 (objecting to YouTube being included in search steps as unlicensed content is not ''by or under the authority of the rights holder''; expressing concerns about resale or imported physical media).

[83] *See* U.S. Copyright Office, Copyright and the Music Marketplace 184 (2015), *https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf;* H.R. Rep. No. 115–651 at 8 (''Music metadata has more often been seen as a competitive advantage for the party that controls the database, rather than as a resource for building an industry on''; noting that the database required by the legislation will include a variety of sound recording information); *see also* SoundExchange Initial at 43 (''Many digital music services operating under the statutory licenses have (or at least report to SoundExchange) very low quality data identifying the recordings they use.'').

from a service of a putative recording not represented in its repertoire database, SoundExchange will not reflect the recording in its repertoire database unless identifying information for the recording is provided by the rights owner or authorized representative of the rights owner.'' [84]

The Office does not read section 1401(c) so narrowly as to preclude searching resources—such as the SoundExchange ISRC lookup tool or major search engines—that are used ''*to determine whether*'' a Pre-1972 Sound Recording is being commercially exploited on services offering a comprehensive set of sound recordings for sale or streaming.[85] Such cross-platform tools can quickly reveal information relevant to whether a recording is being used on a variety of services that are unequivocally involved in commercially exploiting the sound recordings, but of which the Office does not propose searching for purposes of this safe harbor, as noted further below. To exclude reliance upon these sources would hamper the Office's ability to craft a smaller list of ''specific, reasonable steps'' that a user may take before filing a NNU.[86] Requiring a prospective user to search the ISRC lookup tool is thus expected to serve as a reasonable proxy for searches on a wide array of services that offer a comprehensive set of sound recordings for sale or streaming, and specifically, to address stakeholder concerns (from both the prospective user and rights owner perspectives) that it is otherwise difficult to determine exploitation by non-interactive services that offer limited user search capability.[87]

5. Searching Sellers of Physical Product

Fifth, the proposed rule asks the user to search for the Pre-1972 Sound Recording on at least one major seller of physical product, namely *Amazon.com*, and if the user reasonably believes that the sound recording is of a niche genre such as classical music (including opera) or jazz, one smaller online music store offering recordings in that niche whose repertoires are searchable online, namely: ArkivJazz, ArkivMusic (classical), Classical Archives, or Presto (classical). Users of works in other genres are encouraged but not required to search Acoustic Sounds or Smithsonian Folkways Recordings (*e.g.,* international or ''world'' music, zydeco, folk, spoken word).[88] The Office invites public comment on whether, in addition to classical music and jazz, there are specific niche genres of Pre-1972 Sound Recordings that similarly should require the user to search another online music service offering a comprehensive set of recordings in that niche—and if so, to identify the specific sources to be searched.

The Office agrees that it is appropriate to limit safe harbor requirements to search for physical products to internet searches,[89] but finds it important that a good faith, reasonable search be calculated to include ''services offering a comprehensive set of sound recordings *for sale,*'' [90] as some works may be less available on streaming services, but are nonetheless being commercialized in physical formats, including reissues.[91] Although Public Knowledge and *IMSLP.ORG* express concern that sales of physical copies include second-hand sales, as opposed to commercial exploitation by the copyright owner,[92] physical retailers typically indicate whether the products are new or used, and others note the robust market for newly reissued albums.[93] For example, a search for ''Faith and Grace'' by The Staple Singers on *Amazon.com* allows users to purchase both new and used compact discs with that sound recording.[94]

6. Searches for Ethnographic Pre-1972 Sound Recordings

At the reply comment stage, concerns regarding the noncommercial use of ethnographic Pre-1972 Sound Recordings were raised by the National Congress of American Indians (''NCAI''), the oldest and largest national organization made up of Alaska Native and American Indian tribal government, and Professors Trevor Reed, Jane Anderson, and Robin Gray, who have worked on legal and cultural issues surrounding pre-1972 ethnographic sound recordings. NCAI asserts that ''[t]he lack of complete and accurate information typically available on copyright interests in ethnographic sound recordings, and the cultural sensitivity of the contents of many ethnographic sound recording collections, merits consideration of special opt-out rules carefully tailored to the specific needs of Native American communities.'' [95] As NCAI explains further:

> Often such recordings are the result of anthropological or ethnographical gatherings of sound recordings, frequently capturing ceremonial or otherwise culturally significant songs. Further, due to the circumstances of how these recordings were conducted—often without any documentation of the free and prior informed consent of the tribal practitioners/performers—tribes today are unaware of much of the content that they potentially hold valid copyright claims over.[96]

Similarly, Professors Reed, Anderson, and Gray explain that ''scholars have extensively documented the inequalities and ethical dilemmas surrounding early ethnographic field recording,'' claiming that ''ownership interests in pre-1972 ethnographic sound recordings are presumed to have vested in and remained with the performers who recorded them under the common-law rule,'' but that unrelated holding institutions (*e.g.,* libraries, archives, museums, and universities) typically possess the master recordings.[97] Those professors suggest that regulations governing the noncommercial use exception under section 1401(c) ''must be carefully tailored to the informational disadvantages Native American tribes and tribal members face as they attempt to locate and protect their rights to

[84] SoundExchange Initial at 4.

[85] 17 U.S.C. 1401(c)(1)(A) (emphasis added).

[86] *Cf.* Public Knowledge Initial at 2, 6 (suggesting search requirements should be ''proportional'').

[87] *See* 17 U.S.C. 1401(c)(1)(A); (3). *Compare* Copyright Alliance Reply at 2–3; FMC Reply at 4; *and* Recording Academy Reply at 3 (expressing concerns related to rights owner interests) *with* EFF Initial at 4 *and* Public Knowledge Initial at 2 (expressing concerns related to user perspectives).

[88] The proposed rule thus collapses steps 8 and 9 as proposed by A2IM & RIAA, that is, searches of retailers of physical product and niche services. *Compare* A2IM & RIAA Initial at 6. The record and the Office's observations suggest that the universe of niche digital-only sites is small, focused on classical music, and likely to overlap with searches of retailers of physical product.

[89] EFF Initial at 4 (''The Office should not require that potential users search for commercialization of physical copies of recordings unless records of such commercialization are searchable on the internet or in the Office's pre-1972 schedules.'').

[90] 17 U.S.C. 1401(c)(1)(ii) (emphasis added).

[91] *See, e.g.,* FMC Reply at 3 (providing example of recordings by The Staple Singers which are readily available as a box set via *Amazon.com* or *Discogs.com*, and easily located by a simple search engine search, but which are unavailable on Spotify or Apple Music).

[92] Public Knowledge Initial at 7; Public Knowledge Reply at 11; *IMSLP.ORG* Reply at 1.

[93] *See* FMC Reply at 6. FMC contends that Public Knowledge ''overstates the difficulty of discerning whether physical media is made available by authorization of the rightsholder—the risk of a false positive is small when every physical retailer classifies its products as new or used.'' *Id.* at 4. Indeed, although Public Knowledge raises the issue of items being offered for resale ''new'' a/k/a in original shrink wrap packaging, its own example suggests that ''further inspection'' can typically clarify whether an item is being offered for first sale, or resale. Public Knowledge Reply at 12.

[94] *Faith and Grace: A Family Journey 1953–1976,* Amazon (last visited Jan. 28, 2019), *https://www.amazon.com/gp/product/B015FWTAOO?pf_rd_p=c2945051-950f-485c-b4df-15aac5223b10&pf_rd_r=QFZRHA19C97VBPY81EGB*; FMC Reply at 3 (noting availability of ''Faith and Grace'' on a compact disc set, but not on Spotify or Apple Music).

[95] NCAI Reply at 1.

[96] *Id.*

[97] Reed, Anderson & Gray Reply at 2.

ethnographic sound recordings.'' [98] Specifically, they maintain that for pre-1972 Native American ethnographic recordings, ''a user should not qualify for the [section 1401(c)] safe harbor unless the relevant Native American tribe or tribes has certified the identity of the sound recording, its owner(s), and its current commercial uses.'' [99]

The Copyright Office is sensitive to the need to ensure that regulations governing the noncommercial use of Pre-1972 Sound Recordings do not adversely impact Alaska Native and American Indian tribes or communities. The Office has previously noted that ethnographic field recordings ''are an enormous source of cultural and historical information, and come with their own unique copyright issues,'' [100] and that ''librarians and archivists who deal with ethnographic materials must abide by the cultural and religious norms of those whose voices and stories are on the recordings.'' [101] The Office appreciates that the public ownership record for these recordings may be less developed and/or indexed into major search engines, and that as a result, searches that are otherwise reasonable for a prospective user may fail to identify that a specific ethnographic recording is being commercially exploited by the rights owner. But the Office must also be careful not to exceed its regulatory authority, by, for example, imposing a requirement that the user obtain certification of the identity of the sound recording and its owner before making use of the safe harbor.[102]

Accordingly, for ethnographic Pre-1972 Sound Recordings of Alaska Native or American Indian tribes or communities, if the user does not locate the relevant sound recording in the Copyright Office's database of Pre-1972 Schedules or other search categories, the proposed rule asks the user to contact the Alaska Native or Native American tribe and, if known to the user, the relevant holding institution to aid in determining whether the sound recording is being commercially exploited.[103] Specifically, the rule proposes that the user make contact by using contact information known to the user if applicable, and also by using the contact information provided in NCAI's tribal directory.[104] If no information is listed or the tribe is unknown to the user, the user should contact NCAI itself. The Office believes that this search step is a reasonable burden to ask prospective users of such expressions of cultural heritage in light of the complicated history of some of these sound recordings. The Office also expects that the notification requirement will prove useful to rights owners who wish to exercise discretion to opt out of the noncommercial use by filing notice in the Copyright Office.[105]

The Copyright Office appreciates that these issues are nuanced and is committed to addressing them in a sensitive and thoughtful manner. The Office acknowledges that these comments were received in the reply comment stage, without opportunity for further comment. Because the Office must timely promulgate a rule for the safe harbor to be available to prospective users of all types of Pre-1972 Sound Recordings,[106] interested parties are encouraged to submit written comments or contact the Office for a meeting to discuss this provisional aspect of the proposed rule.

ii. Sources Not Required To Be Searched

The proposed rule is intended to be accurate and comprehensive, while minimizing redundancy. In proposing a list of ''specific, reasonable'' steps, the Office declines to add some additional search steps or services proposed by some commenters. Among suggestions received, the rule does not propose to include:

- Additional comprehensive streaming services beyond the one the user elects to search from the proposed rule's list of services
- Terrestrial or internet radio services, including non-interactive services subject to the section 114 license [107]
- The to-be-created Mechanical Licensing Collective database [108]
- Dogstar Radio, which offers searchable playlists from Sirius XM
- Online databases of U.S. performing rights organizations
- Other comprehensive databases offered by private actors (*e.g.,* Songfile, Rumblefish, Songdex, Cuetrak, Crunch Digital)
- *IMDB.com*
- Video streaming services
- The SXWorks NOI Tools
- Music distribution services (*e.g.,* CDBaby, Tunecore)
- Predominantly foreign music services [109]
- SoundCloud or Bandcamp
- Niche streaming services (*e.g.,* Idagio, Primephonic)

Notably, the proposed rule does not ask the user to search services based on the commercial exploitation of user-generated content, such as YouTube. Commenters *IMSLP.ORG* and Public Knowledge maintain that a search should not include services permitting user-uploaded content because such services include unauthorized uses of Pre-1972 Sound Recordings, which do not constitute commercial exploitation ''by or under the authority of the rights owner'' as required by section 1401(c)(1)(A).[110] By contrast, Recording Academy contends that Congress contemplated searching on services with user-uploaded streaming platforms.[111] The Office agrees that a good faith, reasonable search should be targeted at locating authorized instances of commercial exploitation, and the

[98] *Id.* at 3.

[99] *Id.* at 4.

[100] U.S. Copyright Office, Federal Copyright Protection For Pre-1972 Sound Recordings 52 (2011), *https://www.copyright.gov/docs/sound/pre-72-report.pdf* (''Pre-1972 Sound Recordings Report'').

[101] *Id.* at 61 (citing Rob Bamberger and Sam Brylawski, Nat'l Recording Preservation Board of the Library of Congress, The State of Recorded Sound Preservation in the United States: A National Legacy at Risk in the Digital Age 19 (2010)).

[102] *Compare* Reed, Anderson & Gray Reply at 4.

[103] *See id.* at 2 (suggesting that the marketplace lacks ''inaccurate and unreliable information about these sound recordings,'' necessitating tribal consultation). For example, the professors' comment suggests that making contact may be valuable to provide title, artist, or other information relevant to a particular recording.

[104] *See Tribal Directory,* Nat'l Cong. of Am. Indians (last visited Jan. 28, 2019), *http://www.ncai.org/tribal-directory* (providing searchable directory by tribe name, area, and keyword).

[105] *See* 17 U.S.C. 1401(c)(1)(C).

[106] *Id.* at 1401(c)(3).

[107] As noted above, this conclusion is based, in part, on the proposal to include the SoundExchange ISRC lookup tool in the proposed rule.

[108] Although the Office is open to revisiting the relevance of the MLC database once it is up and running, it is disinclined to ask rights owners to provide ''the hashes, with APIs, of all pre-72 sound recordings indexed'' into the database. Music Library Association Initial at 1; *see also* A2IM & RIAA Initial at 5 (suggesting database should be searched *sans* hashes). Other commenters have explained in more detail the difficulty with this request, and overall the Office agrees that the Music Library Association's proposal is opaque and beyond the scope of this rulemaking. *See* A2IM & RIAA Reply at 4; Copyright Alliance Reply at 2; FMC Reply at 2.

[109] *See Find Music Services,* Pro Music, *https://pro-music.org/legal-music-services.php* (last visited Jan. 28, 2019); *see also* A2IM & RIAA Initial at 6; IFPI Initial at 1–2; Public Knowledge Reply at 2 (all discussing same).

[110] *IMSLP.ORG* Reply at 2 (''services permitting user-uploaded content without any mandatory service-side verification of copyright ownership'' such as YouTube ''should be categorically excluded'' from noncommercial use searches under section 1401(c)); Public Knowledge Reply at 11 (maintaining that because websites like YouTube display a combination of licensed and unlicensed media, a sound recording's ''availability on that platform may not be reliable evidence of the recording being commercially exploited 'by or under the authority of the rights owner' as required by § 1401(c)(1)(A)'').

[111] Recording Academy Reply at 4 & n.5 (citing Conf. Rep. at 25) (''it is important that a user seeking to rely on subsection (c) make a robust search, including user-generated services and other services available in the market at the time of the search'').

presumptive difficulty for online service providers to predetermine whether content is authorized by a rights owner is inherent to the section 512 safe harbor, which limits liability for such services displaying user-uploaded infringing content.[112] Because a user conducting a section 1401(c) search on a service permitting user-uploaded content may have no way of knowing if the use of a Pre-1972 Sound Recording is ''by or under the authority of the rights owner,'' [113] the proposed rule does not require the user to search on a service permitting user-uploaded content.

As discussed above, the proposed rule aims to strike a balance between the reasonableness and comprehensivity of the search for this particular subset of works, and can be updated as market conditions warrant. The Office believes that the proposed steps, including the requirement to search major search engines, which may index some of the information contained in the above services, will result in identifying a vast amount of the Pre-1972 Sound Recordings being commercially exploited at the time searches are conducted. If a rights owner is concerned about recordings being overlooked, the Office encourages the filing of a Pre-1972 Schedule and/or monitoring the filing of NNUs for the opportunity to opt out of a particular requested noncommercial use.

Likewise, in commenting on the proposed rule, it would be helpful for user-oriented groups to acknowledge that a list of specific steps should be reasonably calculated to identify recordings being commercially exploited, even where this entails added searching steps of the prospective user.[114] The Office does not believe the proposed rule to be unwieldly from the user perspective. Moreover, while the statute is very clear that following this closed-list of steps is sufficient to qualify for the safe harbor,[115] the proposed rule does not intend to discourage users from taking additional steps that they believe may be fruitful in identifying commercial exploitation of a given Pre-1972 Sound Recording, or in locating the rights owner to negotiate a permissive use, including by searching these additional sources identified by commenters.

iii. Search Terms and Strategy

1. General Rule

In general, the proposed rule asks a user to search on the title and featured artist(s) of the Pre-1972 Sound Recording in the various search categories. If the user knows any of the following attributes of the Pre-1972 Sound Recording, and the source has the capability for the user to search any of the following attributes, the user must also search: Alternate artist name(s), alternate title(s), album title, and the International Standard Recording Code (''ISRC''). The user may also optionally search any other attributes known to the user of the sound recording, such as label, version, or Universal Product Code (''UPC''). Narrowing a search by these attributes may inform a user's good faith, reasonable determination whether or not a Pre-1972 Sound Recording is being commercially exploited.[116] Because ''year'' may refer to year of a record's release or re-release, rather than year of recording, the proposed rule does not require searching this attribute.

2. Classical Music Sound Recordings

Because classical music sound recordings require more information to sufficiently identify the sound recording, the proposed rule requires the user to search on additional attributes for those types of sound recordings. For example, the same conductor could have conducted Beethoven's Symphony No. 9 on multiple occasions, with the same or different orchestras. Even to the trained ear (or database),[117] distinguishing between sound recordings of those various performances may well be impossible without knowing the musical work's composer and opus, the conductor, the performers (*e.g.,* orchestra), and year of performance. Indeed, as with Beethoven's Symphony No. 9, the composer and opus effectively function as the work's title; the closest simile to a ''featured artist'' may be the conductor, featured performers, or ensemble, depending upon the work.[118] Accordingly, the proposed rule requires the user to search on these additional attributes when trying to determine whether a Pre-1972 Sound Recording of classical music is being commercially exploited.

The Office invites public comment on whether other, specific genres of sound recordings (*e.g.,* jazz) similarly can be reasonably expected to require searching additional terms to identify the sound recording sufficiently—and if so, what those additional attributes should be.

3. Remastered Pre-1972 Sound Recordings

As noted below, prospective users must certify that they have conducted a good faith, reasonable search when filing NNUs. While the Office will not examine for a NNU's legal validity, it suggests that should the user find a ''remastered'' version of a Pre-1972 Sound Recording through searching in any of the categories listed in the proposed rule, such a finding likely evidences commercial exploitation of the Pre-1972 Sound Recording. The Office has previously noted that ''remastering'' a sound recording may consist of mechanical contributions or contributions that are too minimal to be copyrightable.[119] For example, it would be prudent for a user to consider a 1948 track that was remastered and reissued in 2015 to qualify as a Pre-1972 Sound Recording.

iv. Other Considerations

1. Searches for Foreign Pre-1972 Sound Recordings

Stakeholders question whether the section 1401(c) exception applies to foreign Pre-1972 Sound Recordings (*i.e.,* Pre-1972 Sound Recordings originating outside the United States). EFF contends that the section 1401(c) exception does apply, ''as nothing in the extensive and detailed language of the MMA authorizes such a carve-out.'' [120] A2IM and RIAA appear to agree, contending that a search under section 1401(c) should include ''leading digital

[112] *See* 17 U.S.C. 512. To pick but one example, a YouTube search of ragtime and early jazz pianist ''Jelly Roll Morton'' yielded a long scroll of hits featuring his sound recordings, and spot checks did not indicate whether any were authorized, without further refining the search criteria to incorporate record labels or album titles readily identifiable from searching the SoundExchange ISRC lookup tool or *Amazon.com.* YouTube, *https://www.youtube.com/results?search_query=%E2%80%9CJelly+Roll+Morton%E2%80%9D+* (last visited Jan. 29, 2019).

[113] *Id.* at 1401(c)(1)(A).

[114] *See id.* at 1401(c)(1), (3).

[115] *Id.* at 1401(c)(4)(B).

[116] *See* EFF Initial at 3.

[117] *See, e.g., What Type of Music Can Shazam Identify,* Shazam, *https://support.shazam.com/hc/en-us/articles/204462958-What-type-of-music-can-Shazam-identify-* (last visited Jan. 28, 2019) (''Classical tracks can be recorded many times over by various artists, so it can sometimes be tricky for Shazam to tell the different versions apart.'').

[118] *See, e.g.,* Anastasia Tsioulcas, *Why Can't Streaming Services Get Classical Music Right?,* NPR The Record (June 4, 2015, 10:50 a.m.), *https://www.npr.org/sections/therecord/2015/06/04/411963624/why-cant-streaming-services-get-classical-music-right* (describing the metadata conundrum in classical music and difficulty searching streaming services); ArkivMusic, *http://www.arkivmusic.com/classical/main.jsp* (last visited Jan. 28, 2019) (listing search categories of composers, conductors, performers, ensembles, labels, operas, and medium of physical product).

[119] U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* sec. 803.9(F)(3) (3d ed. 2017) (''*Compendium (Third)*'').

[120] EFF Reply at 5.

services in relevant foreign countries including the country of origin or countries where the work is most popular, to the extent those services are accessible from the U.S.'' [121] By contrast, IFPI maintains that the Office should clarify that the section 1401(c) exception applies only to foreign sound recordings that have ''previously been exploited commercially in the US, thereby establishing a nexus between the US and the rightholder(s) in question.'' [122]

Prior to the enactment of the MMA, certain foreign Pre-1972 Sound Recordings were already granted copyright protection in the United States.[123] In 1994, the Uruguay Round Agreements Act (''URAA'') amended section 104A to automatically restore U.S. copyright protection to certain foreign works that had been in the public domain in the United States due to lack of copyright protection for Pre-1972 Sound Recordings more generally.[124] While copyright is restored automatically in eligible works, the owner of a restored work must notify reliance parties if they plan to enforce those rights, including constructively by filing a notice of intent to enforce with the Copyright Office.[125]

The MMA revised section 301(c), which now states that ''[n]otwithstanding the provisions of section 303, and in accordance with [section 1401], no sound recording fixed before February 15, 1972, shall be subject to copyright under [title 17].'' [126] But section 1401 and the legislative history do not reference foreign recordings specifically, or refer to or revise section 104A, and there is no evidence of congressional intent to extinguish copyright protection granted to foreign Pre-1972 Sound Recordings under section 104A.[127]

Section 1401 provides *sui generis* protection running parallel to any copyright protection afforded to foreign Pre-1972 Sound Recordings under section 104A.[128] While section 1401(c) operates as a limitation on the protection available under that new chapter, it does not explicitly limit title 17 copyright protection for certain foreign restored works (*i.e.,* copyright protection under section 104A). Whether the noncommercial use exception under section 1401(c) can immunize content actionable under title 17 for restored works that are foreign Pre-1972 Sound Recordings may ultimately be a matter for the courts to resolve. Because protection and enforcement for foreign restored rights is fact-intensive—implicating the specific source country, date and location of publication, duration of term in both the United States and the source country, and compliance with formalities—prospective users of foreign Pre-1972 Sound Recordings should proceed cautiously before relying on the section 1401(c) exception.

2. Reliance on Third-Party Searches

Stakeholders disagree as to whether a user may rely on searches conducted by third parties to meet the good faith, reasonable search requirement under section 1401(c). ARSC and EFF contend that users should be able to rely on previous searches conducted for a Pre-1972 Sound Recording when filing an NNU to avoid ''duplicated effort'' [129] and ''nothing but make-work.'' [130] By contrast, Copyright Alliance, A2IM, RIAA, and FMC maintain that users relying on searches of other users could create blanket exceptions of noncommercial use.[131]

The Office agrees that reliance on a third-party search, unless the third party conducted the search as the user's agent, is not reasonable. The third party may have conducted an inadequate search and incorrectly concluded that a Pre-1972 Sound Recording is not being commercially exploited. Or, as noted by A2IM and RIAA, a Pre-1972 Sound Recording may become subject to commercial exploitation after a third party has conducted a search, but before another user desires to use the same sound recording for a noncommercial use under section 1401(c).[132] As noted below, a user will be required to certify that she conducted a good faith, reasonable search when submitting an NNU, and a user cannot certify the actions of an unrelated third party. Accordingly, the proposed rule does not permit a user to rely on a search conducted by a third party, unless the third party conducted the search as the user's agent.

3. Timing of Completing a Search Before Filing an NNU

To ensure that search results are not stale, the proposed rule states that the user (or the user's agent) must conduct a search under section 1401(c) within 90 days before submitting an NNU with the Office.[133] The Music Library Association asserts that if a search has been conducted within a certain timeframe, the search should not have to be repeated.[134] The Office agrees, and believes that 90 days is a reasonable timeframe for a search to remain fresh.[135] Accordingly, a user may rely on a search for a Pre-1972 Sound Recording that she (or her agent) has conducted for 90 days before submitting an NNU proposing a noncommercial use of the same sound recording.

B. Notices of Noncommercial Use (NNUs)

i. Form and Content of NNUs

1. Overview of Proposed Rule

Commenters offer various proposals on information to be required in NNUs, particularly regarding the level of detail required to describe the good faith, reasonable search and the proposed noncommercial use. Regarding the search, Copyright Alliance, A2IM, and RIAA maintain that the user should be required to describe and certify the steps taken for a search of the Pre-1972 Sound Recording in the NNU,[136] whereas the Music Library Association contends that a user should just have to

[121] A2IM & RIAA Initial at 6.

[122] IFIP Initial at 2.

[123] 17 U.S.C. 104A(a), (h)(6)(C).

[124] *Id.* at 104A(a), (h)(6)(C)(ii) (referencing ''sound recordings fixed before February 15, 1972'').

[125] *See* U.S. Copyright Office, *Circular 38B: Copyright Restoration Under the URAA, https://www.copyright.gov/circs/circ38b.pdf.*

[126] 17 U.S.C. 301(c).

[127] In comparison, to minimize concerns regarding any ''takings'' of property under the Fifth Amendment under section 104A, Congress included provisions to protect the interests of parties who had relied on the loss of copyright protection for such works before enactment of the URAA (*i.e.,* ''reliance parties''). *See id.* at 104A(d)(2), (h)(4).

[128] *See* Conf. Rep. at 15 (discussing *sui generis* of chapter 14); *see also* IFPI Initial at 1–2 (discussing foreign Pre-1972 Sound Recordings).

[129] ARSC Reply at 4.

[130] EFF Reply at 4.

[131] Copyright Alliance Initial at 3 (''[A] notice of noncommercial use for a particular pre-72 sound recording should not create a blanket exception for all future noncommercial uses of that sound recording.''); A2IM & RIAA Reply at 9 (''Congress never envisioned that the index of NNUs would operate as a de facto database of recordings available for noncommercial uses pursuant to the new safe harbor.''); FMC Reply at 2 (''[W]e see no justification for the suggestion that 'if a search has been done within a certain time frame, it does not have to be repeated' . . . '' (quoting Music Library Association Initial at 2)).

[132] A2IM & RIAA Reply at 9.

[133] *See* A2IM & RIAA Initial at 21 (contending search must be conducted within 90 days of filing an NNU to be reasonable); Copyright Alliance Initial at 6 (same). Public Knowledge suggests that an even earlier period of 30 days would be reasonable. Public Knowledge Initial at App.

[134] Music Library Association Initial at 2.

[135] Ninety days is also the timeframe that a rights owner filing a Pre-1972 Schedule must wait before bringing an action for statutory damages or attorneys' fees, 17 U.S.C. 1401(f)(5)(A)(i)(II), and the timeframe a rights owner has to object to a proposed noncommercial use, *id.* at 1401(c)(1)(C).

[136] A2IM & RIAA Initial at 21 (contending that user should provide ''a certified step-by-step account of all sources searched and the precise search terms used''); Copyright Alliance Initial at 6.

state that she conducted a good faith search and found no commercial exploitation.[137] In addition, stakeholders disagree on whether the user should be required to document her search, such as by submitting screen shots from searched websites.[138] Copyright Alliance, A2IM, and RIAA also suggest that users should be required to certify their filings under penalty of perjury.[139]

Regarding the proposed use of a Pre-1972 Sound Recording, Copyright Alliance, A2IM, and RIAA state that the user must sufficiently identify the Pre-1972 Sound Recording she wishes to use and the nature of the proposed use.[140] A2IM and RIAA note that without this information, ''it is impossible for rights owners to exercise their opt-out right in any meaningful way.'' [141] By contrast, EFF and Public Knowledge assert that the user should not have to provide a detailed description of the proposed use.[142] EFF and Public Knowledge also suggest that the Office should allow users to combine multiple notices of noncommercial use into a single filing, as well as opt-out notices directed to the same potential user.[143]

After duly considering all of the public comments, the rule proposes to include a mix of required and optional information to establish a baseline of information that will be deemed sufficient for purposes of meeting the regulatory filing requirements, while encouraging users to provide additional descriptive material that may aid in the ensuing determination whether a Pre-1972 Opt-Out Notice is filed. Specifically, the proposed rule requires the user to provide:

1. The user's full legal name, and whether the user is an individual person or corporate entity, including whether the entity is a tax-exempt organization as defined under the Internal Revenue Code;

2. The title and featured artist(s) of the Pre-1972 Sound Recording desiring to be used; [144]

3. If known, the alternate artist name(s), alternate title(s), album title, and ISRC; and

4. A description of the proposed noncommercial use, including a summary of the project and its purpose, how the Pre-1972 Sound Recording will be used in the project, and when and where the proposed use will occur (*i.e.,* the term and U.S.-based territory of the use).

The prospective user should describe the proposed use clearly and accurately, with enough detail to provide the rights owner with enough information to meaningfully evaluate the use.[145] The proposed categories comprise commonsense information, and the prospective user has flexibility in the description of the proposed use.[146] To aid filers, the Office's form or instructions may include exemplar descriptions of the proposed use. As discussed further below, while the proposed rule does not define ''noncommercial'' for purposes of this filing, the Office's form, instructions, and other material will be intended to aid individuals in determining how a desired use is likely to relate to the exception for noncommercial uses.

Further recognizing that some NNUs are likely to be filed by individuals or smaller noncommercial entities with limited expertise with copyright licensing, the Office's form will also provide cues for users to provide additional optional information that is commonly helpful in licensing transactions, such as spaces for title of the project, the playing time of the Pre-1972 Sound Recording to be used as well as total playing time, description of corresponding visuals in the case of audiovisual uses, and whether and how the user will credit the sound recording title, featured artist, and/or rights owner in connection with the project.[147] The user may also opt to include additional information about the Pre-1972 Sound Recording as permitted by the Office's form or instructions, such as the year of release and version. Similarly, to increase the likelihood of a user receiving timely notification of a rights owner's decision to opt out of a proposed noncommercial use, the proposed rule allows a user to include an email address to which a rights owner may contact the user to obtain more information, or to send a copy of the Pre-1972 Opt-Out Notice in addition to filing a Pre-1972 Opt-Out Notice with the Copyright Office.

In addition, the proposed rule states that an NNU may not include a proposed use for more than one Pre-1972 Sound Recording unless all of the sound recordings include the same featured artist and were released on the same pre-1972 album or unit of publication.[148] The Office recognizes that, for efficiency, users desiring to make noncommercial use of multiple Pre-1972 Sound Recordings from the same album would prefer to file a single NNU in all cases.[149] The Office also recognizes, however, that multiple rights owners may own the various Pre-1972 Sound Recordings in the NNU—and that consequently, multiple rights owners may desire to file Pre-1972 Opt-Out Notices in response to the same NNU. In such circumstances, it may be difficult for rights owners as well as prospective users to evaluate opt-outs to proposed noncommercial uses.

Finally, the proposed rule also requires the individual submitting the NNU to certify that she has appropriate

[137] Music Library Association Initial at 1.

[138] *Compare* Copyright Alliance Initial at 6 (user should be required to document the search); *IMSLP.ORG* Reply at 1 (same); A2IM & RIAA Initial at 21 (same); *with* Public Knowledge Reply at 14 (section 1401(c) does not require documentation of the search for the safe harbor to apply); EFF Reply at 4 (same); Wikimedia Foundation Reply at 3 (any documentation only becomes relevant if the adequacy of the search comes into dispute); *see also* FMC Reply at 5 (requiring a user to upload screenshots is an ''inelegant solution'').

[139] A2IM & RIAA Initial at 21; Copyright Alliance Initial at 6.

[140] A2IM & RIAA Initial at 17–19; Copyright Alliance Initial at 6. Copyright Alliance, A2IM, and RIAA also suggest that the user should identify whether there is another work embodied within the Pre-1972 Sound Recording, and if so, whether the user has a license to use that work. *See* A2IM & RIAA Initial at 20 & n.26; Copyright Alliance Initial at 6 & n.8. Because the noncommercial use exception does not extend to the underlying musical, literary, or dramatic work, which may require separate clearance, users are of course not required to identify underlying works embodied within the Pre-1972 Sound Recording, but may include such information, including whether they have secured permission to use such works, to aid the rights owner in considering how to respond to a NNU. *See* A2IM & RIAA Initial at 20 & n.26.

[141] *Id.* at 17.

[142] EFF Initial at 5–6 (''[R]equiring detailed descriptions of a use would invite future legal disputes over whether a use has exceeded the language of its description.''); Public Knowledge Reply at 15 (user should be required to provide only the ''basic facts which a non-sophisticated user can reasonably be expected to have on hand''; rightsholders may ask for clarification of proposed uses where descriptions are vague or otherwise insufficient).

[143] EFF Reply at 4; Public Knowledge Reply at 16.

[144] As noted above, classical music metadata raises unique issues. For such proposed uses, the prospective user should include information that is similar to the attributes the user is asked to search upon for title and featured artist(s) before claiming the statutory safe harbor.

[145] *See, e.g.,* A2IM & RIAA Initial at 18–19; EFF Initial at 5 (both in general accord).

[146] For example, a user may describe an ''unlimited'' term of use, throughout the United States, or a more limited use, such as a particular high school's spring dance recital. A user may also specify whether a webinar will be live-streamed over the internet and/or archived.

[147] *See* A2IM & RIAA Initial at 19 (proposing these fields, but on a required basis).

[148] A ''unit of publication'' exists where multiple works are physically bundled or packaged together and first published as an integrated unit. U.S. Copyright Office, *Circular 34: Multiple Works, https://www.copyright.gov/circs/.*

[149] Indeed, the Office permits applicants to register a claim to copyright for sound recordings on the same album in certain circumstances. *See, e.g.,* 37 CFR 202.3(b)(4)(i)(A) (allowing applicants to register multiple sound recordings as well as accompanying text and artwork as a ''unit of publication,'' if they are owned by the same claimant, were physically packaged or bundled together, and if all of the recordings were first published together as that integrated unit).

authority to submit the NNU, that the user desiring to make noncommercial use of the Pre-1972 Sound Recording (or the user's agent) conducted a good faith, reasonable search within the last 90 days without finding commercial exploitation of the sound recording, and that all information submitted to the Office in the NNU is true, accurate, and complete to the best of the individual's knowledge, information, and belief, and is made in good faith. Such requirements mimic certification requirements in a wide variety of other filings administered by the Copyright Office.[150] The proposed rule does not require users to submit documentation of their searches, but the Office encourages users to keep records of their searches in case they come into dispute.

2. Determining Whether a Use Is Noncommercial

The section 1401(c) exception applies only to noncommercial uses of Pre-1972 Sound Recordings.[151] Although section 1401(c) does not define ''noncommercial,'' it does state that ''merely recovering costs of production and distribution of a sound recording resulting from a use otherwise permitted under [section 1401(c)] does not itself necessarily constitute a commercial use,'' [152] and ''the fact that a person engaging in the use of a sound recording also engages in commercial activities does not itself necessarily render the use commercial.'' [153] The Conference Report further states that ''the concept of noncommercial use should be understood in the same way as under other provisions of title 17, such as section 107, and includes uses such as teaching, scholarship and research.'' [154] Although other parts of title 17 refer to ''commercial'' or ''non-commercial'' uses, nowhere in the statute are they defined.[155]

The NOI questioned whether the Office should adopt guidelines for filers ''as to what constitutes a 'noncommercial' use, and if so, what?'' [156] FMC strongly urged the Office to provide such guidance to ''prevent situations where less sophisticated users misunderstand the statute.'' [157] Similarly, A2IM and RIAA suggest ''it is vitally important for both users and rights owners that the Office issue guidelines to help users recognize appropriate uses of section 1401(c) and help rights owners assess the NNUs that get filed,'' particularly for users less experienced with copyright.[158] Citing an array of case law and endorsing a public survey on this topic from Creative Commons, they propose specific text for the Office's consideration.[159]

On the other hand, Wikimedia Foundation cautioned the Office to avoid creating ''complex presumptions'' for specific anticipated fact patterns, suggesting that terms like ''noncommercial'' are defined in fact-specific contexts that are still being explored by courts.[160] The Kernochan Center provided a run-down of key court opinions with ''differing conclusions as to what constitutes commercial versus noncommercial use.'' [161] It suggested that the A2IM and RIAA proposal was insufficiently clarifying, while also acknowledging that failure to interpret the term might perpetuate conflicting interpretations by courts and advocacy groups.[162]

The Office agrees with the Kernochan Center that defining noncommercial in relation to section 1401 is ''a complex proposition.'' [163] In a sense, section 1401(c) requires the Office to mediate a channel for users and rights owners to engage with each other regarding potentially noncommercial uses through competing filings, and it is not the Office's intention to constrain resolution of gray areas or edge cases through private negotiation or, if necessary, the courts. If anything, the Office hopes this new mechanism may engender dialogues to further productive developments in this area.

But in examining the relevant statutory and case law, as well as the comments, it is apparent that there are some touchstones in evaluating whether a use is noncommercial that may be helpful to flag for filers and other interested parties. While individual determinations may be fact-specific, inclusion of this new exception suggests a congressional intent to provide a new avenue to facilitate certain noncommercial uses.[164] Moreover, many comments pointed out that individuals and smaller nonprofit entities may benefit from additional explanation regarding the content and filing of NNUs.[165] The Office plans to include information directed at helping users determine whether and how to file a NNU, including considerations that may affect their own determination that a use is noncommercial. Such material may be included on the Office's instructions, forms, or other public resources, which will also make clear that the Office does not provide legal advice regarding specific uses. Because this information is directly tailored to the Office's promulgation of regulations establishing the content for the filing of NNUs, and is aimed at aiding prospective filers—both users and rights owners—in evaluating whether a use may fall under this noncommercial use exemption, the Office agrees that this guidance should not necessarily be presumed to directly bear upon questions related to other parts of the statute.[166]

While this notice is not including specific language, the Office provisionally anticipates calling attention to the following types of considerations.

1. *Use* v. *User.* The evaluation should consider the type of *use* of the copyrighted material and not simply the nature of the *user.*[167] While a filer will be asked to disclose whether the user is a tax-exempt organization or other corporate entity, this information is helpful but not dispositive, as some uses

[150] *See id.* at § 201.4(c)(4) (recorded documents generally), § 201.10(f)(1)(i) (notices of termination of transfer and licenses), § 201.11(e)(9)(iii)(E) (satellite and cable statements of account), § 201.35(d)(2) (submission of Pre-1972 Schedules), § 201.36(d)(4) (submission of notices of contact information for transmitting entities publicly performing Pre-1972 Sound Recordings); *see also* 18 U.S.C. 1001 (false statements generally).

[151] 17 U.S.C. 1401(c)(1); Conf. Rep. at 25 (''Subsection (c) applies only to noncommercial uses.'').

[152] 17 U.S.C. 1401(c)(2)(A).

[153] *Id.* at 1401(c)(2)(B).

[154] Conf. Rep. at 25.

[155] *See, e.g.,* 17 U.S.C. 107; 108(a)(1), (c), (h)(2)(A); 109(a), (b)(1)(A); 110(4), (8); 506(a); *see also* Kernochan Center Reply at 2–3 (discussing various statutory provisions); 37 CFR 201.40(b)(1)(i)(B) (2018) (regulatory exception for certain uses of motion pictures in noncommercial videos); *compare* 17 U.S.C. 901(a)(5) (defining ''commercially exploit'' with respect to mask works).

[156] NOI at 52178.

[157] FMC Reply at 6 (noting prevalence of incorrect understanding of copyright published by users in connection with user-uploaded content on YouTube).

[158] A2IM & RIAA Reply at 6.

[159] A2IM & RIAA Initial at 10–15 (citing Creative Commons, *Defining ''Noncommercial'': A Study of How the Online Population Understands ''Noncommercial Use''* 18 (Sept. 2009), *https://mirrors.creativecommons.org/defining-noncommercial/Defining_Noncommercial_fullreport.pdf*).

[160] Wikimedia Foundation Reply at 3.

[161] Kernochan Center Reply at 3–4.

[162] *Id.* at 4.

[163] *Id.*

[164] *See also* 17 U.S.C. 1401(c)(6)(A) (prescribing penalties for filing an NNU while ''*knowing* that the use proposed is not permitted'') (emphasis added).

[165] *See, e.g.,* EFF Initial at 1; AAU Initial at 1; FMC Reply at 6; Public Knowledge Reply at 9; A2IM & RIAA Reply at 6.

[166] *See* SoundExchange Initial at 15–16 (re specialized licenses for noncommercial users under sections 112 or 114); Kernochan Center Reply at 5.

[167] *See, e.g., Cambridge Univ. Press* v. *Patton,* 769 F.3d 1232, 1264 (11th Cir. 2014) (''[W]e must consider not only the nature of the user, but the use itself.''); *Am. Geophysical Union* v. *Texaco Inc.,* 60 F.3d 913, 921–22 (2d Cir.1994) (''[A] court's focus should be on the use of the copyrighted material and not simply on the user . . . '').

by nonprofit organizations may constitute ''commercial'' use.[168] Similarly, some uses by for-profit entities may constitute ''noncommercial'' use [169] and ''the fact that a person engaging in the use of a sound recording also engages in commercial activities does not itself necessarily render the use commercial.'' [170]

2. *Educational uses.* Educational uses ''such as teaching, scholarship and research'' are often noncommercial uses that provide a public benefit.[171] But some educational uses may be considered commercial, for example, when fees are charged or copies sold, or when the user gains another kind of measurable benefit (such as valuable authorship credit through plagiarism of the work), and so the educational nature of the use should be viewed as one important part of the overall evaluation whether the use is noncommercial.[172]

3. *Covering the costs of production and distribution of the sound recording.* ''Merely recovering costs of production and distribution of a sound recording resulting from a use'' that would otherwise be considered noncommercial ''does not itself necessarily constitute a commercial use.'' [173] Similarly, the fact that the user may save money on a licensing fee does not automatically make the use commercial.[174]

4. *Financial gain or other profit.* Beyond covering the costs of production and distribution, if the user otherwise ''stands to profit from exploitation of the copyrighted material without paying the customary price,'' it is more likely to be considered a commercial use.[175] For example, some courts have stated that if the use can be expected to bring the user ''conspicuous financial rewards,'' it is more likely to be commercial.[176] Some examples may include uses of a copyrighted work in an advertisement, through the sale of a newspaper or magazine (even by a non-profit organization), or other uses that directly earn users money.[177]

5. *Private personal uses.* If the use is a private home use for an individual's personal enjoyment, it will generally be considered noncommercial.[178] Posting on the open, accessible internet is not a private use, even if the user does not encourage others to access the Pre-1972 Sound Recording.

6. *Other individual uses.* Putting a Pre-1972 Sound Recording on YouTube or another platform that allows users to upload content may or may not be commercial; again, the user must consider the purpose of the use, including whether the user is monetizing that use for profit.[179]

Finally, the Copyright Office also addresses a question raised regarding the scope of its regulatory authority. EFF and Public Knowledge contend the Office lacks authority to issue guidance regarding the meaning of ''noncommercial use'' as part of this rulemaking.[180] Perhaps more broadly, EFF suggests that the Copyright Office requires ''a statutory grant'' ''to give opinions'' regarding copyright issues or the meaning of specific terms in the copyright law.[181] In point of fact here, three relevant statutory charges reside at 17 U.S.C. 701(b), 702, and 1401(c)(3).[182] It is well-established, permissible, and often necessary for the Office to construe or otherwise interpret the meaning of statutory terms as part of dutifully exercising its regulatory functions.[183] Indeed, this is a basic precept of administrative law.[184] As

[168] *See, e.g., Greenberg* v. *Nat'l Geographic Soc'y,* 244 F.3d 1267, 1275 (11th Cir. 2001), *rev'd on other grounds on reh'g en banc,* 533 F.3d 1244 (11th Cir. 2008). (''[W]hile the [CD–ROM library] is a product that may serve educational purposes, it is marketed to the public at book stores, specialty stores, and over the internet. [Defendant] is a non-profit organization, but its subsidiary National Geographic Enterprises, which markets and distributes the [product], is not; the sale of the [product] is clearly for profit.'').

[169] *See, e.g., Am. Geophysical Union,* 60 F.3d at 921–22; *Byrne* v. *British Broad. Corp.,* 132 F. Supp. 2d 229, 234 (S.D.N.Y. 2001).

[170] 17 U.S.C. 1401(c)(2)(B).

[171] Conf. Rep. at 25.

[172] *See, e.g., Peter Letterese & Assocs.* v. *World Inst. of Scientology Enters. Int'l,* 533 F.3d 1287, 1309–12 (11th Cir. 2008) (finding use of copyrighted material in an instructional coursepack, where defendants charged a fee, was ''commercial''); *Princeton Univ. Press* v. *Mich. Document Servs.,* 99 F.3d 1381, 1385–86 (6th Cir. 1996) (finding reproduction of academic works was ''commercial'' use because copies were sold in coursepacks); *Weissman* v. *Freeman,* 868 F.2d 1313, 1324 (2d Cir. 1989) (academic researcher's plagiarism was commercial because ''what is valuable is recognition because it so often influences professional advancement''); *see also Cambridge Univ. Press,* 769 F.3d at 1263–66.

[173] 17 U.S.C. 1401(c)(2)(A).

[174] *See, e.g., Cambridge Univ. Press,* 769 F.3d at 1265–66 (''Of course, any unlicensed use of copyrighted material profits the user in the sense that the user does not pay a potential licensing fee, allowing the user to keep his or her money. If this analysis were persuasive, no use could qualify as 'nonprofit' . . . .'').

[175] *Harper & Row Publishers, Inc.* v. *Nation Enters.,* 471 U.S. 539, 562 (1985); *see also Wall Data Inc.* v. *Los Angeles Cty. Sheriff's Dep't,* 447 F.3d 769, 779 (9th Cir. 2006) (police department copying software to avoid buying additional licenses was a commercial use).

[176] *Cambridge Univ. Press,* 769 F.3d at 1266; *see Am. Geophysical Union,* 60 F.3d at 922.

[177] *See, e.g., Davis* v. *The Gap, Inc.,* 246 F.3d 152, 175 (2d Cir. 2001) (''Here the work, being an advertisement, is at the outer limit of commercialism.'') (citing *Campbell,* 510 U.S. at 585); *Hustler Magazine, Inc.* v. *Moral Majority, Inc.,* 796 F.2d 1148, 1152 (9th Cir. 1986) (use in fundraisers for religious organization is commercial); *Sony Comput. Entm't Am., Inc.* v. *Bleem, LLC,* 214 F.3d 1022, 1027 (9th Cir. 2000) (finding use of screen shots of plaintiff's video games in comparative advertising was commercial); *Consumers Union of U.S., Inc.* v. *Gen. Signal Corp.,* 724 F.2d 1044, 1049 (2d Cir. 1983) (''Almost all newspapers, books and magazines are published by commercial enterprises that seek a profit.''); *see also Perfect 10* v. *Google, Inc.,* 416 F. Supp. 2d 828, 846 (C.D. Cal. 2006), *aff'd in part, rev'd in part sub nom on other grounds,* 508 F.3d 1146 (9th Cir. 2006).

[178] *See Sony Corp. of Am.* v. *Universal City Studios, Inc.,* 464 U.S. 417, 448–49 (1984) (''time-shifting for private home use must be characterized as a noncommercial, nonprofit activity''); *Recording Indus. Ass'n of Am.* v. *Diamond Multimedia Sys., Inc.,* 180 F.3d 1072, 1079 (9th Cir. 1999) (addressing transfer of legitimately-acquired MP3 files from user's hard drive to portable media player); *see also* A2IM & RIAA Initial at 13 (acknowledging that ''use of lawfully-acquired works for an individual's personal enjoyment clearly seems to be noncommercial'').

[179] For example, making copies to help people ''get for free something they would ordinarily have to buy,'' such as file sharing to anonymous requesters over the internet, has been found to be commercial. *A&M Records. Inc.* v. *Napster, Inc.,* 239 F.3d 1004, 1015 (9th Cir. 2001); *see also* FMC Reply at 6 (expressing ''acute concern'' about uploads to ''YouTube or similar commercial services'').

[180] Public Knowledge Initial at 8 (suggesting statute provides ''no role'' for the Office); EFF Initial at 5; *see also* Wikimedia Foundation Reply at 3.

[181] EFF Initial at 5 (citation omitted).

[182] 17 U.S.C. 701(b) (outlining additional functions and duties), 702 (Copyright Office regulations), and 1401(c)(3) (directing promulgation of noncommercial use rulemaking). *See also* S. Rep. No. 115–339 at 15 (discussing Copyright Office knowledge and expertise regarding music copyright regulations, educational activities, and reports with respect to title I of the MMA); Conf. Rep. at 12 (same). The Office also provides authoritative information about the copyright law and public education regarding copyright and the administration of its functions and duties under title 17. *See* 17 U.S.C. 701(b); 37 CFR 203.3(f); *id.* at § 201.2(b)(7).

[183] *See, e.g.,* 37 CFR 201.4(c)(2) (defining a document ''pertaining to a copyright''), § 201.10(d)(2) (identifying actions that will meet statutory service requirements), § 201.10(f)(1)(ii)(C) (treating date of creation of a ''gap work'' as date of execution of a grant), § 201.11 (including interest in Section 119 royalty fee payments), § 201.13(a)(2) (defining ''copyright owner'' for purposes of Section 110(4)), § 201.17(b) (defining ''gross receipts'' and ''cable system'' for purposes of Section 111), § 201.18(a)(5) (defining ''copyright owner'' for purposes of Section 115 notices of intention), § 201.22(a)(2) (defining ''copyright owner'' for purposes of Section 411(c)), 201.26(b) (defining terms relating to shareware for purpose of Section 805 of Public Law 101–650), § 202.1 (providing examples of works not subject to copyright), § 202.10 (requirements for protection of pictorial, graphic, and sculptural works), § 201.11(b)(2) (defining ''building'' for purposes of architectural works protection); *see also Mazer* v. *Stein,* 347 U.S. 201, 211–13 (1954) (relying on Copyright Office regulations ''interpreting'' the 1909 Act with respect to copyrightable subject matter).

[184] *See, e.g., Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984); *Skidmore* v. *Swift & Co.,* 323 U.S. 134 (1944). Relatedly, EFF's citation of *Capitol Records, LLC* v. *Vimeo, LLC* seems misplaced in comments responsive to a statutorily-required rulemaking regarding a new federal exception to the ability of rights owners to control uses of Pre-1972 Sound

Continued

Congress has so directed, the Office will continue to interpret statutory terms as necessary to administer a wide variety of filings mandated under title 17, including NNUs, and also through documents such as circulars, its *Compendium of U.S. Copyright Office Practices,* or other public aids.[185] While it is true that courts afford varying levels of deference to these differing types of documents (as with any agency), that fact does not bear upon the Office's authority to issue these documents in fulfillment of its statutory functions and duties.

ii. Filing of NNUs, Including Copyright Office Review

Stakeholders disagree on the Office's level of review of NNUs. Copyright Alliance, A2IM, and RIAA contend that the Office should reject NNUs that do not provide sufficient information or are ''patently deficient.'' [186] In addition, Copyright Alliance and FMC ask for guidance on how the Office plans to police bad faith or deficient notices.[187] By contrast, EFF maintains that the Office cannot reject facially complete notices of use or opt-out notices,[188] and Public Knowledge contends that section 1401(c) ''contemplates no such role for the Office'' to reject notices on substantive grounds.[189]

As with similar types of filings made with the Office, the proposed rule states that the Office does not review NNUs for legal sufficiency.[190] Rather, the Office's review is limited to whether the formal and legal procedural requirements established under the rule (including completing the required information and payment of the proper filing fee) have been met. The Office's indexing of an NNU thus does not mean the proposed use in the NNU is, in fact, noncommercial. Users are therefore cautioned to review and scrutinize NNUs to assure their legal sufficiency before submitting them to the Office.

Section 1401(c)(6)(A) contemplates civil penalties for the filing of fraudulent NNUs (*e.g.,* fraudulently describing the use proposed).[191] In connection with the Office's exercise of the regulatory authority directed under the MMA and its general authority and responsibility to administer title 17,[192] the proposed rule states that if the Register becomes aware of abuse or fraudulent NNUs from a certain filer, she shall have the discretion to reject all submissions from that filer under section 1401(c) for up to one year.

iii. Indexing NNUs Into the Copyright Office's Online Database

Section 1401(c) requires NNUs to be ''indexed into the public records of the Copyright Office.'' [193] Under the proposed rule, an NNU will be considered ''indexed'' once it is made publicly available through the Office's online database of NNUs. Similar to the Office's database of indexed Pre-1972 Schedules, the Office intends to provide an online and searchable database of indexed NNUs. Rights owners can search on the prospective user's name, the title of the sound recording, the featured artist(s), and the ISRC provided in NNUs.[194] In addition, each NNU will be assigned a unique identifier by the Copyright Office, which will also be searchable. As noted below, rights owners will be required to include the unique identifier assigned to an NNU if the rights owner desires to file a Pre-1972 Opt-Out Notice in response. Although indexed NNUs will be publicly available, the proposed rule states that users cannot rely on NNUs filed by third parties (other than the user's agent). Similarly, a user cannot rely on her own NNU once the proposed term of use ends (*i.e.,* she must conduct a new good faith, reasonable search for the Pre-1972 Sound Recording and file a new NNU).

The proposed rule also confirms that persons may request timely notification of when NNUs are indexed into the Office's public records by following the instructions provided by the Copyright Office on its website.[195] Individuals requesting such notification can subscribe to a weekly email through a service similar to the Office's NewsNet service, which will provide a link to the Office's online database of indexed NNUs. The Office's searchable database will default to listing the NNUs with the most recent index dates first, so individuals should easily be able to identify recently indexed filings.[196]

C. Opt-Out Notices

As noted above, the rights owner of a Pre-1972 Sound Recording may file a Pre-1972 Opt-Out Notice with the Copyright Office ''opting out'' of (*i.e.,* objecting to) the proposed use in an NNU within 90 days of the NNU being indexed into the Office's public records.[197] The proposed rule states that where a Pre-1972 Sound Recording has multiple rights owners, only one rights owner needs to file Pre-1972 Opt-Out Notice for purposes of section

Recordings. *See* EFF Initial at 5 (citing 826 F.3d 78, 93 (2d Cir. 2016)). First, as the sentence that EFF partially quotes indicates, *Vimeo* actually suggests that *Chevron* deference is appropriate with respect to a Copyright Office rulemaking (such as this one). *Vimeo,* 826 F.3d at 93 (distinguishing level of deference in that case from ''*Chevron* deference of the sort accorded to rulemaking by authorized agencies''). Indeed, the Second Circuit has ''appl[ied] *Chevron*'' in adopting the Office's interpretation of section 111 as reasoned through similar rulemaking documents concerning requirements for filing statements of account with respect to the cable license, when determining whether internet retransmission services may qualify for this license. *WPIX, Inc.* v. *ivi, Inc.,* 691 F.3d 275, 284 (2d Cir. 2012). Second, far from discounting the Office's guidance in this area, Congress subsequently ratified the approach recommended in the policy report discussed in *Vimeo* of expressly amending title 17 to apply the section 512 safe harbor as well as other federal exceptions and limitations to Pre-1972 Sound Recordings. *See* 17 U.S.C. 1401(f)(3); (1)(B)(3); Pre-1972 Sound Recordings Report at 128–29, 130–32; *see also* Mitch Stoltz, *The New Music Modernization Act Has a Major Fix: Older Recordings Will Belong to the Public, Orphan Recordings Will Be Heard Again,* EFF (Sept. 19, 2018), *https://www.eff.org/deeplinks/2018/09/new-music-modernization-act-has-major-fix-older-recordings-will-belong-public* (noting it is ''important'' that under title II, ''the full set of public rights and protections'' ''will apply explicitly,'' in contrast to state laws).

[185] *See, e.g., Compendium (Third)* Introduction 2 (collecting cases relying on *Compendium*); *ABS Entm't, Inc.* v. *CBS Corp.,* 908 F.3d 405, 417 n.5 (9th Cir. 2018) (''Circulars provide Copyright Office guidance on various issues. We may rely on them as persuasive but not binding authority.'').

[186] A2IM & RIAA Initial at 19; Copyright Alliance Initial at 3.

[187] Copyright Alliance Initial at 3; FMC Reply at 5.

[188] EFF Reply at 3.

[189] Public Knowledge Reply at 7. The Copyright Alliance maintains that the ''Copyright Office does clearly have authority to deny facially invalid notices,'' and the discretion to reject notices which on their face are not sufficient to identify the sound recording—thus not providing notice to the owner of the sound recording—and nature of the use or do not adhere to the form, content, and procedures established by the Register through regulations.'' Copyright Alliance Reply at 2.

[190] For example, the Office accepts statements of account under the section 111 cable license after a review for ''obvious errors or omissions appearing on the face of the documents'' (*see* 37 CFR 201.17(c)(2)), notices of intention under the section 115 compulsory license without review for ''legal sufficiency'' or ''errors or discrepancies'' (*see id.* at § 201.18(g)), and agent designations made pursuant to section 512(c)(2) without any examination.

[191] 17 U.S.C. 1401(c)(6)(A) (''Any person who willfully engages in a pattern or practice of filing a [NNU] . . . fraudulently describing the use proposed, or knowing that the use proposed is not permitted under [section 1401(c)], shall be assessed a civil penalty in an amount that is not less than $250, and not more than $1000, for each such notice, in addition to any other remedies that may be available under this title based on the actual use made.'').

[192] *See id.* at 1401(c)(3), (5)(A); *id.* at 701(a).

[193] *Id.* at 1401(c)(1)(C); *see* internet Archive Initial at 2 (advocating same).

[194] Similar to the database of Pre-1972 Schedules discussed above, the Office's database of NNUs will allow for wildcard searching by using an asterisk to fill in partial words.

[195] *See* A2IM & RIAA Initial at 22 (requesting same).

[196] The Office believes having an online, searchable database of indexed NNUs and a periodic email notification option addresses Author Services' concern about how rights owners of Pre-1972 Sound Recordings will receive notice of indexed NNUs. Author Services Reply #1 at 1–2.

[197] 17 U.S.C. 1401(c)(1)(C).

1401(c)(5).[198] In addition, the proposed rule requires the Pre-1972 Opt-Out Notice to include the rights owner's name and the unique identifier assigned to the NNU by the Copyright Office. The submitter of the Pre-1972 Opt-Out Notice may opt in her discretion to comment on whether the proposed use constitutes noncommercial use. In keeping with filings of similar type, the Pre-1972 Opt-Out Notice must also include a certification that the individual submitting the notice has appropriate authority to do so and that all information submitted to the Office is true, accurate, and complete to the best of the individual's knowledge, information, and belief, and is made in good faith. The Office intends to make Pre-1972 Opt-Out Notices publicly available through the Office's online searchable database of NNUs.

If a rights owner files a timely Pre-1972 Opt-Out Notice, the proposed rule states that the user specified in the NNU use must wait one year before filing another NNU for the same or similar use of the Pre-1972 Sound Recording.

As with NNUs and similar types of filings made with the Office, the proposed rule states that the Office does not review Pre-1972 Opt-Out Notices for legal sufficiency, interpret their content, or screen them for errors or discrepancies. Rather, the Office's review is limited to whether the procedural requirements established by the Office (including payment of the proper filing fee) have been met. Rights owners are therefore cautioned to review and scrutinize Pre-1972 Opt-Out Notices to assure their legal sufficiency before submitting them to the Office. As with the Office's handling of fraudulent NNUs, because section 1401(c)(6)(B)(ii) contemplates civil penalties for a pattern of filing of fraudulent Pre-1972 Opt-Out Notices,[199] the proposed rule states that if the Register becomes aware of abuse or fraudulent Pre-1972 Opt-Out Notices from a certain filer, she shall have the discretion to reject all submissions from that filer for up to one year.

D. Filing Fees

The Copyright Act grants the Office authority to establish, adjust, and recover fees for services provided to the public.[200] The rule proposes fees to file an NNU or an Opt-Out Notice that are the same as the current fee to record a notice of intention to make and distribute phonorecords under section 115 (''NOI'').[201] The Office anticipates that the processing of these documents will be analogous to that of processing electronic NOIs, and has based the proposed fee accordingly.[202] Similar to the Office's free NewsNet service, there will be no fee for individuals to request and receive timely notifications of when NNUs are indexed into the Office's public records.

III. *Ex Parte* Communications

In the past, the Office's communications with rulemaking participants have not generally included discussions about the substance of the proceeding apart from the noticed phases of written comments. The Office has determined that further informal communications with participants might be beneficial in limited circumstances where the Office seeks specific information or follow-up regarding the public record, such as to discuss nuances of proposed regulatory language. The primary means to communicate views in the course of the rulemaking will continue to be through the submission of written comments. In other words, this communication will supplement, not substitute for, the preexisting record.

To ensure that such communications are governed by transparent and consistent procedures, the Office is issuing the following guidelines, which may be supplemented by information on the Copyright Office's website at *https://www.copyright.gov/rulemaking/pre1972-soundrecordings-noncommercial/:*

1. Any interested participant seeking an *ex parte* in-person or telephone meeting with the Office in this proceeding should submit a written request to the persons identified in the contact information section of this NPRM. The request should identify the names of all proposed attendees, and the party or parties on whose behalf each attendee is appearing.

2. *Ex parte* meetings with the Office are intended to provide an opportunity for participants to clarify evidence and/or arguments made in prior written submissions, and to respond to questions from the Office on those matters. The Office will generally not consider or accept new documentary materials outside the rulemaking record.

3. Within two business days after the meeting, the attendees must email the Office (using the above email addresses) a letter detailing the information identified in paragraph 1 and summarizing the discussion at the meeting. The letter must summarize the substance of the views expressed and arguments made in such a way that a non-participating party will understand the scope of issues discussed; merely listing the subjects discussed or providing a 1–2 sentence description will not be sufficient. These letters will be made publicly available on the Copyright Office's website.

4. To ensure compliance with the statutory deadline, all *ex parte* meetings in this proceeding must take place no later than Friday, March 22, 2019. The Office will not consider requests to hold meetings after that date.

List of Subjects in 37 CFR Part 201

Copyright, General provisions.

Proposed Regulations

In consideration of the foregoing, the U.S. Copyright Office proposes amending 37 CFR part 201 as follows:

PART 201—GENERAL PROVISIONS

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

■ 2. Amend § 201.3 as follows:

■ a. Redesignate paragraphs (c)(21) and (c)(22) as paragraphs (c)(23) and (c)(24), respectively.

■ b. Add paragraphs (c)(21) and (c)(22) to read as follows:

[198] Similarly, where a musical work has multiple copyright owners, the Office does not require each copyright owner to record a Declaration of Ownership in Musical Works to become eligible for royalties under the 17 U.S.C. 115 compulsory license. U.S. Copyright Office, *Document Recordation: Completing and Submitting Declarations of Ownership in Musical Works* (last visited Jan. 28, 2019), *https://www.copyright.gov/recordation/domw/#requirements.*

[199] 17 U.S.C. 1401(c)(6)(B)(ii) (''Any person who engages in a pattern or practice of [filing a Pre-1972 Opt-Out Notice, knowing that the person is not the rights owner or authorized to act on behalf of the rights owner of the sound recording to which the NNU pertains,] shall be assessed a civil penalty in an amount not less than $10,000 for each such filing.''); *see also* 17 U.S.C. 1401(c)(5)(A); *id.* at 701(a).

[200] *See id.* at 708. Because they do not involve services specified in section 708(a), the fees proposed in this NPRM are not subject to the adjustment of fees provision in section 708(b).

[201] 37 CFR 201.3(e)(1) (stating cost to record section 115 NOI for one title is $75). The Office notes that the proposed fee is lower than to record a document for a single title. *See id.* at § 201.3(c)(17) (stating cost to record document for single title is $105).

[202] Basing the cost of a service on the cost for a similar service is appropriate. *See* Copyright Office Fees, 83 FR 24054, 24059 (May 24, 2018) (proposing setting new fees at the same level for ''analogous'' services). In 2017, Booz Allen Hamilton conducted a study of the Office's most recent fee structure. When asked whether existing rates could be leveraged for new group registration options, it concluded it was appropriate if the work required was of a similar grade and compensation level. Booz Allen Hamilton, U.S. Copyright Office, Fee Study: Question and Answers 6 (Dec. 2017), *https://www.copyright.gov/rulemaking/feestudy2018/fee_study_q&a.pdf.*

§ 201.3 Fees for registration, recordation, and related services, special services, and services performed by the Licensing Division.

* * * * *

(c) * * *

Registration, recordation and related services	Fees ($)
* * * * * * *	
(21) Notice of noncommercial use of pre-1972 sound recording	75
(22) Opt-out notice of noncommercial use of pre-1972 sound recording	75
* * * * * * *	

* * * * *

■ 3. Amend § 201.4 as follows:

■ a. Revise paragraph (b)(3).

■ b. Revise paragraph (b)(10) by removing ''; and'' and replacing with '';''.

■ c. Revise paragraphs (b)(11), (b)(12), and (b)(13) by removing the period at the end of each paragraph and replacing with a semicolon.

■ d. Add paragraphs (b)(14) and (b)(15).

The additions and revisions read as follows:

§ 201.4 Recordation of transfers and other documents pertaining to copyright.

* * * * *

(b) * * *

(3) Notices of use of sound recordings under statutory license and notices of intention to obtain a compulsory license to make and distribute phonorecords of nondramatic musical works (17 U.S.C. 112(e), 114, and 115(b); see §§ 201.18, 370.2 of this chapter);

* * * * *

(14) Notices of noncommercial use of pre-1972 sound recordings (17 U.S.C. 1401(c)(1)(B); see § 201.37); and

(15) Opt-out notices of noncommercial use of pre-1972 sound recordings (17 U.S.C. 1401(c)(1)(C); see § 201.37).

* * * * *

■ 4. Add § 201.37 to read as follows:

§ 201.37 Noncommercial use of pre-1972 sound recordings

(a) *General.* This section prescribes the rules under which a user, desiring to make noncommercial use of a pre-1972 sound recording pursuant to 17 U.S.C. 1401(c), conducts a good faith, reasonable search to determine whether the sound recording is being commercially exploited, and if not, files a notice of noncommercial use with the Copyright Office. This section also prescribes the rules under which a rights owner of a pre-1972 sound recording identified in a notice of noncommercial use may file an opt-out notice opposing a proposed use of the sound recording, pursuant to 17 U.S.C. 1401(c)(1)(C).

(b) *Definitions.* For purposes of this section:

(1) Unless otherwise specified, the terms used have the meanings set forth in 17 U.S.C. 1401.

(2) A *pre-1972 sound recording* is a sound recording fixed before February 15, 1972.

(3) For pre-1972 sound recordings of classical music, including opera:

(i) The *title* of the pre-1972 sound recording means, to the extent applicable and known by the user, any and all title(s) of the sound recording and underlying musical composition known to the user, and the composer and opus or catalogue number(s) of the underlying musical composition; and

(ii) the *featured artist(s)* of the pre-1972 sound recording means, to the extent applicable and known by the user, the featured soloist(s); featured ensemble(s); featured conductor; and any other featured performer(s).

(c) *Conducting a good faith, reasonable search.*

(1) Pursuant to 17 U.S.C. 1401(c)(3)(A), a user desiring to make noncommercial use of a pre-1972 sound recording should search for the sound recording in each of the categories below until the user finds the sound recording. If the user does not find the pre-1972 sound recording after searching the categories below, her search is sufficient for purposes of the safe harbor in 17 U.S.C. 1401(c)(4), establishing that she made a good faith, reasonable search without finding commercial exploitation of the sound recording by or under the authority of the rights owner. The categories are:

(i) Searching the Copyright Office's database of indexed schedules listing right owners' pre-1972 sound recordings (*https://www.copyright.gov/music-modernization/pre1972-soundrecordings/search-soundrecordings.html*);

(ii) Searching at least one major search engine, namely Google, Yahoo!, or Bing, to determine whether the pre-1972 sound recording is being offered for sale in download form or as a new (not resale) physical product, or is available through a streaming service;

(iii) Searching at least one of the following streaming services: Amazon Music Unlimited, Apple Music, Spotify, or TIDAL;

(iv) Searching SoundExchange's repertoire database through the SoundExchange ISRC lookup tool (*https://isrc.soundexchange.com/#!/search*);

(v) Searching at least one major seller of physical product, namely *Amazon.com*, and if the pre-1972 sound recording is of classical music or jazz, searching a smaller online music store that specializes in product relative to that niche genre, namely: ArkivJazz, ArkivMusic, Classical Archives, or Presto; in either case, to determine whether the pre-1972 sound recording is being offered for sale in download form or as a new (not resale) physical product; and

(vi) For pre-1972 ethnographic sound recordings of Alaska Native or American Indian tribes or communities, searching, if such contact information is known to the user, by contacting the relevant Alaska Native or American Indian tribe and the holding institution of the sound recording (such as a library or archive) to gather information to determine whether the sound recording is being commercially exploited. If this contact information is not previously known to the prospective user, the user should use the information provided by the National Congress of American Indians (NCAI) tribal directory to contact the relevant tribe or NCAI itself (*http://www.ncai.org/tribal-directory*).

(2) A search under paragraph (c)(1) of this section must include searching the title of the pre-1972 sound recording and its featured artist(s). If the user knows any of the following attributes of the sound recording, and the source being searched has the capability for the user to search any of the following

attributes, the search must also include searching: Alternate artist name(s), alternate title(s), album title, and the International Standard Recording Code (''ISRC''). A user is encouraged, but not required, to search additional known attributes, such as the label, version, or Universal Product Code (''UPC'').

(3) A search under paragraph (c)(1) of this section must be conducted within 90 days of the user (or her agent) filing a notice of noncommercial use under paragraph (d)(1) of this section to be sufficient for purposes of the safe harbor in 17 U.S.C. 1401(c)(4).

(4) For purposes of the safe harbor in 17 U.S.C. 1401(c)(4)(A), a user cannot rely on:

(i) A search conducted under paragraph (c)(1) of this section by a third party who is not the user's agent; or

(ii) A notice of noncommercial use filed under paragraph (d)(1) of this section by a third party (who is not the user's agent) to which the rights owner does not file an opt-out notice.

(d) *Notices of noncommercial use.*

(1) *Form and submission.* A user seeking to comply with 17 U.S.C. 1401(c)(1) must submit a notice of noncommercial use identifying the pre-1972 sound recording that the user intends to use and the nature of such use using an appropriate form provided by the Copyright Office on its website and following the instructions provided on the Office's website or the form itself. The Office may reject any submission that fails to comply with the requirements of this section, or any relevant instructions or guidance provided by the Office.

(2) *Content.* A notice of noncommercial use shall contain the following:

(i) The user's full legal name, and whether the user is an individual person or corporate entity, including whether the entity is a tax-exempt organization as defined under the Internal Revenue Code. Additional contact information, including an email address, may be optionally provided.

(ii) The title and featured artist(s) of the pre-1972 sound recording desiring to be used.

(iii) If any are known to the user, the alternate artist name(s), alternate title(s), album title, and International Standard Recording Code (ISRC).

(iv) The user may include additional optional information about the pre-1972 sound recording as permitted by the Office's form or instructions, such as the year of release.

(v) A description of the proposed noncommercial use, including a summary of the project and its purpose, how the pre-1972 sound recording will be used in the project, and when and where the proposed use will occur (*i.e.,* the term and U.S.-based territory of the use). The user may include additional optional information detailing the proposed use, such as the tentative title of the project, the playing time of the pre-1972 sound recording to be used as well as total playing time, description of corresponding visuals in the case of audiovisual uses, and whether and how the user will credit the sound recording title, featured artist, and/or rights owner in connection with the project.

(vi) A certification that the user searched but did not find the pre-1972 sound recording in a search conducted under paragraph (c) of this section.

(vii) A certification that the individual submitting the notice of noncommercial use has appropriate authority to submit the notice, that the user desiring to make noncommercial use of the pre-1972 sound recording (or the user's agent) conducted a search under paragraph (c) within the last 90 days without finding commercial exploitation of the sound recording, and that all information submitted to the Office is true, accurate, and complete to the best of the individual's knowledge, information, and belief, and is made in good faith.

(3) *U.S.-based territory.* Noncommercial use of a pre-1972 recording under this section is limited to use within the United States.

(4) *Number of sound recordings.* A notice of noncommercial use may not include proposed use for more than one pre-1972 sound recording unless all of the sound recordings include the same featured artist(s) and were released on the same pre-1972 album or unit of publication.

(5) *Unique identifier.* The Copyright Office will assign each indexed notice of noncommercial use a unique identifier to identify the notice in the Office's public records.

(6) *Legal sufficiency.*

(i) The Copyright Office does not review notices of noncommercial use submitted under paragraph (d)(1) of this section for legal sufficiency. The Office's review is limited to whether the procedural requirements established by the Office (including payment of the proper filing fee) have been met. The fact that the Office has indexed a notice is not a determination by the Office of the notice's validity or legal effect. Indexing by the Copyright Office is without prejudice to any party claiming that the legal or formal requirements for making a noncommercial use of a pre-1972 sound recording have not been met, including before a court of competent jurisdiction. Users are therefore cautioned to review and scrutinize notices of noncommercial use to assure their legal sufficiency before submitting them to the Office.

(ii) If a rights owner does not file an opt-out notice under paragraph (e) of this section, when the term of use specified in the notice of noncommercial use ends, the user must cease noncommercial use of the pre-1972 sound recording for purposes of remaining in the safe harbor in 17 U.S.C. 1401(c)(4). Should the user desire to requalify for the safe harbor with respect to that same pre-1972 sound recording, the user must conduct a new search and file a new notice of noncommercial use under paragraphs (c) and (d) of this section, respectively.

(7) *Filing date.* The date of filing of a notice of noncommercial use is the date when a proper submission, including the prescribed fee, is received in the Copyright Office. The filing date may not necessarily be the same date that the notice, for purposes of 17 U.S.C. 1401(c)(1)(C), is indexed into the Office's public records.

(8) *Fees.* The filing fee to submit a notice of noncommercial use pursuant to this section is prescribed in § 201.3(c).

(9) *Third-party notification.* A person may request timely notification of filings made under paragraph (d)(1) of this section by following the instructions provided by the Copyright Office on its website.

(e) *Opt-out notices.*

(1) *Form and submission.* A rights owner seeking to comply with 17 U.S.C. 1401(c)(1)(C) must file a notice opting out of a proposed noncommercial use of a pre-1972 sound recording filed under paragraph (d)(1) of this section using an appropriate form provided by the Copyright Office on its website and following the instructions for completion and submission provided on the Office's website or the form itself. The Office may reject any submission that fails to comply with the requirements of this section, or any relevant instructions or guidance provided by the Office.

(2) *Content.* An opt-out notice use shall contain the following:

(i) The rights owner's name and the unique identifier assigned to the notice of noncommercial use by the Copyright Office. Additional contact information, including an email address, may be optionally provided.

(ii) A certification that the individual submitting the opt-out notice has appropriate authority to submit the notice and that all information submitted to the Office is true, accurate,

and complete to the best of the individual's knowledge, information, and belief, and is made in good faith.

(iii) Submission of an opt-out notice does not constitute agreement by the rights owner or the individual submitting the opt-out notice that the proposed use is in fact noncommercial. The submitter may choose to comment upon whether the rights owner agrees that the proposed use is noncommercial use, but failure to do so does not constitute agreement that the proposed use is in fact noncommercial.

(3) *Multiple rights owners.* Where a pre-1972 sound recording has multiple rights owners, only one rights owner needs to file an opt-out notice for purposes of 17 U.S.C. 1401(c)(5).

(4) *Effect of opting out.* If a rights owner files a timely opt-out notice under paragraph (e)(1) of this section, the user must wait one year before filing another notice of noncommercial use proposing the same or similar use of the same pre-1972 sound recording(s).

(5) *Legal sufficiency.* The Copyright Office does not review opt-out notices submitted under paragraph (e)(1) of this section for legal sufficiency. The Office's review is limited to whether the procedural requirements established by the Office (including payment of the proper filing fee) have been met. Rights owners are therefore cautioned to review and scrutinize opt-out notices to assure their legal sufficiency before submitting them to the Office.

(6) *Filing date.* The date of filing of an opt-out notice is the date when a proper submission, including the prescribed fee, is received in the Copyright Office.

(7) *Fee.* The filing fee to submit an opt-out notice pursuant to this section is prescribed in § 201.3(c).

(f) *Fraudulent filings.* If the Register becomes aware of abuse or fraudulent filings under this section by or from a certain filer or user, she shall have the discretion to reject all submissions from that filer or user under this section for up to one year.

Dated: January 30, 2019.

Regan A. Smith,

General Counsel and Associate Register of Copyrights.

[FR Doc. 2019–00873 Filed 2–4–19; 8:45 am]

BILLING CODE 1410–30–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 4

RIN 2900–AQ43

Schedule for Rating Disabilities: Infectious Diseases, Immune Disorders, and Nutritional Deficiencies

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend the section of the VA Schedule for Rating Disabilities (VASRD or Rating Schedule) that addresses infectious diseases and immune disorders. The purpose of these changes is to incorporate medical advances since the last revision, update medical terminology, and clarify evaluation criteria. The proposed rule considers comments from experts and the public during a forum held from January 31 to February 1, 2011, on revising this section of the VASRD.

DATES: Comments must be received by VA on or before April 8, 2019.

ADDRESSES: Written comments may be submitted through *www.regulations.gov;* by mail or hand-delivery to Director, Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Ave. NW, Room 1063B, Washington, DC 20420; or by fax to (202) 273–9026. (This is not a toll free number.) Comments should indicate that they are submitted in response to ''RIN 2900–AQ43—Schedule for Rating Disabilities: Infectious Diseases, Immune Disorders, and Nutritional Deficiencies.'' Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. (This is not a toll free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *www.Regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Ioulia Vvedenskaya, M.D., M.B.A., Medical Officer, Part 4 VASRD Regulations Staff (211C), Compensation Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 461–9700. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION: As part of its ongoing revision of the VASRD, VA proposes changes to 38 CFR 4.88a, which pertains to chronic fatigue syndrome (CFS), and 38 CFR 4.88b, which pertains to the schedule of ratings for infectious diseases and immune disorders (we note that the proposed changes for § 4.88b exclude the schedule of ratings for nutritional deficiencies—diagnostic codes (DC) 6313, 6314, and 6315). VA last updated the schedule of ratings in § 4.88b on July 31, 1996 (*see* 61 FR 39875) and updated § 4.88a on July 19, 1995 (*see* 60 FR 37012).

VA proposes to: (1) Update the medical terminology and definition of certain infectious diseases and immune disorders; (2) add medical conditions not currently in the Rating Schedule; (3) refine evaluation criteria based on medical advances that have occurred since the last revision; and (4) incorporate current understanding of functional changes associated with or resulting from disease (pathophysiology).

A panel of independent experts convened by the Institute of Medicine (IOM) in February 2015 proposed an updated set of diagnostic criteria for infectious disease and immune disorders. This updated revision also included changing the name of CFS to ''Systemic Exertion Intolerance Disease (SEID)/Chronic fatigue Syndrome (CFS).''

VA has clear authority to make this regulatory change because of its broad authority to ''prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by [VA] and are consistent with those laws.'' 38 U.S.C. 501(a); *see also* 38 U.S.C. 1155 (VA's authority to adopt and apply schedule for rating disabilities).

§ 4.88a Chronic Fatigue Syndrome

Currently, § 4.88a specifies older diagnostic criteria for the diagnosis of CFS and uses outdated terminology to refer to this complex disease. VA proposes to update the nomenclature for this disease, which is also known as systemic exertion intolerance disease (SEID) or myalgic encephalomyelitis (ME), by changing the diagnostic code name to ''Systemic Exertion Intolerance Disease (SEID)/Chronic Fatigue Syndrome (CFS).'' This new name captures a central characteristic of the disease that reflects negative effects of any exertion (physical, cognitive, or emotional) on patients' many organ systems. IOM (Institute of Medicine), *Beyond Myalgic Encephalomyelitis/ Chronic Fatigue Syndrome: Redefining an Illness* (2015), *http://www.nationalacademies.org/hmd/~/media/Files/Report%20Files/2015/*

MECFS/MECFSclinicians guide.pdf (last accessed August 30, 2018).

VA is also proposing to revise the current diagnostic criteria for SEID/CFS to adhere to evidence-based criteria which were adopted by the Centers for Disease Control and Prevention (CDC). *IOM Report on ME/CFS* (2015) (updated July 3, 2017), *https://www.cdc.gov/me-cfs/symptoms-diagnosis/diagnosis.html* (last accessed July 17, 2018). According to the 2015 IOM Report, up to 2.5 million Americans suffer from this disease which is characterized by profound fatigue, cognitive dysfunction, sleep abnormalities, pain, autoimmune manifestations, and a variety of other symptoms that are made worse by exertion of any sort. New diagnostic criteria will take into consideration whether this severe chronic fatigue significantly interferes with daily activities and work, if the affected individual concurrently has four or more of the eight symptoms as outlined in CDC evidence-based criteria and whether these symptoms first appeared before the fatigue, have persisted or recurred during six or more consecutive months of illness, and were due to ongoing exertion or other medical conditions associated with fatigue.

The CDC mandates a thorough medical history, physical examination, mental status examination, and laboratory tests to identify underlying or contributing conditions that require treatment. CDC recognizes and identifies several conditions that do not exclude a diagnosis of SEID/CFS. Currently, § 4.88b lists 19 DCs encompassing infectious diseases and immune disorders. VA proposes to revise these codes to reflect current terminology, advances in medical knowledge, recommendations from the 2015 IOM Report on ME/CFS and a 2007 IOM Report on evaluating veterans for disability benefits, IOM, *A 21st Century System For Evaluating Veterans for Disability Benefits* (2007), *https://www.nap.edu/read/11885/chapter/1* (last accessed July 17, 2018).

Schedule of Ratings—Infectious Diseases, Immune Disorders, and Nutritional Deficiencies

Proposed General Rating Formula for § 4.88b

Currently, each infectious disease listed under § 4.88b has its own prescribed rating criteria. In most cases, each specific infectious disease warrants a 100 percent evaluation during an active period of the disease. Thereafter, any residual functional impairment from the infectious disease determines the level of disability. These evaluation principles are generally consistent with the clinical presentation of infectious diseases.

VA proposes one General Rating Formula for § 4.88b. This approach is based on the association between clinical resolution or stabilization of an infectious disease and elimination or complete suppression of the causative infectious agent. Regardless of whether resolution occurs spontaneously or because of treatment, long-term disability in such situations results from residual functional impairment of the body systems affected by the infectious disease, rather than the infection itself. Sheila Davey, World Health Organization, *World Health Organization Report on Infectious Diseases: Removing Obstacles to Healthy Development* (1999).

Therefore, VA's proposal to use a General Rating Formula does not substantively change the current evaluation criteria so much as their organization. This rulemaking proposes to restructure rating criteria by creating one General Rating Formula applicable to multiple infectious diseases, regardless of etiology. A General Rating Formula for infectious diseases would ensure consistency in rating these conditions and be similar to the use of a General Rating Formula in other sections of the VASRD, such as in §§ 4.97, 4.116, 4.130, and others. This formula would be a familiar concept for Veterans Benefits Administration (VBA) employees and minimize the risk for error by providing one criterion applicable to multiple diagnostic codes. Although each specific infectious disease has a different etiology and natural history, once the active disease phase is over, disability would be rated on residuals. VA would assign a 100 percent disability rating during the variable length of each specific disease's active phase. For most infectious diseases manifesting acutely, the length of the active disease phase (*i.e.,* the time between disease onset and resolution or stabilization) is at most usually six to eight weeks. VA proposes to assign a 100 percent evaluation during the active disease phase. VA recognizes that some infectious diseases, such as tuberculosis, may have a longer than average active disease phase. Therefore, VA proposes that the General Rating Formula apply only in those cases where specific rating criteria are not otherwise provided. Diagnostic codes in § 4.88b that would not follow the General Rating Formula would be 6301, 6302, 6310, 6311, 6312, 6313, 6314, 6315, 6325, 6326, 6351, and 6354.

After the disease becomes inactive, VA proposes to assign a 0 percent evaluation. However, even though advancements in antimicrobial therapy have significantly lessened the occurrence of residuals of infectious diseases, they continue to occur. Therefore, VA generally proposes to append each diagnostic code with a note describing the most common residuals associated with a given infection. See below for additional details. As a list of every residual would be impractical, these notes would clearly indicate that they are not exhaustive. Where ascertainable residuals exist, VA proposes to assign evaluations for those residuals under the appropriate body system(s).

Certain infectious conditions are prone to relapse and require laboratory evaluation for confirmation. L. Joseph Wheat et al., *Clinical Practice Guidelines for the Management of Patients with Histoplasmosis: 2007 Update by the Infectious Diseases Society of America,* 45 Clinical Infectious Diseases 807, 807–25 (2007). Oftentimes, non-specific constitutional symptoms (weakness, tiredness, insomnia, weight loss, etc.) occur following the active phase of an infectious disease. However, such symptoms may be due to other causes than the infection. Therefore, to ensure VA assigns the most appropriate evaluations for relapsing infections, VA proposes to include a note in the rule requiring that relapses be confirmed by pathogen-specific testing using appropriate microbiologic, serologic, biochemical (*e.g.,* nucleic acid detection)histopathologic methods.

Finally, although VA proposes using a General Rating Formula for most infectious diseases, VA notes that each infectious disease has a different long-term impact. For those that have longer active phases and/or are commonly associated with relapse and residuals, VA proposes to require VA examination once the disease is no longer active so that a medical professional can evaluate the individual's condition. In these cases, VA also proposes to apply the provisions of § 3.105(e) that require VA to send beneficiaries notice of any proposed reduction in evaluation and provide an opportunity to respond before it becomes effective.

Proposed Changes to Existing Diagnostic Codes

As discussed above, VA proposes to apply a General Rating Formula for infectious diseases unless otherwise noted. Additionally, VA proposes to provide notes identifying common residuals associated with particular diseases and instructions to rating personnel regarding the level of medical

review necessary following cessation of treatment and infection. These specific proposed changes are discussed below.

Diagnostic Code 6300

Currently, DC 6300 is titled ''Cholera, Asiatic'' referring only to infection with toxigenic strains of *Vibrio cholerae;* it does not reflect infections due to other species within the genus *Vibrio.* Non-cholera *Vibrio* species cause diarrheal diseases, as well as wound infections and septicemia. To reflect the total array of diseases caused by *Vibrio* species, VA proposes to rename this DC ''Vibriosis (cholera, non-cholera), to encompass conditions caused by *V. cholerae* and by non-cholera *Vibrio* organisms.

Cholera due to *V. cholerae* and gastroenteritis due to other *Vibrio* species are associated with severe diarrhea of relatively short duration. Hoi Ho et al., *Vibrio Infections, Medscape.com* (July 24, 2018), *http://emedicine.medscape.com/article/232038-overview.* Including the incubation period, cholera usually lasts 7 to 10 days and results in total remission, or, in 5 to 10 percent of cases, death if left untreated. Therefore, the proposed General Rating Formula would be appropriate for both cholera and non-cholera gastroenteritis due to other *Vibrio* species, and VA would remove the existing provision for a separate three-month convalescence period as it would no longer be necessary.

VA proposes to use a note to provide information about common residual disability of cholera and non-cholera *Vibrio* infection, including renal failure, skin, and musculoskeletal conditions, such as necrotizing fasciitis. VA proposes no changes to the evaluation criterion for this DC except eliminating the three-month convalescence and adding a note to address rating of residual disability.

Diagnostic Code 6301

VA evaluates DC 6301, visceral leishmaniasis, at 100 percent for six months following cessation of treatment, after which a VA examination helps determine residual disability. VA proposes only minor changes to this rating criteria, but proposes to change the note regarding rating residual disability. VA would generally identify those residuals commonly associated with post-infection or post-treatment residuals that may warrant evaluation. Currently, DC 6301 lists lymphadenopathy as one such residual disability. However, lymphadenopathy follows numerous diseases and is a frequent physical finding which, even when permanent, is otherwise without symptoms or disability that would warrant evaluation. Robert Ferrer, *Lymphadenopathy: Differential Diagnosis and Evaluation,* 58 a.m. Fam. Physician 1313, 1313–20 (Oct. 15, 1998). In many cases, it may constitute a normal physical finding. Vikramjit S. Kanwar, *Lymphadenopathy, Medscape.com* (Feb. 1, 2018), *http://emedicine.medscape.com/article/956340-overview.*

As lymphadenopathy is often associated with other diseases and, regardless of origin, commonly presents without symptoms or disability warranting evaluation, VA proposes to remove it from the note in DC 6301. VA notes that the list of possible residuals in proposed DC 6301 would not be exhaustive. Thus, if a veteran presents with lymphadenopathy as a residual of visceral leishmaniasis that results in chronic, functional impairment, VA would consider an evaluation under the appropriate system.

In addition to the above revision, VA proposes to amend the existing Note 1 to inform that the residual effects of infection include bone marrow diseases. *Parasites—Leishmaniasis,* CDC (Jan. 10, 2013), *https://www.cdc.gov/parasites/leishmaniasis/index.html.* This note would also refer to the residuals listed in 38 CFR 3.317(d), ''Long-term health effects potentially associated with infectious diseases.''

Finally, VA proposes to add a new Note 2 to address the use of culture, histopathology, and other diagnostic testing to confirm relapses. Clinicians rely on such diagnostic testing, which has increased steadily in accuracy and availability, to determine whether symptoms are due to leishmaniasis or some other disease. Shyam Sundar & M. Rai, ''Laboratory Diagnosis of Visceral Leishmaniasis,'' 9 Clinical and Diagnostic Laboratory Immunology 951, 951–58 (2002). VA also proposes to retitle the existing note as Note 1 to account for the addition of this second note.

Diagnostic Code 6302

VA would not change the rating criteria for leprosy (Hansen's disease), but proposes to amend the current Note under DC 6302 by adding amputations as a residual in the proposed Note. The neurologic impairment in leprosy involves sensory and motor deficits/loss in the extremities that may lead to auto-amputation. Preenon Bagchi et al., *Bacterio-Informatics: Identifying the Cause of Hansen's Disease and Establish [sic] a Remedy for the Same,* 2 Int'l J. of Bioinformatics Res. and Applications 15, 15–19 (2010).

Diagnostic Code 6304

VA proposes to evaluate DC 6304, malaria, using the General Rating Formula because it is an acute, debilitating disease with predictable clinical presentation.

VA proposes to amend an existing note and to add one new notes. Note 1 would explicitly state that VA requires diagnostic confirmation for both the initial diagnosis and any relapse. To reflect advances in malarial testing, VA also proposes to refer to other specific diagnostic tests such as antigen detection, immunologic (immunochromatographic) tests, and molecular testing, such as polymerase chain reaction tests. *Malaria Diagnosis (United States),* CDC (Nov. 19, 2015), *https://www.cdc.gov/malaria/diagnosis_treatment/diagnosis.html.*

Note 2 would recognize potential nervous system residuals because severe forms of malaria affect the brain as an encephalopathy. Pralay Sarkar et al., ''Critical care aspects of malaria,'' 25 J. of Intensive Care Med. 93, 93–103 (2010). In addition, this note would also refer to the residuals listed in § 3.317(d).

Diagnostic Code 6305

VA proposes to amend the title of this DC, currently ''Lymphatic filariasis,'' to include the term elephantiasis, which is another name commonly associated with the chronic form of this condition. *Lymphatic Filariasis Fact Sheet No. 102,* World Health Organization (May 11, 2018), *http://www.who.int/mediacentre/factsheets/fs102/en/.*

The new General Rating Formula would provide 100 percent evaluation for the acute phase of active infection for lymphatic filariasis. The proposed General Rating Formula would be appropriate for use in this acute infection. However, no actual changes in the evaluation criteria would result from this organizational change intended to help rating personnel easily apply the VASRD.

VA proposes to add information to more adequately address the range of potential residuals, which include lymphedema (permanent swelling) and lymphatic obstruction. *Parasites—Lymphatic Filariasis,* CDC (June 14, 2013), *http://www.cdc.gov/parasites/lymphaticfilariasis/disease.html.* VA proposes a new Note to instruct rating personnel to evaluate under the appropriate body system residuals such as epididymitis, lymphangitis, lymphatic obstruction, or lymphedema affecting extremities, genitals, and/or breasts.

Diagnostic Code 6306

Bartonellosis, currently evaluated under DC 6306, generally resolves within two months with appropriate treatment. Kassem A. Hammoud et al., *Bartonellosis,* Medscape.com (Oct. 17, 2012), *http://emedicine.medscape.com/article/213169-overview.* Therefore, VA proposes to rate active bartonellosis under the General Rating Formula at 100 percent, and VA would remove the existing provision for a separate three-month convalescence period as it would no longer be necessary.

VA also proposes to update the residual disability to include endocarditis, which occurs when the bloodstream may carry this bacterium to the heart valves. John L. Brusch et al., *Infective Endocarditis—Pathophysiology, Medscape.com* (Dec. 17, 2013), *http://emedicine.medscape.com/article/216650-overview#a0104.*

Diagnostic Code 6307

VA proposes to evaluate DC 6307, plague, which is an acute, debilitating disease of short duration, using the General Rating Formula.

Use of modern antibiotics renders residual disability from the infection itself extremely rare. Therefore, VA proposes to delete the existing note regarding specific residuals and replace it with a note stating that VA would rate any residual disability under the appropriate body system. Again, lymphadenopathy is a frequent physical finding following numerous diseases, often permanent and without disabling symptoms. Robert Ferrer, *Lymphadenopathy: Differential Diagnosis and Evaluation,* 58 Am.Fam. Physician at 1313–20. VA proposes removing lymphadenopathy as a residual because it may be a normal physical finding. Vikramjit S. Kanwar, *Lymphasdenopathy, Medscape.com* (July 10, 2015), *http://emedicine.medscape.com/article/956340-overview*); *Plague,* CDC (Nov. 28, 2012), *http://www.cdc.gov/plague/.*

Diagnostic Code 6308

VA proposes to evaluate DC 6308, relapsing fever, which is an acute, debilitating disease of short duration, using the General Rating Formula.

Modern treatment helps most patients recover from this disease within a few days, with little incidence of splenic damage. Long-term sequelae of relapsing fever are rare, but include iritis, uveitis, cranial nerve, and other neuropathies. *Tick-borne Relapsing Fever (TBRF),* CDC (Jan. 8, 2016), *http://www.cdc.gov/relapsing-fever/clinicians/.* Therefore, VA proposes a new Note adding iritis and uveitis as residual disabilities and retaining the remainder of the existing information without substantive change.

VA does not propose any changes to the evaluation criteria for this DC.

Diagnostic Code 6309

VA proposes to evaluate DC 6309, rheumatic fever, which is an acute, febrile disease typically lasting less than a month, using the General Rating Formula. The existing note regarding residuals would remain substantively unchanged.

Diagnostic Code 6310

VA does not propose substantive change to the criteria under diagnostic code 6310 for syphilis and other treponemal infections. However, for consistency with the remainder of this section, VA proposes to replace the term ''complications'' with the term ''residual disability,'' which VA would rate under the appropriate body system.

Additionally, VA proposes to remove specific references to the names associated with each DC identified in this note because future revisions of the rating schedule would retitle several of them.

Diagnostic Code 6311

Currently, DC 6311, miliary tuberculosis, provides a 100 percent evaluation during active infection. Under § 4.88c, the 100 percent is continued for one year following the date of inactivity. Active infection may last for months to years, and, if undiagnosed or untreated, may result in death. The standard treatment for drug-susceptible miliary tuberculosis is six to nine months with a combination of anti-tuberculosis drugs. If the meninges are involved, treatment will last for 9 to12 months, but may occasionally require longer a treatment duration. Nahid, P., et al., ''Executive Summary: Official American Thoracic Society/Centers for Disease Control and Prevention/Infectious Diseases Society of America Clinical Practice Guidelines: Treatment of Drug-Susceptible Tuberculosis,'' 63 Clinical Infectious Diseases 853, 853–867 (Oct. 2016), *https://www.nidcd.nih.gov/health/balance/pages/meniere.aspx* (last visited January 22, 2019). Relapses are common when medication is not taken for the full time prescribed and/or not taken in the appropriate combination. Generally, most relapses occur within the first 12 months of treatment completion. *Tuberculosis (TB) Guidelines.* CDC (May 4, 2016), *https://www.cdc.gov/tb/publications/guidelines/treatment.htm.*

To ensure that individuals are entitled to any resumption or continuation of the 100 percent evaluation after the initial active disease, VA proposes to add a Note requiring confirmation of relapse by culture, histopathology, or other diagnostic laboratory testing.

VA also proposes Note 2 addressing residuals which may be found under § 4.88c. Infection residuals include, but are not limited to, chronic diagnosed disabilities affecting such body systems as the skin and respiratory, central nervous, musculoskeletal, ocular, gastrointestinal, and genitourinary systems. VA would rate them under the appropriate body system. J.J. van der Harst & G.J. Luijckx, *Treatment of Central Nervous System Tuberculosis Infections and Neurological Complications of Tuberculosis Treatment,* 17 Current Pharmaceutical Design 2940, 2940–47 (2011).

Diagnostic Code 6316

VA proposes to evaluate DC 6316, brucellosis, an acute, debilitating disease of short duration usually lasting several weeks or less, using the General Rating Formula. Brucellosis is easily treated with antibiotics, but, if untreated, brucellosis may become chronic and leave significant residuals. VA proposes no changes to the evaluation criteria.

As the correct diagnosis is essential in determining if symptoms are due to brucellosis or some other disease entity, VA proposes to add a new Note 1 directing that culture, serologic testing, or both must confirm both the initial diagnosis and any relapse of active infection. Wafa Al-Nassir, *Brucellosis, Medscape.com* (June 16, 2017), *http://emedicine.medscape.com/article/213430-overview.*

VA proposes to amend the existing note as Note 2 and expand the list of residuals in light of advances in medicine and early treatment. Note 2 would reflect the residuals most commonly associated with this infection, including meningitis, and liver, spleen, or musculoskeletal conditions. *Brucellosis,* CDC (Sept. 13, 2017) *http://www.cdc.gov/brucellosis/index.html.* As this condition is a presumptive disease related to Gulf War service, this note would also refer to the many specific residuals of brucellosis listed in § 3.317(d).

Diagnostic Code 6317

Currently, DC 6317 represents scrub typhus, an acute debilitating rickettsial disease lasting for several weeks or less. If untreated, a high mortality rate results. Antibiotic treatment rapidly eradicates the disease and significantly

reduces the chances of complications. Therefore, VA proposes to evaluate DC 6317 using the General Rating Formula. VA proposes to rename this DC to encompass all forms of rickettsial and similar erlichial and *Anaplasma* infections. These infections are not specific to the veteran population as they afflict travelers and field scientists as well. Renaming this DC would mean rating personnel need not further clarify the type of typhus infecting a veteran.

VA is not proposing any changes to the evaluation criteria except to use the General Rating Formula. VA would also remove the existing provision for a separate three-month convalescence period as it would no longer be necessary.

VA proposes to update the existing note to include such residuals frequently associated with DC 6317 as involvement of bone marrow and the central nervous system, in addition to the current list of spleen damage or skin conditions.

Rickettsial, ehrlichial, and *Anaplasma* infections cause similar nonspecific influenza-like illness in humans, including but not limited to, scrub typhus, Rocky Mountain spotted fever, African tick-borne fever, ehrlichiosis, and anaplasmosis. Therefore, VA also proposes to add a second note to list other rickettsial infections, including infections by *Ehrlichia* and *Anaplasma* species (members of the order Rickettsiales) to account for its occurrence in the U.S. veteran population. Johan S. Bakken & J. Stephen Dumler, *Ehrlichiosis and Anaplasmosis, Medscape.com* (2004), *https://www.medscape.com/viewarticle/490468_4.*

Diagnostic Code 6318

Currently, DC 6318 represents melioidosis, an acute debilitating bacterial disease lasting several weeks or less, which, if left untreated, may result in mortality. VA proposes no changes to the evaluation criteria, except use of the General Rating Formula.

As accuracy is essential in diagnosing melioidosis, VA proposes to add Note 1 directing that culture or other specific diagnostic laboratory tests must confirm both the initial diagnosis and any relapse or chronic activity of infection.

VA would retain the existing information regarding common residuals and the instruction to rate residuals under the appropriate body system under Note 2.

Diagnostic Code 6319

VA currently assigns a 100 percent evaluation for DC 6319, Lyme disease, when it is active. Lyme disease is an acute illness, usually lasting several weeks or less. Therefore, VA proposes to rate Lyme disease under the General Rating Formula, without changes to the actual evaluation criteria. VA also proposes to amend the existing note associated with this DC to account for residuals such as Bell's palsy, radiculopathy, ocular, and cognitive dysfunction, in addition to arthritis.

Diagnostic Code 6320

Currently, DC 6320 represents ''Parasitic diseases otherwise not specified.'' VA proposes no changes to the evaluation criteria except to use the General Rating Formula. VA also proposes to amend the existing note associated with this DC with general instructions to rate any residuals of this infection under the appropriate body system.

Diagnostic Code 6351

VA proposes a number of changes to DC 6351, which pertains to human immunodeficiency virus (HIV) related illness. Currently, VA provides a 100 percent evaluation for ''AIDS with recurrent opportunistic infections or with secondary diseases affecting multiple body systems; HIV-related illness with debility and progressive weight loss, without remission, or few or brief remissions.'' VA proposes to remove the statement about remission because the CDC considers AIDS a chronic condition, and the diagnosis continues once a person is properly diagnosed, regardless of improvements in that person's condition.

When VA last revised the evaluation criteria, the medical community considered oral hairy leukoplakia (OHL) a distinctive clinical marker of HIV infection. Since then, measurement of the peripheral CD4 cell count and HIV viral load have become the standard method for evaluating a patient's stage of HIV infection. Sowmya Nanjappa, *Anti-retroviral Therapy in Treatment-Naïve Patients, Medscape.com* (June 3, 2016), *https://emedicine.medscape.com/article/2041458-overview.* In addition, OHL by itself rarely, if ever, requires specific treatment in patients receiving anti-retroviral therapy. James Cade, Hairy Leukoplakia Treatment and Management, *Medscape.com* (December 19, 2018), *https://emedicine.medscape.com/article/279269-overview.* VA proposes to remove reference to OHL in the criteria for a 30 percent evaluation.

Similarly, VA proposes to modify the reference of oral candidiasis to esophageal and lower respiratory tract candidiasis for the criteria for a 30 percent evaluation. In the past, oral candidiasis was strongly associated with HIV infection. However, the increased use of antiretroviral medications has greatly reduced the incidence of this condition in HIV-positive individuals. C. Frezzini et al., *Current Trends of HIV Disease of the Mouth,* 34 J. of Oral Pathology & Med. 513, 513–31 (2005).

For clarification, VA proposes to replace the phrase ''definite medical symptoms'' in the criteria for a 10 percent evaluation with ''HIV-related constitutional symptoms.'' VA would not change the remainder of the criteria for a 10 percent evaluation. The criteria for a 0 percent evaluation would not change.

Existing Note 1 would continue to provide that ''medications prescribed as part of a research protocol at an accredited medical institution'' are to be considered ''approved medication'' within the context of the evaluation criteria. VA proposes to add a reference to treatment regimens as part of a research protocol at an accredited medical institution because some research protocols use not only new medications but also new regimens for already FDA approved medications.

Existing Note 2 would continue to provide for separate evaluation of various manifestations of HIV infection under the appropriate diagnostic codes. VA proposes to retain the instruction to evaluate on the basis of psychiatric or central nervous system manifestations, opportunistic infections, and neoplasms, rather than based on this diagnostic code, if a higher overall evaluation results. However, VA proposes to substitute the term ''diagnosed psychiatric condition'' for the phrase ''psychiatric manifestations.'' VA recognizes that a veteran may exhibit psychiatric symptoms, such as depression, which do not rise to the level of a diagnosed disability. Such symptoms are more appropriately rated under DC 6351 as 10 percent disabling, provided there is evidence of activity limitations. Note 2, however, would refer to diagnosed, disabling acquired psychiatric illness.

VA also proposes the addition of a new Note 3 to assist rating personnel in applying these revised evaluation criteria. Note 3 would include a list of current opportunistic infections, which includes the following conditions: Candidiasis of the bronchi, trachea, esophagus, or lungs; invasive cervical cancer; coccidioidomycosis; cryptococcosis; cryptosporidiosis; cytomegalovirus (particularly CMV retinitis); HIV-related encephalopathy; herpes simplex-chronic ulcers of greater

than one month's duration, or bronchitis, pneumonia, or esophagitis; histoplasmosis; isosporiasis (chronic intestinal); Kaposi's sarcoma; lymphoma; *Mycobacterium avium* complex; tuberculosis; *Pneumocystis jirovecii* (*carinii*) pneumonia; pneumonia, recurrent; progressive multifocal leukoencephalopathy; *Salmonella* septicemia, recurrent; toxoplasmosis of the brain; and wasting syndrome due to HIV. *AIDS and Opportunistic Infections,* CDC (July 23, 2018), *https://www.cdc.gov/hiv/basics/livingwithhiv/opportunisticinfections.html.*

Diagnostic Code 6354

VA is proposing no change to the rating criteria for this DC other than to update the name from chronic fatigue syndrome (CFS) to systemic exertion intolerance disease/chronic fatigue syndrome (CFS). VA would, however, clarify the note to indicate that incapacitation requires that a licensed physician must prescribe both bed rest and treatment, which would be consistent with current VA practice.

Proposed New Diagnostic Codes

As discussed above, in addition to updating existing DCs, VA proposes to add medical conditions not currently listed in the Rating Schedule:

Proposed New Diagnostic Code 6312

VA proposes to add a new DC 6312 for ''Nontuberculosis mycobacterial infection'' (NTM). NTM lung infection occurs when a person inhales the organism from the environment. Most people do not become ill but some susceptible individuals require prolonged treatment of one to two years. Without treatment, many people, but not all, will develop a progressive lung infection characterized by cough, fatigue, and often weight loss. However, death directly related to NTM lung disease is relatively rare in immunocompetent individuals.

Systemic infection, which is the most severe form, is most often seen in individuals with other underlying conditions, especially those that inhibit immune function. Arry Dieudonne, *Atypical Mycobacterium Infection, Medscape.com* (Feb. 7, 2018), *http://emedicine.medscape.com/article/972708-overview.*

Similar to other infectious diseases found in the Rating Schedule, VA proposes to assign a 100 percent evaluation during active infection, after which a mandatory VA evaluation would be conducted to determine the appropriate evaluation based on residuals, if any. Therefore, VA proposes a Note 1 to this effect and instructs that any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e). Furthermore, the note would instruct rating personnel to rate on residuals if there is no relapse.

Establishing the correct diagnosis is essential in determining if symptoms are due to NTM or some other disease entity. Diagnostic testing has become more accurate and readily available over the years. Therefore, VA proposes a Note 2, requiring diagnostic confirmation for subsequent relapses.

VA proposes to include Note 3, which would identify common residuals to assist rating personnel in assigning evaluations following cessation of the 100 percent evaluation. Residuals of infection identified in Note 3 would include skin conditions and conditions of the respiratory, central nervous, musculoskeletal, ocular, gastrointestinal, and genitourinary systems.

Proposed New Diagnostic Code 6325

VA proposes to add new DC 6325 which applies to hyperinfection syndrome or disseminated strongyloidiasis. Because strongyloidiasis is not an acute, self-limited disease, VA would not use the General Rating Formula. Similar to other severe infectious diseases, VA proposes to assign a 100 percent evaluation during active disease followed by a mandatory VA evaluation to determine the appropriate evaluation based on any residuals. Systemic infection, which is the most severe form of strongyloidiasis, with a mortality rate approaching 90 percent, is most often seen in individuals with other underlying conditions, especially those with compromised immune function. *Parasites—Strongyloides, Resources for Health Professionals,* CDC (Jan. 6, 2012), *http://www.cdc.gov/parasites/strongyloides/.* VA is not proposing to list the most common residuals because their number is so vast.

Proposed New Diagnostic Code 6326

VA proposes a new diagnostic code for schistosomiasis, the second most common parasitic disease in the world. *Parasites—Schistosomiasis,* CDC (Apr. 30, 2018), *http://www.cdc.gov/parasites/schistosomiasis/.* While the parasite is not found in the United States, it is sufficiently prevalent in tropical regions that VA may presume service connection if records indicate service in such regions. *See* 38 CFR 3.309(b). VA is proposing to add a distinct DC for schistosomiasis because it otherwise lacks a means to accurately track such claims and can evaluate them only by analogy.

Most people who contract schistosomiasis are asymptomatic and have subclinical disease during both acute and chronic stages of infection. Persons with acute infection (also known as Katayama syndrome) may present with mild symptoms such as rash, fever, headache, myalgia, and respiratory symptoms that are not disabling.

Chronic disease results from host immune responses to schistosome eggs: *S. mansoni* and *S. japonicum.* These eggs most commonly lodge in the blood vessels of the liver or intestine with chronic inflammation leading to bowel wall ulceration, hyperplasia, and polyposis and, with heavy infections, to liver fibrosis and portal hypertension.

S. haematobium eggs tend to lodge in the urinary tract and the female genital tract. Female genital schistosomiasis can affect the cervix, fallopian tubes, and vagina.

Central nervous system lesions, such as in the spinal cord or brain and inflammatory reactions, may cause the formation of granulomas that act as space-occupying lesions.

VA proposes to evaluate DC 6326 by assigning a 0 percent evaluation for acute and asymptomatic chronic infections. Additionally, VA proposes to note common residuals of infection, such as liver and genitourinary tract conditions. VA would rate residual disability in the appropriate system.

Proposed New Diagnostic Code 6329

VA proposes new DC 6329 to encompass hemorrhagic fevers, including dengue, yellow fever, and others. While these fevers are uncommon in the United States, they are prevalent in tropical regions and, therefore, associated with military deployments. David C. Pigott, *CBRNE—Viral Hemorrhagic Fevers, Medscape.com* (Mar. 16, 2017), *https://emedicine.medscape.com/article/830594-overview.* VA may presume service connection for hemorrhagic fever if records indicate service in certain regions. *See* 38 CFR 3.309(b). VA is proposing to add a distinct DC for hemorrhagic fever because it otherwise lacks a means to accurately track such claims and can evaluate them only by analogy.

VA proposes to apply the General Rating Formula and assign a 100 percent evaluation for active disease because hemorrhagic fever is associated with a debilitating, acute, febrile illness that often lasts for several weeks at most. VA also proposes to include a note listing common residual disabilities of central

nervous system, liver, or kidney conditions.

Proposed New Diagnostic Code 6330

VA proposes new DC 6330 for infections caused by *Campylobacter jejuni.* In 2010, VA issued a regulation establishing that *Campylobacter jejuni* is subject to presumptive service connection for certain veterans because it is (1) prevalent in Southwest Asia, (2) has been diagnosed among U.S. troops serving in the Persian Gulf/Southwest Asia Theater of operations, and (3) is known to cause long-term adverse health effects. *See* 75 FR 59968 and 38 CFR 3.317. To monitor claims for this infection, VA proposes a diagnostic code specifically for *Campylobacter jejuni.*

VA proposes to rate *Campylobacter jejuni* infection under the General Rating Formula, meaning that it would receive a 100 percent evaluation during active infection. The symptoms of *Campylobacter jejuni* infection consist of diarrhea, cramping, abdominal pain, and fever within two to five days after exposure to the bacteria. The diarrhea may be bloody and can be accompanied by nausea and vomiting. The illness typically lasts about one week. *Campylobacter (Campylobacteriosis),* CDC (Aug. 30, 2017), *https://www.cdc.gov/campylobacter/index.html.*

Thereafter, VA would rate the condition based on residuals listed in § 3.317(d), ''Long-Term Health Effects Potentially Associated With Infectious Diseases,'' such as Guillain-Barre syndrome, reactive arthritis, and uveitis.

Proposed New Diagnostic Code 6331

VA proposes a new diagnostic code to encompass infections caused by *Coxiella burnetii.* In 2010, VA issued a regulation establishing that infection due to *Coxiella burnetii* (Q fever) is subject to presumptive service connection for certain veterans because it is (1) prevalent in Southwest Asia, (2) has been diagnosed among U.S. troops serving in the Persian Gulf/Southwest Asia theater of operations, and (3) is known to cause long-term adverse health effects. *See* 75 FR 59968 and 38 CFR 3.317. To track claims for this infection, VA proposes a diagnostic code specifically for *Coxiella burnetii* infection (Q fever).

VA proposes assigning a 100 percent evaluation during active infection according to the General Rating Formula. Thereafter, VA would rate the condition based on residuals listed in § 3.317(d), such as chronic hepatitis, endocarditis, osteomyelitis, post Q-fever chronic fatigue syndrome, and vascular infections.

Proposed New Diagnostic Code 6333

VA proposes a new diagnostic code to encompass infections caused by nontyphoidal *Salmonella.* In 2010, VA issued a regulation establishing that nontyphoidal salmonellosis is subject to presumptive service connection for certain veterans. *See* 75 FR 59968 and 38 CFR 3.317. To track claims decisions regarding this infection and to more consistently rate it, VA proposes a diagnostic code specifically for nontyphoidal salmonellosis.

VA proposes to assign a 100 percent evaluation during active infection according to the General Rating Formula. Thereafter, VA would rate the condition based on residuals, including those listed in § 3.317(d), such as reactive arthritis.

Proposed New Diagnostic Code 6334

VA proposes a new diagnostic code to encompass infections caused by *Shigella,* which would be rated under the General Rating Formula. In 2010, VA issued a regulation presuming service connection for *Shigella* infection in certain veterans. *See* 75 FR 59968 and 38 CFR 3.317. To allow for better tracking of decisions on claims for this infection and to more consistently rate it, VA proposes a diagnostic code specifically for *Shigella* infection.

VA would rate the condition based on residuals, including those listed in § 3.317(d), such as hemolytic-uremic syndrome, and reactive arthritis.

Proposed New Diagnostic Code 6335

VA proposes a new diagnostic code to encompass infections caused by West Nile virus. In 2010, VA issued a regulation presuming service connection for West Nile virus in certain veterans. *See* 75 FR 59968. To better track claims decisions regarding this infection, VA proposes a separate diagnostic code for West Nile virus, which would be rated under the General Rating Formula.

VA would rate the condition based on residuals, including those listed in § 3.317(d), such as variable physical, functional, or cognitive disability.

Executive Orders 12866, 13563, and 13771

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

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant regulatory action under E.O. 12866. VA's impact analysis can be found as a supporting document at *http://www.regulations.gov,* usually within 48 hours after the rulemaking document is published. Additionally, a copy of this rulemaking and its impact analysis are available on VA's website at *http://www.va.gov/orpm/,* by following the link for ''VA Regulations Published From FY 2004 Through Fiscal Year to Date.''

This rule is not an E.O. 13771 regulatory action because this rule is not significant under E.O. 12866.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This proposed rule would not affect any small entities. Only certain VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Unfunded Mandates

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

Paperwork Reduction Act

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

Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program numbers and titles for this rule are 64.102, Compensation for Service-Connected Deaths for Veterans' Dependents; 64.105, Pension to Veterans, Surviving Spouses, and Children; 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

List of Subjects in 38 CFR Part 4

Disability benefits, Pensions, Veterans.

Signing Authority

The Secretary of Veterans Affairs 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 January 29, 2019, for publication.

Dated: January 29, 2019.

Jeffrey M. Martin,

Assistant Director, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR part 4 as set forth below:

PART 4—SCHEDULE FOR RATING DISABILITIES

Subpart B—Disability Ratings

■ 1. The authority citation for part 4 continues to read as follows:

Authority: 38 U.S.C. 1155, unless otherwise noted.

■ 2. Revise § 4.88a to read as follows:

§ 4.88a Systemic exertion intolerance disease/chronic fatigue syndrome (CFS).

(a) For VA purposes, the diagnosis of Systemic Exertion Intolerance Disease/Chronic Fatigue Syndrome (CFS) must meet the following conditions:

(1) A severe chronic fatigue that significantly interferes with daily activities and work.

(2) The individual concerned concurrently has four or more of the following eight symptoms:

(i) Post-exertion malaise lasting more than 24 hours

(ii) Unrefreshing sleep

(iii) Significant impairment of short-term memory or concentration

(iv) Muscle pain

(v) Pain in the joints without swelling or redness

(vi) Headaches of a new type, pattern, or severity

(vii) Tender lymph nodes in the neck or armpit

(viii) Sore throat that is frequent or recurring

(3) These symptoms:

(i) Cannot have first appeared before the fatigue

(ii) Have persisted or recurred during six or more consecutive months of illness, and

(iii) Are not due to ongoing exertion or other medical conditions associated with fatigue, as ruled out by a physician who administered relevant diagnostic tests.

(b) Several past or current medical conditions exclude the diagnosis of systemic exertion intolerance disease/CFS to include:

(1) Any active condition that may explain the presence of chronic fatigue, such as untreated hypothyroidism, sleep apnea, narcolepsy, and iatrogenic conditions such as side effects of medication.

(2) Some illnesses, including some types of cancers and chronic cases of hepatitis B or C virus infection, which could explain the presence of chronic fatigue, and which have not clearly and completely resolved.

(3) Any past or current diagnosis of: major depressive disorder with psychotic or melancholic features, bipolar affective disorders, anorexia nervosa, bulimia nervosa, or any subtype of schizophrenia, delusional disorders, or dementias.

(4) Alcohol or other substance abuse, occurring within two years of the onset of chronic fatigue and any time afterwards.

(5) Severe obesity, defined as having a body mass index equal to or greater than 45. [Body mass index = weight in kilograms ÷ (height in meters)^2].

(6) Examination or testing detects any abnormality that strongly suggests an exclusionary condition that needs to be treated or resolved before attempting further diagnosis. Once fully treated, diagnose accordingly if the individual still meets criteria for Systemic Exertion Intolerance Disease (SEID)/Chronic Fatigue Syndrome (CFS).

■ 3. Amend § 4.88b by:

■ a. Revising the entries for diagnostic codes 6300 through 6302 and 6304 through 6311;

■ b. Adding in numerical order an entry for diagnostic code 6312;

■ c. Revising the entries for diagnostic codes 6316 through 6320;

■ d. Adding in numerical order entires for diagnostic codes 6325, 6326, 6329 through 6331, and 6333 through 6335; and

■ e. Revising the entries for diagnostic codes 6351 and 6354.

The revisions and additions read as follows:

§ 4.88b Schedule of ratings-infectious diseases, immune disorders, and nutritional deficiencies.

	Rating
General Rating Formula for Infectious Diseases:	
For active disease	100
After active disease has resolved, rate at 0 percent for infection. Rate any residual disability of infection within the appropriate body system.	
6300 Vibriosis (Cholera, Non-cholera):	
Evaluate under the General Rating Formula.	
Note: Rate residuals of cholera and non-cholera *Vibrio* infections, such as renal failure, skin, and musculoskeletal conditions, within the appropriate body system.	

	Rating
6301 Visceral leishmaniasis:	
As active disease	100
Note 1: Continue a 100 percent evaluation beyond the cessation of treatment for active disease. Six months after discontinuance of such treatment, determine the appropriate disability rating by mandatory VA examination. Any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter. Thereafter, rate under the appropriate body system any residual disability of infection, which includes, but is not limited to, liver damage, bone marrow disease, and those residuals listed in § 3.317(d) of this chapter.	
Note 2: Confirm the recurrence of active infection by culture, histopathology, or other diagnostic laboratory testing.	
6302 Leprosy (Hansen's disease):	
As active disease	100
Note: Continue a 100 percent evaluation beyond the cessation of treatment for active disease. Six months after discontinuance of such treatment, determine the appropriate disability rating by mandatory VA examination. Any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter. Thereafter, rate under the appropriate body system any residual disability of infection, which includes, but is not limited to, skin lesions, peripheral neuropathy, or amputations.	
6304 Malaria:	
Evaluate under the General Rating Formula.	
Note 1: The diagnosis of malaria, both initially and during relapse, depends on the identification of the malarial parasites in blood smears or other specific diagnostic laboratory tests such as antigen detection, immunologic (immunochromatographic) tests, and molecular testing such as polymerase chain reaction tests.	
Note 2: Rate under the appropriate body system any residual disability of infection, which includes, but is not limited to, liver or splenic damage, central nervous system conditions, and those residuals listed in § 3.317(d) of this chapter.	
6305 Lymphatic filariasis, to include elephantiasis:	
Evaluate under the General Rating Formula.	
Note: Rate under the appropriate body system any residual disability of infection, which includes, but is not limited to, epididymitis, lymphangitis, lymphatic obstruction, or lymphedema affecting extremities, genitals, and/or breasts.	
6306 Bartonellosis:	
Evaluate under the General Rating Formula.	
Note: Rate under the appropriate body system any residual disability of infection, which includes, but is not limited to, endocarditis or skin lesions.	
6307 Plague:	
Evaluate under the General Rating Formula.	
Note: Rate under the appropriate body system any residual disability of infection.	
6308 Relapsing Fever:	
Evaluate under the General Rating Formula.	
Note: Rate under the appropriate body system any residual disability of infection, which includes, but is not limited to, liver or spleen damage, iritis, uveitis, or central nervous system involvement.	
6309 Rheumatic fever:	
Evaluate under the General Rating Formula.	
Note: Rate under the appropriate body system any residual disability of infection, which includes, but is not limited to, heart damage.	
6310 Syphilis, and other treponemal infections:	
Note : Rate under the appropriate body system any residual disability of infection, which includes, but is not limited to, diseases of the nervous system, vascular system, eyes, or ears (*see* DC 7004, DC 8013, DC 8014, DC 8015, and DC 9301).	
6311 Tuberculosis, miliary:	
As active disease	100
Inactive disease: *See* §§ 4.88c and 4.89.	
Note 1: Confirm the recurrence of active infection by culture, histopathology, or other diagnostic laboratory testing.	
Note 2: Rate under the appropriate body system any residual disability of infection which includes, but is not limited to, skin conditions and conditions of the respiratory, central nervous, musculoskeletal, ocular, gastrointestinal, and genitourinary systems and those residuals listed in § 4.88c of this chapter.	
6312 Nontuberculosis mycobacterial infection:	
As active disease	100
Note 1: Continue the rating of 100 percent for the duration of treatment for active disease followed by a mandatory VA exam. If there is no relapse, rate on residuals. Any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter.	
Note 2: Confirm the recurrence of active infection by culture, histopathology, or other diagnostic laboratory testing.	
Note 3: Rate under the appropriate body system any residual disability of infection which includes, but is not limited to, skin conditions and conditions of the respiratory, central nervous, musculoskeletal, ocular, gastrointestinal, and genitourinary systems and those residuals listed in § 4.88c of this chapter.	
* * * * * * *	
6316 Brucellosis:	
Evaluate under the General Rating Formula.	
Note 1: Culture, serologic testing, or both must confirm the initial diagnosis and recurrence of active infection.	
Note 2: Rate under the appropriate body system any residual disability of infection, which includes, but is not limited to, meningitis, liver, spleen and musculoskeletal conditions, and those residuals listed in § 3.317(d) of this chapter.	
6317 Rickettsial, erlichial, and *Anaplasma* infections:	
Evaluate under the General Rating Formula.	
Note 1: Rate under the appropriate body system any residual disability of infection, which includes, but is not limited to, bone marrow, spleen, central nervous system, and skin conditions.	
Note 2: This diagnostic code includes, but is not limited to, scrub typhus, Rickettsial pox, African tick-borne fever, Rocky Mountain spotted fever, ehrlichiosis, or anaplasmosis.	
6318 Melioidosis:	

	Rating
Evaluate under the General Rating Formula.	
Note 1: Confirm by culture or other specific diagnostic laboratory tests the initial diagnosis and any relapse or chronic activity of infection.	
Note 2: Rate under the appropriate body system any residual disability of infection, which includes, but is not limited to, arthritis, lung lesions, or meningitis.	
6319 Lyme disease:	
Evaluate under the General Rating Formula.	
Note: Rate under the appropriate body system any residual disability of infection, which includes, but is not limited to, arthritis, Bell's palsy, radiculopathy, ocular, or cognitive dysfunction.	
6320 Parasitic diseases otherwise not specified:	
Evaluate under the General Rating Formula.	
Note: Rate under the appropriate body system any residual disability of infection.	
* * * * * * *	
6325 Hyperinfection syndrome or disseminated strongyloidiasis:	
As active disease	100
Note: Continue the rating of 100 percent through active disease followed by a mandatory VA exam. If there is no relapse, rate on residual disability. Any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter.	
6326 Schistosomiasis:	
As acute or asymptomatic chronic disease	0
Note: Rate under the appropriate body system any residual disability of infection, which includes, but is not limited to, conditions of the liver, intestinal system, female genital tract, genitourinary tract, or central nervous system.	
6329 Hemorrhagic fevers, including dengue, yellow fever, and others:	
Evaluate under the General Rating Formula.	
Note: Rate under the appropriate body system any residual disability of infection, which includes, but is not limited to, conditions of the central nervous system, liver, or kidney.	
6330 *Campylobacter jejuni* infection:	
Evaluate under the General Rating Formula.	
Note: Rate under the appropriate body system any residual disability of infection, which includes, but is not limited to, Guillain-Barre syndrome, reactive arthritis, or uveitis as specified in § 3.317(d) of this chapter.	
6331 *Coxiella burnetii* infection (Q fever):	
Evaluate under the General Rating Formula.	
Note: Rate under the appropriate body system any residual disability of infection, which includes, but is not limited to, chronic hepatitis, endocarditis, osteomyelitis, post Q-fever chronic fatigue syndrome, or vascular infections as specified in § 3.317(d) of this chapter.	
6333 Nontyphoid *Salmonella* infections:	
Evaluate under the General Rating Formula.	
Note: Rate under the appropriate body system any residual disability of infection, which includes, but is not limited to, reactive arthritis as specified in § 3.317(d) of this chapter.	
6334 *Shigella* infections:	
Evaluate under the General Rating Formula.	
Note: Rate under the appropriate body system any residual disability of infection, which includes, but is not limited to, hemolytic-uremic syndrome or reactive arthritis as specified in § 3.317(d) of this chapter.	
6335 West Nile virus infection:	
Evaluate under the General Rating Formula.	
Note: Rate under the appropriate body system any residual disability of infection, which includes, but is not limited to, variable physical, functional, or cognitive disabilities as specified in § 3.317(d) of this chapter.	
* * * * * * *	
6351 HIV-related illness:	
AIDS with recurrent opportunistic infections (see Note 3) or with secondary diseases afflicting multiple body systems; HIV-related illness with debility and progressive weight loss	100
Refractory constitutional symptoms, diarrhea, and pathological weight loss; or minimum rating following development of AIDS-related opportunistic infection or neoplasm	60
Recurrent constitutional symptoms, intermittent diarrhea, and use of approved medication(s); or minimum rating with T4 cell count less than 200	30
Following development of HIV-related constitutional symptoms; T4 cell count between 200 and 500, and use of approved medication(s); or with evidence of depression or memory loss with employment limitations	10
Asymptomatic, following initial diagnosis of HIV infection, with or without lymphadenopathy or decreased T4 cell count	0
Note 1: In addition to standard therapies and regimens, the term "approved medication(s)" includes treatment regimens and medications prescribed as part of a research protocol at an accredited medical institution.	
Note 2: Diagnosed psychiatric illness, central nervous system manifestations, opportunistic infections, and neoplasms may be rated separately under the appropriate diagnostic codes if a higher overall evaluation results, provided the disability symptoms do not overlap with evaluations otherwise assignable above.	
Note 3: The following list of opportunistic infections are considered AIDS-defining conditions, that is, a diagnosis of AIDS follows if a person has HIV and one more of these infections, regardless of the CD4 count—candidiasis of the bronchi, trachea, esophagus, or lungs; invasive cervical cancer; coccidioidomycosis; cryptococcosis; cryptosporidiosis; cytomegalovirus (particularly CMV retinitis); HIV-related encephalopathy; herpes simplex-chronic ulcers for greater than one month, or bronchitis, pneumonia, or esophagitis; histoplasmosis; isosporiasis (chronic intestinal); Kaposi's sarcoma; lymphoma; *Mycobacterium avium* complex; tuberculosis; Pneumocystis jirovecii (*carinii*) pneumonia; pneumonia, recurrent; progressive multifocal leukoencephalopathy; *Salmonella* septicemia, recurrent; toxoplasmosis of the brain; and wasting syndrome due to HIV.	
6354 Systemic exertional intolerance disease/chronic fatigue syndrome (CFS):	

	Rating
Debilitating fatigue, cognitive impairments (such as inability to concentrate, forgetfulness, or confusion), or a combination of other signs and symptoms:	
Which are nearly constant and so severe as to restrict routine daily activities almost completely and which may occasionally preclude self-care	100
Which are nearly constant and restrict routine daily activities to less than 50 percent of the pre-illness level; or which wax and wane, resulting in periods of incapacitation totaling at least six weeks per year	60
Which are nearly constant and restrict routine daily activities from 50 to 75 percent of the pre-illness level; or which wax and wane, resulting in periods of incapacitation totaling at least four but less than six weeks per year	40
Which are nearly constant and restrict routine daily activities by less than 25 percent of the pre-illness level; or which wax and wane, resulting in periods of incapacitation totaling at least two but less than four weeks per year	20
Which wax and wane but result in periods of incapacitation totaling at least one but less than two weeks per year; or symptoms controlled by continuous medication	10
Note: For the purpose of evaluating this disability, incapacitation exists only when a licensed physician prescribes bed rest and treatment.	

■ 4. In appendix A to part 4 by:

■ a. Revising the entries for diagnostic codes 6300–6302, 6304–6311;

■ b. Adding in numerical order an entry for diagnostic code 6312;

■ c. Revising the entries for diagnostic codes 6316–6320;

■ d. Adding in numerical order entries for diagnostic codes 6325, 6326, 6329 through 6331, and 6333 through 6335; and

■ e. Revising the entries for diagnostic codes 6351 and 6354.

The revisions and additions read as follows:

APPENDIX A TO PART 4—TABLE OF AMENDMENTS AND EFFECTIVE DATES SINCE 1946

Sec.	Diagnostic code No.	
*	*	* * * * *
4.88a		March 11, 1969; re-designated § 4.88b November 29, 1994; § 4.88a added to read "Chronic fatigue syndrome"; criterion November 29, 1994; title, criterion [insert *effective date of final rule*].
4.88b		Added March 11, 1969; re-designated § 4.88c November 29, 1994; § 4.88a re-designated to § 4.88b November 29, 1994; General Rating Formula for Infectious Diseases added [insert *effective date of final rule*].
	6300	Criterion August 30, 1996; title, criterion, and note [insert *effective date of final rule*].
	6301	Criterion, note [insert *effective date of final rule*].
	6302	Criterion September 22, 1978; criterion August 30, 1996; criterion, note [insert *effective date of final rule*].
	6304	Evaluation August 30, 1996; criterion, note [insert *effective date of final rule*].
	6305	Criterion March 1, 1989; evaluation August 30, 1996; title, criterion, note [insert *effective date of final rule*].
	6306	Evaluation August 30, 1996; criterion, note [insert *effective date of final rule*].
	6307	Criterion May 13, 2018; criterion, note [insert *effective date of final rule*].
	6308	Criterion August 30, 1996; criterion, note [insert *effective date of final rule*].
	6309	Added March 1, 1963; criterion March 1, 1989; criterion August 30, 1996; criterion, note [insert *effective date of final rule*].
	6310	Criterion, note [insert *effective date of final rule*].
	6311	Criterion, note [insert *effective date of final rule*].
	6312	Added [insert *effective date of final rule*].
*	*	* * * * * *
	6316	Evaluation March 1, 1989; evaluation August 30, 1996; criterion, note [insert *effective date of final rule*].
	6317	Criterion August 30, 1996; title, criterion, note [insert *effective date of final rule*].
	6318	Added March 1, 1989; criterion August 30, 1996; criterion, note [insert *effective date of final rule*].
	6319	Added August 30, 1996; criterion, note [insert *effective date of final rule*].
	6320	Added August 30, 1996; criterion, note [insert *effective date of final rule*].
	6325	Added [insert *effective date of final rule*].
	6326	Added [insert *effective date of final rule*].
	6329	Added [insert *effective date of final rule*].
	6330	Added [insert *effective date of final rule*].
	6331	Added [insert *effective date of final rule*].
	6333	Added [insert *effective date of final rule*].
	6334	Added [insert *effective date of final rule*].
	6335	Added [insert *effective date of final rule*].
*	*	* * * * * *
	6351	Added March 1, 1989; evaluation March 24, 1992; criterion August 30, 1996; criterion, note [insert *effective date of final rule*].
	6354	Added November 29, 1994; criterion August 30, 1996; title, criterion, note [insert *effective date of final rule*].
*	*	* * * * * *

■ 5. Amend appendix B to part 4 by:
■ a. Revising the entries for diagnostic codes 6300 and 6305;
■ b. Adding in numerical order an entry for diagnostic code 6312;
■ c. Revising the entry for diagnostic code 6317; and,
■ d. Adding in numerical order entries for diagnostic codes 6325, 6326, 6329 through 6331, and 6333 through 6335.

The revisions and additions read as follows:

APPENDIX B TO PART 4—NUMERICAL INDEX OF DISABILITIES

Diagnostic code No.	
* * *	* * * *
INFECTIOUS DISEASES, IMMUNE DISORDERS AND NUTRITIONAL DEFICIENCIES	
* * *	* * * *
6300	Vibriosis (Cholera, Non-cholera).
* * *	* * * *
6305	Lymphatic filariasis, to include elephantiasis.
* * *	* * * *
6312	Nontuberculosis mycobacterial infection.
* * *	* * * *
6317	Rickettsial, erlichial, and *Anaplasma* infections.
* * *	* * * *
6325	Hyperinfection syndrome or disseminated strongyloidiasis.
6326	Schistosomiasis.
6329	Hemorrhagic fevers, including dengue, yellow fever, and others.
6330	Campylobacter jejuni infection.
6331	Coxiella burnetii infection (Q Fever).
6333	Nontyphoid salmonella infections.
6334	Shigella infections.
6335	West Nile virus infection.
* * *	* * * *
6351	HIV-related infection.
6356	Systemic exertional intolerance disease/chronic fatigue syndrome (CFS).

■ 6. Amend appendix C to part 4 by:
■ a. Adding in alphabetical order an entry for ''Campylobacter jejuni infection'';
■ b. Removing the entry for ''Cholera, Asiatic'';
■ c. Adding in alphabetical order entries for ''Coxiella burnetii infection (Q Fever)'', ''Hemorrhagic fevers, including dengue, yellow fever, and others'', and ''Hyperinfection syndrome or disseminated strongyloidiasis'';
■ d. Revise the entry for ''Lymphatic filariasis'';
■ e. Adding in alphabetical order entries for ''Nontuberculosis mycobacterial infection'', ''Nontyphoid salmonella infection'', ''Rickettsial, erlichial, and *Anaplasma* infections'', Shigella infections, and ''Schistosomiasis'';
■ f. Removing the entry for ''Typhus, scrub''; and
■ g. Adding in alphabetical order entries for ''Vibriosis (Cholera, Non-cholera)'' and ''West Nile virus infection''

The additions and revisions read as follows:

APPENDIX C TO PART 4—ALPHABETICAL INDEX OF DISABILITIES

	Diagnostic code No.
* * * * * * *	
Campylobacter jejuni infection	6330
* * * * * * *	
Coxiella burnetii infection (Q Fever)	6331
* * * * * * *	
Hemorrhagic fevers, including dengue, yellow fever, and others)	6329
* * * * * * *	
Hyperinfection syndrome or disseminated strongyloidiasis	6325
* * * * * * *	
Lymphatic filariasis, to include elephantiasis	6305

APPENDIX C TO PART 4—ALPHABETICAL INDEX OF DISABILITIES—Continued

	Diagnostic code No.
* * * * * * *	
Nontyphoid salmonella infection	6333
* * * * * * *	
Nontuberculosis mycobacterial infection	6312
* * * * * * *	
Rickettsial, erlichial, and *Anaplasma* Infections	6317
* * * * * * *	
Schistosomiasis	6326
* * * * * * *	
Shigella infections	6334
* * * * * * *	
Vibriosis (Cholera, Non-cholera)	6300
* * * * * * *	
West Nile virus infection	6335
* * * * * * *	

[FR Doc. 2019–00636 Filed 2–4–19; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 49 and 52

[EPA–R10–OAR–2017–0347; FRL–9988–88–Region 10]

Indian Country: Air Quality Planning and Management; Federal Implementation Plan for the Kalispel Indian Community of the Kalispel Reservation, Washington; Redesignation to a PSD Class I Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed rulemaking; reopening of comment period.

SUMMARY: The Environmental Protection Agency (EPA) is reopening the public comment period for the proposed rule ''Indian Country: Air Quality Planning and Management; Federal Implementation Plan for the Kalispel Indian Community of the Kalispel Reservation, Washington; Redesignation to a PSD Class I Area'' published on October 31, 2018. In the October 31, 2018, publication, the EPA proposed to approve the Kalispel Indian Community of the Kalispel Reservation's request to redesignate certain lands within its reservation to a Class I area under the Prevention of Significant Deterioration program and revise the Federal Implementation Plan for the Kalispel Reservation and State Implementation Plan for the State of Washington accordingly. A commenter requested additional time to review the proposal and prepare comments. In response to this request, the EPA is reopening the comment period.

DATES: The comment period for the proposed rule published October 31, 2018 (83 FR 54691), is reopened, and written comments must be received on or before February 20, 2019.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R10–OAR–2017–0347 at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information, the disclosure of which is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Sandra Brozusky at (206) 553–5317, or *brozusky.sandra@epa.gov.*

SUPPLEMENTARY INFORMATION: On October 31, 2018, the EPA published a proposed rulemaking to approve the Kalispel Indian Community of the Kalispel Reservation's request to redesignate certain lands within its reservation to a Class I area under the Prevention of Significant Deterioration program and revise the Federal Implementation Plan for the Kalispel Reservation (40 CFR part 49, subpart M) and State Implementation Plan for the State of Washington (40 CFR part 52, subpart WW) accordingly. (83 FR 54691). A commenter requested additional time to review the proposal and prepare comments. In response to this request, the EPA is reopening the comment period.

Dated: December 20, 2018.

Michelle L. Pirzadeh,

Acting Regional Administrator, Region 10.

[FR Doc. 2019–00935 Filed 2–4–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2017–0418; FRL–9970–24]

RIN 2070–ZA16

Fenoxaprop-ethyl, Flufenpyr-ethyl, Imazapyr, Maleic hydrazide, Pyrazon, Quinclorac, Triflumizole, et al.; Proposed Tolerance and Tolerance Exemption Actions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to revoke certain tolerances for fenoxaprop-ethyl, flufenpyr-ethyl, maleic hydrazide, pyrazon, and quinclorac in follow up to canceled products or where a commodity is no longer a significant livestock feed item or a tolerance is no longer needed. In addition, EPA is proposing to establish exemptions from certain tolerances for maleic hydrazide and to modify certain tolerances for quinclorac and imazapyr. In accordance with current Agency practice, EPA also is proposing to update the nomenclature for certain tolerances for fenoxaprop-ethyl and triflumizole, to remove expired tolerances for certain pesticide active ingredients, and to conform with rounding class practices for certain existing tolerances of specific pesticide active ingredients.

DATES: Comments must be received on or before February 5, 2019.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2017–0418, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Christina Scheltema, Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (703) 308–2201; email address: *scheltema.christina@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

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

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

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *http://www.epa.gov/dockets/comments.html.*

C. What can I do if I wish the Agency to maintain a tolerance that the Agency proposes to revoke?

This proposed rule provides a comment period of 60 days for any person to state an interest in retaining a tolerance proposed for revocation. If EPA receives a comment within the 60-day period to that effect, EPA will not proceed to revoke the tolerance immediately. However, EPA will take steps to ensure the submission of any needed supporting data and will issue an order in the **Federal Register** under the Federal Food, Drug, and Cosmetic Act (FFDCA) section 408(f), if needed. The order would specify data needed and the timeframes for its submission, and would require that within 90 days some person or persons notify EPA that they will submit the data. If the data are not submitted as required in the order, EPA will take appropriate action under FFDCA.

EPA issues a final rule after considering comments that are submitted in response to this proposed rule. In addition to submitting comments in response to this proposal, you may also submit an objection at the time of the final rule. If you fail to file an objection to the final rule within the time period specified, you will have waived the right to raise any issues resolved in the final rule. After the specified time, issues resolved in the final rule cannot be raised again in any subsequent proceedings.

II. Background

A. What action is the Agency taking?

EPA is proposing to revoke or modify specific tolerances, and/or update the nomenclature for specific tolerances, for the fungicide triflumizole and the herbicides fenoxaprop-ethyl, flufenpyr-ethyl, imazapyr, pyrazon, and quinclorac, in or on the commodities specified in the regulatory text. In addition, EPA is proposing to revoke tolerances for maleic hydrazide and concomitantly establish tolerance exemptions to cover the existing food uses for it.

EPA is proposing to revoke certain tolerances because they are no longer needed, because they are on commodities that EPA no longer considers to be significant livestock feed items, or because they are associated with uses that are no longer registered under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) in the United States (U.S.). EPA is proposing to revoke the tolerance for quinclorac on grain, aspirated fractions because it is no longer needed, and proposing to revoke the fenoxaprop-ethyl tolerance on peanut, hulls because EPA no longer considers the commodity to be a significant livestock feed item (determination can be found in the June 30, 2008 memorandum titled *Revisions of Feedstuffs in Table 1 of OPPTS Test Guidelines 860.1000 and Guidance on Constructing Maximum Reasonably Balanced Diets (MRBD),* available in docket EPA–HQ–OPPT–2009–0155 at

https://www.regulations.gov). EPA is proposing to revoke all tolerances for flufenpyr-ethyl and pyrazon due to cancellation of associated uses in the United States.

EPA is proposing to remove from 40 CFR part 180, subpart C certain tolerances for boscalid, cyazofamid, endosulfan, fenoxaprop-ethyl, fenpyroximate, mandipropamid, methidathion, pendimethalin, pyraclostrobin, quinclorac, and spiromesifen because those tolerances have expired. EPA also is proposing to modify tolerance levels to conform with rounding class practices for certain existing tolerances of specific pesticide active ingredients.

Detailed explanations for the proposed modifications of tolerances for imazapyr can be found in the May 24, 2017 memorandum titled *Imazapyr, Isopropylamine Salt: Amendment of Tolerances for Residues on Livestock Tissues,* available in the docket of this proposed rule. Detailed explanations for the proposed modifications of tolerances for quinclorac can be found in the *November 6, 2012 Human Health Risk Assessment for Registration Review* and the March 10, 2015 *Interim Registration Review Decision,* available in docket EPA–HQ–OPP–2007–1135 at *https://www.regulations.gov.* Detailed explanations for the proposed tolerance exemptions for maleic hydrazide can be found in the May 14, 2014 *Registration Review Summary of Analytical Chemistry and Residue Data,* the *June 18, 2014 Human Health Risk Assessment for Registration Review,* and the September 11, 2015 *Interim Registration Review Decision,* available in docket EPA–HQ–OPP–2009–0387 at *https://www.regulations.gov.*

1. *Boscalid.* Because the sole tolerance in 40 CFR 180.589(b) for endive, Belgian expired on December 31, 2013, EPA proposes to remove the existing paragraph and table, and reserve the section.

2. *Cyazofamid.* Because the sole tolerance in 40 CFR 180.601(b) for basil, dried expired on December 31, 2014, EPA proposes to remove the existing paragraph and table, and reserve the section.

3. *Endosulfan.* Because the tolerances in 40 CFR 180.182 for endosulfan residues of concern all expired on various dates from July 31, 2012 through July 31, 2016, EPA proposes to remove that section in its entirety.

4. *Fenoxaprop-ethyl.* Because EPA no longer considers peanut hulls to be a significant livestock feed item, the tolerance on peanut, hulls is no longer needed, and therefore should be revoked. Consequently, EPA proposes to revoke the tolerance in 40 CFR 180.430(a) for peanut, hulls.

Also, because all the tolerances (grass, forage and grass, hay) in 40 CFR 180.430(b) expired on December 31, 2016, EPA proposes to remove the paragraph and table, and reserve the section.

In order to conform to current Agency practice, EPA proposes in 40 CFR 180.430(a) to revise the commodity terminology for ''soybean'' to ''soybean, seed.''

Also, in accordance with current Agency rounding class practices for tolerance values, EPA proposes to list the existing tolerance in 40 CFR 180.430(a) for barley, straw at 0.10 ppm.

5. *Fenpyroximate.* Because the sole tolerance in 40 CFR 180.566(b) for honey expired on December 31, 2013, EPA proposes to remove the existing paragraph and table, and reserve the section.

6. *Flufenpyr-ethyl.* In the **Federal Register** of July 8, 2015 (80 FR 39100) (FRL–9928–54), EPA announced its receipt of voluntary requests by registrants to cancel certain pesticide registrations, including requests to cancel the last flufenpyr-ethyl products registered for use on food in the U.S. At the time of their voluntary request to cancel, the flufenpyr-ethyl registrant stated that these products were never manufactured and there were no existing stocks in the channels of trade, and therefore no existing stocks provision was requested. In the **Federal Register** of September 22, 2015 (80 FR 57179) (FRL–9933–58), EPA published a cancellation order in follow-up to the July 8, 2015 notice and granted the requested product cancellations for flufenpyr-ethyl. No existing stocks provision was requested or needed. Therefore, EPA proposes to revoke the tolerances in 40 CFR 180.595(a)(1) on corn, field, grain; soybean, seed; and sugarcane, cane and to revoke the tolerances in 40 CFR 180.595(a)(2) on corn, field, forage and corn, field, stover.

7. *Imazapyr.* Based on the lack of human health endpoints for imazapyr, EPA determined there are no hazards and no risks of concern from exposure to residues of imazapyr, and therefore the current U.S. tolerances in livestock kidneys can be increased to harmonize with the current Canadian MRLs in livestock kidneys at 0.3 ppm (the determination is available in the docket of this proposed rule). Consequently, EPA proposes to increase the tolerances in 40 CFR 180.500(a) in or on cattle, kidney; goat, kidney; horse, kidney; and sheep, kidney from 0.20 to 0.30 ppm.

Also, in accordance with current Agency rounding class practices for tolerance values, EPA proposes to list the existing tolerance in 40 CFR 180.500(a) for lentil at 0.20 ppm.

8. *Maleic hydrazide.* Based on the low toxicity and lack of human health endpoints for maleic hydrazide, EPA determined that there are no risks of concern from exposure to residues of maleic hydrazide. As a result, EPA concluded that the current tolerances for residues of maleic hydrazide in 40 CFR 180.175 are no longer needed and should be revoked, and exemptions from the requirement of a tolerance should be concomitantly established. Therefore, EPA proposes to revoke the tolerances in § 180.175(a)(1) in or on onion, bulb and potato; to revoke the tolerances in § 180.175(a)(2) in or on potato, chips; to remove § 180.175 in its entirety; and to establish exemptions from tolerances in 40 CFR part 180, subpart D, for onion, bulb and potato in newly designated 40 CFR 180.1349(a) and for potato, chips in newly designated 40 CFR 180.1349(b).

9. *Mandipropamid.* Because the sole tolerance in 40 CFR 180.637(b) for basil, dried expired on December 31, 2015, EPA proposes to remove the existing paragraph and table, and reserve the section.

10. *Methidathion.* Because the tolerances in 40 CFR 180.298 all expired on December 31, 2016, EPA proposes to remove that section in its entirety.

11. *Pendimethalin.* Because all the tolerances (Bermuda grass, forage and Bermuda grass, hay) in 40 CFR 180.361(b) expired on December 31, 2010, EPA proposes to remove the existing paragraph and table, and reserve the section.

12. *Pyraclostrobin.* Because the sole tolerance in 40 CFR 180.582(b) for endive, Belgium expired on December 31, 2013, EPA proposes to remove the existing paragraph and table, and reserve the section.

13. *Pyrazon.* In the **Federal Register** of March 12, 2015 (80 FR 12996) (FRL–9923–27), EPA announced its receipt of voluntary requests by registrants to cancel certain pesticide registrations, including the last pyrazon products registered for use on food commodities in the U.S. In the **Federal Register** of June 3, 2015 (80 FR 31596) (FRL–9926–88), EPA published a cancellation order in follow-up to the March 12, 2015 notice and granted the requested product cancellations for pyrazon. EPA permitted the registrant to sell and distribute existing stocks of the cancelled pyrazon products until June 2, 2016, and persons other than the registrant to sell, distribute, or use existing stocks of the cancelled pyrazon products until supplies are exhausted.

EPA believes that existing stocks in the U.S. are exhausted. However, in a letter dated February 10, 2015, the pyrazon registrant (BASF) notified EPA of a need for the pyrazon tolerances for import purposes through December 31, 2017. Consequently, EPA proposes to revoke the tolerances in 40 CFR 180.316(a) on beet, garden, roots; beet, garden, tops; beet, sugar, molasses; beet, sugar, roots; beet, sugar, tops; cattle, fat; cattle, liver; cattle, meat; cattle, meat byproducts, except liver; goat, fat; goat, liver; goat, meat; goat, meat byproducts, except liver; horse, fat; horse, liver; horse, meat; horse, meat byproducts, except liver; milk; sheep, fat; sheep, liver; sheep, meat; and sheep, meat byproducts, except liver; and in 40 CFR 180.316(d) on corn, field, forage; corn, field, stover; soybean, forage; soybean, hay; wheat, forage; wheat, hay; and wheat, straw each with an expiration/revocation date of [DATE 6 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE] and to add a footnote that there are no U.S. registrations for them.

Also, in accordance with current Agency rounding class practices for tolerance values, EPA proposes to list existing tolerances in 40 CFR 180.316(a) for beet, garden, roots at 0.90 ppm and beet, sugar, roots at 0.20 ppm and to list existing tolerances in 40 CFR 180.316(d) for corn, field, forage; corn, field, stover; soybean, forage; and soybean, hay at 0.50 ppm; for wheat, forage at 0.30 ppm; for wheat, hay at 0.20 ppm; and for wheat, straw at 0.10 ppm.

14. *Quinclorac.* A tolerance on grain, aspirated fractions exists in 40 CFR 180.463 for residues of quinclorac at 1,200 ppm, a level which EPA originally determined by calculation in the absence of residue data. Since that time, residue data on aspirated grain fractions showed that residues on aspirated grain fractions were no higher than the individual tolerances set on barley, grain (2.0 ppm), rice, grain (5.0 ppm), and wheat, grain (0.5 ppm). Therefore, a separate tolerance on grain, aspirated fractions is no longer needed. Consequently, EPA proposes to revoke the tolerance in 40 CFR 180.463(a)(1) on grain, aspirated fractions.

Based on the recalculated dietary burdens for livestock, which demonstrate Maximum Dietary Burdens (MDBs) for poultry at 5.4 ppm and swine at 6.0 ppm, EPA determined that the existing tolerances in poultry and hog commodities should be reassessed. Based on quinclorac data from the available cattle and poultry feeding studies, which demonstrate that the maximum residues in the commodities are expected to be <0.05 ppm, EPA determined that the tolerances in poultry, meat byproducts; hog, fat; and hog, meat byproducts should be set at 0.05 ppm. This will also harmonize the tolerances with the existing Canadian MRLs at 0.05 ppm. Consequently, EPA proposes to decrease the tolerances in 40 CFR 180.463(a)(1) for poultry, meat byproducts from 0.1 to 0.05 ppm; hog, fat from 0.7 to 0.05 ppm; and hog, meat byproducts from 1.5 to 0.05 ppm.

Also, in accordance with current Agency rounding class practices for tolerance values, EPA proposes to list the existing tolerances in 40 CFR 180.463(a)(1) for cattle, fat; goat, fat; horse, fat; and sheep, fat at 0.70 ppm; for rhubarb; wheat, grain; and wheat, hay at 0.50 ppm; and for wheat, straw at 0.10 ppm.

In the **Federal Register** of September 28, 2007 (72 FR 55068) (FRL–8149–5), a tolerance was established in 40 CFR 180.463 for residues of quinclorac in or on imported barley, grain. There are no U.S. registrations for the use of quinclorac on barley. Therefore, EPA will add a footnote to the tolerance in 40 CFR 180.463(a)(1) on barley, grain explaining that there are no U.S. registrations as of September 28, 2007.

Because the sole tolerance in 40 CFR 180.463(b) on cranberry expired on December 31, 2012, EPA proposes to remove the existing paragraph and table, and reserve the section.

15. *Spiromesifen.* Because all the tolerances in 40 CFR 180.607(b) expired on December 31, 2014, EPA proposes to remove the existing paragraph and table, and reserve the section.

16. *Triflumizole.* In order to conform to current Agency practice, EPA proposes in 40 CFR 180.476(a)(l) to revise the commodity terminology for ''Cilantro, leaves'' to ''Cilantro, fresh leaves.''

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

A ''tolerance'' represents the maximum level for residues of pesticide chemicals legally allowed in or on raw agricultural commodities and processed foods. Section 408 of FFDCA, 21 U.S.C. 346a, authorizes the establishment of tolerances, exemptions from tolerance requirements, modifications in tolerances, and revocation of tolerances for residues of pesticide chemicals in or on raw agricultural commodities and processed foods. Without a tolerance or exemption, food containing pesticide residues is considered to be unsafe and therefore ''adulterated'' under FFDCA section 402(a), 21 U.S.C. 342(a). Such food may not be distributed in interstate commerce, 21 U.S.C. 331(a). For a food-use pesticide to be sold and distributed, the pesticide must not only have appropriate tolerances under the FFDCA, but also must be registered under FIFRA, 7 U.S.C. 136 *et seq.* Food-use pesticides not registered in the U.S. must have tolerances in order for commodities treated with those pesticides to be imported into the United States.

EPA's general practice is to propose revocation of tolerances for residues of pesticide active ingredients on crops for which FIFRA registrations no longer exist and on which the pesticide may therefore no longer be used in the United States. EPA has historically been concerned that retention of tolerances that are not necessary to cover residues in or on legally treated foods may encourage misuse of pesticides within the United States. Nonetheless, EPA will establish and maintain tolerances even when corresponding domestic uses are canceled if the tolerances, which EPA refers to as ''import tolerances,'' are necessary to allow importation into the U.S. of food containing such pesticide residues. However, when there are no imported commodities that require these import tolerances, the Agency believes it is appropriate to revoke tolerances for unregistered pesticides in order to prevent potential misuse.

Furthermore, as a general matter, the Agency believes that retention of import tolerances not needed to cover any imported food may result in unnecessary restriction on trade of pesticides and foods. Under FFDCA section 408, a tolerance may only be established or maintained if EPA determines that the tolerance is safe based on a number of factors, including an assessment of the aggregate exposure to the pesticide and an assessment of the cumulative effects of such pesticide and other substances that have a common mechanism of toxicity. In doing so, EPA must consider potential contributions to such exposure from all tolerances. If the cumulative risk is such that the tolerances in aggregate are not safe, then every one of these tolerances is potentially vulnerable to revocation. Furthermore, if unneeded tolerances are included in the aggregate and cumulative risk assessments, the estimated exposure to the pesticide would be inflated. Consequently, it may be more difficult for others to obtain needed tolerances or to register needed new uses. To avoid potential trade restrictions, the Agency is proposing to revoke tolerances for residues on crops uses for which FIFRA registrations no longer exist, unless someone expresses a need for such tolerances. Through this proposed rule, the Agency is inviting individuals who need these import

tolerances to identify themselves and the tolerances that are needed to cover imported commodities.

Parties interested in retention of the tolerances should be aware that additional data may be needed to support retention. These parties should be aware that, under FFDCA section 408(f), if the Agency determines that additional information is reasonably required to support the continuation of a tolerance, EPA may require that parties interested in maintaining the tolerances provide the necessary information. If the requisite information is not submitted, EPA may issue an order revoking the tolerance at issue.

C. When do these actions become effective?

EPA is proposing that the actions herein become effective 6 months after the date of publication of the final rule in the **Federal Register**. EPA is proposing this effective date for these actions to allow a reasonable interval for producers in exporting members of the World Trade Organization's (WTO's) Sanitary and Phytosanitary (SPS) Measures Agreement to adapt to the requirements of a final rule. With the exception of the proposed revocation of tolerances with expiration dates for pyrazon, the Agency believes that existing stocks of pesticide products labeled for the uses associated with the tolerances proposed for revocation have been completely exhausted and that treated commodities have cleared the channels of trade. Where EPA is proposing revocation with expiration dates for pyrazon, the Agency believes that existing stocks in the U.S. are exhausted and that the proposed date allow sufficient time for passage of treated commodities through the channels of trade for import purposes as requested by the manufacturer. If you have comments regarding existing stocks and whether the effective date allows sufficient time for treated commodities to clear the channels of trade, please submit comments as described under **SUPPLEMENTARY INFORMATION**.

Any commodities listed in this proposal treated with the pesticides subject to this proposal, and in the channels of trade following the tolerance revocations, shall be subject to FFDCA section 408(1)(5), as established by FQPA. Under this unit, any residues of these pesticides in or on such food shall not render the food adulterated so long as it is shown to the satisfaction of the Food and Drug Administration that:

1. The residue is present as the result of an application or use of the pesticide at a time and in a manner, that was lawful under FIFRA, and

2. The residue does not exceed the level that was authorized at the time of the application or use to be present on the food under a tolerance or exemption from tolerance. Evidence to show that food was lawfully treated may include records that verify the dates when the pesticide was applied to such food.

III. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the U.S. is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established MRLs for pyrazon, fenoxaprop-ethyl, or flufenpyr-ethyl.

The Codex has not established MRLs for quinclorac in or on grain, aspirated fractions; hog, fat; hog, meat byproducts; and poultry, meat products.

The Codex has established MRLs for maleic hydrazide in or on various commodities including onion, bulb at 15 milligrams per kilogram (mg/kg) and potato at 50 mg/kg. These MRLs are the same as the current tolerances for maleic hydrazide in the United States. However, because the tolerances are not needed, EPA is proposing to revoke the U.S. tolerances for maleic hydrazide and to establish exemptions from tolerances in or on onion, bulb; potato; and potato, chips.

The Codex has established MRLs for imazapyr in or on various commodities including edible offal (mammalian) at 0.2 mg/kg, which is the same as the current U.S. tolerances, and will be covered by the proposed U.S. tolerances for imazapyr in or on cattle, kidney; goat, kidney; horse, kidney; and sheep, kidney at 0.3 ppm, a higher level than the MRL.

IV. Statutory and Executive Order Reviews

In this proposed rule, EPA is proposing to establish tolerance exemptions under FFDCA 408(e), and also to modify and revoke specific tolerances established under FFDCA section 408. The Office of Management and Budget (OMB) has exempted these types of actions (*e.g.,* establishment of a tolerance/tolerance exemption, modification of a tolerance, and tolerance revocation for which extraordinary circumstances do not exist) from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this proposed rule has been exempted from review under Executive Order 12866 due to its lack of significance, this proposed rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001). This proposed rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*). Nor does it require any special considerations as required by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any other Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This proposed rule does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note). Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agency previously assessed whether exemptions from tolerances, raising of tolerance levels, or revocations might significantly impact a substantial number of small entities and concluded that, as a general matter, these actions do not impose a significant economic impact on a substantial number of small entities. These analyses for tolerance establishments and modifications, and for tolerance revocations, were published in the **Federal Register** of May 4, 1981 (46 FR 24950) and December 17, 1997 (62 FR 66020) (FRL–

5753–1), respectively, and were provided to the Chief Counsel for Advocacy of the Small Business Administration. Taking into account this analysis, and available information concerning the pesticides listed in this proposed rule, the Agency hereby certifies that this proposed rule will not have a significant negative economic impact on a substantial number of small entities. In a memorandum dated May 25, 2001, EPA determined that eight conditions must all be satisfied in order for an import tolerance or tolerance exemption revocation to adversely affect a significant number of small entity importers, and that there is a negligible joint probability of all eight conditions holding simultaneously with respect to any particular revocation. (This Agency document is available in the docket of this proposed rule). Furthermore, for the pesticides named in this proposed rule, the Agency knows of no extraordinary circumstances that exist as to the present proposed rule that would change EPA's previous analysis. Any comments about the Agency's determination should be submitted to the EPA along with comments on the proposed rule, and will be addressed prior to issuing a final rule. In addition, the Agency has determined that this proposed rule will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive order to include regulations that 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.'' This proposed rule directly regulates growers, food processors, food handlers, and food retailers, not States. This proposed rule does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). For these same reasons, the Agency has determined that this proposed rule does not have any ''tribal implications'' as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000). Executive Order 13175, requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.'' This proposed rule will not have substantial direct effects on tribal governments, 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, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this proposed rule.

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 6, 2018.

Richard P. Keigwin, Jr.,

Director, Office of Pesticide Programs.

Therefore, it is proposed that 40 CFR part 180 be amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

§ § 180.175, 180.182, and 180.298 [Removed]

■ 2. Remove §§ 180.175, 180.182, and 180.298.

■ 3. In § 180.316, revise the tables in paragraphs (a) and (d) to read as follows:

§ 180.316 Pyrazon; tolerances for residues.

(a) * * *

Commodity	Parts per million
Beet, garden, roots [1]	0.90
Beet, garden, tops [1]	7.0
Beet, sugar, molasses [1]	1.5
Beet, sugar, roots [1]	0.20
Beet, sugar, tops [1]	3.0
Cattle, fat [1]	0.10
Cattle, liver [1]	0.15
Cattle, meat [1]	0.10
Cattle, meat byproducts, except liver [1]	0.10
Goat, fat [1]	0.10
Goat, liver [1]	0.15
Goat, meat [1]	0.10
Goat, meat byproducts, except liver [1]	0.10
Horse, fat [1]	0.10
Horse, liver [1]	0.15
Horse, meat [1]	0.10
Horse, meat byproducts, except liver [1]	0.10
Milk [1]	0.02
Sheep, fat [1]	0.10
Sheep, liver [1]	0.15
Sheep, meat [1]	0.10
Sheep, meat byproducts, except liver [1]	0.10

[1] There are no U.S. registrations for these commodities; therefore, these tolerances will expire [DATE 6 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE].

* * * * *

(d) * * *

Commodity	Parts per million
Corn, field, forage [1]	0.50
Corn, field, stover [1]	0.50
Soybean, forage [1]	0.50
Soybean, hay [1]	0.50
Wheat, forage [1]	0.30
Wheat, hay [1]	0.20
Wheat, straw [1]	0.10

[1] There are no U.S. registrations on these commodities.

■ 4. In § 180.361, revise paragraph (b) to read as follows:

§ 180.361 Pendimethalin; tolerances for residues.

* * * * *

(b) *Section 18 emergency exemptions.* [Reserved]

* * * * *

■ 5. In § 180.430, revise the table in paragraph (a) and paragraph (b) to read as follows:

§ 180.430 Fenoxaprop-ethyl; tolerances for residues.

(a) * * *

Commodity	Parts per million
Barley, grain	0.05
Barley, straw	0.10
Cattle, fat	0.05
Cattle, meat	0.05
Cattle, meat byproducts	0.05
Cotton, undelinted seed	0.05
Goat, fat	0.05
Goat, meat	0.05
Goat, meat byproducts	0.05
Hog, fat	0.05
Hog, meat	0.05
Hog, meat byproducts	0.05
Horse, fat	0.05

Commodity	Parts per million
Horse, meat	0.05
Horse, meat byproducts	0.05
Milk	0.02
Peanut	0.05
Rice, grain	0.05
Sheep, fat	0.05
Sheep, meat	0.05
Sheep, meat byproducts	0.05
Soybean, seed	0.05
Wheat, grain	0.05
Wheat, straw	0.50

(b) *Section 18 emergency exemptions.* [Reserved]

* * * * *

■ 6. In § 180.463, revise the table in paragraph (a)(1) and paragraph (b) to read as follows:

§ 180.463 Quinclorac; tolerances for residues.

(a)(1) * * *

Commodity	Parts per million
Barley, grain [1]	2.0
Berry, low growing, except strawberry, subgroup 13–07H	1.5
Cattle, fat	0.70
Cattle, meat	0.05
Cattle, meat byproducts	1.5
Egg	0.05
Goat, fat	0.70
Goat, meat	0.05
Goat, meat byproducts	1.5
Grass, forage	150
Grass, hay	130
Hog, fat	0.05
Hog, meat	0.05
Hog, meat byproducts	0.05
Horse, fat	0.70
Horse, meat	0.05
Horse, meat byproducts	1.5
Milk	0.05
Poultry, fat	0.05
Poultry, meat	0.05
Poultry, meat byproducts	0.05
Rhubarb	0.50
Rice, bran	15.0
Rice, grain	5.0
Sheep, fat	0.70
Sheep, meat	0.05
Sheep, meat byproducts	1.5
Sorghum, grain, forage	3.0
Sorghum, grain, grain	6.0
Sorghum, grain, stover	1.0
Wheat, forage	1.0
Wheat, germ	0.75
Wheat, grain	0.50
Wheat, hay	0.50
Wheat, straw	0.10

[1] There are no U.S. registrations for this commodity as of September 28, 2007.

* * * * *

(b) *Section 18 emergency exemptions.* [Reserved]

* * * * *

■ 7. In § 180.476, in the table in paragraph (a)(1), remove the entry for ''Cilantro, leaves'' and add an entry for ''Cilantro, fresh leaves'' in its place to read as follows:

§ 180.476 Triflumizole; tolerances for residues.

(a)(1) * * *

Commodity	Parts per million
* * * * *	
Cilantro, fresh leaves	35
* * * * *	

* * * * *

■ 8. In § 180.500, revise the table in paragraph (a) to read as follows:

§ 180.500 Imazapyr; tolerances for residues.

(a) * * *

Commodity	Parts per million
Cattle, fat	0.05
Cattle, kidney	0.30
Cattle, meat	0.05
Cattle, meat byproducts, except kidney	0.05
Corn, field, forage	0.05
Corn, field, grain	0.05
Corn, field, stover	0.05
Fish	1.0
Goat, fat	0.05
Goat, kidney	0.30
Goat, meat	0.05
Goats, meat byproducts, except kidney	0.05
Grass, forage	100
Grass, hay	30
Horse, fat	0.05
Horse, kidney	0.30
Horse, meat	0.05
Horse, meat byproducts, except kidney	0.05
Lentil [1]	0.20
Milk	0.01
Rapeseed subgroup 20A [1]	0.05
Sheep, fat	0.05
Sheep, kidney	0.30
Sheep, meat	0.05
Sheep, meat byproducts, except kidney	0.05
Shellfish	0.10
Soybean, meal [1]	4.5
Soybean, seed [1]	4.0
Sunflower subgroup 20B [1]	0.05

[1] There are no U.S. registrations on these commodities.

* * * * *

■ 9. In § 180.566, revise paragraph (b) to read as follows:

§ 180.566 Fenpyroximate; tolerances for residues.

* * * * *

(b) *Section 18 emergency exemptions.* [Reserved]

* * * * *

■ 10. In § 180.582, revise paragraph (b) to read as follows:

§ 180.582 Pyraclostrobin; tolerances for residues.

* * * * *

(b) *Section 18 emergency exemptions.* [Reserved]

* * * * *

■ 11. In § 180.589, revise paragraph (b) to read as follows:

§ 180.589 Boscalid; tolerances for residues.

* * * * *

(b) *Section 18 emergency exemptions.* [Reserved]

* * * * *

§ 180.595 [Removed]

■ 12. Remove § 180.595.

■ 13. In § 180.601, revise paragraph (b) to read as follows:

§ 180.601 Cyazofamid; tolerances for residues.

* * * * *

(b) *Section 18 emergency exemptions.* [Reserved]

* * * * *

■ 14. In § 180.607, revise paragraph (b) to read as follows:

§ 180.607 Spiromesifen; tolerances for residues.

* * * * *

(b) *Section 18 emergency exemptions.* [Reserved]

* * * * *

■ 15. In § 180.637, revise paragraph (b) to read as follows:

§ 180.637 Mandipropamid; tolerances for residues.

* * * * *

(b) *Section 18 emergency exemptions.* [Reserved]

* * * * *

■ 16. Add § 180.1349 to subpart D to read as follows:

§ 180.1349 Maleic hydrazide; exemption from the requirement of a tolerance.

(a) An exemption from the requirement of a tolerance is established for residues of the pesticide maleic hydrazide, including its metabolites and degradates, when used as a plant growth regulator or herbicide in or on onion, bulb and potato.

(b) An exemption from the requirement of a tolerance is established for residues of the pesticide maleic hydrazide, including its metabolites and degradates, when present in or on potato, chips as a result of application of maleic hydrazide to the growing potato plant.

[FR Doc. 2019–00787 Filed 2–4–19; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register

Vol. 84, No. 24

Tuesday, February 5, 2019

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

January 31, 2019.

The Department of Agriculture has submitted the following information collection requirement(s) to Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by March 7, 2019 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725 17th Street NW, Washington, DC 20502. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

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.

Rural Utilities Service

Title: 7 CFR 1717 Subpart Y, Settlement of Debt Owed by Electric Borrowers

OMB Control Number: 0572–0116.

Summary of Collection: The Rural Utilities Service (RUS) makes mortgage loans and loan guarantees to electric systems to provide and improve electric service in rural areas pursuant to the Rural Electrification Act of 1936, as amended (7 U.S.C. 901 et. seq.) (RE Act). This information collection requirement stems from passage of Public Law 104–127, which amended section 331(b) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 *et seq.,*) to extend to the RUS' loans and loan guarantees the Secretary authority to compromise, adjust, reduce, or charge-off debts or claims owed to the government (collectively, debt settlement) with respect to loans made or guaranteed by RUS. Only those electric borrowers that are unable to fully repay their debts to the government and who apply to RUS for relief will be affected by this collection of information. The information collected will be similar to that which any prudent lender would need to determine whether debt settlement is required and the amount of relief that is needed.

Need and Use of the Information: RUS will collect information to determine the need for debt settlement; the amount of debt the borrower can repay; the future scheduling of debt repayment; and, the range of opportunities for enhancing the amount of debt that can be recovered.

Description of Respondents: Non-for-profit institutions; Business or other for-profit.

Number of Respondents: 1.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 1,000.

Kimble Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2019–01066 Filed 2–4–19; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

January 31, 2019.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by March 7, 2019 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725 17th Street NW, Washington, DC 20502. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

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Food Safety and Inspection Service

Title: Laboratories.

OMB Control Number: 0583–0158.

Summary of Collection: The Food Safety and Inspection Service (FSIS) has been delegated the authority to exercise the functions of the Secretary as provided in the Federal Meat Inspection Act (FMIA) (21 U. S.C. 601 *et seq.*), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*), and the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031). These statues mandate that FSIS protect the public by verifying that meat and poultry products are safe, wholesome, unadulterated, and properly labeled and packaged.

Need and Use of the Information: FSIS will use two forms to collect information to help assess laboratories participating in the pasteurized egg product or the Accredited Laboratory programs, to ensure they meet required standards. FSIS will use the PEPRL–F–0008–05 form as a self assessment audit checklist to collect information related to the quality assurance/quality control procedures in place at in-plant and private laboratories participating n the Pasteurized Egg Product Recognized Laboratory program. FSIS uses the data collected in the desk audit of existing labs or in the appraisal of a new applicant. Any non-federal laboratory that is applying for the FSIS Accredited Laboratory program will need to complete an Application for FSIS Accredited Laboratory Program 10,110–2 form. FSIS will use the information collected by the form to help access the laboratory applying for admission to the FSIS Accredited Laboratory program.

Description of Respondents: Business or other for-profit.

Number of Respondents: 14.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 13.

Food Safety and Inspection Service

Title: Records to be Kept by Official Establishments and Retail Stores that Grind Raw Beef Products.

OMB Control Number: 0583–0165.

Summary of Collection: The Food Safety and Inspection Service (FSIS) has been delegated the authority to exercise the functions of the Secretary as provided in the Federal Meat Inspection Act (FMIA) (21 U. S.C. 601 *et seq.*). These statues mandate that FSIS protect the public by verifying that meat and poultry products are safe, wholesome, not adulterated, and properly labeled and packaged.

Need and Use of the Information: FSIS requires that all establishments and retail stores that grind raw beef products for sale in commerce, including products ground at a customer's request, are required to maintain certain records which will fully and correctly disclose all transactions involved in their business subject to the Act. In addition, FSIS requires that specific information be kept in the required records and and that retail stores maintain store-designed systems that allow them to link individual packages of raw ground or chopped beef products prepared and sold by them to the required records.

Description of Respondents: Business or other for-profit.

Number of Respondents: 65,911.

Frequency of Responses: Recordkeeping: Weekly, Annually; Monthly.

Total Burden Hours: 3,317,301.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2019–01054 Filed 2–4–19; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

January 31, 2019.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are required regarding (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by March 7, 2019 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725 17th Street NW, Washington, DC 20502. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Farm Service Agency

Title: 2017 Wildfires and Hurricanes Indemnity Program (2017 WHIP) and Citrus Trees Block Grant to Florida.

OMB Control Number: 0560–0291.

Summary of Collection: The Bipartisan Budget Act of 2018 (BBA, Pub. L. 115–123) authorized $2.36 billion in assistance for losses to crops, trees, bushes, and vine losses due to 2017 wildfires and hurricanes. The Farm Service Agency (FSA) is implementing the provisions of the BBA by providing up to $2 billion in assistance to eligible producers through the 2017 WHIP, and approximately $340 million through a block grant with the State of Florida to address losses to citrus trees, and production.

Need and Use of the Information: In order for FSA to determine whether a producer is eligible for 2017 WHIP and to calculate a payment, a producer is required to submit FSA–890 2017, WHIP application; FSA–891, Crop Insurance and/or NAP Coverage Agreement; FSA–892, Request for an Exception to the WHIP Payment Limitation (if applicable); FSA–893, 2018 Citrus Actual Production History and Approved Yield Record (Florida Only); CCC–902, Farm Operating Plan for Payment Eligibility; FSA–578, Report of Acreage; and AD–1026, Highly Erodible Land Conservation (HELC) and Wetland Conservation Certification. The information collected from the forms will be used by FSA and the State of Florida to determine eligibility and distribute payments to eligible producers under WHIP.

Description of Respondents: Farms; State, Local and Tribal Government.

Number of Respondents: 44,124.

Frequency of Responses: Recordkeeping; Annually.

Total Burden Hours: 29,611.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2019–01058 Filed 2–4–19; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

January 31, 2019.

The Department of Agriculture will submit the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. Comments are requested regarding: (1) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including 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), New Executive Office Building, Washington, DC; New Executive Office Building, 725 17th Street NW, Washington, DC 20503. Commenters are encouraged to submit their comments to OMB via email to: *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 by March 7, 2019. 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.

Agricultural Marketing Service

Title: Export Certificate Request Forms.

OMB Control Number: 0581–0283.

Summary of Collection: The Agricultural Marketing Service, Dairy Grading Branch, dairy grading program is a voluntary user fee program authorized under the Agricultural Marketing Act of 1946 (7 U.S.C. 1621). The regulations governing inspection and grading services of manufactured or processed dairy products are contained in 7 CFR part 58. International markets are increasing for U.S. dairy products. Forms will provide a format for exporters to provide information to the Dairy Grading Branch on consignments they wish to export so that the Dairy Grading Branch can issue the proper health certificate with the information required by the importing country.

Need and Use of the Information: Importing countries are requiring certification as to production methods and sources of raw ingredients for dairy products. Information will be gathered using DA–228 ''Request for Applicant Number,'' DA–253 European Union Health Certificate Request,'' and the Sanitary Certificate Request. The information required on the sanitary certificates varies from country to country requiring specific forms for each country. Such information includes, but not limited to, identity of the importer and exporter; consignment specifics and border entry point at the country of destination. Information gathered from the applicants is transferred to the proper health certificate, certified by the proper authority and returned to the exporter. The collection of the information on the forms is necessary for the Dairy Grading Branch to be able to properly complete the required export certificate.

Description of Respondents: Business or other for-profit.

Number of Respondents: 265.

Frequency of Responses: Reporting: Each time a product is exported.

Total Burden Hours: 10,345.

Kimble Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2019–01040 Filed 2–4–19; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Farm Service Agency

Information Collection Request; Direct Loan Making

AGENCY: Farm Service Agency, USDA.

ACTION: Notice; request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Farm Service Agency (FSA) is requesting comments from all interested individuals and organizations on a revision and an extension of a currently approved information collection associated with Direct Loan Making Program. The collected information is used in eligibility and feasibility determinations on farm loan applications.

DATES: We will consider comments that we receive by April 8, 2019.

ADDRESSES: We invite you to submit comments on this notice. In your comments, please include date, volume, and page number of this issue of the **Federal Register**. You may submit comments through the Federal eRulemaking Portal website (*http://www.regulations.gov*) by following the instructions on that website for submitting comments electronically.

You may also send comments to the Desk Officer for Agricultures, Office of the Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503. Comments will be available for public inspection online at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For specific questions related to the collection activities or to obtain a copy of the information collection request package, please contact Russ Clanton, (202) 690–0214; *russ.clanton@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Farm Loan Programs, Direct Loan Making.

OMB Control Number: 0560–0237.

Expiration Date: May 31, 2019.

Type of Request: Revision and Extension.

Abstract: FSA's Farm Loan Programs provide loans to family farmers to purchase real estate and equipment, and to finance agricultural production. Direct Loan Making and Direct Farm Ownership Microloan (DFOML) regulations in 7 CFR part 764 provide the requirements and process for determining an applicant's eligibility for a direct loan.

The burden hours decreased by 125,832 hours since the last OMB approval. Specifically, the annual number of responses decreased slightly by 43, the number of respondents increased by 2,438 in the collection due to more borrowers participating in the Direct Loan Making Program and a large correction fixed an error in the prior calculation.

Also, the Farm Storage Facility Loan Program, which is exempted from PRA as specified in 2014 Farm Bill, is no longer included in the collection. The travel times have been removed from the request. The respondents go to the county offices to do regular and

customary business with FSA for loans; this means no travel times is required specifically for the information collection and therefore, it is no longer included in the burden hour reporting.

For the following estimated total annual burden on respondents, the formula used to calculate the total burden hour is the estimated average time per responses hours multiplied by the estimated total annual responses.

Estimate of Average Time to Respond: Public reporting burden for the information collection is estimated to average 0.312 hours per response.

Type of Respondents: Individuals or households, businesses or other for-profit farms.

Estimated Annual Number of Respondents: 184,871.

Estimated Number of Reponses per Respondent: 3.7.

Estimated Total Annual Responses: 698,394.

Estimated Average Time per Response: 0.312 hours.

Estimated Total Annual Burden on Respondents: 217,927 hours.

We are requesting comments on all aspects of this information collection to help us to:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of FSA, including whether the information will have practical utility;

(2) Evaluate the accuracy of FSA's estimate of burden including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility and clarity of the information to be collected;

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the submission for Office of Management and Budget approval.

Steven Peterson,

Acting Administrator, Farm Service Agency.

[FR Doc. 2019–01071 Filed 2–4–19; 8:45 am]

BILLING CODE 3410–05–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the District of Columbia Advisory Committee

AGENCY: Commission on Civil Rights.

ACTION: Announcement of monthly planning 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 (FACA), that a meeting of the District of Columbia Advisory Committee to the Commission will convene by conference call, at 12:00 p.m. (EST) Thursday, February 14, 2019. The purpose of the planning meeting is to continue project planning for a future briefing meeting on the Committee's civil rights project, which will examine the treatment of homeless persons that get swept up in the DC criminal justice system, including a review of the DC Mental Health Court.

DATES: Thursday, February 14, 2019 at 12:00 p.m. (EST).

Public Call-In Information: Conference call number: 1–855–719–5012 and conference call ID number: 3606878.

FOR FURTHER INFORMATION CONTACT: Ivy L. Davis, at *ero@usccr.gov* or by phone at 202–376–7533.

SUPPLEMENTARY INFORMATION: Interested members of the public may listen to the discussion by calling the following toll-free conference call number: 1–855–719–5012 and conference call ID number: 3606878. Please be advised that before placing them into the conference call, the conference call operator may ask callers to provide their names, their organizational affiliations (if any), and email addresses (so that callers may be notified of future meetings). Callers can expect to incur charges for calls they initiate over wireless lines, and 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 herein.

Persons with hearing impairments may also follow the discussion by first calling the Federal Relay Service at 1–800–877–8339 and providing the operator with the toll-free conference call number: 1–855–719–5012 and conference call ID number: 3606878.

Members of the public are invited to make statements during the Public Comments section of the meeting or to submit written comments. The comments must be received in the regional office by Thursday, March 13, 2019. Comments may be mailed to the Eastern Regional Office, U.S. Commission on Civil Rights, 1331 Pennsylvania Avenue, Suite 1150, Washington, DC 20425 or emailed to Evelyn Bohor at *ero@usccr.gov.* Persons who desire additional information may contact the Eastern Regional Office at 202–376–7533.

Records and documents discussed during the meeting will be available for public viewing as they become available at *https://gsageo.force.com/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzlKAAQ.* Please click the ''Meeting Details'' and ''Documents'' links. Records generated from this meeting may also be inspected and reproduced at the Eastern Regional Office, as they become available, both before and after the meeting. Persons interested in the work of this advisory committee are advised to go to the Commission's website, *www.usccr.gov,* or to contact the Eastern Regional Office at the above phone numbers, email or street address.

Agenda

Thursday, February 14, 2019, at 12:00 p.m. (EST)

I. Rollcall
II. Welcome and Introductions
III. Discuss Project Planning
IV. Other Business
V. Public Comments
VI. Adjourn

Dated: January 31, 2019.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2019–01033 Filed 2–4–19; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Virginia Advisory Committee

AGENCY: 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 (FACA) that a meeting of the Virginia Advisory Committee to the Commission will convene by conference call at 12:00 p.m. (EST) on Wednesday, February 13, 2019. The purpose of the meeting is for Committee members to discuss and announce meeting date and expert presenters who will be invited to participate at the in-person briefing on its civil rights project titled, Hate Crimes in VA—Incidences and Responses.

DATES: Wednesday, February 13, 2019, at 12:00 p.m. EST.

FOR FURTHER INFORMATION CONTACT: Ivy Davis at *ero@usccr.gov* or by phone at 202–376–7533.

SUPPLEMENTARY INFORMATION: Public Call-In Information: Conference call-in number: 1–800–474–8920 and conference call ID #: 8310490.

Interested members of the public may listen to the discussion by calling the following toll-free conference call-in number: 1–800–474–8920 and conference call 8310490. Please be advised that before placing them into the conference call, the conference call operator will ask callers to provide their names, their organizational affiliations (if any), and email addresses (so that callers may be notified of future meetings). Callers can expect to incur charges for calls they initiate over wireless lines, and 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 conference call-in number.

Persons with hearing impairments may also follow the discussion by first calling the Federal Relay Service at 1–800–877–8339 and providing the operator with the toll-free conference call-in number: 1–800–474–8920 and conference call ID #: 8310490.

Members of the public are invited to make statements during the open comment period of the meeting or submit written comments. The comments must be received in the regional office approximately 30 days after each scheduled meeting. Written comments may be mailed to the Eastern Regional Office, U.S. Commission on Civil Rights, 1331 Pennsylvania Avenue, Suite 1150, Washington, DC 20425, faxed to (202) 376–7548, or emailed to Corrine Sanders at *ero@usccr.gov.* Persons who desire additional information may contact the Eastern Regional Office at (202) 376–7533.

Records and documents discussed during the meeting will be available for public viewing as they become available at *https://database.faca.gov/committee/meetings.aspx?cid=279,* click the ''Meeting Details'' and ''Documents'' links. Records generated from this meeting may also be inspected and reproduced at the Eastern Regional Office, as they become available, both before and after the meetings. Persons interested in the work of this advisory committee are advised to go to the Commission's website, *www.usccr.gov,* or to contact the Eastern Regional Office at the above phone number, email or street address.

Agenda

Wednesday, February 13, 2019.
I. Rollcall
II. Welcome
III. Project Planning—Discuss Plans for Briefing Meeting
IV. Other Business
V. Open Comment
VI. Adjourn

Exceptional Circumstance

Pursuant to 41 CFR 102–3.150, the notice for this meeting is given less than 15 calendar days prior to the meeting because of the exceptional circumstances of the federal government shutdown.

Dated: January 30, 2019.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2019–00937 Filed 2–4–19; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Colorado Advisory Committee

AGENCY: Commission on Civil Rights.

ACTION: Announcement of planning 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 (FACA) that a meeting of the Colorado Advisory Committee to the Commission will convene by conference call at 2:00 p.m. (MST) on Friday, February 8, 2019. The purpose of the meeting is for preparation to hear testimony on the civil rights issues related to the U.S. immigration naturalization backlog.

DATES: Friday, February 8, 2019, at 2:00 p.m. (MST).

Public Call-In Information: Conference call number: 1–877–260–1479 and conference call ID: 5240949.

FOR FURTHER INFORMATION CONTACT: Evelyn Bohor, *ebohor@usccr.gov* or by phone at 303–866–1040.

SUPPLEMENTARY INFORMATION: Interested members of the public may listen to the discussion by calling the following toll-free conference call number: 1–877–260–1479 and conference call ID: 5240949.

Please be advised that, before being placed into the conference call, the conference call operator will ask callers to provide their names, their organizational affiliations (if any), and email addresses (so that callers may be notified of future meetings). Callers can expect to incur charges for calls they initiate over wireless lines, and 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 provided.

Persons with hearing impairments may also follow the discussion by first calling the Federal Relay Service at 1–800–877–8339 and providing the operator with the toll-free conference call number: 1–877–260–1479 and conference call 5240949.

Members of the public are invited to make statements during the open comment period of the meeting or submit written comments. The comments must be received in the regional office approximately 30 days after each scheduled meeting. Written comments may be mailed to the Rocky Mountain Regional Office, U.S. Commission on Civil Rights, 1961 Stout Street, Suite 13–201, Denver, CO 80294, faxed to (303) 866–1040, or emailed to Evelyn Bohor at *ebohor@usccr.gov.* Persons who desire additional information may contact the Rocky Mountain Regional Office at (303) 866–1040.

Records and documents discussed during the meeting will be available for public viewing as they become available at *https://gsageo.force.com/FACA/;FACAPublicViewCommitteeDetails?id=a10t0000001gzksAAA;* click the ''Meeting Details'' and ''Documents'' links. Records generated from this meeting may also be inspected and reproduced at the Rocky Mountain Regional Office, as they become available, both before and after the meeting. Persons interested in the work of this advisory committee are advised to go to the Commission's website, *www.usccr.gov,* or to contact the Rocky Mountain Regional Office at the above phone number, email or street address.

Agenda: Friday, February 8, 2019; 2:00 p.m. (MST)

I. Roll Call
II. Project Planning Including Final Briefing Preparations
III. Other Business
IV. Open Comment
V. Adjournment

Exceptional Circumstance: Pursuant to 41 CFR 102–3.150, the notice for this meeting is given less than 15 calendar days prior to the meeting because of the exceptional circumstances of the federal government shutdown.

Dated: January 30, 2019.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2019–00912 Filed 2–4–19; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

In the Matter of: Shavkat Abdullaev, Inmate Number: 73083–279, Moshannon Valley Correctional Institution, 555 Geo Drive, Philipsburg, PA 16866; Order Denying Export Privileges

On December 1, 2016, in the U.S. District Court for the Eastern District of New York, Shavkat Abdullaev (''Abdullaev'') was convicted of violating the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2012)) (''IEEPA''). Specifically, Abdullaev was convicted of knowingly and intentionally exporting from the United States to Russia microelectronics without the required U.S. Department of Commerce licenses. Abdullaev was sentenced to 36 months in prison, two years of supervised release, and a $400 assessment.

The Export Administration Regulations (''EAR'' or ''Regulations'') are administered and enforced by the U.S. Department of Commerce's Bureau of Industry and Security (''BIS'').[1] Section 766.25 of the Regulations provides, in pertinent part, that the ''Director of [BIS's] Office of Exporter Services, in consultation with the Director of [BIS's] Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of the International Emergency Economic Powers Act (50 U.S.C. 1701–1706).'' 15 CFR 766.25(a). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR 766.25(d).[2] In addition, pursuant to Section 750.8 of the Regulations, BIS's Office of Exporter Services may revoke any BIS-issued licenses in which the person had an interest at the time of his/her conviction.[3]

BIS has received notice of Abdullaev's conviction for violating IEEPA, and has provided notice and an opportunity for Abdullaev to make a written submission to BIS, as provided in Section 766.25 of the Regulations. BIS has not received a submission from Abdullaev.

Based upon my review and consultations with BIS's Office of Export Enforcement, including its Director, and the facts available to BIS, I have decided to deny Abdullaev's export privileges under the Regulations for a period of five years from the date of Abdullaev's conviction. I have also decided to revoke all BIS-issued licenses in which Abdullaev had an interest at the time of his conviction.

Accordingly, it is hereby *ordered:*

First, from the date of this Order until December 1, 2021, Shavkat Abdullaev with a last known address of Inmate Number: 73083–279, Moshannon Valley Correctional Institution, 555 Geo Drive, Philipsburg, PA 16866, and when acting for or on his behalf, his successors, assigns, employees, agents or representatives (''the Denied Person''), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or engaging in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or from any other activity subject to the Regulations.

Second, no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any other person, firm, corporation, or business organization related to Abdullaev by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order in order to prevent evasion of this Order.

Fourth, in accordance with Part 756 of the Regulations, Abdullaev may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

Fifth, a copy of this Order shall be delivered to Abdullaev and shall be published in the **Federal Register**.

[1] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2018). The Regulations originally issued under the Export Administration Act of 1979, as amended, 50 U.S.C. 4601–4623 (Supp. III 2015) (''EAA''), which lapsed on August 21, 2001. The President, through Executive Order 13,222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 8, 2018 (83 FR 39,871 (Aug. 13, 2018)), continued the Regulations in full force and effect under the International Emergency Economic Powers Act, 50 U.S.C. 1701, *et seq.* (2012) (''IEEPA''). On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which includes the Export Control Reform Act of 2018, Title XVII, Subtitle B of Public Law 115–232, 132 Stat. 2208 (''ECRA''). While Section 1766 of ECRA repeals the provisions of the EAA (except for three sections which are inapplicable here), Section 1768 of ECRA provides, in pertinent part, that all rules and regulations that were made or issued under the EAA, including as continued in effect pursuant to IEEPA, and were in effect as of ECRA's date of enactment (August 13, 2018), shall continue in effect according to their terms until modified, superseded, set aside, or revoked through action undertaken pursuant to the authority provided under ECRA.

[2] *See also* Section 11(h) of the EAA, 50 U.S.C. 4610(h) (Supp. III 2015); Sections 1760(e) and 1768 of ECRA, Title XVII, Subtitle B of Public Law 115–232, 132 Stat. 2208, 2225 and 2233 (Aug. 13, 2018); and note 1, *supra.*

[3] *See* notes 1 and 2, *supra.*

Sixth, this Order is effective immediately and shall remain in effect until December 1, 2021.

Issued this 31st day of December 2018.

Karen H. Nies-Vogel,

Director, Office of Exporter Services.

[FR Doc. 2019–00856 Filed 2–4–19; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Five-Year (Sunset) Reviews

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

ACTION: Notice.

SUMMARY: In accordance with the Tariff Act of 1930, as amended (the Act), the Department of Commerce (Commerce) is automatically initiating the five-year reviews (Sunset Reviews) of the antidumping and countervailing duty (AD/CVD) order(s) listed below. The International Trade Commission (the Commission) is publishing concurrently with this notice its notice of *Institution of Five-Year Reviews* which covers the same order(s).

DATES: Applicable February 1, 2019.

FOR FURTHER INFORMATION CONTACT: Commerce official identified in the *Initiation of Review* section below at AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230. For information from the Commission contact Mary Messer, Office of Investigations, U.S. International Trade Commission at (202) 205–3193.

SUPPLEMENTARY INFORMATION:

Background

Commerce's procedures for the conduct of Sunset Reviews are set forth in its *Procedures for Conducting Five-Year (Sunset) Reviews of Antidumping and Countervailing Duty Orders,* 63 FR 13516 (March 20, 1998) and 70 FR 62061 (October 28, 2005). Guidance on methodological or analytical issues relevant to Commerce's conduct of Sunset Reviews is set forth in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification,* 77 FR 8101 (February 14, 2012).

Initiation of Review

In accordance with section 751(c) of the Act and 19 CFR 351.218(c), we are initiating the Sunset Reviews of the following antidumping and countervailing duty order(s):

DOC Case No.	ITC Case No.	Country	Product	Commerce contact
A–570–916	731–TA–1122	China	Laminated Woven Sacks (2nd Review).	Matthew Renkey (202) 482–2312.
C–570–917	701–TA–450	China	Laminated Woven Sacks (2nd Review).	Jacqueline Arrowsmith (202) 482–5255.
A–570–847	731–TA–749	China	Persulfates (4th Review)	Matthew Renkey (202) 482–2312.
A–570–918	731–TA–1123	China	Steel Wire Garment Hangers (2nd Review).	Matthew Renkey (202) 482–2312.

Filing Information

As a courtesy, we are making information related to sunset proceedings, including copies of the pertinent statute and Commerces's regulations, Commerce's schedule for Sunset Reviews, a listing of past revocations and continuations, and current service lists, available to the public on Commerce's website at the following address: *http://enforcement.trade.gov/sunset/.* All submissions in these Sunset Reviews must be filed in accordance with Commerce's regulations regarding format, translation, and service of documents. These rules, including electronic filing requirements via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS), can be found at 19 CFR 351.303.[1]

Any party submitting factual information in an AD/CVD proceeding must certify to the accuracy and completeness of that information.[2] Parties must use the certification formats provided in 19 CFR 351.303(g).[3] Commerce intends to reject factual submissions if the submitting party does not comply with applicable revised certification requirements.

On April 10, 2013, Commerce modified two regulations related to AD/CVD proceedings: The definition of factual information (19 CFR 351.102(b)(21)), and the time limits for the submission of factual information (19 CFR 351.301).[4] Parties are advised to review the final rule, available at *http://enforcement.trade.gov/frn/2013/1304frn/2013-08227.txt,* prior to submitting factual information in these segments. To the extent that other regulations govern the submission of factual information in a segment (such as 19 CFR 351.218), these time limits will continue to be applied. Parties are also advised to review the final rule concerning the extension of time limits for submissions in AD/CVD proceedings, available at *http://enforcement.trade.gov/frn/2013/1309frn/2013-22853.txt,* prior to submitting factual information in these segments.[5]

Letters of Appearance and Administrative Protective Orders

Pursuant to 19 CFR 351.103(d), Commerce will maintain and make available a public service list for these proceedings. Parties wishing to participate in any of these five-year reviews must file letters of appearance as discussed at 19 CFR 351.103(d)). To facilitate the timely preparation of the public service list, it is requested that those seeking recognition as interested parties to a proceeding submit an entry of appearance within 10 days of the publication of the Notice of Initiation. Because deadlines in Sunset Reviews can be very short, we urge interested parties who want access to proprietary information under administrative protective order (APO) to file an APO application immediately following publication in the **Federal Register** of

[1] *See also Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011).

[2] *See* section 782(b) of the Act.

[3] *See also Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (*Final Rule*). Answers to frequently asked questions regarding the *Final Rule* are available at *http://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.*

[4] *See Definition of Factual Information and Time Limits for Submission of Factual Information: Final Rule,* 78 FR 21246 (April 10, 2013).

[5] *See Extension of Time Limits,* 78 FR 57790 (September 20, 2013).

this notice of initiation. Commerce's regulations on submission of proprietary information and eligibility to receive access to business proprietary information under APO can be found at 19 CFR 351.304–306.

Information Required From Interested Parties

Domestic interested parties, as defined in section 771(9)(C), (D), (E), (F), and (G) of the Act and 19 CFR 351.102(b), wishing to participate in a Sunset Review must respond not later than 15 days after the date of publication in the **Federal Register** of this notice of initiation by filing a notice of intent to participate. The required contents of the notice of intent to participate are set forth at 19 CFR 351.218(d)(1)(ii). In accordance with Commerce's regulations, if we do not receive a notice of intent to participate from at least one domestic interested party by the 15-day deadline, Commerce will automatically revoke the order without further review.[6]

If we receive an order-specific notice of intent to participate from a domestic interested party, Commerce's regulations provide that *all parties* wishing to participate in a Sunset Review must file complete substantive responses not later than 30 days after the date of publication in the **Federal Register** of this notice of initiation. The required contents of a substantive response, on an order-specific basis, are set forth at 19 CFR 351.218(d)(3). Note that certain information requirements differ for respondent and domestic parties. Also, note that

Commerce's information requirements are distinct from the Commission's information requirements. Consult Commerce's regulations for information regarding Commerce's conduct of Sunset Reviews. Consult Commerce's regulations at 19 CFR part 351 for definitions of terms and for other general information concerning antidumping and countervailing duty proceedings at Commerce.

This notice of initiation is being published in accordance with section 751(c) of the Act and 19 CFR 351.218(c).

Dated: January 30, 2019.

James Maeder,

Associate Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations performing the duties of Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2019–01269 Filed 2–4–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Five-Year (Sunset) Reviews

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

ACTION: Notice.

SUMMARY: In accordance with the Tariff Act of 1930, as amended (the Act), the Department of Commerce (Commerce) is automatically initiating the five-year reviews (Sunset Reviews) of the antidumping and countervailing duty (AD/CVD) order(s) listed below. The International Trade Commission (the Commission) is publishing concurrently with this notice its notice of *Institution of Five-Year Reviews* which covers the same order(s).

DATES: Applicable January 1, 2019.[1]

FOR FURTHER INFORMATION CONTACT: Commerce official identified in the *Initiation of Review* section below at AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230. For information from the Commission contact Mary Messer, Office of Investigations, U.S. International Trade Commission at (202) 205–3193.

SUPPLEMENTARY INFORMATION:

Background

Commerce's procedures for the conduct of Sunset Reviews are set forth in its *Procedures for Conducting Five-Year (Sunset) Reviews of Antidumping and Countervailing Duty Orders,* 63 FR 13516 (March 20, 1998) and 70 FR 62061 (October 28, 2005). Guidance on methodological or analytical issues relevant to Commerce's conduct of Sunset Reviews is set forth in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification,* 77 FR 8101 (February 14, 2012).

Initiation of Review

In accordance with section 751(c) of the Act and 19 CFR 351.218(c), we are initiating the Sunset Reviews of the following antidumping and countervailing duty order(s):

DOC Case No.	ITC Case No.	Country	Product	Commerce contact
A–570–865	731–TA–899	China	Certain Hot-Rolled Carbon Steel Flat Products (3rd Review).	Matthew Renkey (202) 482–2312.
A–570–912	731–TA–1117	China	New Pnematic Off-The Road Tires (2nd Review).	Joshua Poole (202) 482–1293.
C–570–913	C–570–913	China	New Pnematic Off-The Road Tires (2nd Review).	Jacqueline Arrowsmith (202) 482–5255.
A–570–875	731–TA–990	China	Non-Malleable Cast Iron Pipe Fitting (3rd Review).	Joshua Poole (202) 482–1293.
A–570–922	731–TA–1129	China	Raw Flexible Magnets (2nd Review)	Joshua Poole (202) 482–1293.
C–570–923	701–TA–452	China	Raw Flexible Magnets (2nd Review)	Joshua Poole (202) 482–1293.
A–570–925	731–TA–1136	China	Sodium Nitrite (2nd Review)	Joshua Poole (202) 482–1293.
C–570–926	701–TA–453	China	Sodium Nitrite (2nd Review)	Joshua Poole (202) 482–1293.
A–428–841	731–TA–1137	Germany	Sodium Nitrite (2nd Review)	Joshua Poole (202) 482–1293.
A–533–820	731–TA–900	India	Certain Hot-Rolled Carbon Steel Flat Products (3rd Review).	Joshua Poole (202) 482–1293.
C–533–821	701–TA–405	India	Certain Hot-Rolled Carbon Steel Flat Products (3rd Review).	Joshua Poole (202) 482–1293.
A–560–812	731–TA–901	Indonesia	Certain Hot-Rolled Carbon Steel Flat Products (3rd Review).	Joshua Poole (202) 482–1293.

[6] *See* 19 CFR 351.218(d)(1)(iii).

[1] Commerce exercised its discretion to toll all deadlines affected by the partial federal government closure from December 22, 2018, through the resumption of operations on January 29, 2019. *See* Memorandum to the Record from Gary Taverman, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance, ''Deadlines Affected by the Partial Shutdown of the Federal Government,'' dated January 28, 2019. Accordingly, this notice is issued within that 40-day tolling period.

DOC Case No.	ITC Case No.	Country	Product	Commerce contact
C–560–813	701–TA–406	Indonesia	Certain Hot-Rolled Carbon Steel Flat Products (3rd Review).	Joshua Poole (202) 482–1293.
A–583–835	731–TA–906	Taiwan	Certain Hot-Rolled Carbon Steel Flat Products (3rd Review).	Jacqueline Arrowsmith (202) 482–5255.
A–583–842	731–TA–1130	Taiwan	Raw Flexible Magnets (2nd Review)	Joshua Poole (202) 482–1293.
A–549–817	731–TA–907	Thailand	Certain Hot-Rolled Carbon Steel Flat Products (3rd Review).	Jacqueline Arrowsmith (202) 482–5255.
C–549–818	701–TA–408	Thailand	Certain Hot-Rolled Carbon Steel Flat Products (3rd Review).	Jacqueline Arrowsmith (202) 482–5255.
A–823–811	731–TA–908	Ukraine	Certain Hot-Rolled Carbon Steel Flat Products (3rd Review).	Jacqueline Arrowsmith (202) 482–5255.

With respect to the countervailing duty order on Sodium Nitrate from China (C–570–926), we have advanced the initiation date of this Sunset Review upon determining that initiation of the Sunset Reviews for the Sodium Nitrate antidumping and countervailing duty orders on the same date would promote administrative efficiency.

Filing Information

As a courtesy, we are making information related to sunset proceedings, including copies of the pertinent statute and Commerces's regulations, Commerce's schedule for Sunset Reviews, a listing of past revocations and continuations, and current service lists, available to the public on Commerce's website at the following address: *http://enforcement.trade.gov/sunset/.* All submissions in these Sunset Reviews must be filed in accordance with Commerce's regulations regarding format, translation, and service of documents. These rules, including electronic filing requirements via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS), can be found at 19 CFR 351.303.[2]

Any party submitting factual information in an AD/CVD proceeding must certify to the accuracy and completeness of that information.[3] Parties must use the certification formats provided in 19 CFR 351.303(g).[4] Commerce intends to reject factual submissions if the submitting party does not comply with applicable revised certification requirements.

On April 10, 2013, Commerce modified two regulations related to AD/CVD proceedings: the definition of factual information (19 CFR 351.102(b)(21)), and the time limits for the submission of factual information (19 CFR 351.301).[5] Parties are advised to review the final rule, available at *http://enforcement.trade.gov/frn/2013/1304frn/2013-08227.txt,* prior to submitting factual information in these segments. To the extent that other regulations govern the submission of factual information in a segment (such as 19 CFR 351.218), these time limits will continue to be applied. Parties are also advised to review the final rule concerning the extension of time limits for submissions in AD/CVD proceedings, available at *http://enforcement.trade.gov/frn/2013/1309frn/2013-22853.txt,* prior to submitting factual information in these segments.[6]

Letters of Appearance and Administrative Protective Orders

Pursuant to 19 CFR 351.103(d), Commerce will maintain and make available a public service list for these proceedings. Parties wishing to participate in any of these five-year reviews must file letters of appearance as discussed at 19 CFR 351.103(d)). To facilitate the timely preparation of the public service list, it is requested that those seeking recognition as interested parties to a proceeding submit an entry of appearance within 10 days of the publication of the Notice of Initiation. Because deadlines in Sunset Reviews can be very short, we urge interested parties who want access to proprietary information under administrative protective order (APO) to file an APO application immediately following publication in the **Federal Register** of this notice of initiation. Commerce's regulations on submission of proprietary information and eligibility to receive access to business proprietary information under APO can be found at 19 CFR 351.304–306.

Information Required From Interested Parties

Domestic interested parties, as defined in section 771(9)(C), (D), (E), (F), and (G) of the Act and 19 CFR 351.102(b), wishing to participate in a Sunset Review must respond not later than 15 days after the date of publication in the **Federal Register** of this notice of initiation by filing a notice of intent to participate. The required contents of the notice of intent to participate are set forth at 19 CFR 351.218(d)(1)(ii). In accordance with Commerce's regulations, if we do not receive a notice of intent to participate from at least one domestic interested party by the 15-day deadline, Commerce will automatically revoke the order without further review.[7]

If we receive an order-specific notice of intent to participate from a domestic interested party, Commerce's regulations provide that *all parties* wishing to participate in a Sunset Review must file complete substantive responses not later than 30 days after the date of publication in the **Federal Register** of this notice of initiation. The required contents of a substantive response, on an order-specific basis, are set forth at 19 CFR 351.218(d)(3). Note that certain information requirements differ for respondent and domestic parties. Also, note that

Commerce's information requirements are distinct from the Commission's information requirements. Consult Commerce's regulations for information regarding Commerce's conduct of Sunset Reviews. Consult Commerce's regulations at 19 CFR part 351 for definitions of terms and for other general information concerning antidumping and countervailing duty proceedings at Commerce.

[2] *See also Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011).

[3] *See* section 782(b) of the Act.

[4] *See also Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (*Final Rule*). Answers to frequently asked questions regarding the *Final Rule* are available at *http://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.*

[5] *See Definition of Factual Information and Time Limits for Submission of Factual Information: Final Rule,* 78 FR 21246 (April 10, 2013).

[6] *See Extension of Time Limits,* 78 FR 57790 (September 20, 2013).

[7] *See* 19 CFR 351.218(d)(1)(iii).

This notice of initiation is being published in accordance with section 751(c) of the Act and 19 CFR 351.218(c).

Dated: January 31, 2019.

James Maeder,

Associate Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations performing the duties of Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2019–01271 Filed 2–4–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG749

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Recreational Advisory Panel to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Friday, February 22, 2019 at 10 a.m.

ADDRESSES:

Meeting address: The meeting will be held at the Hilton Garden Inn, 100 Boardman Street, Boston, MA 02128; phone: (617) 567–6789.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Recreational Advisory Panel will provide recommendations to the Groundfish Committee on fishing year 2019 recreational measures for Gulf of Maine cod and haddock, and Georges Bank cod. They plan to discuss public listening sessions for a possible limited access program for the recreational groundfish party/charter fishery. The panel will receive an overview of the Council's priorities for 2019. Other business will be discussed as necessary.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date. This meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

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

Dated: January 31, 2019.

Jennifer M. Wallace,

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

[FR Doc. 2019–01053 Filed 2–4–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG573

Endangered and Threatened Species; Recovery Plans

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

ACTION: Notice of availability; extension of public comment period.

SUMMARY: We, NMFS, announce the extension of the comment period for the Proposed Endangered Species Act (ESA) Recovery Plan for Puget Sound Steelhead (Proposed Plan) published on December 13, 2018. The Proposed Plan addresses the Puget Sound steelhead (*Oncorhynchus mykiss*) Distinct Population Segment (DPS), which was listed as threatened under the Endangered Species Act (ESA) on May 11, 2007 (72 FR 26722). The geographic area covered by the Proposed Plan is the Puget Sound basin, from the Elwha River (inclusive) eastward, including rivers in Hood Canal, South Sound, and North Sound. As required under the ESA, the Proposed Plan contains objective, measurable delisting criteria, site-specific management actions necessary to achieve the Proposed Plan's goals, and estimates of the time and costs required to implement recovery actions. We are soliciting review and comment from the public and all interested parties on the Proposed Plan. The close of the comment period is being extended—from February 11, 2019, to March 28, 2019—to provide additional opportunity for public comment.

DATES: The deadline for receipt of comments on the Proposed Recovery Plan published on December 13, 2018 (83 FR 64110), is extended to close of business on March 28, 2019.

ADDRESSES: You may submit comments on the Proposed Plan, identified by NOAA–NMFS–2018–0125, by either of the following methods:

- *Electronic Submission:* Submit all electronic public comments on the Proposed Plan via the Federal eRulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D= NOAA-NMFS-2018-0125.* Click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments on the Proposed Plan to David Price, National Marine Fisheries Service, 510 Desmond Dr. SE, Lacey, WA 98503.

Instructions: Comments or information sent by any other method, to any other address or individual, or received after the end of the comment period may not be considered by NMFS. All comments and information received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

The Proposed Plan is available online at *www.regulations.gov/#!docketDetail;D= NOAA-NMFS-2018-0125* or upon request from the NMFS West Coast Region, Protected Resources Division (see **ADDRESSES** or **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: David Price, Puget Sound Steelhead Recovery Coordinator, at (360) 753–9598, *david.price@noaa.gov;* or Elizabeth Babcock, (206) 526–4505, *elizabeth.babcock@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Extension of Comment Period

On December 13, 2018 (83 FR 64110) we (NMFS) published in the **Federal Register** a request for public comment on the Proposed Endangered Species Act Recovery Plan for Puget Sound steelhead. The public comment period for this action is set to end on February 11, 2019. The comment period is being extended through March 28, 2019, to provide additional opportunity for public comment.

Background

We are responsible for developing and implementing recovery plans for Pacific salmon and steelhead listed under the ESA of 1973, as amended (16 U.S.C. 1531 *et seq.*). The ESA requires the development of recovery plans for each listed species unless such a plan would not promote its recovery. We believe it is essential to have local support of recovery plans by those whose activities directly affect the listed species and whose continued commitment and leadership will be needed to implement the necessary recovery actions. We therefore support and participate in collaborative efforts to develop recovery plans that involve state, tribal, and federal entities, local communities, and other stakeholders. For the Proposed Plan for threatened Puget Sound steelhead, we worked collaboratively with state, tribal, and federal partners to produce a recovery plan that satisfies the ESA requirements. We have determined that this Proposed ESA Recovery Plan for Puget Sound Steelhead meets the statutory requirements for a recovery plan and we are proposing to adopt it as the ESA recovery plan for this threatened species. Section 4(f) of the ESA, as amended in 1988, requires that public notice and an opportunity for public review and comment be provided prior to final approval of a recovery plan. This notice solicits comments on the Proposed Plan.

Development of the Proposed Plan

The geographic area covered by the Proposed Plan is the Puget Sound basin, from the Elwha River (inclusive) eastward, including rivers in Hood Canal, South Sound, and North Sound. The area includes steelhead from six artificial propagation programs: The Green River Natural Program; White River Winter Steelhead Supplementation Program; Hood Canal Steelhead Supplementation Off-station Projects in the Dewatto, Skokomish, and Duckabush Rivers; and the Lower Elwha Fish Hatchery Wild Steelhead Recovery Program.

For the purpose of recovery planning for the ESA-listed species of Pacific salmon and steelhead in Idaho, Oregon, and Washington, NMFS designated five geographically based ''recovery domains.'' The Puget Sound steelhead DPS spawning range is in the Puget Sound domain. For each domain, NMFS appointed a team of scientists, nominated for their geographic and species expertise, to provide a solid scientific foundation for recovery plans. The Puget Sound Steelhead Technical Recovery Team included biologists from NMFS, other federal agencies, state agencies, tribal entities and governments, and academic institutions.

A primary task for the Puget Sound Steelhead Technical Recovery Team was to recommend criteria for determining when each component population within a DPS or Evolutionarily Significant Unit (ESU) should be considered viable (*i.e.,* when they are have a low risk of extinction over a 100-year period) and when ESUs or DPSs have a risk of extinction consistent with no longer needing the protections of the ESA. All NMFS' technical recovery teams used the same biological principles for developing their recommendations; these principles are described in the NOAA technical memorandum, Viable Salmonid Populations and the Recovery of Evolutionarily Significant Units (McElhany et al. 2000). Viable salmonid populations (VSP) are defined in terms of four parameters: Abundance, productivity or growth rate, spatial structure, and diversity.

We also collaborated with the state of Washington, tribes, other federal agencies, local governments, representatives of industry and environmental groups, other stakeholders, and the public to develop this Proposed Plan. The plan for the Puget Sound steelhead DPS was developed by NMFS in cooperation with a recovery team made up of experts from the Washington Department of Fish and Wildlife, Northwest Indian Fisheries Commission, Nooksack Tribe, Seattle City Light, Long Live the Kings, Puget Sound Partnership, and NMFS' Northwest Fisheries Science Center. These groups provided vital input during the planning process and their continued involvement during recovery plan implementation is critical to the success of our joint efforts to recover Puget Sound steelhead.

Contents of Proposed Plan

The Proposed Plan contains biological background and contextual information that includes description of the DPS, planning area, and context of the plan's development. It presents relevant information on DPS structure and guidelines for assessing salmonid population and DPS status. It provides background on the natural history of steelhead, population status, and threats to their sustainability.

The Puget Sound steelhead DPS consists of three Major Population Groups (MPGs) and 32 Demographically Independent Populations (DIPs). NMFS based its decision to list the species in 2007 on findings by the Puget Sound Steelhead Biological Review Team (Biological Review Team) (Hard et al. 2007). The team's findings identified the major risk factors facing Puget Sound steelhead to be: (1) Widespread declines in abundance and productivity for most natural steelhead populations in the DPS, including those in Skagit and Snohomish Rivers, previously considered strongholds for steelhead in the DPS; (2) the low abundance of several summer-run populations; and (3) the sharply diminishing abundance of some steelhead populations, especially in south Puget Sound, Hood Canal, and the Strait of Juan de Fuca. Continued releases of out-of-DPS hatchery fish from Skamania-derived summer run were a major concern for diversity in the DPS. In 2011, four years after the ESA-listing decision, a status assessment of the DPS by NMFS' Biological Review Team found that the status of Puget Sound steelhead in terms of risk of extinction had not changed (NMFS 2016; 81 FR 33468). Scientists on the Biological Review Team identified degradation and fragmentation of freshwater habitat, with consequential effects on connectivity, as the primary limiting factors and threats facing the Puget Sound steelhead DPS. They determined that most of the steelhead populations within the DPS continued to show downward trends in estimated abundance, with a few sharp declines (Ford 2011). Most recently, a NMFS review (NMFS 2016) concluded that ''The biological risks faced by the Puget Sound steelhead DPS have not substantively changed since the listing in 2007, or since the 2011 status review.'' The Puget Sound Steelhead Technical Recovery Team concluded that the DPS was at very low viability, as were all three of its constituent MPGs and many of its 32 DIPs (Hard et al. 2015).

The Proposed Plan presents NMFS' proposed recovery goals, viability criteria, and listing factor criteria for making a delisting decision. The proposed viability criteria for the Puget Sound steelhead DPS are designed to improve the DPS so it ''has a negligible

risk of extinction due to threats from demographic variation, local environmental variation, and genetic diversity changes over a 100-year time frame'' based on the status of the MPGs, DIPs, and supporting ecosystems (McElhany *et al.* 2000). A self-sustaining viable population has a negligible risk of extinction due to reasonably foreseeable changes in circumstances affecting its abundance, productivity, spatial structure, and diversity characteristics and achieves these characteristics without dependence upon artificial propagation. The proposed viability criteria for Puget Sound steelhead require that all three MPGs be viable because the three MPGs differ substantially in key biological and habitat characteristics that contribute in distinct ways to the overall viability, diversity and spatial structure of the DPS.

The proposed listing factor criteria are based on the five listing factors found in the ESA section 4(a)(1). Before NMFS can remove the DPS from protection under the ESA, the factors that led to ESA listing need to have been reduced or eliminated to the point where federal protection under the ESA is no longer needed, and there is reasonable certainty that the relevant regulatory mechanisms are adequate to protect Puget Sound steelhead viability. NMFS' listing factor criteria for Puget Sound steelhead address pressures from freshwater habitat degradation, hatcheries, and other factors that led to the species' listing and continue to affect their viability.

The Proposed Plan also describes specific information on the following: Current status of Puget Sound steelhead; pressures (limiting factors) and threats throughout the life cycle that have contributed to the species' decline; recovery strategies to address the threats based on the best available science; site-specific actions with timelines; and a proposed adaptive management framework for focusing needed research and evaluations, and revising our recovery strategies and actions. The Proposed Plan also summarizes time and costs required to implement recovery actions. NMFS is particularly interested in comments on the proposed strategies and actions for steelhead recovery, and in gaining additional information regarding scale, scope, and costs of these actions. We are also interested in comments on establishing appropriate forums to coordinate implementation of the recovery plan.

Public Comments Solicited

We are soliciting written comments on the Proposed Plan. All substantive comments received by the date specified above will be considered and incorporated, as appropriate, prior to our decision whether to approve the plan. While we invite comments on all aspects of the Proposed Plan, we are particularly interested in comments on developing specific scenarios to address the placeholder recovery scenario, comments on the cost of recovery actions for which we have not yet determined implementation costs, and comments on establishing an appropriate implementation forum for the plan. We will issue a news release announcing the adoption and availability of the final plan. We will post on the NMFS West Coast Region website (*www.wcr.noaa.gov*) a summary of, and responses to, the comments received, along with electronic copies of the final plan and its appendices.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: January 30, 2019.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2019–00941 Filed 2–4–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG746

North Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The North Pacific Fishery Management Council (Council) Scallop Plan Team will meet on February 20, 2019 in Kodiak, AK.

DATES: The meeting will be held on Wednesday, February 20, 2019, from 9 a.m. to 5 p.m. Alaska Standard Time.

ADDRESSES: The meeting will be held at the Alaska Department of Fish and Game Office, 351 Research Ct, Kodiak, AK 99615.

Council address: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252; telephone: (907) 271–2809.

FOR FURTHER INFORMATION CONTACT: Jim Armstrong, Council staff; telephone: (907) 271–2809.

SUPPLEMENTARY INFORMATION:

Agenda

Wednesday, February 20, 2019

The Council's Scallop Plan Team will update the status of the Statewide Scallop Stocks and Stock Assessment and Fishery Evaluation (SAFE) report, including catch specification recommendations for the 2019 fishing year. Additionally, there will be discussion of survey results and the scallop assessment program, survey plans for 2019, and a review and update of scallop research priorities. The agenda is subject to change and will be posted at *http://www.npfmc.org/.*

Public Comment

Public comment letters will be accepted and should be submitted either electronically via the eCommenting portal at: *meetings.npfmc.org/Meeting/Details/449* or through the mail: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252. Oral public testimony will be accepted at the discretion of the chair.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Shannon Gleason at (907) 271–2809 at least 7 working days prior to the meeting date.

Dated: January 31, 2019.

Jennifer M. Wallace,

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

[FR Doc. 2019–01051 Filed 2–4–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG673

Fisheries of the Exclusive Economic Zone Off Alaska; Groundfish of the Gulf of Alaska; Central Gulf of Alaska Rockfish Program

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

ACTION: Notification of standard prices and fee percentage.

SUMMARY: NMFS publishes the standard ex-vessel prices and fee percentage for cost recovery under the Central Gulf of Alaska Rockfish Program. This action is intended to provide participants in a rockfish cooperative with the standard

prices and fee percentage for the 2018 fishing year, which was authorized from May 1 through November 15. The fee percentage is 2.86 percent. The fee payments are due from each rockfish cooperative on or before February 15, 2019.

DATES: Valid on: February 5, 2019.

FOR FURTHER INFORMATION CONTACT: Carl Greene, 907–586–7105.

SUPPLEMENTARY INFORMATION:

Background

The rockfish fisheries are conducted in Federal waters near Kodiak, AK, by trawl and longline vessels. Regulations implementing the Central Gulf of Alaska (GOA) Rockfish Program (Rockfish Program) are set forth at 50 CFR part 679. Exclusive harvesting privileges are allocated as quota share under the Rockfish Program for rockfish primary and secondary species. Each year, NMFS issues rockfish primary and secondary species cooperative quota (CQ) to rockfish quota shareholders to authorize harvest of these species. The rockfish primary species are northern rockfish, Pacific ocean perch, and dusky rockfish. In 2012, dusky rockfish replaced the pelagic shelf rockfish species group in the GOA Groundfish Harvest Specifications (77 FR 15194, March 14, 2012). The rockfish secondary species include Pacific cod, rougheye rockfish, shortraker rockfish, sablefish, and thornyhead rockfish. Rockfish cooperatives began fishing under the Rockfish Program on May 1, 2012.

The Rockfish Program is a limited access privilege program established under the provisions of section 303A of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Sections 303A and 304(d) of the Magnuson-Stevens Act require NMFS to collect fees to recover the actual costs directly related to the management, data collection and analysis, and enforcement of any limited access privilege program. Therefore, NMFS is required to collect fees for the Rockfish Program under sections 303A and 304(d)(2) of the Magnuson-Stevens Act. Section 304(d)(2) of the Magnuson-Stevens Act also limits the cost recovery fee so that it may not exceed 3 percent of the ex-vessel value of the fish harvested under the Rockfish Program.

Standard Prices

NMFS calculates cost recovery fees based on standard ex-vessel value prices, rather than actual price data provided by each rockfish CQ holder. Use of standard ex-vessel prices is allowed under sections 303A and 304(d)(2) of the Magnuson-Stevens Act. NMFS generates a standard ex-vessel price for each rockfish primary and secondary species on a monthly basis to determine the average price paid per pound for all shoreside processors receiving rockfish primary and secondary species CQ.

Regulations at § 679.85(b)(2) require the Regional Administrator to publish rockfish standard ex-vessel values during the first quarter of each calendar year. The standard prices are described in U.S. dollars per pound for rockfish primary and secondary species CQ landings made during the previous year.

Fee Percentage

NMFS assesses a fee on the standard ex-vessel value of rockfish primary species and rockfish secondary species CQ harvested by rockfish cooperatives in the Central GOA and waters adjacent to the Central GOA when rockfish primary species caught by a cooperative are deducted from the Federal total allowable catch. The rockfish entry level longline fishery and trawl vessels that opt out of joining a cooperative are not subject to cost recovery fees because those participants do not receive rockfish CQ. Specific details on the Rockfish Program's cost recovery provision may be found in the implementing regulations set forth at § 679.85.

NMFS informs—by letter—each rockfish cooperative of the fee percentage applied to the previous year's landings and the total amount due. Fees are due on or before February 15 of each year. Failure to pay on time will result in the permit holder's rockfish quota share becoming non-transferable, and the person will be ineligible to receive any additional rockfish quota share by transfer. In addition, cooperative members will not receive any rockfish CQ the following year until full payment of the fee is received by NMFS.

NMFS calculates and publishes in the **Federal Register** the fee percentage in the first quarter of each year according to the factors and methods described in Federal regulations at § 679.85(c)(2). NMFS determines the fee percentage that applies to landings made in the previous year by dividing the total Rockfish Program management, data collection and analysis, and enforcement costs (direct program costs) during the previous year by the total standard ex-vessel value of the rockfish primary species and rockfish secondary species for all rockfish CQ landings made during the previous year (fishery value). NMFS captures the direct program costs through an established accounting system that allows staff to track labor, travel, contracts, rent, and procurement. Fee collections in any given year may be less than, or greater than, the direct program costs and fishery value for that year, because, by regulation, the fee percentage is established in the first quarter of the calendar year based on the program costs and the fishery value of the previous calendar year.

Using the fee percentage formula described above, the estimated percentage of program costs to value for the 2018 calendar year is 2.86 percent of the standard ex-vessel value. The fee percentage for 2018 is an increase from the 2017 fee percentage of 2.04 percent (83 FR 2964, January 22, 2018). Program costs for 2018 increased over costs accrued in 2017. The value of the fishery also increased by 10% in 2018, relative to the 2017 fishery value. The majority of the 2018 costs come from direct personnel and overhead costs, which has been consistent across all years of the program.

TABLE 1—STANDARD EX-VESSEL PRICES BY SPECIES FOR THE 2018 ROCKFISH PROGRAM SEASON IN KODIAK, ALASKA

Species	Period ending	Standard ex-vessel price per pound ($)
Dusky rockfish *	May 31	0.18
	June 30	0.18
	July 31	0.18
	August 31	0.18
	September 30	0.18
	October 31	0.18

TABLE 1—STANDARD EX-VESSEL PRICES BY SPECIES FOR THE 2018 ROCKFISH PROGRAM SEASON IN KODIAK, ALASKA—Continued

Species	Period ending	Standard ex-vessel price per pound ($)
	November 30	0.18
Northern rockfish	May 31	0.16
	June 30	0.16
	July 31	0.16
	August 31	0.16
	September 30	0.16
	October 31	0.16
	November 30	0.16
Pacific cod	May 31	0.42
	June 30	0.42
	July 31	0.42
	August 31	0.42
	September 30	0.40
	October 31	0.45
	November 30	0.41
Pacific ocean perch	May 31	0.20
	June 30	0.20
	July 31	0.20
	August 31	0.20
	September 30	0.20
	October 31	0.20
	November 30	0.20
Rougheye rockfish	May 31	0.26
	June 30	0.20
	July 31	0.21
	August 31	0.21
	September 30	0.29
	October 31	0.21
	November 30	0.21
Sablefish	May 31	2.21
	June 30	2.04
	July 31	1.94
	August 31	1.90
	September 30	1.98
	October 31	1.86
	November 30	1.71
Shortraker rockfish	May 31	0.20
	June 30	0.20
	July 31	0.20
	August 31	0.20
	September 30	0.20
	October 31	0.20
	November 30	0.20
Thornyhead rockfish	May 31	0.45
	June 30	0.33
	July 31	0.36
	August 31	0.22
	September 30	0.46
	October 31	0.31
	November 30	0.29

* The pelagic shelf rockfish species group has been changed to ''dusky rockfish.''

Authority: 16 U.S.C. 773 *et seq.;* 1801 *et seq.;* 3631 *et seq.;* Pub. L. 108–447; Pub. L. 111–281.

Dated: January 30, 2019.

Karen H. Abrams,

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

[FR Doc. 2019–00995 Filed 2–4–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG744

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Tilefish Advisory Panel of the Mid-Atlantic Fishery Management Council (Council) will hold a meeting.

DATES: The meeting will be held on Wednesday, February 20, 2019, beginning at 9 a.m. and conclude by 1 p.m. For agenda details, see **SUPPLEMENTARY INFORMATION.**

ADDRESSES: The meeting will be held via webinar with a telephone-only connection option.

Council address: Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331 or on their website at *www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to create fishery performance reports for blueline and golden tilefish by the Council's Tilefish Advisory Panel. The intent of these reports is to facilitate a venue for structured input from the Advisory Panel members for the Tilefish specifications processes, including recommendations to the Council and its Scientific and Statistical Committee.

Dated: January 31, 2019.

Jennifer M. Wallace,

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

[FR Doc. 2019–01050 Filed 2–4–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG747

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting (webinar).

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Highly Migratory Species Management Team (HMSMT) will hold a webinar, which is open to the public.

DATES: The webinar meeting will be held on Friday, February 22, 2019, from 1:30 p.m. until 4:30 p.m. The webinar time is an estimate; the meeting will adjourn when business for the day is completed.

ADDRESSES: The meeting will be held via webinar. A public listening station is available at the Pacific Council office (address below). To attend the webinar (1) join the meeting by visiting this link *https://www.gotomeeting.com/webinar,* (2) enter the Webinar ID: 544–381–883, and (3) enter your name and email address (required). After logging in to the webinar, please (1) dial this TOLL number 1–562–247–8321 (not a toll-free number), (2) enter the attendee phone audio access code 835–605–745, and (3) enter the provided audio PIN after joining the webinar. You must enter this PIN for audio access. NOTE: We have disabled Mic/Speakers as an option and require all participants to use a telephone or cell phone to participate. Technical Information and system requirements: PC-based attendees are required to use Windows® 7, Vista, or XP; Mac®-based attendees are required to use Mac OS® X 10.5 or newer; Mobile attendees are required to use iPhone®, iPad®, Android™ phone or Android tablet (See the *https://www.gotomeeting.com/webinar/ipad-iphone-android-webinar-apps.*) You may send an email to Mr. Kris Kleinschmidt at *Kris.Kleinschmidt@noaa.gov* or contact him at 503–820–2280, extension 411 for technical assistance. A public listening station will also be available at the Pacific Council office.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220.

FOR FURTHER INFORMATION CONTACT: Dr. Kit Dahl, Pacific Council; telephone: (503) 820–2422.

SUPPLEMENTARY INFORMATION: The primary purpose of this HMSMT webinar is to prepare for the March 2019 Council meeting. The HMS topics on the Council's March agenda are: (1) National Marine Fisheries Report, (2) International Management Recommendations, and (3) Drift Gillnet Fishery Performance Metrics Review. The HMSMT may also discuss other items related to HMS management and administrative Pacific Council agenda items. A detailed agenda for the webinar will be available on the Pacific Council's website prior to the meeting. The HMSMT may also address other assignments relating to HMS management. No management actions will be decided by the HMSMT.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt at (503) 820–2411 at least 10 business days prior to the meeting date.

Dated: January 31, 2019.

Jennifer M. Wallace,

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

[FR Doc. 2019–01052 Filed 2–4–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No.: PTO–P–2019–0002]

Grant of Interim Extension of the Term of U.S. Patent No. 7,534,790; Vernakalant Hydrochloride

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice of interim patent term extension.

SUMMARY: The United States Patent and Trademark Office has issued an order granting interim extension under for a one-year interim extension of the term of U.S. Patent No. 7,534,790.

FOR FURTHER INFORMATION CONTACT: Mary C. Till by telephone at (571) 272–7755; by mail marked to her attention and addressed to the Commissioner for Patents, Mail Stop Hatch-Waxman PTE, P.O. Box 1450, Alexandria, VA 22313–1450; by fax marked to her attention at (571) 273–7755; or by email to *Mary.Till@uspto.gov.*

SUPPLEMENTARY INFORMATION: Section 156 of Title 35, United States Code, generally provides that the term of a patent may be extended for a period of up to five years if the patent claims a product, or a method of making or using a product, that has been subject to certain defined regulatory review, and that the patent may be extended for interim periods of up to one year if the regulatory review is anticipated to extend beyond the expiration date of the patent.

On December 28, 2018, Correvio International Sàrl, the patent owner of record, timely filed an application under 35 U.S.C. 156(d)(5) for an interim extension of the term of U.S. Patent No. 7,534,790. The patent claims the human drug product, vernakalant hydrochloride. The application for patent term extension indicates that New Drug Application (NDA) 22–034 was submitted to the Food and Drug

Administration (FDA) on December 19, 2006.

Review of the patent term extension application indicates that, except for permission to market or use the product commercially, the subject patent would be eligible for an extension of the patent term under 35 U.S.C. 156, and that the patent should be extended for one year as required by 35 U.S.C. 156(d)(5)(B). Because the regulatory review period will continue beyond the original expiration date of the patent, March 31, 2019, interim extension of the patent term under 35 U.S.C. 156(d)(5) is appropriate.

An interim extension under 35 U.S.C. 156(d)(5) of the term of U.S. Patent No. 7,534,790 is granted for a period of one year from the original expiration date of the patent.

Dated: January 29, 2019.

Robert Bahr,

Deputy Commissioner for Patent Examination Policy, United States Patent and Trademark Office.

[FR Doc. 2019–01049 Filed 2–4–19; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF DEFENSE

Department of the Army

Intent To Grant an Exclusive License for U.S. Government-Owned Invention

AGENCY: Department of the Army, DoD.

ACTION: Notice.

SUMMARY: In accordance with applicable laws and regulations, announcement is made of the intent to grant an exclusive, royalty-bearing, revocable license.

ADDRESSES: Commander, U.S. Army Medical Research and Materiel Command, Attn: Office of Research and Technology Applications, 1520 Freedman Drive, Suite 227, Fort Detrick, MD 21702–5012.

FOR FURTHER INFORMATION CONTACT: Dr. Paul Michaels, Office of Research & Technology Applications, (301) 619–4145. For patent issues, Ms. Elizabeth Arwine, Patent Attorney, (301) 619–7808, both at telefax (301) 619–5034.

SUPPLEMENTARY INFORMATION: In accordance with 35 U.S.C. 209 (e) and 37 CFR 404.7 (a)(1)(i), announcement is made of the intent to grant an exclusive, royalty-bearing, revocable license to United States Patent 7,867,983, filed March 25, 2008, entitled ''Methods to Protect Skeletal Muscle Against Injury,'' to the University of Connecticut, having its principal place of business at 400 Farmington Avenue, Farmington, CT 06032.

Anyone wishing to object to grant of this license can file written objections along with supporting evidence, if any, within 15 days from the date of this publication. Written objections are to be filed with the Command Judge Advocate (see **ADDRESSES**).

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2019–01055 Filed 2–4–19; 8:45 am]

BILLING CODE 5001–03–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Vietnam War Commemoration Advisory Committee; Notice of Federal Advisory Committee Meeting; Amendment

AGENCY: Chief Management Officer, Vietnam War Commemoration Advisory Committee, Department of Defense.

ACTION: Notice of federal advisory committee meeting.

SUMMARY: On Wednesday, December 26, 2018, the Department of Defense (DoD) published a notice to announce that the following Federal Advisory Committee meeting of the Vietnam War Commemoration Advisory Committee will be held on February 8, 2019. Subsequent to the publication of this notice, the start time for this meeting has changed. The public is asked to arrive no later than 10:15 a.m. The meeting will begin promptly at 10:30 a.m. All other information in the December 26, 2018 notice remains the same.

DATES: Open to the public Friday, February 8, 2019 from 10:15 a.m. to 4:00 p.m.

ADDRESSES: The address of the open meeting is 241 18th Street South, Room 101, Arlington VA 22202.

FOR FURTHER INFORMATION CONTACT: Mrs. Marcia L. Moore, 703–571–2005 (Voice), 703–692–4691 (Facsimile), *marcia.l.moore12.civ@mail.mil* (Email) or Mr. Mark Franklin, 703–697–4849 (Voice), mark.r.franklin.civ@mail.mil (Email). Mailing address is DOD Vietnam War Commemoration Program Office, 241 18th Street South, Suite 101, Arlington, VA 22202. Website: *http://www.vietnamwar50th.com.* The most up-to-date changes to the meeting agenda can be found on the website.

SUPPLEMENTARY INFORMATION: Due to circumstances beyond the control of the Department of Defense (DoD) and the Designated Federal Officer, the Vietnam War Commemoration Advisory Committee was unable to provide public notification required by 41 CFR 102–3.150(a) concerning its need to amend the previously published notice about the February 8, 2019 meeting of the Vietnam War Commemoration Advisory Committee. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement. This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.140 and 102–3.150.

Purpose of the Meeting: The Department of Defense is publishing this notice to announce the following Federal advisory committee meeting of the Vietnam War Commemoration Advisory Committee. This meeting is open to the public. The Committee is asked to provide advice on the concept and design of the types of commemoration events the Vietnam War Commemoration Office (VWC) should consider supporting or coordinating during the close-out phase from 2023 through 2025. The objective for this meeting is to finalize the Advisory Committee's recommendations.

Agenda: The Committee will convene from 10:15 a.m. to 4:00 p.m. on February 8, 2019 to finalize the Committee's recommendations on the concept and types of commemoration events the Vietnam War Commemoration Office (VWC) should consider supporting or coordinating during the close-out phase from 2023 through 2025.

Meeting Accessibility: Special Accommodations: Individuals requiring special accommodations to access the public meeting should contact Mrs. Marcia Moore or Mr. Franklin at the number listed in the **FOR FURTHER INFORMATION CONTACT** section by February 1, 2019 so that appropriate arrangements can be made.

Written Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140, and section 10(a)(3) of the Federal Advisory Committee Act of 1972, the public or interested organizations may submit written comments to the Committee about its mission and topics pertaining to this public meeting. Written comments should be received by the DFO by February 1, 2019. Written comments should be submitted via email to the address for the DFO given in the **FOR FURTHER INFORMATION CONTACT** section in either Adobe Acrobat or Microsoft Word format. Please note that since the Committee

operates under the provisions of the Federal Advisory Committee Act, as amended, all submitted comments and public presentations will be treated as public documents and will be made available for public inspection, including, but not limited to, being posted on the Committee's website.

Dated: January 31, 2019.

Shelly E. Finke,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2019–01124 Filed 2–4–19; 8:45 am]

BILLING CODE 5001–06–P

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

Sunshine Act Meetings

TIME AND DATE: Session 1: 5:30 p.m.–7:00 p.m., Session 2: 7:15 p.m.–9:00 p.m., February 21, 2019.

PLACE: Albuquerque Convention Center, 401 2nd St. NW (Rooms 215, 220, 230, & 235), Albuquerque, NM 87102.

STATUS: Open. While the Government in the Sunshine Act does not require that the scheduled hearing be conducted in a meeting, the Defense Nuclear Facilities Safety Board has determined that an open meeting and hearing furthers the public interests underlying both the Government in the Sunshine Act and the Board's enabling legislation.

MATTERS TO BE CONSIDERED: Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), and as authorized by 42 U.S.C. 2286b, notice is hereby given of the Board's public hearing on February 21, 2019. The goals for the hearing are (1) to gather information from DOE Field Offices regarding DNFSB interfaces and access to information, facilities, and personnel managed; and (2) receive input from the public regarding the role of independent oversight and interfaces between DNFSB and the Department of Energy (DOE).

In Session 1, the Board will hear from the Field Managers for the National Nuclear Security Administration (NNSA) Los Alamos Field Office, the Office of Environmental Management (EM) Los Alamos Field Office, the EM Carlsbad Field Office, and the NNSA Sandia Field Office. The objectives for this session are to (1) discuss implementation of DOE Order 140.1 by DOE field offices and (2) discuss changes in DNFSB access to information, facilities, and personnel, and interfaces as a result of DOE Order 140.1. In Session 2, the Board will hear comments from members of the public regarding the role of independent oversight and interfaces between DNFSB and DOE.

The agenda for the hearing is posted on the Board's website (*www.dnfsb.gov*). Public participation in the hearing is invited during the public comment period of the agenda. Persons interested in speaking during the public comment period are encouraged to pre-register by submitting a request in writing to the Board's address listed above, emailing *hearing@dnfsb.gov,* or calling the Office of the General Counsel at (202) 694–7000 or (800) 788–4016 prior to close of business on February 19, 2019. The Board asks that commenters describe the nature and scope of their oral presentations. Those who pre-register will be scheduled to speak first. Individual oral comments may be limited by the time available, depending on the number of persons who register. At the beginning of the hearing, the Board will post a list of speakers at the entrance to the hearing room. Anyone who wishes to comment or provide technical information or data may do so in writing, either in lieu of, or in addition to, making an oral presentation. The Board Members may question presenters to the extent deemed appropriate. Written comments and documents will be accepted at the hearing or may be sent to the Board's Washington, DC office. The Board will hold the hearing record open until March 21, 2019, for the receipt of additional materials.

The hearing will be presented live through internet video streaming. A link to the presentation will be available on the Board's website, and a recording will be posted soon after. A transcript of these sessions and the associated correspondence will be made available on the Board's website. The Board specifically reserves its right to further schedule and otherwise regulate the course of the hearing, to recess, reconvene, postpone, or adjourn the hearing, conduct further reviews, and otherwise exercise its authority under the Atomic Energy Act of 1954, as amended.

CONTACT PERSON FOR MORE INFORMATION: Glenn Sklar, General Manager, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue NW, Suite 700, Washington, DC, 20004–2901, (800) 788–4016.

Dated: February 1, 2019.

Bruce Hamilton,

Chairman.

[FR Doc. 2019–01217 Filed 2–1–19; 11:15 am]

BILLING CODE 3670–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2019–ICCD–0012]

Agency Information Collection Activities; Comment Request; National Center for College Students With Disabilities (NCCSD) Database of Disability Services and Activities in Higher Education

AGENCY: . Office of Postsecondary Education (OPE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a new information collection.

DATES: Interested persons are invited to submit comments on or before April 8, 2019.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2019–ICCD–0012. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 550 12th Street SW, PCP, Room 9086, Washington, DC 20202–0023.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Shedita Alston, 202–453–7090.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the

Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: National Center for College Students with Disabilities (NCCSD) Database of Disability Services and Activities in Higher Education.

OMB Control Number: 1840–NEW.

Type of Review: A new information collection.

Respondents/Affected Public: State, Local, and Tribal Governments; Private Sector.

Total Estimated Number of Annual Responses: 4,583.

Total Estimated Number of Annual Burden Hours: 13,749.

Abstract: The National Center for College Students with Disabilities (NCCSD) at the Association on Higher Education and Disability (AHEAD) is authorized by Congress in the Higher Education Opportunity Act of 2008 (§ 777.4) and was established in 2016. The NCCSD College Disability Resource Database is designed to address a gap in information about services and accessibility for college students with disabilities, who make up 11% of the undergraduate population. Existing general information about colleges is available in the Department of Education's online College Navigator and College Affordability and Transparency Center, but the only information about students with disabilities in these databases is the percentage of students registered with campus disability services offices. At this time, there are no national or federal surveys or databases that provide systematic collection of information about campus-level disability-related services, access, and activities at colleges and universities in the United States. The NCCSD survey will ask all U.S. campuses to provide basic information about disability services, accessibility of campus, and disability-related activities that may affect inclusion and the campus climate. The data will be available to the public in an accessible and searchable database, to help prospective college students and their families make informed decisions during the college search process. Because the database will be public, researchers and policymakers will also be able to utilize the data to gather information about disability and higher education in systematic ways.

Dated: January 30, 2019.

Kate Mullan,

Acting Director, Information Collection Clearance Program, Information Management Branch, Office of the Chief Information Officer.

[FR Doc. 2019–00938 Filed 2–4–19; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2018–ICCD–0112]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Educational Quality Through Innovative Partnerships (EQUIP) Experimental Sites Initiative

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before March 7, 2019.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2018–ICCD–0112. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the regulations.gov site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 550 12th Street SW, PCP, Room 9086, Washington, DC 20202–0023.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Educational Quality through Innovative Partnerships (EQUIP) Experimental Sites Initiative.

OMB Control Number: 1845–0140.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments; Private Sector.

Total Estimated Number of Annual Responses: 60.

Total Estimated Number of Annual Burden Hours: 4,800.

Abstract: The Department of Education (the Department) is requesting an extension without change to this information collection package to provide for a series of questions that are components of the selection process for a new Federal Student Aid experimental site project. The Educational Quality

through Innovative Partnerships (EQUIP) project was undertaken in order to advance the Department's understanding of how to best increase access to high quality innovative programs in higher education. An invitation to participate and an explanation of this proposed experimental site would be published separately in the **Federal Register**. This experimental site project is designed to explore ways to increase access for low-income students to high-quality innovate programs in higher education through the engagement of institutions of higher education (IHEs) with non-IHE providers and quality assurance entities that can develop new quality assurance processes for student and taxpayer protection. The data and information collected can provide valuable guidance for the Department in determining future policy in these areas.

Dated: January 30, 2019.

Kate Mullan,

Acting Director, Information Collection Clearance Program, Information Management Branch, Office of the Chief Information Officer.

[FR Doc. 2019–00919 Filed 2–4–19; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Extension of Public Comment Period, Draft Supplemental Environmental Impact Statement for Disposition of Depleted Uranium Oxide Conversion Product Generated from DOE's Inventory of Depleted Uranium Hexafluoride

AGENCY: Office of Environmental Management, U.S. Department of Energy.

ACTION: Extension of public comment period.

SUMMARY: On December 28, 2018, a **Federal Register** Notice was issued that announced the availability of the U.S. Department of Energy (DOE) Office of Environmental Management's Draft Supplemental Environmental Impact Statement for Disposition of Depleted Uranium Oxide Conversion Product Generated from DOE's Inventory of Depleted Uranium Hexafluoride (Draft SEIS) (DOE/EIS–0359–S1; DOE/EIS–0360–S1). The **Federal Register** Notice also announced three web-based public hearings that occurred on January 22 to 24, 2019, to obtain public comments. DOE is extending the public comment period for the Draft SEIS from February 11, 2019, to March 4, 2019.

DATES: DOE extends the public comment period on the notice published at 83 FR 67250 to March 4, 2019. DOE will consider all comments submitted or postmarked by March 4, 2019. Comments submitted to DOE concerning the Draft Supplemental Environmental Impact Statement prior to this announcement do not need to be resubmitted as a result of this extension of the comment period.

ADDRESSES: Written comments on the Draft Supplemental Environmental Impact Statement (SEIS) may be submitted by mail or email and additional information is found on the Depleted Uranium Oxide SEIS website:

- *Mail:* Ms. Jaffet Ferrer-Torres, Document Manager, Office of Environmental Management, Department of Energy, EM–4.22, 1000 Independence Avenue SW, Washington, DC 20585.
- *Email: DUF6_NEPA@em.doe.gov.*
- DU Oxide SEIS website: *http://www.energy.gov/em/disposition-uranium-oxide-conversion-depleted-uranium-hexafluoride.*

FOR FURTHER INFORMATION CONTACT: For further information, please contact Ms. Jaffet Ferrer-Torres, DOE Document Manager at the addresses listed in **ADDRESSES**. For information on DOE's NEPA process, please contact Mr. William Ostrum, Acting NEPA Compliance Officer, Office of Regulatory Compliance, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585; or email at *askNEPA@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: The Draft Supplemental Environmental Impact Statement for Disposition of Depleted Uranium Oxide Conversion Product Generated from DOE's Inventory of Depleted Uranium Hexafluoride evaluates the potential environmental impacts associated with the transportation to final disposition of depleted uranium oxide conversion product from its depleted uranium hexafluoride conversion facilities at the Paducah, Kentucky, and Portsmouth, Ohio, sites at three alternative offsite low-level radioactive waste disposal facilities: the DOE-owned low-level radioactive waste disposal facility at the Nevada National Security Site in Nye County, Nevada; the Energy*Solutions* low-level radioactive waste disposal facility in Clive, Utah; and the Waste Control Specialists LLC low-level radioactive waste disposal facility in Andrews, Texas. The public comment period has been extended to March 4, 2019, to respond to requests for an extension of the public comment period.

Issued at Washington, DC, on January 30, 2019.

Elizabeth A. Connell,

Acting Associate Principal Deputy Assistant Secretary for Regulatory and Policy Affairs.

[FR Doc. 2019–01063 Filed 2–4–19; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Fusion Energy Sciences Advisory Committee

AGENCY: Office of Science, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Fusion Energy Sciences Advisory Committee. The Federal Advisory Committee Act requires that public notice of these meetings be announced in the **Federal Register**.

DATES: March 12, 2019; 8:30 a.m. to 5:00 p.m. March 13, 2019; 8:30 a.m. to 12:00 noon.

ADDRESSES: Canopy by Hilton, 940 Rose Avenue, North Bethesda, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Dr. Samuel J. Barish, Acting Designated Federal Officer, Office of Fusion Energy Sciences (FES); U.S. Department of Energy; Office of Science; 1000 Independence Avenue SW, Washington, DC 20585; Telephone: (301) 903–2917.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to provide advice on a continuing basis to the Director, Office of Science of the Department of Energy, on the many complex scientific and technical issues that arise in the development and implementation of the fusion energy sciences program.

Tentative Agenda Items

- FES Perspective
- Nuclear Physics Long-Range Planning Activity Perspective
- High Energy Physics Long-Range Planning Activity Perspective
- FES Community: Status of their Long-Range Strategic Planning Activity
- National Academies of Science, Engineering, and Medicine Burning Plasma Report
- Public Comment
- Adjourn

Note: Remote attendance of the FESAC meeting will be possible via Zoom. Instructions will be posted on the FESAC website *(http://science.energy.gov/fes/fesac/meetings/)* prior to the meeting and can also be obtained by contacting Dr. Barish by email *sam.barish@science.doe.gov* or by phone (301) 903–2917.

Public Participation: The meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make an oral statement regarding any of the items on the agenda, you should contact Dr. Barish at 301–903–1233 (fax) or *sam.barish@science.doe.gov* (email). Reasonable provision will be made to include the scheduled oral statements during the Public Comment time on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of the meeting will be available for public review and copying within 45 days on the Fusion Energy Sciences Advisory Committee website—*http://science.energy.gov/fes/fesac/.*

Signed in Washington, DC on January 29, 2019.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2019–00922 Filed 2–4–19; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Portsmouth; Meeting

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Portsmouth. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Thursday, March 7, 2019; 6:00 p.m.

ADDRESSES: Ohio State University, Endeavor Center, 1862 Shyville Road, Piketon, Ohio 45661.

FOR FURTHER INFORMATION CONTACT: Greg Simonton, Alternate Deputy Designated Federal Officer, Department of Energy Portsmouth/Paducah Project Office, Post Office Box 700, Piketon, Ohio 45661, (740) 897–3737, *Greg.Simonton@lex.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management and related activities.

Tentative Agenda:

- Call to Order, Introductions, Review of Agenda
- Approval of December 2018 Minutes
- Deputy Designated Federal Officer's Comments
- Federal Coordinator's Comments
- Liaison's Comments
- Presentation
- Administrative Issues
- Subcommittee Updates
- Public Comments
- Final Comments from the Board
- Adjourn

Public Participation: The meeting is open to the public. The EM SSAB, Portsmouth, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Greg Simonton at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Greg Simonton at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Greg Simonton at the address and phone number listed above. Minutes will also be available at the following website: *https://www.energy.gov/pppo/ports-ssab/listings/meeting-materials.*

Signed in Washington, DC on January 29, 2019.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2019–00924 Filed 2–4–19; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Nevada

AGENCY: Department of Energy, Office of Environmental Management.

ACTION: Notice of Open Meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Nevada. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, April 24, 2019 4:00 p.m.

ADDRESSES: Frank H. Rogers Science and Technology Building, 755 East Flamingo, Las Vegas, Nevada 89119.

FOR FURTHER INFORMATION CONTACT: Barbara Ulmer, Board Administrator, 232 Energy Way, M/S 167, North Las Vegas, Nevada 89030. Phone: (702) 523–0894; Fax (702) 295–2025 or Email: *Barbara.Ulmer@emcbc.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda: 1. Briefing and Recommendation Development for Fiscal Year 2021 Baseline Prioritization—Work Plan Item #7.

Public Participation: The EM SSAB, Nevada, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Barbara Ulmer at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral presentations pertaining to agenda items should contact Barbara Ulmer at the telephone number listed above. The request must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments can do so during the 15 minutes allotted for public comments.

Minutes: Minutes will be available by writing to Barbara Ulmer at the address listed above or at the following website: *http://www.nnss.gov/NSSAB/pages/MM_FY19.html.*

Signed in Washington, DC, on January 31, 2019.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2019–01104 Filed 2–4–19; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Basic Energy Sciences Advisory Committee; Meeting

AGENCY: Office of Science, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Basic Energy Sciences Advisory Committee (BESAC). The Federal Advisory Committee Act requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Thursday, March 7, 2019—9:00 a.m. to 5:00 p.m., Friday, March 8, 2019—8:30 a.m. to 12:00 p.m.

ADDRESSES: Bethesda North Marriott Hotel and Conference Center, 5701 Marinelli Drive, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Katie Runkles; Office of Basic Energy Sciences; U.S. Department of Energy; Germantown Building, 1000 Independence Avenue SW, Washington, DC 20585; Telephone: (301) 903–6529.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of this Board is to make recommendation to DOE–SC with respect to the basic energy sciences research program.

Tentative Agenda

- Call to Order, Introductions, Review of the Agenda
- News from the Office of Science
- News from the Office of Basic Energy Sciences
- BES 40th Update
- Presentation of New Charge to BESAC
- Scientific User Facilities Updates
- Polymer Upcycling Roundtable Announcement
- Basic Research Needs Workshop on Microelectronics Update
- Public Comments
- Adjourn

Breaks Taken As Appropriate

Public Participation: The meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Katie Runkles at 301–903–6594 (fax) or *katie.runkles@science.doe.gov* (email). Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of this meeting will be available for public review and copying within 60 days on the Committee's web page: *https://science.energy.gov/bes/besac/meetings/.*

Signed in Washington, DC, on January 29, 2019.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2019–00923 Filed 2–4–19; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Nevada

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Nevada. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, March 20, 2019, 4:00 p.m.

ADDRESSES: Amargosa Valley Community Center, 841 East Farm Road, Amargosa Valley, Nevada 89020.

FOR FURTHER INFORMATION CONTACT: Barbara Ulmer, Board Administrator, 232 Energy Way, M/S 167, North Las Vegas, Nevada 89030. Phone: (702) 523–0894; Fax (702) 295–2025 or Email: *Barbara.Ulmer@emcbc.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

1. Recommendation Development for Evaluation of the Audit Determination Process—Work Plan Item #4
2. Recommendation Development for Low-Level Waste Visual Verification—Work Plan Item #5
3. Briefing and Recommendation Development for Changes to Approach to Pahute Mesa Completion—Work Plan Item #5

Public Participation: The EM SSAB, Nevada, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Barbara Ulmer at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral presentations pertaining to agenda items should contact Barbara Ulmer at the telephone number listed above. The request must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments can do so during the 15 minutes allotted for public comments.

Minutes: Minutes will be available by writing to Barbara Ulmer at the address listed above or at the following website: *http://www.nnss.gov/NSSAB/pages/MM_FY19.html.*

Signed in Washington, DC, on January 29, 2019.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2019–00934 Filed 2–4–19; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Biological and Environmental Research Advisory Committee

AGENCY: Office of Science, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Biological and Environmental Research Advisory Committee (BERAC). The Federal Advisory Committee Act requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Thursday, April 25, 2019 8:30 a.m.–5:30 p.m., Friday, April 26, 2019, 8:30 a.m.–12:30 p.m.

ADDRESSES: Gaithersburg Marriott Washingtonian Center, 9751 Washingtonian Boulevard, Gaithersburg, MD 20878.

FOR FURTHER INFORMATION CONTACT: Dr. Tristram West, Designated Federal Officer, BERAC, U.S. Department of Energy, Office of Science, Office of Biological and Environmental Research, SC–23/Germantown Building, 1000 Independence Avenue SW, Washington, DC 20585. Telephone (301) 903–5155; Fax (301) 903–5051 or email: *tristram.west@science.doe.gov.* The most current information concerning this meeting can be found on the website: *http://science.energy.gov/ber/berac/meetings/.*

SUPPLEMENTARY INFORMATION:

Purpose of the Committee: To provide advice on a continuing basis to the Director, Office of Science of the Department of Energy, on the many complex scientific and technical issues that arise in the development and implementation of the Biological and Environmental Research Program.

Tentative Agenda Topics

- News from the Office of Science
- News from the Office of Biological and Environmental Research (BER)
- News from the Biological Systems Science and Climate and Environmental Sciences Divisions
- Workshop briefings
- Science talks
- New business
- Public comment

Public Participation: The day and a half meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Tristram West at *tristram.west@science.doe.gov* (email) or (301) 903–5051 (Fax). You must make your request for an oral statement at least five business days before the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will be limited to five minutes each.

Minutes: The minutes of this meeting will be available for public review and copying within 45 days at the BERAC website: *http://science.energy.gov/ber/berac/meetings/berac-minutes/.*

Issued in Washington, DC, on January 29, 2019.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2019–00933 Filed 2–4–19; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

State Energy Advisory Board

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

ACTION: Notice of open teleconference.

SUMMARY: This notice announces an open teleconference call of the State Energy Advisory Board (STEAB). The Federal Advisory Committee Act requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Thursday, February 21, 2019 from 3:00 p.m. to 4:00 p.m. (EDT). To receive the call-in number and passcode, please contact the Board's Designated Federal Officer at the address or phone number listed below.

FOR FURTHER INFORMATION CONTACT: Michael Li, Senior Policy Advisor, Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy, 1000 Independence Ave. SW, Washington, DC 20585. Phone number 202–287–5718, and email: *michael.li@ee.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: To make recommendations to the Assistant Secretary for the Office of Energy Efficiency and Renewable Energy regarding goals and objectives, programmatic and administrative policies, and to otherwise carry out the Board's responsibilities as designated in the State Energy Efficiency Programs Improvement Act of 1990 (Pub. L. 101–440).

Tentative Agenda: Discuss recommendations from STEAB to the Assistant Secretary for the Office of Energy Efficiency and Renewable Energy.

Public Participation: The meeting is open to the public. Written statements may be filed with the Board either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Michael Li at the address or telephone number listed above. Requests to make oral comments must be received five days prior to the meeting; reasonable provision will be made to include requested topic(s) on the agenda. The Chair of the Board is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business.

Signed in Washington, DC, on January 29, 2019.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2019–00921 Filed 2–4–19; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Oak Ridge

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Oak Ridge. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, March 13, 2019, 6:00 p.m.

ADDRESSES: DOE Information Center, Office of Science and Technical Information, 1 Science.gov Way, Oak Ridge, Tennessee 37831.

FOR FURTHER INFORMATION CONTACT: Melyssa P. Noe, Alternate Deputy Designated Federal Officer, U.S. Department of Energy, Oak Ridge Office of Environmental Management (OREM), P.O. Box 2001, EM–942, Oak Ridge, TN 37831. Phone (865) 241–3315; Fax (865) 241–6932; Email: *Melyssa.Noe@orem.doe.gov.* Or visit the website at *https://energy.gov/orem/services/community-engagement/oak-ridge-site-specific-advisory-board.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda:

- Welcome and Announcements
- Comments from the Deputy Designated Federal Officer (DDFO)
- Comments from the DOE, Tennessee Department of Environment and Conservation, and Environmental Protection Agency Liaisons
- Public Comment Period
- Presentation: Aquatic Ecology Research and Technology Development in East Fork Poplar Creek
- Motions/Approval of November 14, 2018 Meeting Minutes
- Status of Outstanding Recommendations
- Alternate DDFO Report
- Committee Reports
- Adjourn

Public Participation: The EM SSAB, Oak Ridge, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Melyssa P. Noe at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to the agenda item should contact Melyssa P. Noe at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable

provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Melyssa P. Noe at the address and phone number listed above. Minutes will also be available at the following website: *https://energy.gov/orem/listings/oak-ridge-site-specific-advisory-board-meetings.*

Signed in Washington, DC, on January 29, 2019.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2019–00939 Filed 2–4–19; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL19–39–000]

Light Power & Gas of NY LLC v. New York Independent System Operator, Inc.; Notice of Complaint

Take notice that on January 29, 2018, pursuant to sections 206 and 306 of the Federal Power Act, 16 U.S.C. 824e and 825e, and Rule 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206, Light Power and Gas of NY LLC (Complainant) filed a formal complaint against New York Independent System Operator, Inc. (Respondent) alleging that the Respondent violated its Open Access Transmission Tariff by discriminating against the Complainant by refusing to process the Complainant's application for registration to participate in the Respondent's markets, all as more fully explained in the complaint.

The Complainant certifies that copies of the complaint were served on the contacts for the Respondent as listed on the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the website that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on February 19, 2019.

Dated: January 29, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019–00969 Filed 2–4–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC19–50–000.

Applicants: Frontier Utilities Northeast LLC, NextEra Energy Services, LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act, et al. of Frontier Utilities Northeast LLC, et al.

Filed Date: 1/25/19.

Accession Number: 20190125–5181.

Comments Due: 5 p.m. ET 2/15/19.

Docket Numbers: EC19–51–000.

Applicants: Bloom Energy Corporation, Diamond State Generation Partners, LLC, Yellow Jacket Energy, LLC, 2014 ESA Project Company, LLC, 2015 ESA Project Company, LLC, Canada Pension Plan Investment Board.

Description: Application for Authorization Under Section 203 of the Federal Power Act, et al. of Bloom Energy Corporation, et al.

Filed Date: 1/28/19.

Accession Number: 20190128–5109.

Comments Due: 5 p.m. ET 2/19/19.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG19–52–000.

Applicants: Crystal Lake Wind Energy I, LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Crystal Lake Wind Energy I, LLC.

Filed Date: 1/28/19.

Accession Number: 20190128–5120.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: EG19–53–000.

Applicants: Crystal Lake Wind Energy II, LLC.

Description: Self-Certification of Self-Certification of Exempt Wholesale Generator Status of Crystal Lake Wind Energy II, LLC.

Filed Date: 1/28/19.

Accession Number: 20190128–5121.

Comments Due: 5 p.m. ET 2/19/19.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER17–615–003; ER10–2184–027; ER10–2192–032; ER10–2178–032; ER11–2014–025; ER11–2013–025; ER13–1536–016; ER11–2005–025.

Applicants: Albany Green Energy, LLC, CER Generation, LLC, Constellation Energy Commodities Group Maine, LLC, Constellation NewEnergy, Inc., Cow Branch Wind Power, LLC, CR Clearing, LLC, Exelon Generation Company, LLC, Wind Capital Holdings, LLC.

Description: Supplement to December 22, 2017 Updated Market Power Analysis for the Southeast Region of the Exelon Southeast Entities.

Filed Date: 1/24/19.

Accession Number: 20190124–5212.

Comments Due: 5 p.m. ET 2/7/19.

Docket Numbers: ER17–2386–001.

Applicants: Great Bay Solar I, LLC.

Description: Report Filing: Refund Report (ER17–2386 and EL18–8) to be effective N/A.

Filed Date: 1/28/19.

Accession Number: 20190128–5137.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER18–1708–001.

Applicants: Copenhagen Wind Farm, LLC.

Description: Notice of Non-Material Change in Status of Copenhagen Wind Farm, LLC.

Filed Date: 1/24/19.
Accession Number: 20190124–5229.
Comments Due: 5 p.m. ET 2/14/19.

Docket Numbers: ER18–1954–002.
Applicants: Gulf Power Company.
Description: Compliance filing: Notice of Effective Date & Compliance Filing (NITSA/NOA) ER18–1954 to be effective 1/1/2019.
Filed Date: 1/25/19.
Accession Number: 20190125–5141.
Comments Due: 5 p.m. ET 2/15/19.

Docket Numbers: ER18–2352–002.
Applicants: Midcontinent Independent System Operator, Inc.
Description: Tariff Amendment: 2019–01–28_Amendment to Real-Time Buybacks of Spinning and Offline Supplemental to be effective 2/14/2019.
Filed Date: 1/28/19.
Accession Number: 20190128–5041.
Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19–871–000.
Applicants: Southwestern Electric Power Company.
Description: § 205(d) Rate Filing: SWEPCO–ETEC Contracting Services Agreements (Monitor, Op, Dispatch) to be effective 1/1/2019.
Filed Date: 1/25/19.
Accession Number: 20190125–5113.
Comments Due: 5 p.m. ET 2/15/19.

Docket Numbers: ER19–872–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2019–01–28_SA 1925 ITC Midwest-Interstate Power and Light 4th Rev DTIA to be effective 3/30/2019.
Filed Date: 1/28/19.
Accession Number: 20190128–5104.
Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19–873–000.
Applicants: AEP Texas Inc.
Description: § 205(d) Rate Filing: AEPTX-Lighthouse EC-Golden Spread EC Interconnection Agreement to be effective 1/15/2019.
Filed Date: 1/28/19.
Accession Number: 20190128–5108.
Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19–874–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original WMPA, SA No. 5260; Queue No. AD1–060 to be effective 1/2/2019.
Filed Date: 1/28/19.
Accession Number: 20190128–5119.
Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19–875–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2019–01–28_Cyber Security Coordination to be effective 3/30/2019.
Filed Date: 1/28/19.
Accession Number: 20190128–5135.
Comments Due: 5 p.m. ET 2/19/19.

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: January 29, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019–00973 Filed 2–4–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL19–29–000]

Notice of Institution of Section 206 Proceedings and Refund Effective Date; GridLiance High Plains LLC, GridLiance West LLC

On January 29, 2019, the Commission issued an order in Docket No. EL19–29–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e (2012), instituting an investigation into whether the existing formula rates of two of GridLiance Heartland LLC's affiliates—GridLiance High Plains LLC [1] and GridLiance West LLC—may be unjust, unreasonable, unduly discriminatory, or preferential. *GridLiance Heartland LLC, et al.,* 166 FERC ¶ 61,067 (2019).

The refund effective date in Docket No. EL19–29–000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Any interested person desiring to be heard in Docket No. EL19–29–000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214, within 21 days of the date of issuance of the order.

Dated: January 29, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019–00960 Filed 2–4–19; 8:45 am]

BILLING CODE 6717–01–P

[1] GridLiance High Plains LLC was formerly known as South Central MCN LLC.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2331–072.
Applicants: J.P. Morgan Ventures Energy Corporation.
Description: Notice of Change in Status of the J.P. Morgan Ventures Energy Corporation.
Filed Date: 1/28/19.
Accession Number: 20190128–5213.
Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER10–2984–043.
Applicants: Merrill Lynch Commodities, Inc.
Description: Notice of Non-Material Change in Status of Merrill Lynch Commodities, Inc.
Filed Date: 1/28/19.
Accession Number: 20190128–5217.
Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER18–1186–002.
Applicants: Turtle Creek Wind Farm LLC.
Description: Notice of Non-Material Change in Status of Turtle Creek Wind Farm LLC.
Filed Date: 1/28/19.
Accession Number: 20190128–5215.
Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER18–1189–002; ER18–1188–003.
Applicants: Meadow Lake Wind Farm VI LLC, Prairie Queen Wind Farm LLC.
Description: Notice of Non-Material Change in Status of Meadow Lake Wind Farm VI LLC, et. al.
Filed Date: 1/28/19.
Accession Number: 20190128–5223.
Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19–876–000.
Applicants: Commonwealth Edison Company, Commonwealth Edison Company of Indiana, Inc., PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: ComEd submits revisions to Att. H–13A re: Update of the Depreciation Rate to be effective 3/29/2019.

Filed Date: 1/28/19.
Accession Number: 20190128–5149.
Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19–877–000.
Applicants: Commonwealth Edison Company, Commonwealth Edison Company of Indiana, Inc., PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: ComEd submits revisions to Letter Agreement, Service Agreement No. 3747 to be effective 3/29/2019.
Filed Date: 1/28/19.
Accession Number: 20190128–5153.
Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19–878–000.
Applicants: Enel Green Power Hilltopper Wind, LLC.
Description: Baseline eTariff Filing: Reactive Power Compensation Filing to be effective 3/30/2019.
Filed Date: 1/29/19.
Accession Number: 20190129–5036.
Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19–879–000.
Applicants: Alabama Power Company.
Description: § 205(d) Rate Filing: Blountstown Long-Term Firm PTP Agreement Filing to be effective 1/1/2019.
Filed Date: 1/29/19.
Accession Number: 20190129–5069.
Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19–880–000.
Applicants: Alabama Power Company.
Description: Tariff Cancellation: Blountstown NITSA Termination Filing to be effective 1/1/2019.
Filed Date: 1/29/19.
Accession Number: 20190129–5070.
Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19–881–000.
Applicants: Alabama Power Company.
Description: § 205(d) Rate Filing: Calhoun Power Interconnection Agreement Amendment Filing to be effective 1/1/2019.
Filed Date: 1/29/19.
Accession Number: 20190129–5075.
Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19–882–000.
Applicants: Alabama Power Company.
Description: § 205(d) Rate Filing: CER Generation Interconnection Agreement Amendment Filing to be effective 1/1/2019.
Filed Date: 1/29/19.
Accession Number: 20190129–5079.
Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19–883–000.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Cancellation: Notice of Cancellation of WMPA SA No. 4267; Queue No. Z1–091 to be effective 12/15/2018.
Filed Date: 1/29/19.
Accession Number: 20190129–5089.
Comments Due: 5 p.m. ET 2/19/19.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES19–13–000.
Applicants: Kingsport Power Company.
Description: Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of Kingsport Power Company.
Filed Date: 1/28/19.
Accession Number: 20190128–5211.
Comments Due: 5 p.m. ET 2/19/19.

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: January 29, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019–00992 Filed 2–4–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR19–17–000]

Notice of Request for Temporary Waiver; Lone Star NGL Mont Belvieu LP

Take notice that on January 25, 2019, Lone Star NGL Mont Belvieu LP (Lone Star) filed a petition seeking a temporary waiver of the tariff filing and reporting requirements of sections 6 and 20 of the Interstate Commerce Act and parts 341 and 357 of the Commission's regulations. This request pertains to transportation service on certain natural gas liquids pipeline facilities currently being developed and to be owned and operated by Lone Star between Mont Belvieu, Texas and Nederland, Texas, all as more fully explained in the petition.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Petitioner.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the website that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern time on February 22, 2019.

Dated: January 29, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019–00962 Filed 2–4–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2528–104]

Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests; Brookfield White Pine Hydro, LLC

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Application for Non-Capacity Amendment of license.

b. *Project No:* 2528–104.

c. *Date Filed:* January 4, 2019.

d. *Applicant:* Brookfield White Pine Hydro, LLC.

e. *Name of Project:* Cataract Hydroelectric Project.

f. *Location:* The project is located on the Saco River in the cities of Saco and Biddeford, York County, Maine.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Kelly Maloney, License Compliance Manager, 150 Main Street, Lewiston, ME 04240, (207) 755–5605 or *kelly.maloney@brookfieldrenewable.com.*

i. *FERC Contact:* Diana Shannon (202) 502–6136 or *diana.shannon@ferc.gov.*

j. *Deadline for filing comments, motions to intervene, and protests:* February 28, 2019.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. The first page of any filing should include docket number P–2528–104. 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 whose name appears 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 proposes to remove the existing hinged flashboards on top of the East Channel (Cataract) dam spillway and install 5-foot-high pneumatic crest gates. A control building would be installed above the powerhouse intake to house the associated control equipment. Construction is planned from July to October 2019. A 1-foot drawdown from the normal full pond elevation (*i.e.,* 44 feet USGS) is necessary to complete the work. The drawdown is expected to last from July through October 2019. No permanent changes to project operations, headpond elevation, or spillway capacity are proposed (after crest gate construction has been completed). The licensee provided documentation of consultation with resource agencies and stakeholders with its application.

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, .214, respectively. 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 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: January 29, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019–00964 Filed 2–4–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL19–38–000]

Notice of Complaint; City and County of San Francisco v. Pacific Gas and Electric Company

Take notice that on January 28, 2019, City and County of San Francisco (San Francisco or Complainant) filed a formal complaint (complaint) against Pacific Gas and Electric Company (PG&E or Respondent) pursuant to sections 206, 306, and 309 of the Federal Power Act [1] (FPA) and Rule 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure,[2] alleging that PG&E has violated its open-access Wholesale Distribution Tariff (WDT) and that it is implementing its WDT in a manner that is unjust, unreasonable, and unduly discriminatory. San Francisco requests that the Commission (1) direct PG&E to comply with its Tariff by offering San Francisco the secondary and primary-plus wholesale distribution service provided for by the WDT; (2) direct PG&E to pay refunds to San Francisco consistent with the filed rate; and (3) take any such other actions that the Commission finds necessary or appropriate to address PG&E's tariff violations and to assure that the WDT and PG&E's implementation of that Tariff are just, reasonable, and not unduly discriminatory, all as more fully explained in the complaint.

San Francisco certifies that copies of the complaint were served on contacts for PG&E as listed on the Commission's list of Corporate Officials.

[1] 16 U.S.C. 824e, 825e, and 825h.

[2] 18 CFR 385.206.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the website that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 1:00 p.m. Eastern Time on February 19, 2019.

Dated: January 29, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019–00966 Filed 2–4–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: CP19–43–000.

Applicants: Transcontinental Gas Pipe Line Company, LLC.

Description: Application of Transcontinental Gas Pipe Line Company, LLC under Section 7(b) to abandon certain firm transportation services.

Filed Date: 1/11/19.

Accession Number: 20190111–5164.

Comments Due: 5 p.m. ET 2/1/19.

Docket Numbers: RP19–577–000.

Applicants: Big Sandy Pipeline, LLC.

Description: Compliance filing Big Sandy Fuel Filing effective 3/1/2019.

Filed Date: 1/24/19.

Accession Number: 20190124–5125.

Comments Due: 5 p.m. ET 2/5/19.

Docket Numbers: RP19–578–000.

Applicants: Algonquin Gas Transmission, LLC.

Description: § 4(d) Rate Filing: Negotiated Rate—ConEd to Pay Less #798588 to be effective 1/26/2019.

Filed Date: 1/25/19.

Accession Number: 20190125–5033.

Comments Due: 5 p.m. ET 2/6/19.

Docket Numbers: RP19–579–000.

Applicants: WBI Energy Transmission, Inc.

Description: § 4(d) Rate Filing: 2019 Subsystem & Pooling Revisions to be effective 3/1/2019.

Filed Date: 1/25/19.

Accession Number: 20190125–5036.

Comments Due: 5 p.m. ET 2/6/19.

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: January 29, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019–00993 Filed 2–4–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP19–211–000]

Notice of Technical Conference; Columbia Gulf Transmission, LLC

Take notice that a technical conference will be held on Wednesday, March 20, 2019 at 10:00 a.m. (Eastern Daylight Time) at the offices of the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

At the technical conference, the parties to the proceeding should be prepared to discuss all issues raised in the November 29, 2018 order, *Columbia Gulf Transmission, LLC,* 165 FERC ¶ 61,181 (2018). All interested persons are permitted to attend.

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an email to *accessibility@ferc.gov* or call toll free 1–866–208–3372 (voice) or 202–502–8659 (TTY); or send a fax to 202–208–2106 with the required accommodations.

For more information about this technical conference please contact Raymond Womble at (202)–502–8536 or *Raymond.Womble@ferc.gov.*

Dated: January 29, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019–00974 Filed 2–4–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP19–351–001.

Applicants: Tennessee Gas Pipeline Company, L.L.C

Description: Compliance filing Petition for an Extension Amendment to File FERC Form 501–G.

Filed Date: 1/28/19.

Accession Number: 20190128–5057.

Comments Due: 12 p.m. ET 2/1/19.

Docket Numbers: RP19–580–000.

Applicants: Algonquin Gas Transmission, LLC.

Description: § 4(d) Rate Filing: NCF Agreement Cleanup to Remove ConEd 510371 to be effective 2/28/2019.

Filed Date: 1/28/19.
Accession Number: 20190128–5033.
Comments Due: 5 p.m. ET 2/11/19.
Docket Numbers: RP19–581–000.
Applicants: Rager Mountain Storage Company LLC.
Description: Compliance filing Order No. 587–Y—Request for Extension of Time.
Filed Date: 1/28/19.
Accession Number: 20190128–5044.
Comments Due: 5 p.m. ET 2/11/19.
Docket Numbers: RP19–582–000.
Applicants: Equitrans, L.P
Description: Compliance filing Order No. 587–Y—Request for Extension of Time.
Filed Date: 1/28/19.
Accession Number: 20190128–5053.
Comments Due: 5 p.m. ET 2/11/19.
Docket Numbers: RP19–583–000.
Applicants: Algonquin Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Negotiated Rate -Boston Gas 510798 releases eff 2–1–19 to be effective 2/1/2019.
Filed Date: 1/28/19.
Accession Number: 20190128–5136.
Comments Due: 5 p.m. ET 2/11/19.

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: January 29, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019–00959 Filed 2–4–19; 8:45 am]

BILLING CODE 6717–01–P

EXPORT-IMPORT BANK

[Public Notice: 2019–6001]

Agency Information Collection Activities: Final Collection; Comment Request

AGENCY: Export-Import Bank of the United States

ACTION: Submission for OMB review and comments request.

SUMMARY: The Export-Import Bank of the United States (EXIM), as a part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995. This collection of information is necessary, pursuant to 12 U.S.C. Sec. 635(a)(1), to determine whether or not a company has a good payment history.

This form will enable EXIM to make a credit decision on a foreign buyer credit limit request submitted by a new or existing policy holder. Additionally, this form is used by those EXIM policy holders granted delegated authority to commit the Bank to a foreign buyer credit limit.

DATES: Comments should be received on or before April 8, 2019 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *www.regulations.gov* (EIB 99–14) 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 form can be viewed at *http://www.exim.gov/sites/default/files/pub/pending/eib99-14.pdf.*

SUPPLEMENTARY INFORMATION:

Titles and Form Number: EIB 99–14 Export-Import Bank Trade Reference form.

OMB Number: 3048–0042.

Type of Review: Renew.

Need and Use: This form provides essential credit information used by EXIM credit officers when analyzing requests for export credit insurance/financing support, both short-term (360 days and less) and medium-term (longer than 360 days), for the export of their U.S. goods and services. Additionally, this form is an integral part of the short term Multi-Buyer export credit insurance policy for those policy holders granted foreign buyer discretionary credit limit authority (DCL). Multi-Buyer policy holders given DCL authority may use this form as the sole source or one piece among several sources of credit information for their internal foreign buyer credit decision which, in turn, commits EXIM's insurance.

Affected Public: This form affects entities involved in the export of U.S. goods and services.

Annual Number of Respondents: 6,500.

Estimated Time per Respondent: 15 minutes.

Annual Burden Hours: 1,625 hours.

Frequency of Reporting or Use: As needed.

Government Expenses: Reviewing time per year: 1,625 hours.

Average Wages per Hour: $42.50.

Average Cost per Year: $69,062 (time * wages).

Benefits and Overhead: 20%.

Total Government Cost: $82,875.

Bassam Doughman,

IT Specialist.

[FR Doc. 2019–01064 Filed 2–4–19; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

Privacy Act of 1974; Matching Program

AGENCY: Federal Communications Commission.

ACTION: Notice of a new matching program.

SUMMARY: In accordance with the *Privacy Act of 1974,* as amended (''Privacy Act''), this notice announces the establishment of a computer matching program the Federal Communications Commission (''FCC'' or ''Commission'' or ''Agency'') and the Universal Service Administrative Company (USAC) will conduct with four non-Federal agencies. The purpose of this matching program is to verify the eligibility of applicants to and subscribers of the Universal Service Fund (USF) Lifeline program, which is administered by USAC under the direction of the FCC. More information about this program is provided in the **SUPPLEMENTARY INFORMATION** section below.

DATES: Written comments are due on or before March 7, 2019. This computer matching program will commence on March 7, 2019, unless comments are received that require a contrary determination, and will conclude on August 5, 2020.

ADDRESSES: Send comments to Mr. Leslie F. Smith, Privacy Manager, Information Technology (IT), Room 1–C216, FCC, 445 12th Street SW, Washington, DC 20554, or to *Leslie.Smith@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Leslie F. Smith, (202) 418–0217, or *Leslie.Smith@fcc.gov.*

SUPPLEMENTARY INFORMATION: The Lifeline program provides support for discounted broadband and voice services to low-income consumers. Lifeline is administered by the Universal Service Administrative

Company (USAC) under FCC direction. Consumers qualify for Lifeline through proof of income or participation in a qualifying program, such as Medicaid, the Supplemental Nutritional Assistance Program (SNAP), Federal Public Housing Assistance, Supplemental Security Income (SSI), Veterans and Survivors Pension Benefit, or various Tribal-specific federal assistance programs. In a Report and Order adopted on March 31, 2016, the Commission ordered USAC to create a National Lifeline Eligibility Verifier (''National Verifier''), including the National Lifeline Eligibility Database (LED), that would match data about Lifeline applicants and subscribers with other data sources to verify the eligibility of an applicant or subscriber. The Commission found that the National Verifier would reduce compliance costs for Lifeline service providers, improve service for Lifeline subscribers, and reduce waste, fraud, and abuse in the program.

Participating Non-Federal Agencies

- Indiana Family and Social Services Administration, Division of Family Resources;
- Kentucky Cabinet for Health and Family Services, Division of Family Support;
- Michigan Department of Health and Human Services: And
- Puerto Rico Department of the Family.

Authority for Conducting the Matching Program

47 U.S.C. 254; 47 CFR 54.400 *et seq.; Lifeline and Link Up Reform and Modernization, et al.,* Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962, 4006–21, paras. 126–66 (2016) (*2016 Lifeline Modernization Order*).

Purpose(s)

In the *2016 Lifeline Modernization Order,* the FCC required USAC to develop and operate a National Lifeline Eligibility Verifier (National Verifier) to improve efficiency and reduce waste, fraud, and abuse in the Lifeline program. The stated purpose of the National Verifier is ''to increase the integrity and improve the performance of the Lifeline program for the benefit of a variety of Lifeline participants, including Lifeline providers, subscribers, states, community-based organizations, USAC, and the Commission.'' 31 FCC Rcd 3962, 4006, para. 126. To help determine whether Lifeline applicants and subscribers are eligible for Lifeline benefits, the Order contemplates that a USAC-operated Lifeline Eligibility Database (LED) will communicate with information systems and databases operated by other Federal and State agencies. *Id.* at 4011–2, paras. 135–7.

Categories of Individuals

The categories of individuals whose information is involved in this matching program include, but are not limited to, those individuals (residing in a single household) who have applied for Lifeline benefits; are currently receiving Lifeline benefits; are individuals who enable another individual in their household to qualify for Lifeline benefits; are minors whose status qualifies a parent or guardian for Lifeline benefits; are individuals who have received Lifeline benefits; or are individuals acting on behalf of an eligible telecommunications carrier (ETC) who have enrolled individuals in the Lifeline program.

Categories of Records

The categories of records involved in the matching program include, but are not limited to, a Lifeline applicant or subscriber's full name; physical and mailing addresses; partial Social Security number or Tribal ID number; date of birth; qualifying person's full name (if qualifying person is different from subscriber); qualifying person's physical and mailing addresses; qualifying person's partial Social Security number or Tribal ID number, and qualifying person's date of birth. The National Verifier will transfer these data elements to the source agencies, which will respond either ''yes'' or ''no'' that the individual is enrolled in a Lifeline-qualifying assistance program.

System(s) of Records

The USAC records shared as part of this matching program reside in the Lifeline system of records, FCC/WCB–1, Lifeline Program, a notice of which the FCC published at 82 FR 38686 (Aug. 15, 2017) and became effective on September 14, 2017.

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2019–00980 Filed 2–4–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1138]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before April 8, 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 at (202) 418–2991.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1138.

Title: Sections 1.49 and 1.54, Forbearance Petition Filing Requirements.

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: 2 respondents; 2 responses.

Estimated Time per Response: 640 hours.

Frequency of Response: On occasion 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. 10, 151, 154(i), 154(j), 155(c), 160, 201* and *303(r)* of the Communications Act of 1934.

Total Annual Burden: 1,280 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 or disclose confidential information. Respondents may, however, request confidential treatment for information they believe to be confidential under *47 CFR 0.459* of the Commission's rules.

Needs and Uses: Under section 10 of the Communications Act of 1934, as amended, telecommunications carriers may petition the Commission to forbear from applying to a telecommunications carrier any statutory provision or Commission regulation. When a carrier petitions the Commission for forbearance, *section 10* requires the Commission to make three determinations with regard to the need for the challenged provision or regulation. If the Commission fails to act within one year (extended by three additional months, if necessary), the petition is ''deemed granted'' by operation of law. These determinations require complex, fact-intensive analysis, *e.g.,* ''whether forbearance from enforcing the provision or regulation will promote competitive market conditions.'' Under the filing procedures, the Commission requires that petitions for forbearance must be ''complete as filed'' and explain in detail what must be included in the forbearance petition. The Commission also incorporates by reference its rule, *47 CFR 1.49,* which states the Commission's standard ''specifications as to pleadings and documents.'' Precise filing requirements are necessary because of *section 10*'s strict time limit for Commission action. Also, commenters must be able to understand clearly the scope of the petition in order to comment on it. Finally, standard filing procedures inform petitioners precisely what the Commission expects from them in order to make the statutory determinations that the statute requires.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2019–00978 Filed 2–4–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0292, 3060–0743]

Information Collections 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 April 8, 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: 3060–0292.

Title: Section 69.605, Reporting and Distribution of Pool Access Revenues, Part 69-Access Charges.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents and Responses: 732 respondents; 8,773 responses.

Estimated Time per Response: 0.75 hours–1 hour.

Frequency of Response: Annual and monthly reporting requirements and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 154, 201, 202, 203, 205, 218 and 403 of the Communications Act of 1934, as amended.

Total Annual Burden: 6,580 hours.

Total Annual Cost: No cost.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: Section 69.605 requires that access revenues and cost data shall be reported by participants in association tariffs to the association for computation of monthly pool revenues distributions. The association shall submit a report on or before February 1 of each calendar year describing the associations' cost study review process for the preceding calendar year as well as the results of that process. For any revisions to the cost study results made or recommended by the association that would change the respective carrier's calculated annual common line or traffic sensitive revenue requirement by ten percent or more, the report shall include the following information:

(1) Name of the carrier;

(2) A detailed description of the revisions;

(3) The amount of the revisions;

(4) The impact of the revisions on the carrier's calculated common line and traffic sensitive revenue requirements; and

(5) The carrier's total annual common line and traffic sensitive revenue

requirement. The information is used to compute charges in tariffs for access service (or origination and termination) and to compute revenue pool distributions. Neither process could be implemented without the information.

OMB Control Number: 3060–0743.

Title: Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96–128.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities and state, local and tribal government.

Number of Respondents and Responses: 4,471 respondents; 10,071 responses.

Estimated Time per Response: 11.730414 hours.

Frequency of Response: On occasion, quarterly and monthly reporting requirements, 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. 276 of the Telecommunications Act of 1996, as amended.

Total Annual Burden: 118,137 hours.

Total Annual Cost: No cost.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: The Commission is not requesting that respondents submit confidential information to the FCC. If the Commission requests respondents to submit information which respondents believe is confidential, they may request confidential treatment of such information under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: In CC Docket No. 96–128, the Commission promulgated rules and requirements implementing Section 276 of the Telecommunications Act of 1996. Among other things, the rules (1) establish fair compensation for every completed intrastate and interstate payphone call; (2) discontinue intrastate and interstate access charge payphone service elements and payments, and intrastate and interstate payphone subsidies from basic exchange services; and (3) adopt guidelines for use by the states in establishing public interest payphones to be located where there would otherwise not be a payphone. The information collected under LEC Provision of Emergency Numbers to Carrier-Payers would able used to ensure that interexchange carriers, payphone service providers (''PSP'') LECs, and the states, comply with their obligations under the 1996 Act.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2019–00994 Filed 2–4–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0185 and OMB 3060–0214]

Information Collections Approved by the Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The Federal Communications Commission (FCC) has received Office of Management and Budget (OMB) approval for a non-substantive and non-material change to a currently approved public information collection pursuant to the Paperwork Reduction Act of 1995. An agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number, and no person is required to respond to a collection of information unless it displays a currently valid control number. Comments concerning the accuracy of the burden estimates and any suggestions for reducing the burden should be directed to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.

FOR FURTHER INFORMATION CONTACT: Cathy Williams, Office of the Managing Director, at (202) 418–2918, or email: *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION: The total annual reporting burdens and costs for the respondents are as follows:

OMB Control Number: 3060–0185.

OMB Approval Date: December 4, 2018.

OMB Expiration Date: July 31, 2020.

Title: Section 73.3613, Availability of Contracts.

Form Number: N/A.

Respondents: Business or other for-profit entities and Not-for-profit institutions.

Number of Respondents and Responses: 2,400 respondents; 2,400 responses.

Estimated Time per Response: 0.25 to 0.5 hours.

Frequency of Response: On-occasion reporting requirement, Recordkeeping requirement, Third-party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in sections 154(i) and 303 the Communications Act of 1934, as amended.

Total Annual Burden: 975 hours.

Total Annual Cost: $ 135,000.

Nature and Extent of Confidentiality: There is no need for confidentiality with this information collection.

Privacy Act: No impact(s).

Needs and Uses: The information collection requirements included under OMB Control Number 3060–0185 require that commercial and noncommercial AM, FM, TV, and international broadcast stations make station contracts and other documents available to the FCC as set forth in 47 CFR 73.3613. The FCC received approval from OMB for a non-substantive and non-material change to the information collection under OMB Control No. 3060–0185 as a result of a recent rulemaking discussed below.

On October 23, 2018, the FCC adopted and released the *Filing of Contracts Report & Order,* FCC 18–145 (*Order*), as part of the FCC's ongoing Modernization of Media Regulation Initiative. The *Order* advances the FCC's goal of eliminating outdated and unnecessary regulatory burdens that can impede competition and innovation in media markets.

In the *Order,* the FCC revised Section 73.3613 to eliminate the requirement that licensees and permittees of commercial and noncommercial AM, FM, TV, and international broadcast stations routinely file paper copies of station contracts and other documents with the FCC within 30 days of executing such documents. Rather than continuing to require routine paper filings, the FCC will rely instead on its existing online public inspection file rules as discussed in the *Order* and its ability to obtain the documents from licensees and permittees upon request as needed.

In addition to eliminating the routine paper filing requirement for Section 73.3613 documents, the FCC also eliminated a redundant disclosure requirement pertaining to certain Section 73.3613 documents and expanded an existing redaction allowance for confidential or proprietary information in Section 73.3613 documents. Unredacted copies of the documents must be provided to the FCC upon request. The revised requirements will take effect as stated in the summary of the *Order,* published at 83 FR 65551, on December 21, 2018.

OMB Control Number: 3060–0214.

OMB Approval Date: December 6, 2018.

OMB Expiration Date: March 31, 2021.

Title: Sections 73.3526 and 73.3527, Local Public Inspection Files; Sections 73.1212, 76.1701 and 73.1943, Political Files.

Form Number: N/A.

Respondents: Business or other for profit entities; Not for profit institutions; State, Local or Tribal government; Individuals or households.

Number of Respondents and Responses: 24,013 respondents; 63,261 responses.

Estimated Time per Response: 1 to 52 hours.

Frequency of Response: On-occasion reporting requirement, Recordkeeping requirement, Third-party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in sections 151, 152, 154(i), 303, 307 and 308 of the Communications Act of 1934, as amended.

Total Annual Burden: 2,067,853 hours.

Total Annual Cost: $27,168.

Nature and Extent of Confidentiality: Most of the documents comprising the public file consist of materials that are not of a confidential nature. With respect to any such documents that may contain proprietary trade secrets and confidential information, the FCC has instituted procedures to protect the confidentiality of any such information to the extent permitted by law. For example, licensees are explicitly authorized to redact information from contracts for the joint sale of advertising time that is confidential or proprietary in nature, and the requirement to disclose other SSAs also allows for the redaction of information that is confidential or proprietary in nature. Respondents complying with the information collection requirements may request that the information they submit be withheld from disclosure. If confidentiality is requested, such requests will be processed in accordance with the FCC's rules, 47 CFR 0.459.

Privacy Act: The FCC prepared a system of records notice (SORN), FCC/MB–2, ''Broadcast Station Public Inspection Files,'' that covers the PII contained in the broadcast station public inspection files located on the FCC's website.

Needs and Uses: The information collection requirements included under OMB Control Number 3060–0214 require that commercial and noncommercial broadcast stations maintain for public inspection a file containing the material set forth in 47 CFR 73.3526 and 73.3527. The FCC received approval from OMB for a non-substantive and non-material change to the information collection under OMB Control No. 3060–0214 as a result of a recent rulemaking discussed below.

On October 23, 2018, the FCC adopted and released the *Filing of Contracts Report & Order,* FCC 18–145 (*Order*), as part of the FCC's ongoing Modernization of Media Regulation Initiative. The *Order* advances the FCC's goal of eliminating outdated and unnecessary regulatory burdens that can impede competition and innovation in media markets. In the *Order,* the FCC eliminated the requirement that licensees and permittees of commercial and noncommercial AM, FM, TV, and international broadcast stations routinely file paper copies of station contracts and other documents with the FCC within 30 days of executing such documents. Rather than continuing to require routine paper filings, the FCC will rely instead on its existing online public inspection file (OPIF) rules and its ability to obtain the documents from licensees and permittees upon request, as discussed in the *Order.* The existing OPIF rules already require licensees and permittees of commercial and noncommercial AM, FM, and TV stations to make the relevant documents available to the FCC and the public electronically via the OPIF.

To ensure that the FCC and the public continue to have timely access to the relevant documents, the FCC revised Sections 73.3526(e) and 73.3527(e) to require that licensees and permittees update the documents in the OPIF within the same 30-day timeframe previously required under the eliminated paper filing requirement. The FCC also revised Sections 73.3526(e)(5) and 73.3527(e)(4) to require that licensees and permittees that list the required documents in the OPIF include on their list all of the information that they are already required provide for such documents on broadcast ownership reports. In addition, the FCC expanded an existing redaction allowance for confidential or proprietary information in documents that may contain proprietary trade secrets and confidential information. The revised requirements will take effect as stated in the summary of the *Order,* published at 83 FR 65551, on December 21, 2018.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2019–00970 Filed 2–4–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATION COMMISSION

Schedule Change to Open Meeting, Wednesday, January 30, 2019

January 29, 2019.

Please note that the time of the January Open Meeting of the Federal Communications Commission is rescheduled from 11:00 a.m. to 12:30 p.m.

Due to the Office of Personnel Management's decision to provide a three-hour delayed arrival for federal employees tomorrow morning, the Federal Communications Commission's meeting on Wednesday, January 30, will not begin until 12:30 p.m., ninety minutes later than previously announced.

The Open Meeting will commence in Room TW–C305, at 445 12th Street SW, Washington, DC. As announced on January 23, due to the earlier partial lapse in federal funding, the meeting will consist of announcements only, and the items set forth in the January 3, 2019 Tentative Agenda will not be considered.

While the Open Meeting is open to the public, the FCC headquarters building is not open access, and all guests must check in with and be screened by FCC security at the main entrance on 12th Street. Open Meetings are streamed live at *www.fcc.gov/live* and can be followed on social media with #OpenMtgFCC.

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2019–00989 Filed 2–4–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice to All Interested Parties of Intent To Terminate Receiverships

Notice is hereby given that the Federal Deposit Insurance Corporation (FDIC or Receiver), as Receiver for the institutions listed below, intends to terminate its receivership for said institutions.

NOTICE OF INTENT TO TERMINATE RECEIVERSHIPS

Fund	Receivership name	City	State	Date of appointment of receiver
10152	The Buckhead Community Bank	Atlanta	GA	12/04/2009
10182	Marshall Bank, NA	Hallock	MN	01/29/2010
10278	Butte Community Bank	Chico	CA	08/20/2010
10283	Pacific State Bank	Stockton	CA	08/20/2010
10322	First Southern Bank	Batesville	AR	12/17/2010
10356	Nexity Bank	Birmingham	AL	04/15/2011
10365	Atlantic Southern Bank	Macon	GA	05/20/2011
10497	Allendale County Bank	Fairfax	SC	04/25/2014
10523	Harvest Community Bank	Pennsville	NJ	01/13/2017

The liquidation of the assets for each receivership has been completed. To the extent permitted by available funds and in accordance with law, the Receiver will be making a final dividend payment to proven creditors.

Based upon the foregoing, the Receiver has determined that the continued existence of the receiverships will serve no useful purpose. Consequently, notice is given that the receiverships shall be terminated, to be effective no sooner than thirty days after the date of this notice. If any person wishes to comment concerning the termination of any of the receiverships, such comment must be made in writing, identify the receivership to which the comment pertains, and be sent within thirty days of the date of this notice to: Federal Deposit Insurance Corporation, Division of Resolutions and Receiverships, Attention: Receivership Oversight Department 34.6, 1601 Bryan Street, Dallas, TX 75201.

No comments concerning the termination of the above-mentioned receiverships will be considered which are not sent within this time frame.

Dated at Washington, DC, on January 31, 2019.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2019–01027 Filed 2–4–19; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

FEDERAL REGISTER CITATION NOTICE OF PREVIOUS ANNOUNCEMENT: 84 FR 716.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: Tuesday, February 5, 2019 at 10:00 a.m. and its continuation at the conclusion of the open meeting on February 7, 2019.

CHANGES IN THE MEETING:

This meeting will also discuss:

Matters relating to internal personnel decisions, or internal rules and practices.

Information the premature disclosure of which would be likely to have a considerable adverse effect on the implementation of a proposed Commission action.

* * * * *

CONTACT FOR MORE INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Laura E. Sinram,

Deputy Secretary of the Commission.

[FR Doc. 2019–01184 Filed 2–1–19; 11:15 am]

BILLING CODE 6715–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary by email at *Secretary@fmc.gov,* or by mail, Federal Maritime Commission, Washington, DC 20573, within twelve days of the date this notice appears in the **Federal Register**. Copies of agreements are available through the Commission's website (*www.fmc.gov*) or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 012414–002.

Agreement Name: LGL/Glovis Space Charter Agreement.

Parties: Hyundai Glovis Co., Ltd. and Liberty Global Logistics LLC.

Filing Party: Wayne Rohde; Cozen O'Connor.

Synopsis: The amendment adds Qatar, Iraq and India to the scope of the Agreement. It also revises Article 5.1 to replace the ad hoc space chartering arrangement which had existed previously with a more defined reciprocal space chartering arrangement. The amendment also revises the duration and termination of the Agreement, and restates the Agreement.

Proposed Effective Date: 3/8/2019.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/1879.

Agreement No.: 201288.

Agreement Name: Digital Container Shipping Association Agreement.

Parties: Maersk Line A/S; Hapag-Lloyd AG; CMA CGM S.A.; MSC Mediterranean Shipping Company S.A.; and Ocean Network Express Pte. Ltd.

Filing Party: Wayne Rohde; Cozen O'Connor.

Synopsis: The Agreement authorizes the parties to form a non-profit corporate entity through which they can discuss, exchange information and agree on the development, establishment, standardization and harmonization of terminology, guidelines and standards for information technology used in any aspect of the movement of containers or services ancillary thereto. The parties request expedited review.

Proposed Effective Date: 3/14/2019.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/21328.

Agreement No.: 011290–042.

Agreement Name: International Vessel Operators Dangerous Goods Association Agreement.

Parties: Evergreen Line Joint Service Agreement; Hapag-Lloyd AG; Hyundai Merchant Marine Co., Ltd.; Independent Container Line, Ltd; Maersk Line A/S; Matson Navigation Company, Inc.; Ocean Network Express Pte. Ltd.; Orient Overseas Container Line Limited; Tampa Bay International Terminals, Inc.; The National Shipping Company of Saudi Arabia d/b/a Bahri; Tropical Shipping & Construction Co., Ltd.; Wallenius Wilhelmsen Ocean AS; Wan Hai Lines Ltd.; Yang Ming Marine Transport Corporation; APL C. Pte. Ltd.; Crowley Caribbean Services LLC; Crowley Latin America Services, LLC; COSCO Shipping Lines Co., Ltd.; Bermuda Container Line Ltd.; Seaboard

Marine Ltd.; and the Klinge Corporation.

Filing Party: Wayne Rohde; Cozen O'Connor.

Synopsis: The amendment deletes Alianca Navegacao E Logistica Ltda; Atlantic Container Line AB; Hamburg Süd; Kawasaki Kisen Kaisha Ltd.; Mitsui O.S.K. Lines, Ltd.; and Nippon Yusen Kaisha Line as parties to the Agreement. It adds Ocean Network Express Pte. Ltd. as a party and adds Klinge Corporation and Tampa Bay International Terminals, Inc. as associate parties. The amendment also makes technical corrections to the names and/or addresses of various parties.

Proposed Effective Date: March 7, 2019.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/1638.

Agreement No.: 012307–003.

Agreement Name: Maersk Line/APL Slot Exchange Agreement.

Parties: American President Lines, LLC; APL Co. Pte. Ltd.; and Maersk Line A/S.

Filing Party: Wayne Rohde; Cozen O'Connor.

Synopsis: The amendment revises the amount of space being chartered by Maersk and revises the name of one of the APL entities that is a party to the Agreement.

Proposed Effective Date: March 7, 2019.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/176.

Dated: January 31, 2018.

JoAnne D. O' Bryant,

Program Analyst.

[FR Doc. 2019–01128 Filed 2–4–19; 8:45 am]

BILLING CODE 6731–AA–P

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice, request for comment.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) invites comment on a proposal to extend for three years, without revision, the Recordkeeping Requirements of Regulation H and Regulation K Associated with the Procedures for Monitoring Bank Secrecy Act Compliance (FR K; OMB No. 7100–0310). The internal Agency Tracking Number previously assigned by the Board to this information collection was ''Reg K.'' The Board is changing the internal Agency Tracking Number to ''FR K'' for the purpose of consistency.

DATES: Comments must be submitted on or before April 8, 2019.

ADDRESSES: You may submit comments, identified by *FR K,* by any of the following methods:

- *Agency Website: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx.*
- *Email: regs.comments@federalreserve.gov.* Include OMB number in the subject line of the message.
- *FAX:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available from the Board's website at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room 3515, 1801 K Street NW (between 18th and 19th Streets, NW), Washington, DC 20006 between 9:00 a.m. and 5:00 p.m. on weekdays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452–3684. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments. Additionally, commenters may send a copy of their comments to the OMB Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of the PRA OMB submission, including the proposed reporting form and instructions, supporting statement, and other documentation will be placed into OMB's public docket files, if approved. These documents will also be made available on the Board's public website at *http://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears below.

Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452–3829. Telecommunications Device for the Deaf (TDD) users may contact (202) 263–4869, Board of Governors of the Federal Reserve System, Washington, DC 20551.

SUPPLEMENTARY INFORMATION: On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board. In exercising this delegated authority, the Board is directed to take every reasonable step to solicit comment. In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies.

Request for Comment on Information Collection Proposal

The Board invites public comment on the following information collection, which is being reviewed under authority delegated by the OMB under the PRA. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Board's functions, including whether the information has practical utility;

b. The accuracy of the Board's estimate of the burden of the proposed information collection, 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 information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the Board should modify the proposal.

Proposal To Approve Under OMB Delegated Authority the Extension for Three Years, Without Revision, of the Following Report

Report title: Recordkeeping Requirements of Regulation H and Regulation K Associated with the Procedures for Monitoring Bank Secrecy Act Compliance.

Agency form number: FR K.

OMB control number: 7100–0310.

Frequency: Annually.

Respondents: State member banks; Edge and agreement corporations; and certain U.S. branches, agencies, and representative offices of foreign banks supervised by the Board.

Estimated number of respondents: Establish compliance program—1; maintenance of compliance program—957.

Estimated average hours per response: Establish compliance program—16; maintenance of compliance program—4.

Estimated annual burden hours: Establish compliance program—16; maintenance of compliance program—3,828.

General description of report: The Board's Regulation K and Regulation H require state member banks, Edge and agreement corporations and, except for a federal branch or a federal agency or a state branch that is insured by the Federal Deposit Insurance Corporation, the U.S. branches, agencies, and representative offices of foreign banks supervised by the Board to establish a written Bank Secrecy Act (BSA) compliance program that includes the following components: (1) A system of internal controls to assure ongoing compliance, (2) independent testing of compliance by the institution's personnel or by an outside party, (3) the designation of an individual or individuals for coordinating and monitoring day-to-day compliance, and (4) training for appropriate personnel.[1] The compliance program must be approved by the board of directors of the state member bank, Edge corporation, or agreement corporation and must be noted in the institution's minutes. In the case of a branch, agency, or representative office of a foreign bank, the compliance program may be approved by the foreign bank's board of directors and noted in the minutes or approved by a delegee acting under the express authority of the foreign bank's board of directors.

Legal authorization and confidentiality: The FR K is authorized pursuant to the Federal Deposit Insurance Act (12 U.S.C. 1818(s)), which requires the federal banking agencies, including the Board, to (1) prescribe regulations requiring the institutions they regulate to establish and maintain procedures reasonably designed to assure and monitor compliance with the BSA and (2) to review such procedures during the course of their examinations.[2] The FR K is mandatory.

Because the Federal Reserve will not collect this information, confidentiality issues would normally not arise. Because the records will be retained at banking organizations, the Freedom of Information Act (FOIA) will only be implicated if the Board's examiners retain a copy of the record as part of an examination or supervision of a banking institution. In that case, the records would be exempt from disclosure under exemption 8 to FOIA, which protects examination materials from disclosure (5 U.S.C. 552(b)(8)). Exemption 4 to FOIA, which protects confidential financial information, may also be applicable (5 U.S.C. 552(b)(4)).

Board of Governors of the Federal Reserve System, January 30, 2019.

Michele Taylor Fennell,

Assistant Secretary of the Board.

[FR Doc. 2019–01000 Filed 2–4–19; 8:45 am]

BILLING CODE 6210–01–P

[1] See 12 CFR 208.63(c); these specific requirements are incorporated by reference in 12 CFR 211.5(m)(1) and 211.24(j)(1).

[2] The Board's authority in 12 U.S.C. 1818(s) to prescribe regulations includes the entities required to comply with section 208.63 of the Board's Regulation H (12 CFR 208.63) and sections 211.5(m)(1) and 211.24(j)(1) of the Board's Regulation K (12 CFR 211.5(m)(1) and 12 CFR 211.24(j)(1)).

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 (''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 February 21, 2019.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *The RFB–FLB Trust, U/A/D October 25, 2016 and Frances Biolchini, as trustee, both of Kelly, Wyoming;* to retain voting shares of Tulsa Valley Bancshares Corporation, Tulsa, Oklahoma, and thereby indirectly retain Vast Bank, N.A., Tulsa, Oklahoma

Board of Governors of the Federal Reserve System, January 31, 2019.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2019–01125 Filed 2–4–19; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice, request for comment.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) invites comment on a proposal to extend for three years, with revision, the Suspicious Activity Report (FR 2230; OMB No. 7100–0212).

DATES: Comments must be submitted on or before April 8, 2019.

ADDRESSES: You may submit comments, identified by FR 2230, by any of the following methods:

- Agency website: *http://www.federalreserve.gov.* Follow the instructions for submitting comments at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx.*
- *Email: regs.comments@federalreserve.gov.* Include OMB number in the subject line of the message.
- *FAX:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available from the Board's website at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons or to remove sensitive personally identifiable information at the commenter's request. Public comments may also be viewed electronically or in paper form in Room 3515, 1801 K Street NW (between 18th and 19th Streets NW), Washington, DC 20006, between 9:00 a.m. and 5:00 p.m. on weekdays. For security reasons, the

Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452–3684. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, commenters may send a copy of their comments to the OMB Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of the PRA OMB submission, including the proposed reporting form and instructions, supporting statement, and other documentation will be placed into OMB's public docket files, if approved. These documents will also be made available on the Board's public website at: *http://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears below.

Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452–3829. Telecommunications Device for the Deaf (TDD) users may contact (202) 263–4869, Board of Governors of the Federal Reserve System, Washington, DC 20551.

SUPPLEMENTARY INFORMATION: On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board. In exercising this delegated authority, the Board is directed to take every reasonable step to solicit comment. In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies.

Request for Comment on Information Collection Proposal

The Board invites public comment on the following information collection, which is being reviewed under authority delegated by the OMB under the PRA. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Board's functions; including whether the information has practical utility;

b. The accuracy of the Board's estimate of the burden of the proposed information collection, 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 information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the Board should modify the proposal.

Proposal To Approve Under OMB Delegated Authority the Extension for Three Years, With Revision, of the Following Report

Report title: Suspicious Activity Report.

Agency form number: FR 2230.

OMB control number: 7100–0212.

Frequency: On occasion.

Respondents: State member banks, bank holding companies and their nonbank subsidiaries, Edge and agreement corporations, the nonbank subsidiaries of foreign banks supervised by the Board, and certain U.S. branches, agencies, and representative offices of such foreign banks.

Estimated number of respondents: 6,698.

Estimated average hours per response: 1.5.

Estimated annual burden hours: 439,520.

General description of report: Since 1996, the federal banking agencies [1] and the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) have required certain types of financial institutions to report known or suspected violations of law and suspicious transactions. To fulfill these requirements, supervised banking organizations file Bank Secrecy Act—Suspicious Activity Reports (BSA–SARs).[2] Law enforcement agencies use the information submitted in the reports to initiate investigations and the Board uses the information in the examination and oversight of supervised institutions.

The Board's suspicious activity reporting rules apply to state member banks, bank holding companies and their nonbank subsidiaries, Edge and agreement corporations, the nonbank subsidiaries of foreign banks supervised by the Board, and certain U.S. branches, agencies, and representative offices of such foreign banks.[3] The Board is only responsible for the paperwork burden imposed on these institutions. Other federal banking agencies account for the paperwork burden for the institutions they supervise.

Proposed revisions: On July 27, 2018, FinCEN implemented the new version 1.2 of the SAR, which added, removed, or revised several data fields.[4] The FinCEN revisions added or modified types and subtypes of suspicious activities, added new fields related to IP address information, and added new cyber event indicators. These revisions were made to ensure the collection of appropriate and current information in order to aid law enforcement in combating cyber-events and cyber-enabled crime.

The Board is proposing to adopt the revisions made by FinCEN.

With respect to the file format changes for electronic submission, the BSA E-Filing System would continue to accept ASCII based batch files until January 1, 2019. Batch filers would have six months from the expected go-live date in June to adhere to the new XML specification.[5]

Legal authorization and confidentiality: The FR 2230 is authorized pursuant to the Federal Reserve Act (12 U.S.C. 248(a)(1), 602, 625), the Federal Deposit Insurance Act (12 U.S.C. 1818(s)), the Bank Holding Company Act (12 U.S.C. 1844(c)), and

[1] These agencies include the Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the National Credit Union Administration.

[2] In 1996, the Board together with the other federal banking agencies issued nearly identical regulations to implement the SAR process for banking organizations.

[3] See 12 CFR 208.62 (state member banks); 12 CFR 211.5(k) (Edge and agreement corporations); 12 CFR 211.24(f) (a branch, agency, or representative office of a foreign bank operating in the United States, except for a federal branch or a federal agency or a state branch that is insured by the Federal Deposit Insurance Corporation (FDIC)); 12 CFR 225.4(f) (bank holding companies, nonbank subsidiaries of a bank holding company, foreign banks subject to the Bank Holding Company Act, and nonbank subsidiaries of such a foreign bank). The Board's suspicious activity reporting rules do not apply to a branch or agency of a foreign bank operating in the United States if it is a federal branch or a federal agency or a state branch that is insured by the FDIC.

[4] The notice announcing the final submission to OMB was published in the **Federal Register** November 28, 2017 (82 FR 56325).

[5] See Department of the Treasury, Financial Crimes Enforcement Network (2018), ''FinCEN Announces Update to the Suspicious Activity Report (SAR) & Technical Webinar for Batch Filers,'' press release, January 26, 2018 *https://bsaefiling.fincen.treas.gov/docs/SARXMLAnnouncement_Jan2018.pdf.*

the International Banking Act (12 U.S.C. 3105(c)(2) and 3106(a)). The FR 2230 is mandatory. SARs are confidential and exempt from Freedom of Information Act (''FOIA'') disclosure by 31 U.S.C. 5319, which specifically provides that SARs ''are exempt from disclosure under section 552 of title 5,'' and FOIA exemption 3, 5 U.S.C. 552(b)(3) (matters ''specifically exempted from disclosure by statute'').

Consultation outside the agency: The current revisions to the BSA–SAR data elements were discussed in the interagency Data Management Council led by FinCEN and of which the Board is a member.

Board of Governors of the Federal Reserve System, January 30, 2019.

Michele Taylor Fennell,

Assistant Secretary of the Board.

[FR Doc. 2019–00996 Filed 2–4–19; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than March 6, 2019.

A. Federal Reserve Bank of Chicago

(Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *MiCommunity Bancorp, Inc.*; to become a bank holding company by acquiring voting shares of Mi Bank, a de novo bank, both of Bloomfield Township, Michigan.

Board of Governors of the Federal Reserve System, January 31, 2019.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2019–01126 Filed 2–4–19; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Announcement of Board Approval under Delegated Authority and Submission to OMB

AGENCY: Board of Governors of the Federal Reserve System.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) is adopting a proposal to extend for three years, without revision, the Disclosure Requirements of Subpart H of Regulation H (Consumer Protections in Sales of Insurance) (Reg H–7; OMB No. 7100–0298).

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202) 452–3829. Telecommunications Device for the Deaf (TDD) users may contact (202) 263–4869, Board of Governors of the Federal Reserve System, Washington, DC 20551.

OMB Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–6974.

SUPPLEMENTARY INFORMATION: On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the Paperwork Reduction Act Submission, supporting statements and approved collection of information instrument(s) are placed into OMB's public docket files. The Board may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Final Approval Under OMB Delegated Authority of the Extension for Three Years, Without Revision, of the Following Information Collection

Report title: Disclosure Requirements of Subpart H of Regulation H (Consumer Protections in Sales of Insurance).

Agency form number: Reg H–7.

OMB control number: 7100–0298.

Frequency: On occasion.

Respondents: State member banks and other persons.

Estimated number of respondents: 822.

Estimated time per response: 1.5 minutes.

Estimated annual burden hours: 12,947.

General description of report: Subpart H of Regulation H was adopted by the Board in 2003 pursuant to section 305 of the Gramm-Leach-Bliley Act of 1999 (GLBA), which required the federal banking agencies to issue joint regulations governing retail sales practices, solicitations, advertising, and offers of insurance by, on behalf of, or at the offices of insured depository institutions. The insurance consumer protection rules in Regulation H, which apply to the sale of insurance by a state member bank or by any other person at an office of the bank or on behalf of the bank (collectively, ''Covered Persons''), require Covered Persons to prepare and provide certain disclosures to consumers. Covered persons are required to make certain written and oral disclosures before the completion of the initial sale of an insurance product or annuity to a consumer and at the time a consumer applies for an extension of credit in connection with which an insurance product or annuity is solicited, offered, or sold (see 12 CFR 208.84(a)–(d)).

Legal authorization and confidentiality: Section 305 of the GLBA requires that the Board issue regulations, including disclosure requirements, applicable to retail sales practices, solicitations, advertising, or offers of insurance by depository institutions (12 U.S.C. 1831x). The disclosure requirements described above are contained in Subpart H of the Board's Regulation H. 12 CFR part 208, subpart H. The disclosures required under Subpart H are mandatory. Because Regulation H–7 disclosures are

provided by Covered Persons to customers, confidentiality issues should generally not arise. However, if the Board obtains any institution-specific information during an examination of a state member bank, such information may be protected under exemption (b)(8) of the Freedom of Information Act, which exempts from disclosure materials related to the examination of financial institutions (5 U.S.C. 552(b)(8)).

Current actions: On October 17, 2018, the Board published an initial notice in the **Federal Register** (83 FR 52452) requesting public comment for 60 days on the extension, without revision, of the Disclosure Requirements of Subpart H of Regulation H (Consumer Protections in Sales of Insurance). The comment period for this notice expired on December 17, 2018. The Board did not receive any comments.

Board of Governors of the Federal Reserve System, January 30, 2019.

Michele Taylor Fennell,

Assistant Secretary of the Board.

[FR Doc. 2019–00998 Filed 2–4–19; 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 February 19, 2019.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *F. Walter Riebenack, Evanston, Wyoming,* to retain individually, voting shares of UCSB Financial Corporation, and thereby indirectly retain shares of Uinta Bank, both of Mountain View, Wyoming, and for approval to become a member of the Riebenack/Gilbert Control Group that owns voting shares of UCSB Financial Corporation. In addition, Keith L. Gilbert, Fort Wayne, Indiana, The Cyprian Fund, LLC of Mountain View, Wyoming, the estate of Barbara A. Gilbert, Fort Wayne, Indiana, Brian K. Gilbert and Andrea R. Gilbert, Naperville, Illinois, Fred L. Gilbert and Cynthia D. Gilbert, Singapore, James Gilbert and Christina Gilbert, Akron, Ohio, Terry Gilbert, Uniondale, Indiana, Andrea S. Worsham, Altamonte Springs, Florida, and Lindsay Worsham, Altamonte Springs, Florida, have applied for approval as members of the Riebenack/Gilbert Control Group to retain shares of UCSB Financial Corporation.

Board of Governors of the Federal Reserve System, January 30, 2019.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2019–00920 Filed 2–4–19; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[CDC–2018–0038; Docket Number NIOSH–312]

Continuing To Protect the Nanotechnology Workforce: NIOSH Nanotechnology Research Plan for 2018–2025

AGENCY: National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of availability.

SUMMARY: NIOSH announces the availability of *Continuing to Protect the Nanotechnology Workforce: NIOSH Nanotechnology Research Plan for 2018–2015.*

DATES: The final document was published on January 25, 2019 on the CDC website.

ADDRESSES: The document may be obtained at the following link: *https://www.cdc.gov/niosh/docs/2019-116/.*

FOR FURTHER INFORMATION CONTACT: Charles L. Geraci (*CGeraci@cdc.gov*), National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, 1090 Tusculum Ave., MS C–14, Cincinnati, OH 45226, phone (513) 533–8339 (not a toll free number).

SUPPLEMENTARY INFORMATION: On April 24, 2018, NIOSH published a request for public review in the **Federal Register** [83 FR 17824] of the draft version of the document *Continuing To Protect the Nanotechnology Workforce: NIOSH Nanotechnology Research Plan for 2018–2025.* All comments received were reviewed and addressed where appropriate.

John J. Howard,

Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention.

[FR Doc. 2019–01039 Filed 2–4–19; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[CDC–2018–0024; Docket Number NIOSH–302]

Final National Occupational Research Agenda for Respiratory Health

AGENCY: National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of availability.

SUMMARY: NIOSH announces the availability of the final *National Occupational Research Agenda for Respiratory Health.*

DATES: The final document was published on January 16, 2019 on the CDC website.

ADDRESSES: The document may be obtained at the following link: *https://www.cdc.gov/nora/councils/resp/agenda.html.*

FOR FURTHER INFORMATION CONTACT: Emily Novicki, M.A., M.P.H, (*NORACoordinator@cdc.gov*), National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, Mailstop E–20, 1600 Clifton Road NE, Atlanta, GA 30329, phone (404) 498–2581 (not a toll free number).

SUPPLEMENTARY INFORMATION: On March 15, 2018, NIOSH published a request for public review in the **Federal Register** [83 FR 11537 and 83 FR 19768] of the draft version of the *National Occupational Research Agenda for Respiratory.* All comments received

were reviewed and addressed where appropriate.

John J. Howard,

Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention.

[FR Doc. 2019–01046 Filed 2–4–19; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket Number CDC–2019–0001, NIOSH–323]

Draft—National Occupational Research Agenda for Hearing Loss Prevention

AGENCY: National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Request for comment.

SUMMARY: The National Institute for Occupational Safety and Health of the Centers for Disease Control and Prevention announces the availability of a draft NORA Agenda entitled *National Occupational Research Agenda for Hearing Loss Prevention* for public comment. To view the notice and related materials, visit *https://www.regulations.gov* and enter CDC–2019–0001 in the search field and click ''Search.''

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DATES: Electronic or written comments must be received by April 8, 2019.

ADDRESSES: You may submit comments, identified by CDC–2019–0001 and docket number NIOSH–323, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov* Follow the instructions for submitting comments.
- *Mail:* National Institute for Occupational Safety and Health, NIOSH Docket Office, 1090 Tusculum Avenue, MS C–34, Cincinnati, Ohio 45226–1998.

Instructions: All submissions received in response to this notice must include the agency name and docket number [CDC–2019–0001; NIOSH–323]. All relevant comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided. For access to the docket to read background documents or comments received, go to *https://www.regulations.gov.* All information received in response to this notice will also be available for public examination and copying at the NIOSH Docket Office, 1150 Tusculum Avenue, Room 155, Cincinnati, OH 45226–1998.

FOR FURTHER INFORMATION CONTACT: Emily Novicki (*NORACoordinator@cdc.gov*), National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, Mailstop E–20, 1600 Clifton Road NE, Atlanta, GA 30329, phone (404) 498–2581 (not a toll free number).

SUPPLEMENTARY INFORMATION: The National Occupational Research Agenda (NORA) is a partnership program created to stimulate innovative research and improved workplace practices. The national agenda is developed and implemented through the NORA sector and cross-sector councils. Each council develops and maintains an agenda for its sector or cross-sector.

Background: The National Occupational Research Agenda for Hearing Loss Prevention is intended to identify the research, information, and actions most urgently needed to prevent occupational injuries. The National Occupational Research Agenda for Hearing Loss prevention provides a vehicle for stakeholders to describe the most relevant issues, gaps, and safety and health needs for the sector. Each NORA research agenda is meant to guide or promote high priority research efforts on a national level, conducted by various entities, including: Government, higher education, and the private sector.

This is the first Hearing Loss Prevention Agenda, developed for the third decade of NORA (2016–2026). It was developed considering new information about injuries and illnesses, the state of the science, and the probability that new information and approaches will make a difference. As the steward of the NORA process, NIOSH invites comments on the draft *National Occupational Research Agenda for Hearing Loss Prevention.* Comments expressing support or with specific recommendations to improve the Agenda are requested. A copy of the draft Agenda is available at *https://www.regulations.gov* (see Docket Number CDC–2019–0001).

John J. Howard,

Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention.

[FR Doc. 2019–01045 Filed 2–4–19; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[CDC–2015–0021; Docket Number NIOSH–153–C]

Final Guidance Publications for Skin Notation Profiles

AGENCY: National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of availability.

SUMMARY: The National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), announces the availability of the following 5 *Skin Notation Profiles* [DHHS (NIOSH) Publication No. 2019–117 to 2019–121]:

Substance(s)

Atrazine [CAS No. 1912–24–9]

Catechol [CAS No. 120–80–9]

Chlorinated Camphene [CAS No. 8001–35–2]

Pentachlorophenol (PCP) [CAS No. 87–86–5]

Sodium Fluoroacetate [CAS No. 62–74–8]

DATES: The final documents were published on January 11, 2019 on the CDC website.

ADDRESSES: The documents may be obtained at the following link: *https://www.cdc.gov/niosh/topics/skin/skin-notation_profiles.html.*

FOR FURTHER INFORMATION CONTACT: Naomi Hudson, Dr.P.H, (*iuz8@cdc.gov*), Robert A. Taft Laboratories, 1090 Tusculum Avenue, MS–C32, Cincinnati, OH 45226. Telephone: (513) 533–8388 (not a toll free number).

SUPPLEMENTARY INFORMATION: On May 1, 2015, NIOSH published a request for public review in the **Federal Register** [80 FR 24932] of 19 draft skin notation profiles. All comments received were reviewed and addressed where appropriate.

John J. Howard,

Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention.

[FR Doc. 2019–01047 Filed 2–4–19; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–3366–FN]

Medicare and Medicaid Programs: Approval of an Application From National Dialysis Accreditation Commission for CMS Approval of Its End Stage Renal Disease (ESRD) Facility Accreditation Program

AGENCY: Centers for Medicare and Medicaid Services (CMS), HHS.

ACTION: Final notice.

SUMMARY: This final notice announces our decision to approve National Dialysis Accreditation Commission (NDAC) for recognition as a national accrediting organization (AO) for End Stage Renal Disease (ESRD) Facilities that wish to participate in the Medicare or Medicaid programs.

DATES: The approval announced in this notice is effective January 4, 2019 through January 4, 2023.

FOR FURTHER INFORMATION CONTACT: Renee Henry, (410) 786–7828, Monda Shaver, (410) 786–3410 or Joann Fitzell (410) 786–4280.

SUPPLEMENTARY INFORMATION:

I. Background

Under the Medicare program, eligible beneficiaries may receive covered services in an end stage renal disease (ESRD) facility, provided the facility meets the requirements established by the Secretary of the Department of Health and Human Services (the Secretary). Section 1881(b) of the Social Security Act (the Act) establishes distinct requirements for facilities seeking designation as an ESRD facility under Medicare. Regulations concerning provider agreements and supplier approval are at 42 CFR part 489 and those pertaining to activities relating to the survey, certification, and enforcement procedures of suppliers, which include ESRD facilities are at 42 CFR part 488. The regulations at part 494 subparts A through D implement section 1881(b) of the Act, which specify the conditions that an ESRD facility must meet in order to participate in the Medicare program and the conditions for Medicare payment for ESRD facilities.

For an ESRD facility to enter into a provider agreement with the Medicare program, an ESRD facility must first be certified by a State survey agency as complying with the conditions or requirements set forth in section 1881(b) of the Act and our regulations at part 494 subparts A through D. Subsequently, the ESRD facility is subject to ongoing review by a State survey agency to determine whether it continues to meet the Medicare requirements. However, there is an alternative to State compliance surveys. Certification by a nationally recognized accreditation program can substitute for ongoing State review.

Section 1865(a)(1) of the Act provides that, if the Secretary finds that accreditation of a provider entity by an approved national accrediting organization (AO) meets or exceeds all applicable Medicare conditions, we may treat the provider entity as having met those conditions, that is, we may ''deem'' the provider entity to be in compliance. Accreditation by an AO is voluntary and is not required for Medicare participation.

Section 1865(a)(1) of the Act had historically excluded dialysis facilities from participating in Medicare via a Centers for Medicare & Medicaid Services (CMS)-approved accreditation program; however, section 50404 of the Bipartisan Budget Act of 2018 (Pub. L. 115–123) amended section 1865(a) of the Act to include renal dialysis facilities as provider entities allowed to participate in Medicare through a CMS-approved accreditation program.

If an AO is recognized by the Secretary as having standards for accreditation that meet or exceed Medicare requirements, any provider entity accredited by the national accrediting body's approved program may be deemed to meet the Medicare conditions. An AO applying for approval of its accreditation program under part 488, subpart A, must provide CMS with reasonable assurance that the AO requires the accredited provider entities to meet requirements that are at least as stringent as the Medicare conditions. Our regulations concerning the approval of AOs are set forth at § 488.5.

II. Application Approval Process

Section 1865(a)(2) of the Act and our regulations at § 488.5 require that our findings concerning review and approval of an AO's requirements consider, among other factors, the applying AO's requirements for accreditation; survey procedures; resources for conducting required surveys; capacity to furnish information for use in enforcement activities; monitoring procedures for provider entities that were not in compliance with the conditions or requirements; and their ability to provide CMS with the necessary data for validation.

Section 1865(a)(3)(A) of the Act further requires that we publish, within 60 days of receipt of an organization's complete application, a notice identifying the national accrediting body making the request, describing the nature of the request, and providing at least a 30-day public comment period. We have 210 days from the receipt of a complete application to publish notice of approval or denial of the application.

III. Provisions of the Proposed Notice

On August 7, 2018, we published a proposed notice in the **Federal Register** announcing National Dialysis Accreditation Commission's (NDAC's) request for approval of its Medicare ESRD facility accreditation program (83 FR 38697). In the proposed notice, we detailed our evaluation criteria. Under section 1865(a)(2) of the Act and in our regulations at § 488.5, we conducted a review of NDAC's Medicare ESRD Facility accreditation application in accordance with the criteria specified by our regulations, which include, but are not limited to, the following:

- An onsite administrative review of NDAC's: (1) Corporate policies; (2) financial and human resources available to accomplish the proposed surveys; (3) procedures for training, monitoring, and evaluation of its hospital surveyors; (4) ability to investigate and respond appropriately to complaints against accredited ESRD facilities; and, (5) survey review and decision-making process for accreditation.
- A comparison of NDAC's Medicare accreditation program standards to our current Medicare ESRD facility Conditions for Coverage (CfCs).
- A documentation review of NDAC's survey process to do the following:

++ Determine the composition of the survey team, surveyor qualifications, and NDAC's ability to provide continuing surveyor training.

++ Compare NDAC's processes to those we require of State survey agencies, including periodic re-survey and the ability to investigate and respond appropriately to complaints against accredited ESRD Facilities.

++ Evaluate NDAC's procedures for monitoring ESRD Facilities it has found to be out of compliance with NDAC's program requirements. (This pertains only to monitoring procedures when NDAC identifies non-compliance. If non-compliance is identified by a State survey agency through a validation survey, the State survey agency monitors corrections as specified at § 488.9(c)(1).

++ Assess NDAC's ability to report deficiencies to the surveyed facilities

and respond to the facility's plan of correction in a timely manner.

++ Establish NDAC's ability to provide CMS with electronic data and reports necessary for effective validation and assessment of the organization's survey process.

++ Determine the adequacy of NDAC's staff and other resources.

++ Confirm NDAC's ability to provide adequate funding for performing required surveys.

++ Confirm NDAC's policies with respect to surveys being unannounced.

++ Obtain NDAC's agreement to provide CMS with a copy of the most current accreditation survey together with any other information related to the survey as we may require, including corrective action plans.

In accordance with section 1865(a)(3)(A) of the Act, the August 7, 2018, proposed notice also solicited public comments regarding whether NDAC's requirements met or exceeded the Medicare CfCs for ESRD facilities. Six comments were submitted. Of these comments, four were in full support of approving NDAC as a new AO for ESRD Facilities. They welcomed the additional support this would provide the industry in certifying facilities. CMS thanks them for their support. One commenter voiced support of allowing accreditation of ESRD facilities, but expressed concern that continuing to allow State Survey Agencies to conduct surveys when accreditation is allowed would cause confusion for facilities. CMS thanks the commenter for their submission; however, the law allows an ESRD facility to be surveyed by a State Survey Agency or an accrediting organization. Accreditation by an AO is a voluntary choice made by the ESRD facility. In addition, this process of allowing certification either through accreditation by an AO or through a survey performed by a State Survey Agency has been well established in other programs and does not, to our knowledge, present any confusion to providers. One commenter encouraged CMS to continue to recognize the value of home-only programs. Another commenter expressed concern with NDAC's ability to provide sufficient national coverage with limited staffing available to travel and respond to certification needs and complaints. This commenter also expressed concern over Conflict of Interest related to NDAC conducting mock surveys in the past for some facilities, which may be potential clients. In its application, NDAC addressed staffing requirements adequately to support national expansion. With respect to conflict of interest concerns, we believe that NDAC addressed these concerns adequately in their application and will conduct unbiased surveys. Firewalls and policies surrounding conflicts of interest are in line with other approved AO programs.

IV. Provisions of the Final Notice

A. Differences Between NDAC's Standards and Requirements for Accreditation and Medicare Conditions and Survey Requirements

We compared NDAC's ESRD facility accreditation requirements and survey process with the Medicare CfCs at part 494, and the survey and certification process requirements of parts 488 and 489. NDAC's standards and standards crosswalk were also examined to ensure that the appropriate CMS regulations would be included in citations as appropriate. Our review and evaluation of NDAC's ESRD facility application, which was conducted as described in section III of this final notice, yielded the following areas where, as of the date of this notice, NDAC has revised the following standards and certification processes:

- Section 494.30(a)(1)(i), to ensure that its interpretive guidance accurately reflects the appropriate CMS standard.
- Section 494.40(a), to ensure that appropriate maximum allowable limits for microbial and endotoxin counts are comparable to CMS requirements and to clarify that bacteria counts can be tested via outside lab or dip test.
- Section 494.60(d)(4)(ii), to correct its related standards crosswalk to accurately reflect the CMS standards references and the 2012 edition of the Life Safety Code.
- Section 494.70(a)(14), to clarify language that each facility must develop and implement an internal grievance process.
- Section 494.70(a)(16), to clarify language that each facility must inform patients that they can file a grievance.
- Section 494.70(d), to accurately reflect current CMS regulations and references.
- Section 494.90(b)(1)(i), to ensure that allowing an Advanced Practice Registered Nurse or Physician Assistant to conduct patient assessments and plans of care does not eliminate the physician from participation in the interdisciplinary team and team discussions.
- Section 494.170(b)(3), to ensure that ESRD facilities must also meet this CMS requirement for home care patients who receive supplies and equipment from a durable medical equipment supplier.
- Section 494.180(b)(1), to ensure that State-specific staffing requirements that are more stringent than CMS requirements will be cited at as the appropriate CMS standard.
- Section 494.180(c)(1), to ensure that State-specific Medical-staff requirements that are more stringent than CMS requirements will be cited at the appropriate CMS standard.
- NDAC revised its policies and procedures to ensure that its documentation demonstrates that the organization's survey reports identify, for each finding of noncompliance with accreditation standards, the appropriate comparable Medicare CfCs.
- NDAC revised its policies and procedures to ensure that all observations of non-compliance are noted on the final deficiency report and to require that an acceptable plan of correction must be submitted by the ESRD facility.
- NDAC revised its policies, procedures and surveyor worksheets to ensure that survey documentation is consistently and accurately completed.
- NDAC updated its policies and procedures to ensure that the effective date of full accreditation does not precede the receipt date of an acceptable plan of correction.
- NDAC revised its policy to include language that would specifically restrict the accreditation time period to no more than 36 months.
- NDAC revised its policies and procedures to review and assess surveyor documentation on survey reports to ensure that all findings noted on the surveyor worksheets are clearly and accurately reflected in the final survey (deficiency) report and that these findings are quantifiable where appropriate.
- NDAC revised its policies and procedures to ensure that a survey report is generated for each survey, irrespective of deficiencies found on a follow-up survey.
- NDAC revised its policies and procedures to ensure that a follow-up survey conducted for the purposes of ''clearing'' a previous observation of non-compliance at the condition level, assesses compliance with the entire condition that was previously cited.
- NDAC revised its policies and procedures to include ''denial'' of accreditation when condition-level non-compliance is found on an initial survey.
- NDAC revised its policy related to conducting follow-up surveys to clarify that the follow-up survey for condition-level non-compliance must take place within 45 calendar days from the survey end date for which the condition-level finding was originally made.

B. Term of Approval

Based on our review and observations described in section III of this final notice, we have determined that NDAC's ESRD facility accreditation program requirements meet or exceed our requirements, and its survey processes are also comparable. Therefore, we approve NDAC as a national accreditation organization for ESRD facilities that request participation in the Medicare program, effective January 4, 2019 through January 4, 2023.

V. 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 (44 U.S.C. 3501 *et seq.*).

Dated: January 2, 2019.

Seema Verma,

Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2019–01103 Filed 2–4–19; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

[OMB No.: 0970–0476]

Proposed Information Collection Activity; Comment Request

Proposed Projects: Generic Clearance for Disaster Information Collection Form.

Title: Disaster Information Collection Form.

Description: This is a request by the Administration for Children and Families (ACF) for an extension without change to a generic clearance for the Disaster Information Collection Form. An approval for this extension without change to the generic clearance is being requested because each of the thirteen program offices within ACF has a slightly different need for information about program impact information collection during a disaster.

ACF oversees more than 60 programs that affect the normal day to day operations of families, children, individuals and communities in the United States. Many of these programs encourage grantees or state administrators to develop emergency preparedness plans, but do not have statutory authority to require these plans be in place. ACF facilitates the inclusion of emergency preparedness planning and training efforts for ACF programs.

Presidential Policy Directive-8 (PPD–8) provides federal guidance and planning procedures under established phases—protection, preparedness, response, recovery, and mitigation. The Disaster Information Collection Forms addressed in this clearance process provide assessment of ACF programs in disaster response, and recovery.

ACF/Office of Human Services Emergency Preparedness and Response (OHSEPR) has a requirement under PPD–8, the National Response Framework, and the National Disaster Recovery Framework to report disaster impacts to ACF-supported human services programs to the HHS Secretary's Operation Center (SOC) and interagency partners. ACF/OHSEPR works in partnership with the Assistant Secretary for Preparedness and Response (ASPR), and the Federal Emergency Management Agency (FEMA) to report assessments of disaster impacted ACF programs and the status of continuity of services and recovery.

Respondents: State Administrators, and/or ACF grantees.

Annual Burden Estimates

The estimate is based on a single disaster per year. The estimate is for one state administrator to go through all the applicable questions with the Regional and Central Office staff, if applicable.

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Disaster Information Collection Form	10	15	0.08 Hours (5 Minutes)	12 Hours (720 Minutes).

Estimated Total Annual Burden Hours: 12 hours.

In compliance with the requirements of the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chap 35), the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 330 C Street SW, Washington DC 20201. Attn: ACF Reports Clearance Officer. Email address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2019–01078 Filed 2–4–19; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects:

Title: Electronic Document Exchange (formerly titled, ''Child Support Document Exchange System'')

OMB No.: 0970–0435.

Description: The Federal Office of Child Support Enforcement's (OCSE) Federal Parent Locator Service offers the Electronic Document Exchange (EDE), formerly titled ''Child Support Document Exchange System'' (CSDES), application within the OCSE Child Support Portal. The EDE provides a centralized, secure system for authorized users in state child support

agencies to electronically exchange child support and spousal support case information with other state child support agencies. Using the EDE benefits state child support agencies by reducing delays, costs, and barriers associated with interstate case processing; increasing state collections; improving document security; standardizing data sharing; increasing state participation; and improving case processing and overall child and spousal support outcomes.

The activities associated with the EDE are authorized by (1) 42 U.S.C. 652(a)(7), which requires OCSE to provide technical assistance to the states to help them establish effective systems for collecting child support and spousal support; (2) 42 U.S.C. 666(c)(1), which requires state child support agencies to have expedited procedures to obtain and promptly share information with other state child support agencies; and (3) 45 CFR 303.7(a)(5), provides the mechanism for state child support agencies to fulfill the federal requirement to transmit requests for child support case information and provide requested information electronically to the greatest extent possible as required by the regulation.

Respondents: State Child Support Agencies.

ANNUAL BURDEN ESTIMATES

Information collection instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Online Data Entry Screens	38	1,777	.017 (60 seconds)	1,147.94

Estimated Total Annual Burden Hours: 1,147.94.

In compliance with the requirements of the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chap 35), the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 330 C Street SW, Washington, DC 20201. Attn: ACF Reports Clearance Officer. Email address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2019–01059 Filed 2–4–19; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Assessing Models of Coordinated Services for Low-Income Children and Their Families (AMCS) (New Collection)

AGENCY: Office of Planning, Research, and Evaluation; Administration for Children and Families; HHS.

ACTION: Request for Public Comment.

SUMMARY: The Office of Planning, Research, and Evaluation (OPRE), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is proposing to collect data for a new study, Assessing Models of Coordinated Services for Low-Income Children and Their Families (AMCS).

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research, and Evaluation, 330 C Street SW, Washington, DC 20201, Attn: OPRE Reports Clearance Officer. Email address: *OPREinfocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: Through AMCS, ACF seeks to learn more about how states and communities coordinate early care and education, family economic security, and/or other health and human services to most efficiently and effectively serve the needs of low-income children and their families. ACF aims to understand strategies used to support partnerships, including the federal barriers to agency collaboration. In support of achieving these goals, the study team will conduct site visits to six programs that offer coordinated services. The study team will gather information through interviews with program staff members, such as agency leaders or frontline staff, and focus groups with parents.

Data collection activities will include up to six program site visits. Programs will be identified through a scan of publicly available information about programs, recommendations from stakeholders, and proposed telephone interviews (the information collection request for these interviews will be submitted under the generic clearance: Formative Data Collections for ACF Research, OMB #0970–0356). Once potential programs are identified, agency leaders will be invited to participate in the site visit. Site visits will include semi-structured interviews with up to 30 total staff at each site. Staff invited will include lead program and partner staff to include agency leaders (including program directors, executive directors, or CEOs), directors of programs within the site, frontline staff (including service navigators or coordinators), and focus groups with 8–10 parents at each site. Semi-structured interviews with program and partner staff will obtain in-depth information about the goals and objectives of programs, the services provided, how

the coordinated services are implemented, how staffing is managed, data use, and any facilitators and barriers to coordination. Focus groups with parents participating in the program will provide the opportunity to learn about how parents perceive the program, how it meets their needs, what benefits they gain from the program, and how they enroll, participate, and progress through the program.

Respondents: Lead program and partner program staff members working in six programs across the United States that coordinate early care and education services with family economic security services and/or other health and human services, as well as parents receiving services from these programs. Staff respondents will be selected with the goal of having staff represent each level of the organization. Parents who have participated in the program for at least six months and who have received early childhood services and at least one other program service will be invited to participate in focus groups.

ANNUAL BURDEN ESTIMATES

Instrument	Total/annual number of respondents	Number of responses per respondent	Average burden hours per response	Annual burden hours
Master Interview Protocol	180	1	2	360
Parent Focus Group Protocol	60	1	1	60

Estimated Total Annual Burden Hours: 420.

Comments: The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Authority: 42 U.S.C. 9858(a)(5).

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2019–00942 Filed 2–4–19; 8:45 am]

BILLING CODE 4184–23–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Administration on Intellectual and Developmental Disabilities, President's Committee for People With Intellectual Disabilities

AGENCY: Administration for Community Living, HHS.

ACTION: Notice.

SUMMARY: The President's Committee for People with Intellectual Disabilities (PCPID) will host a face to face meeting for its members to discuss the potential topics of the Committee's 2019 Report to the President. All the PCPID meetings, in any format, are open to the public.

DATES: Thursday, March 21, 2019 from 9:00 a.m. to 4:30 p.m.; and Friday, March 22, 2019 from 9:00 a.m. to 4:30 p.m. (EST).

ADDRESSES: This meeting will be held in U.S. Department of Health and Human Services/Hubert H. Humphrey Building located at 200 Independence Avenue SW, Room 800, Washington, DC 20201. Individuals who would like to participate via conference call may do so by dialing toll-free #: 1–888–949–2790, when prompted enter pass code: 1989852. Individuals whose full participation in the meeting will require special accommodations (*e.g.,* sign language interpreting services, assistive listening devices, materials in alternative format such as large print or Braille) should notify Ms. Allison Cruz, Director, Office of Innovation, via email at *Allison.Cruz@acl.hhs.gov,* or via telephone at 202–795–7334, *no later than* Monday, February 28, 2019. The PCPID will attempt to accommodate requests made after this date, *but cannot guarantee the ability to grant requests received after the deadline.* All meeting sites are barrier free, consistent with the Americans with Disabilities Act (ADA) and the Federal Advisory Committee Act (FACA).

Agenda: The Committee will discuss the preparation of the PCPID 2019 Report to the President.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is to discuss the Committee's preparation of the 2019 Report to the President, including its content and format, and related data collection and analysis required to complete the writing of the Report.

Background Information on the Committee: The PCPID acts in an advisory capacity to the President and the Secretary of Health and Human Services on a broad range of topics relating to programs, services and support for individuals with intellectual disabilities. The PCPID executive order stipulates that the Committee shall: (1) Provide such advice concerning intellectual disabilities as the President or the Secretary of Health and Human Services may request; and (2) provide advice to the President concerning the following for people with intellectual disabilities: (A) Expanding employment opportunities; (B) connecting people to services; (C) supporting families and caregivers; (D) strengthening the networks; and (E) protecting rights and preventing abuse.

Dated: January 29, 2019.

Julie Hocker,

Commissioner, Administration on Disabilities (AoD).

[FR Doc. 2019–01122 Filed 2–4–19; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Single-Source Supplement; Advancing Person-Centered, Trauma-Informed Supportive Services for Holocaust Survivors Program

AGENCY: Administration for Community Living, HHS.

ACTION: Announcing the Intent To Award a Single-Source Supplement for the Advancing Person-Centered, Trauma-Informed Supportive Services for Holocaust Survivors Program

The Administration for Community Living (ACL) announces the intent to award a single-source supplement to the current cooperative agreement held by the Jewish Federations of North America for the project *Advancing Person-Centered, Trauma-Informed Supportive Services for Holocaust Survivors.* The purpose of this project is to, (1) advance the development and

expansion of person-centered, trauma-informed (PCTI) supportive services for Holocaust survivors living in the U.S. and, (2) improve the nation's overall capacity to deliver PCTI health and human services for this population and to any older adult with a history of trauma. The administrative supplement for FY 2019 will be in the amount of $2,467,000, bringing the total award for FY 2019 to $4,935,000.

The additional funding will not be used to begin new projects, but to serve more Holocaust survivors with vital supports such as legal assistance, case management, transportation, medication management, social engagement activities designed to reduce isolation, loneliness and depression, and to provide supports for family caregivers, all of which will employ PCTI approaches. The additional funds will also be used to further expand existing technical assistance activities, under the second objective, in a variety of ways, including replicating and translating proven models of PCTI services and supports developed under this grant. Additional funds will also further the development of new training materials, curricula and partnerships to aid in the replication of PCTI practices; enhance and expand the evaluation activities currently under way; and enhance existing website capacities for improved information dissemination.

Program Name: Advancing Person-Centered, Trauma-Informed (PCTI) Supportive Services for Holocaust Survivors.

Recipient: The Jewish Federations of North America.

Period of Performance: The supplement award will be issued for the fifth (and final) year of the five-year project period of September 30, 2015 through September 29, 2020.

Total Award Amount: $4,935,000 in FY 2018.

Award Type: Cooperative Agreement Supplement.

Statutory Authority: The Older Americans Act (OAA) of 1965, as amended, Public Law 109–365—Title 4, Section 411.

Basis for Award: The Jewish Federations of North America (JFNA) is currently funded to carry out the objectives of this project, entitled *Advancing PCTI Supportive Services for Holocaust Survivors* for the period of September 30, 2015 through September 29, 2020. Since project implementation began in late 2015, the grantee has accomplished a great deal. The supplement will enable the grantee to carry their work even further, serving more Holocaust survivors and providing even more comprehensive training and technical assistance in the development of PCTI supportive services. The additional funding will not be used to begin new projects or activities.

The JFNA is uniquely positioned to complete the work called for under this project. JFNA and its project partners, including the Network of Jewish Human Services Agencies (NJHSA), and the Conference on Material Claims Against Germany (Claims Conference), have the cultural competence and long history of serving and advocating for Holocaust survivors. Additionally, JFNA is already working in collaboration with numerous partners representing a broad cross section of the Jewish human services network (*e.g.,* Selfhelp Community Services, Bet Tzedek, The Blue Card, and the Orthodox Union of America) and the ''mainstream aging services network,'' (*e.g.,* Meals on Wheels of America (MoWA), the National Association of Area Agencies on Aging (n4a), the National Council on Aging (NCOA), Leading Age and other members of the Leadership Council of Aging Organizations [LCAO]).

Establishing an entirely new grant project at this time would be potentially disruptive to the current work already well under way. More importantly, the Holocaust survivors currently being served by this project could be negatively impacted by a service disruption, thus posing the risk of re-traumatization and further negative impacts on health and wellbeing. If this supplement is not provided, the project would be less able to address the significant unmet health and social support needs of additional Holocaust survivors. Similarly, the project would be unable to expand its current technical assistance and training efforts in PCTI concepts and approaches, let alone reach beyond traditional providers of services to this population to train more ''mainstream'' providers of aging services.

For More Information Contact: For further information or comments regarding this program supplement, contact Greg Link, U.S. Department of Health and Human Services, Administration for Community Living, Administration on Aging, Office of Supportive and Caregiver Services: telephone (202)-795–7386; email *greg.link@acl.hhs.gov.*

Dated: January 29, 2019.

Mary Lazare,

Principal Deputy Administrator.

[FR Doc. 2019–01121 Filed 2–4–19; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2019–N–0071]

Vaccines and Related Biological Products Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) announces a forthcoming public advisory committee meeting of the Vaccines and Related Biological Products Advisory Committee (VRBPAC). The general function of the committee is to provide advice and recommendations to the Agency on FDA's regulatory issues. At least one portion of the meeting will be closed to the public.

DATES: The meeting will be held on March 6, 2019, from 8 a.m. to 4:30 p.m. and March 7, 2019, from 8:30 a.m. to 4:45 p.m.

ADDRESSES: FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993–0002. Answers to commonly asked questions including information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm.*

For those unable to attend in person, the meeting will also be webcast and will be available at the following link: *https://collaboration.fda.gov/vrbpac032019/.*

FOR FURTHER INFORMATION CONTACT: Serina Hunter-Thomas, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 6338, Silver Spring, MD 20993–0002, 240–402–5771, *serina.hunter-thomas@fda.hhs.gov;* or Monique Hill, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 6307C, Silver Spring, MD 20993–0002, 301–796–4620, *monique.hill@fda.hhs.gov;* or the FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the

Agency's website at *https://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

SUPPLEMENTARY INFORMATION:

Agenda: On March 6, 2019, under Topic I, the Center for Biologics Evaluation and Research's (CBER) VRBPAC will meet in open session to discuss and make recommendations on the selection of strains to be included in the influenza virus vaccines for the 2019 to 2020 influenza season. Also on March 6, 2019, under Topic II, the committee will meet in open session to hear an overview of the research programs in the Laboratory of Immunoregulation (LIR) and the Laboratory of Retroviruses (LR), Division of Viral Products, Office of Vaccines Research and Review, CBER, FDA.

On March 7, 2019, under Topic III, the committee will meet in open session to discuss and make recommendations on the safety and effectiveness of Dengue Tetravalent Vaccine (Live, Attenuated) (DENGVAXIA) manufactured by Sanofi Pasteur.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its website prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's website after the meeting. Background material is available at *https://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link.

Procedure: On March 6, 2019, from 8 a.m. to 3:15 p.m., and on March 7, 2019, from 8:30 a.m. to 4:45 p.m., the meeting is open to the public. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before February 27, 2019. On March 6, 2019, oral presentations from the public will be scheduled between approximately 11:10 a.m. to 11:55 a.m. for the influenza strain selection portion of the meeting and 3 p.m. to 3:15 p.m. for the overview portion of the LIR/LR Site Visit. On March 7, 2019, oral presentations from the public will be scheduled between approximately 1:15 p.m. to 2:15 p.m. for the Dengue Tetravalent Vaccine (Live, Attenuated) (DENGVAXIA) manufactured by Sanofi Pasteur portion of the meeting. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before February 19, 2019. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by February 20, 2019.

Closed Committee Deliberations: On March 6, 2019, from 3:15 p.m. to 4:30 p.m., the meeting will be closed to permit discussion where disclosure would constitute a clearly unwarranted invasion of personal privacy (5 U.S.C. 552b(c)(6)). The recommendations of the advisory committee regarding the progress of the investigator's research will, along with other information, be used in making personnel and staffing decisions regarding individual scientists.

We believe that public discussion of these recommendations on individual scientists would constitute an unwarranted invasion of personal privacy.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact Serina Hunter-Thomas (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our website at: *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: January 15, 2019.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2019–00769 Filed 2–4–19; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2017–N–6644]

Fiscal Year 2019 Generic Drug Regulatory Science Initiatives; Public Workshop; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop; request for comments.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we) is announcing the following public workshop entitled ''FY 2019 Generic Drug Regulatory Science Initiatives.'' The purpose of the public workshop is to provide an overview of the status of regulatory science initiatives for generic drugs and an opportunity for public input on these initiatives. FDA is seeking this input from a variety of stakeholders—industry, academia, patient advocates, professional societies, and other interested parties—as it fulfills its commitment under the Generic Drug User Fee Amendments of 2017 (GDUFA II) to develop an annual list of regulatory science initiatives specific to generic drugs. FDA will take the information it obtains from the public workshop into account in developing its fiscal year (FY) 2020 regulatory science initiatives.

DATES: The public workshop will be held on May 1, 2019, from 8:30 a.m. to 4:30 p.m. Submit either electronic or written comments on this public workshop by June 1, 2019. See the **SUPPLEMENTARY INFORMATION** section for registration date and information.

ADDRESSES: The public workshop will be held at the FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (Rm. 1503, sections B and C), Silver Spring, MD 20993–0002. Entrance for the public workshop participants (non-FDA employees) is through Building 1, where routine security check procedures will be performed. For parking and security information, please refer to *https://www.fda.gov/AboutFDA/WorkingatFDA/BuildingsandFacilities/WhiteOakCampusInformation/ucm241740.htm.*

You may submit comments as follows. Please note that late, untimely

filed comments will not be considered. Electronic comments must be submitted on or before June 1, 2019. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of June 1, 2019. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2017–N–6644 for ''FY 2019 Generic Drug Regulatory Science Initiatives; Public Workshop; Request for Comments.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

• 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.

FOR FURTHER INFORMATION CONTACT: Stephanie Choi, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 3742, Silver Spring, MD 20993, 240–402–7960, *Stephanie.Choi@fda.hhs.gov;* or Robert Lionberger, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 4722, Silver Spring, MD 20993, 240–402–7957, *Robert.Lionberger@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In July 2012, Congress passed the Generic Drug User Fee Amendments of 2012 (GDUFA I) (Pub. L. 112–144). GDUFA I was designed to enhance public access to safe, high-quality generic drugs and to modernize the generic drug program. To support this goal, FDA agreed in the GDUFA I commitment letter to work with industry and interested stakeholders on identifying regulatory science initiatives specific to generic drugs for each fiscal year covered by GDUFA I.

In August 2017, GDUFA I was reauthorized until September 2022 through GDUFA II (Pub. L. 115–52). In the GDUFA II commitment letter,[1] FDA agreed to conduct annual public workshops ''to solicit input from industry and stakeholders for inclusion in an annual list of GDUFA II [r]egulatory [s]cience initiatives.'' The public workshop scheduled for May 1, 2019, seeks to fulfill this agreement.

II. Topics for Discussion at the Public Workshop

The purpose of the public workshop is to obtain input from industry and other interested stakeholders on the identification of generic drug regulatory science initiatives for FY 2020.

FDA is particularly interested in receiving input on the following three topics:

1. FY 2019 regulatory science initiatives,[2] including specific products or actions that FDA should consider as it implements those initiatives, including, for example:

a. The value to the generic drug product industry in expanding the Biopharmaceutics Classification System Class III waivers to include non-Q1/Q2 formulations,

b. Scientific gaps that impact the prediction of the results of fed bioequivalence studies (when the drug product is administered shortly after a meal, as opposed to administration under fasting conditions), and

c. Challenges for industry in implementing new analytical or computational methods that arise from regulatory science initiatives.

2. Recently approved new drug applications that may pose scientific challenges to the future development of generic drug products referencing those applications.

[1] The GDUFA II commitment letter is available at *https://www.fda.gov/downloads/ForIndustry/UserFees/GenericDrugUserFees/UCM525234.pdf.*

[2] The FY 2019 regulatory science initiatives are available at *https://www.fda.gov/downloads/Drugs/ResourcesForYou/Consumers/BuyingUsingMedicineSafely/GenericDrugs/UCM626329.pdf.*

3. Regulatory science initiatives that FDA should begin to consider in FY 2019, including, for example:

a. Scientific challenges in the evaluation of sensitization for transdermal systems and

b. The development of alternative approaches to in vivo bioequivalence studies to evaluate product equivalence.

FDA will consider all comments made at this workshop or received through the docket (see **ADDRESSES**) as it develops its FY 2020 regulatory science initiatives. Information concerning the regulatory science initiatives for generic drugs can be found at *https://www.fda.gov/gdufaregscience.*

III. Participating in the Public Workshop

Registration: To register for the public workshop, please email complete contact information for each attendee—including the attendee's name, title, affiliation, address, email, and telephone number—to *GDUFARegulatoryScience@fda.hhs.gov.* Please also indicate in the email whether attendance will be by webcast or in person.

Registration is free and based on space availability, with priority given to early registrants. Persons interested in attending this public workshop must register online by April 1, 2019, 11:59 p.m. Eastern Time. Early registration is recommended because seating is limited; therefore, FDA may limit the number of participants from each organization. Registrants will receive confirmation when they have been accepted.

If you need special accommodations due to a disability, please contact Stephanie Choi (see **FOR FURTHER INFORMATION CONTACT**) no later than April 1, 2019.

Requests for Oral Presentations: During online registration you may indicate if you wish to present during a public comment session or participate in a specific session, and which topic(s) you wish to address. We will do our best to accommodate requests to make public comments (and requests to participate in the focused sessions). Individuals and organizations with common interests are urged to consolidate or coordinate their presentations, and request time for a joint presentation, or submit requests for designated representatives to participate in the focused sessions. Following the close of registration, we will determine the amount of time allotted to each presenter and the approximate time each oral presentation is to begin, and will select and notify participants by April 8, 2019. All requests to make oral presentations must be received by the close of registration on April 1, 2019, 11:59 p.m. Eastern Time. If selected for presentation, any presentation materials must be emailed to *GDUFARegulatoryScience@fda.hhs.gov* no later than April 22, 2019, 11:59 p.m. Eastern Time. No commercial or promotional material will be permitted to be presented or distributed at the public workshop.

Streaming Webcast of the Public Workshop: This public workshop will also be webcast. Please register online by April 1, 2019, 11:59 p.m. Eastern Time to attend the workshop remotely. Please note that remote attendees will not be able to speak or make presentations during the public comment period or during any other session of the workshop. To join the workshop via the webcast, please go to *https://collaboration.fda.gov/gdufa2019/.*

If you have never attended a Connect Pro event before, test your connection at *https://collaboration.fda.gov/common/help/en/support/meeting_test.htm.* To get a quick overview of the Connect Pro program, visit *https://www.adobe.com/go/connectpro_overview.* FDA has verified the website addresses in this document, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

Transcripts: Please be advised that as soon as a transcript of the public workshop is available, it will be accessible at *https://www.regulations.gov* or at *https://www.fda.gov/gdufaregscience.* It may be viewed at the Dockets Management Staff (see **ADDRESSES**). A link to the transcript will also be available on the internet at *https://www.fda.gov/gdufaregscience.*

Dated: January 16, 2019.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2019–01067 Filed 2–4–19; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2019–N–0113]

Facta Farmaceutici S.p.A., et al.; Withdrawal of Approval of 23 Abbreviated New Drug Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is withdrawing approval of 23 abbreviated new drug applications (ANDAs) from multiple applicants. The applicants notified the Agency in writing that the drug products were no longer marketed and requested that the approval of the applications be withdrawn.

DATES: Approval is withdrawn as of March 7, 2019.

FOR FURTHER INFORMATION CONTACT: Trang Tran, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 1671, Silver Spring, MD 20993–0002, 240–402–7945, *Trang.Tran@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: The applicants listed in the table have informed FDA that these drug products are no longer marketed and have requested that FDA withdraw approval of the applications under the process described in § 314.150(c) (21 CFR 314.150(c)). The applicants have also, by their requests, waived their opportunity for a hearing. Withdrawal of approval of an application or abbreviated application under § 314.150(c) is without prejudice to refiling.

Application No.	Drug	Applicant
ANDA 062117	Cephalexin for Oral Suspension USP, Equivalent to (EQ) 100 milligrams (mg) base/milliliter (mL), EQ 125 mg base/5 mL, and EQ 250 mg base/5 mL.	Facta Farmaceutici S.p.A., c/o Interchem Corp., 120 Route, 17 North, Paramus, NJ 07652.
ANDA 062508	Erymax (erythromycin) Topical Solution USP, 2%	Merz North America, 6501 Six Forks Rd., Raleigh, NC 27615.
ANDA 075369	Enalapril Maleate Tablets USP, 10 mg and 20 mg	Krka, tovarna zdravil, d.d., Novo mesto, Slovenia, c/o KRKA USA, LLC, 4216 Cravens Point Rd., Wilmington, NC 28409.
ANDA 075370	Enalapril Maleate Tablets USP, 2.5 mg and 5 mg	Do.

Application No.	Drug	Applicant
ANDA 077895	Ursodiol Capsules USP, 300 mg	Impax Laboratories, LLC, 30831 Huntwood Ave., Hayward, CA 94544.
ANDA 078810	Oxaliplatin for Injection, 50 mg/vial and 100 mg/vial	Fresenius Kabi Oncology Plc., c/o Fresenius Kabi USA, LLC, Three Corporate Dr., Lake Zurich, IL 60047.
ANDA 080420	Lidocaine Hydrochloride (HCl) Injection USP, 1%, 1.5%, and 2%.	Lyphomed, Inc., 2045 North Cornell Ave., Melrose Park, IL 60160.
ANDA 080421	Procaine HCl Injection USP, 1% and 2%	Do.
ANDA 083083	Lidocaine HCl Injection USP, 1% and 2%	Wyeth-Ayerst Laboratories, P.O. Box 8299, Philadelphia, PA 19101.
ANDA 083744	Lidocaine HCl Injection USP, 0.5%, 1%, 1.5%, and 2%	Tera Pharmaceuticals, Inc., 6920 Stanton Ave., Buena Park, CA 90621.
ANDA 083907	Lidocaine HCl With Epinephrine Injection USP	Do.
ANDA 084571	Lidocaine HCl Injection, 10 mg/20 mL and 10 mg/50 mL	Knoll Pharmaceuticals, 30 North Jefferson Rd., Whippany, NJ 07981.
ANDA 084572	Lidocaine HCl Injection, 20 mg/20 mL and 20 mg/50 mL	Do.
ANDA 084720	Lidocaine HCl and Epinephrine Injection USP, 2%; 0.01 mg/mL.	Naska Pharmacal Co., Inc., Riverview Rd., P.O. Box 898, Lincolnton, NC 28093.
ANDA 084732	Lidocaine HCl and Epinephrine Injection USP, 2%; 0.02 mg/mL.	Do.
ANDA 084947	Alphacaine (lidocaine) Ointment, 5%	Carlisle Laboratories, Inc., 404 Doughty Blvd., Inwood, NY 11696.
ANDA 085037	Lidocaine HCl Injection USP, 1% and 2%	Akorn, Inc., P.O. Box 1220, Decatur, IL 62525.
ANDA 085677	Cortisone Acetate Injectable Suspension USP, 25 mg/mL and 50 mg/mL.	Steris Laboratories, Inc., 620 North 51st Ave., Phoenix, AZ 85043.
ANDA 088051	Thalitone (chlorthalidone) Tablets USP, 25 mg	Casper Pharma LLC, 2 Tower Center Blvd., Suite 1101C, East Brunswick, NJ 08816.
ANDA 089688	Lidocaine HCl Topical Solution USP, 4%	Paco Research, Corp., 1705 Oak St., Lakewood, NJ 08701.
ANDA 091212	Lansoprazole Delayed-Release Capsules USP, 15 mg and 30 mg.	Krka, tovarna zdravil, d.d., Novo mesto, c/o KRKA USA, LLC.
ANDA 091377	Vancomycin HCl for Injection USP, EQ 500 mg base/vial and EQ 1gram (g) base/vial.	Xellia Pharmaceuticals ApS, c/o Xellia Pharmaceuticals USA, LLC, 8841 Wadford Dr., Raleigh, NC 27616.
ANDA 206243	Vancomycin HCl for Injection USP, EQ 5 g base/vial and EQ 10 g base/vial (Pharmacy Bulk Package).	Do.

Therefore, approval of the applications listed in the table, and all amendments and supplements thereto, is hereby withdrawn as of March 7, 2019. Introduction or delivery for introduction into interstate commerce of products without approved new drug applications violates section 301(a) and (d) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 331(a) and (d)). Drug products that are listed in the table that are in inventory on March 7, 2019, may continue to be dispensed until the inventories have been depleted or the drug products have reached their expiration dates or otherwise become violative, whichever occurs first.

Dated: January 16, 2019.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2019–01129 Filed 2–4–19; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–1987–D–0240 (formerly 87D–0315)]

Neomycin Sulfate for Prescription Compounding; Withdrawal of Approval of One Abbreviated New Drug Application

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is withdrawing approval of abbreviated new drug application (ANDA) 061579 for nonsterile neomycin sulfate powder for prescription compounding. The basis for the withdrawal is that the product is no longer considered safe as labeled due to clinical evidence that systemic exposure to neomycin sulfate can induce significant toxicity, including ototoxicity (manifested as sensorineural hearing loss), nephrotoxicity, and neuromuscular blockade. The holder of this ANDA has waived its opportunity for a hearing.

DATES: Approval is withdrawn as of February 5, 2019.

FOR FURTHER INFORMATION CONTACT: Kate Greenwood, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6286, Silver Spring, MD 20993–0002, 240–402–1748.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of April 15, 1988, FDA published four documents arising out of the Agency's finding that systemic absorption of neomycin sulfate can induce significant toxicity, including ototoxicity (manifested as sensorineural hearing loss), nephrotoxicity, and neuromuscular blockade (see generally 53 FR 12644; 53 FR 12658; 53 FR 12662; and 53 FR 12664 (April 15, 1988)). Two of the four documents were issued under docket numbers FDA–1979–N–0220 and FDA–1987–D–0240 and related to nonsterile neomycin sulfate for prescription compounding.[1]

Under docket number FDA–1979–N–0220, FDA published a final rule amending the antibiotic drug

[1] These documents were originally assigned docket numbers 79N–0155, and 87D–0315. The numbers were changed to FDA–1979–N–0220 and FDA–1987–D–0240, respectively, as a result of FDA's transition to its new docketing system (Regulations.gov) in January 2008. The other two documents were issued under docket number FDA–1979–N–0256 (formerly 79N–0151) and related to neomycin sulfate in sterile vials for parenteral use.

regulations governing the certification of nonsterile neomycin sulfate powder for prescription compounding (53 FR 12644). Based on its evaluation of the written and oral comments received on the proposed rule (44 FR 44180 (July 27, 1979)), and based on other information, FDA concluded that there was a favorable risk:benefit profile for orally administered neomycin sulfate preparations as adjunctive therapy for preoperative suppression of intestinal bacteria and for the treatment of hepatic coma. However, consistent with the findings published in the proposed rule, FDA concluded in the final rule that the risks of adverse reactions from the use of the product for wound irrigation resulted in systemic absorption and a resultant risk of adverse reactions that significantly outweighed any demonstrated benefits. Accordingly, the final rule amended the antibiotic drug regulations by changing the product name from ''neomycin sulfate for prescription compounding'' to ''neomycin sulfate for compounding oral products'' and by requiring package insert labeling to provide information concerning the appropriate uses of the product and to warn about the risks associated with inappropriate use.

Under docket number FDA–1987–D–0240, FDA proposed to issue an order under section 505(e) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(e)) withdrawing approval of six antibiotic drug applications and abbreviated antibiotic drug applications (AADAs) [2] for nonsterile neomycin sulfate for prescription compounding products unless the application holders submitted supplemental applications providing for a product name and labeling consistent with the revised name and labeling requirements described in the newly amended antibiotic certification regulations (53 FR 12662).[3] In the document, FDA announced the availability of guideline labeling for nonsterile neomycin sulfate for prescription compounding products that manufacturers could adopt to ensure that their labeling would be consistent with the labeling required by the revised antibiotic certification regulations. The proposed order was based on clinical or other experience, tests, or other scientific data that showed nonsterile neomycin sulfate was unsafe for use except when named ''Neomycin Sulfate for Compounding Oral Products'' and used in accordance with package insert labeling that provides information concerning appropriate uses and that warns about risks associated with inappropriate use. Under section 505 and the regulations promulgated at 21 CFR parts 310 and 314, the holders of the applications were given the opportunity for a hearing to show why approval should not be withdrawn. One application holder, Pharma-Tek, Inc. (Pharma-Tek), requested a hearing to challenge FDA's proposal to withdraw approval of its application, AADA 61–579. On December 6, 1988, FDA announced the withdrawal of approval of five of the six applications for nonsterile neomycin sulfate for prescription compounding for which the holders had not requested a hearing (53 FR 49231). The AADA for neomycin sulfate for prescription compounding, AADA 61–579, held by Pharma-Tek, was not withdrawn at that time because of the sponsor's pending hearing request. Today, this application corresponds to ANDA 061579 held by X-Gen Pharmaceuticals, Inc. (X-Gen).

X-Gen informed FDA by letter dated October 9, 2015, that it was withdrawing the hearing request previously filed on behalf of its predecessor Pharma-Tek concerning ANDA 061579. X-Gen also informed FDA that it waived the opportunity for a hearing and, under 21 CFR 314.150(d), X-Gen permitted the Agency to withdraw approval of ANDA 061579 for neomycin sulfate for prescription compounding.

For the reasons discussed in the document published in the **Federal Register** on April 15, 1988, under docket number FDA–1987–D–0240, the Director of FDA's Center for Drug Evaluation and Research finds that ANDA 061579 was withdrawn from sale for safety and effectiveness reasons (21 CFR 314.161(c)). The Director, under section 505(e) of the FD&C Act and under authority delegated to her by the Commissioner, also finds that new evidence of clinical experience, not contained in ANDA 061579 and not available at the time the application was approved, evaluated together with the evidence available to the Secretary when the application was approved, shows that nonsterile neomycin sulfate for prescription compounding is not shown to be safe for use under the conditions of use upon the basis of which the application was approved (21 U.S.C. 355(e)). Therefore, approval of ANDA 061579 is hereby withdrawn.

Under 21 CFR 314.161(e) and 314.162(a)(2), FDA will remove ANDA 061579 from the list of drug products with effective approvals published in FDA's ''Approved Drug Products With Therapeutic Equivalence Evaluations.''

Dated: January 23, 2019.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2019–01131 Filed 2–4–19; 8:45 am]

BILLING CODE 4164–01–P

[2] The terms ''antibiotic drug applications'' and ''abbreviated antibiotic drug applications'' are no longer used. AADAs approved under section 507 of the FD&C Act on or before November 20, 1997, are deemed to have been approved under section 505(j) of the FD&C Act.

[3] This proposed regulatory action was necessary because the antibiotic drug certification regulations did not apply to products with applications in which FDA had approved alternative labeling.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2017–D–6702]

The Least Burdensome Provisions: Concept and Principles; 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 a final guidance entitled ''The Least Burdensome Provisions: Concept and Principles.'' FDA utilizes a least burdensome approach to medical device regulation to eliminate unnecessary burdens that may delay the marketing of beneficial new products, while maintaining the statutory requirements for clearance and approval. This document describes the guiding principles and recommended approach for FDA staff and industry to facilitate consistent application of least burdensome principles to the activities pertaining to products meeting the statutory definition of a device regulated under the Federal Food, Drug, and Cosmetic Act (FD&C Act).

DATES: The announcement of the guidance is published in the **Federal Register** on February 5, 2019.

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–6702 for ''The Least Burdensome Provisions: Concept and Principles; 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 ''The Least Burdensome Provisions: Concept and Principles'' 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: Joshua Silverstein, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1615, Silver Spring, MD 20993–0002, 301–796–5155; or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

The FD&C Act, as amended by the Food and Drug Administration Modernization Act of 1997, the FDA Safety and Innovation Act (FDASIA), and the 21st Century Cures Act (Cures Act), includes least burdensome provisions that direct FDA to take a least burdensome approach to medical device evaluation in a manner that eliminates unnecessary burdens that may delay the marketing of beneficial new products, while maintaining the statutory requirements for clearance and approval. The updates to the least burdensome provisions in FDASIA and the Cures Act clarified the original least burdensome provisions and further recognized the role of postmarket activities as they relate to premarket decisions. FDA believes, as a matter of policy, that least burdensome principles should be consistently and widely applied to all activities in the premarket and postmarket settings to remove or reduce unnecessary burdens so that patients can have earlier and continued access to high quality, safe, and effective devices. This guidance, therefore, reflects FDA's belief that least burdensome principles should be applied throughout the medical device total product lifecycle.

For the purposes of this guidance, FDA defines ''least burdensome'' as the minimum amount of information necessary to adequately address a relevant regulatory question or issue through the most efficient manner at the right time. This guidance describes the least burdensome guiding principles and recommended approach for FDA staff and industry to ensure consistent application of least burdensome principles to the activities pertaining to products meeting the statutory definition of a device regulated under the FD&C Act.

FDA considered comments received on the draft guidance that appeared in the **Federal Register** of December 15, 2017 (82 FR 59623). FDA revised the guidance as appropriate in response to the comments. Among the comments that FDA received were those regarding metrics assessing the application of least burdensome principles and internal training on least burdensome principles. FDA issued a Report to Congress entitled ''Least Burdensome Training Audit'' pursuant to section 513(j) of the FD&C Act (21 U.S.C. 360c(j)), as added by the Cures Act.[1] This report summarizes the mandatory training on least burdensome requirements for device review staff and supervisors and outcome of an audit of such training.

This guidance document replaces the 2002 Least Burdensome Guidance

[1] FDA Report to Congress, ''Least Burdensome Training Audit,'' June 8, 2018, available at *https://www.fda.gov/downloads/AboutFDA/CentersOffices/OfficeofMedicalProductsandTobacco/CDRH/CDRHReports/UCM610577.pdf.*

entitled ''The Least Burdensome Provisions of the FDA Modernization Act of 1997: Concept and Principles'' (October 4, 2002).

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 Least Burdensome Provisions: Concept and Principles.'' 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* or *https://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/default.htm.* Persons unable to download an electronic copy of ''The Least Burdensome Provisions: Concept and Principles; 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 1332 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, guidance, form, and statutory provision have been approved by OMB as listed in the following table:

21 CFR part or section; guidance; FDA form; or statute	Topic	OMB control No.
820	Quality System Regulation	0910–0073
812	Investigational Device Exemption	0910–0078
807, subpart E	Premarket Notification	0910–0120
860.123	Reclassification Petition	0910–0138
814, subparts A through E	Premarket Approval	0910–0231
814, subpart H	Humanitarian Device Exemption	0910–0332
806	Medical Devices; Reports of Corrections and Removals	0910–0359
803	Medical Device Reporting	0910–0437
822	Postmarket Surveillance	0910–0449
Form FDA 3670	Adverse Event Reports/MedSun Program	0910–0471
801 and 809	Labeling	0910–0485
''Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices''.	CLIA Waiver	0910–0598
807, subparts A through D	Registration and Listing	0910–0625
807, 812, and 814	Human Subject Protection; Acceptance of Data from Clinical Studies for Medical Devices.	0910–0741
''Requests for Feedback on Medical Device Submissions: The Pre-Submission Program and Meetings with Food and Drug Administration Staff''.	Q-Submissions	0910–0756
42 U.S.C. 241	Electronic Submission of Allegations of Regulatory Misconduct Associated with Medical Devices.	0910–0769
830	Unique Device Identification System	0910–0720
''De Novo Classification Process (Evaluation of Automatic Class III Designation)''.	De Novo Classification Process	0910–0844

Dated: January 16, 2019.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2019–01022 Filed 2–4–19; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission to OMB for Review and Approval; Public Comment Request; Information Collection Request Title: Telehealth Resource Center Performance Measurement Tool, OMB No. 0915–0361—Revision

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, HRSA has submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period.

DATES: Comments on this ICR should be received no later than March 7, 2019.

ADDRESSES: Submit your comments, including the Information Collection Request Title, to the desk officer for HRSA, either by email to *OIRA_submission@omb.eop.gov* or by fax to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: To request a copy of the clearance requests

submitted to OMB for review, email Lisa Wright-Solomon, the HRSA Information Collection Clearance Officer, at *paperwork@hrsa.gov* or call (301) 443–1984.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the information request collection title for reference.

Information Collection Request Title: Telehealth Resource Center Performance Measurement Tool, OMB No. 0915–0361, Revision

Abstract: To ensure the best use of public funds and to meet the Government Performance Review Act requirements, the Office for the Advancement of Telehealth (OAT) in collaboration with the Telehealth Resource Centers (TRCs) created a set of performance measures that grantees can use to evaluate the technical assistance services provided by the TRCs. Grantee goals are to provide customized telehealth technical assistance across the country. The TRCs provide technical assistance to health care organizations, health care networks, and health care providers in the implementation of cost-effective telehealth programs to serve rural and medically underserved areas and populations.

Need and Proposed Use of the Information: In order to evaluate existing programs, data are submitted to OAT through HRSA's Performance Improvement Management System (PIMS). The data are used to measure the effectiveness of the technical assistance. There are two data reporting periods each year; during these biannual reporting periods data are reported for the previous six months of activity. Programs have approximately six weeks to enter their data into the PIMS system during each biannual reporting period.

The instrument was developed with the following four goals in mind:

1. Improving access to needed services;
2. Reducing rural practitioner isolation;
3. Improving health system productivity and efficiency; and
4. Improving patient outcomes.

The TRCs currently report on existing performance data elements using PIMS. The performance measures are designed to assess how the TRC program is meeting its goals to:

1. Expand the availability of telehealth services in underserved communities;
2. Improve the quality, efficiency, and effectiveness of telehealth services;
3. Promote knowledge exchange and dissemination about efficient and effective telehealth practices and technology; and
4. Establish sustainable technical assistance (TA) centers providing quality, unbiased TA for the development and expansion of effective and efficient telehealth services in underserved communities.

Additionally, the PIMS tool allows OAT to:

1. Determine the value added from the TRC Cooperative Agreement;
2. Justify budget requests;
3. Collect uniform, consistent data which enables OAT to monitor programs;
4. Provide guidance to grantees on important indicators to track over time for their own internal program management;
5. Measure performance relative to the mission of OAT/HRSA as well as individual goals and objectives of the program;
6. Identify topics of interest for future special studies; and
7. Identify changes in healthcare needs within rural communities, allowing programs to shift focus in order to meet those needs.

This renewal request proposes changes to existing measures. After compiling data from the previous tool over the last three years, OAT conducted an analysis of the data and compared the findings with the program needs. Based on the findings, the measures are being revised to better capture information necessary to measure the effectiveness of the program. The measure changes include: additional demographic details from organizations requesting technical assistance, streamlined methods of inquiry; additional topics of technical assistance inquiries aligning with the current telehealth landscape; streamlined types of services provided by the grantees; deletion of client satisfaction survey results; and deletion of telehealth sites developed as a result of grantee technical assistance. A 60-day **Federal Register** Notice was published in the **Federal Register** on April 9, 2018, vol. 83, No. 68; pp. 15164–65. There were no public comments.

Likely Respondents: The likely respondents will be telehealth associations, telehealth providers, rural health providers, clinicians that deliver services via telehealth, technical assistance providers, research organizations, and academic medical centers.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Telehealth Resource Center Performance Data Collection	14	42	588	0.07	41
Total	14		588		41

Amy P. McNulty,

Acting Director, Division of the Executive Secretariat.

[FR Doc. 2019–01107 Filed 2–4–19; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request; Information Collection Request Title: Medicare Rural Hospital Flexibility Program Performance, OMB No. 0915–0363—Extension

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on this ICR should be received no later than April 8, 2019.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or mail to Lisa Wright-Solomon, the HRSA Information Collection Clearance Officer, Room 14N136B, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call Lisa Wright-Solomon, the HRSA Information Collection Clearance Officer at (301) 443–1984.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the information request collection title for reference.

Information Collection Request Title: Medicare Rural Hospital Flexibility Program Performance Measures, OMB No. 0915–0363—Extension

Abstract: This information collection comment request is for continued approval of the Medicare Rural Hospital Flexibility Program Performance Measures. HRSA is proposing to continue this data collection with no changes. The current performance measures are collected electronically in the Performance Improvement and Measurement System, which awardees access securely through the HRSA Electronic Handbooks.

The Medicare Rural Hospital Flexibility Program (Flex Program) is authorized by Section 1820 of the Social Security Act (42 U.S.C. 1395i–4), as amended. The purpose of the Flex Program is to enable state designated entities to support critical access hospitals in quality improvement, quality reporting, performance improvement, and benchmarking; to assist facilities seeking designation as critical access hospitals; and to create a program to establish or expand the provision of rural emergency medical services.

Need and Proposed Use of the Information: For this program, performance measures were developed to provide data useful to the Flex program and to enable HRSA to provide aggregate program data required by Congress under the Government Performance and Results Modernization Act of 2010 (GPRA). These measures cover principal topic areas of interest to the Federal Office of Rural Health Policy, including: (a) Quality reporting, (b) quality improvement interventions, (c) financial and operational improvement initiatives, (d) population health management, and (e) innovative care models. In addition to informing the Office's progress toward meeting the goals set in GPRA, the information is important in identifying and understanding programmatic improvement across program areas, as well as guiding future iterations of the Flex Program and prioritizing areas of need and support.

Likely Respondents: Respondents are the Flex Program coordinators for the states participating in the Flex Program. There are currently 45 states participating in the Flex Program.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total Burden Hours
Medicare Rural Hospital Flexibility Program	45	1	45	70	3,150
Total	45		45		3,150

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Amy P. McNulty,

Acting Director, Division of the Executive Secretariat.

[FR Doc. 2019–01106 Filed 2–4–19; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Center for Faith and Opportunity Initiatives (The Partnership Center); Statement of Organization, Functions, and Delegations of Authority

37814 Part A, Office of the Secretary, Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services (HHS), as last amended at 75 FR 20364–5, dated April 19, 2010, and Chapter AA, Immediate Office of the Secretary, as last amended at 75 FR 20364–5, dated April 19, 2010, is being amended to update Chapter AW, ''Center for Faith and Opportunity Initiatives (The Partnership Center),'' in the Office of the Secretary. The changes are as follows:

A. Under Part A, Chapter AA, Section AA.10 Organization, insert the following: ''Center for Faith and Opportunity Initiatives (The Partnership Center) (AW).''

B. Under Part A, update Chapter AW, ''Center for Faith and Opportunity Initiatives (The Partnership Center)'' to read as follows:

Chapter AW, Center for Faith and Opportunity Initiatives (The Partnership Center).

AW.00 Mission

AW.10 Organization

AW.20 Functions

AW.00 Mission. The Center for Faith and Opportunity Initiatives (The Partnership Center) coordinates the Department of Health and Human Services' (HHS') efforts to support partnerships between HHS and faith and community-based nonprofit organizations in the health care and human services sectors in order to better serve people and communities.

AW.10 Organization. The Partnership Center is headed by a Director, appointed by the Secretary in consultation with the White House Faith and Opportunity Initiative, who reports to the Secretary and serves as the Secretary's principal advisor on HHS' activities relating to faith-based and community partnerships.

AW.20 Functions. The Partnership Center engages and communicates with national, regional, and local faith and community-based organizations and service providers, ensuring that local institutions that hold community trust and deliver essential services have up-to-date information regarding health and human service activities and resources in their area. The Partnership Center also works to enable community and faith-based organizations to collaborate with the government, through both non-fiduciary and fiduciary partnerships, to achieve the strategic priorities of HHS and the President.

Scott W. Rowell,

Assistant Secretary for Administration.

[FR Doc. 2019–01038 Filed 2–4–19; 8:45 am]

BILLING CODE 4150–24–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Statement of Organization, Functions, and Delegations of Authority

Part A, Office of the Secretary, Statement of Organization, Function, and Delegation of Authority for the U.S. Department of Health and Human Services is being amended at Chapter AC, Office of the Assistant Secretary for Health (OASH), as amended at 72 FR 58095–96, dated October 1 2, 2007; 69 FR 660–661, dated January 6, 2004; 68 FR 70507–10, dated December 18, 2003; 67 FR 71568, dated December 2, 2002; 75 FR 53304–05, dated August 31, 2010; and most recently at 77 FR 30005–07 dated May 21, 2012 and 77 FR 60996, dated October 5, 2012. This amendment reflects the realignment of personnel oversight, administration and management functions for the Office of the Surgeon General and the U.S. Public Health Service (PHS) Commissioned Corps in the OASH. Specifically, this notice establishes the Office of Commissioned Corps Headquarters (CCHQ) within the Office of the Surgeon General (OSG) and deletes the Division of Systems Integration and the Division of Science and Communications.

The changes are as follows:

I. Under Part A, Chapter AC, under the Office of the Assistant Secretary for Health, make the following changes:

A. Under Section ACM.00 Mission, delete ''(7) Maintaining and overseeing activities of the Volunteer Medical Reserve Corps program (42 U.S.C. 300hh).''

B. Under Section ACM.10, Organization, delete the following components ''Division of Science and Communications, Division of Commissioned Corps Personnel and Readiness, and Division of Systems Integration''.

C. Under Section ACM.10, Organization, add ''Commissioned Corps Headquarters''.

D. Under Section ACM.20 Functions replace the entire section with:

Section ACM .20 Functions: (a) Office of the Surgeon General (ACM): (1) Advises the Assistant Secretary for Health (ASH) on matters relating to protecting and advancing the public health of the Nation; (2) Manages special deployments that address Presidential and Secretarial initiatives directed toward resolving critical public health problems; (3) Serves, as requested, as the spokesperson on behalf of the Secretary and the ASH, addressing the quality of public health practice on the Nation; (4) Provides administrative and management support to Public Health Reports; (5) Provides supervision of activities relating to the day-to-day management of operations, training, force readiness, and deployment of officers of the PHS Commissioned Corps; (6) Provides advice to the ASH on the policies and implementation related to the appointment, promotion, recognition, professional development, retirement, and other matters required for the efficient management of the Commissioned Corps; (7) Provides liaison with governmental and non-governmental organizations on matters pertaining to military and veterans affairs; (8) Supports the Surgeon General's mandate to bring focused attention and up-to-date scientific and evidence-based data and information concerning matters of health and science to federal and non-federal stakeholders in the general public; (9) Directs and oversees internal office management (including programmatic assessments and evaluations) and administrative operations (including proposing office budgets); and (10) Convenes periodic meetings of the Assistant Surgeon Generals (flag officers) to obtain senior level advice concerning the management of Corps' operations.

(b) Commissioned Corps Headquarters (ACM 2), under the leadership of the Office Director, who reports to the Office of the Surgeon General, provides

staff support for executing the mission of the U.S. Public Health Service Commissioned Corps: protect, promote, and advance the health and safety of our Nation. As America's uniformed service of public health professionals, the Commissioned Corps achieves its mission through: (1) Rapid and effective response to public health needs, (2) Leadership and excellence in public health practices, and (3) Advancement of public health science. The Office of Commissioned Corps Headquarters: (1) Provides overall management of Commissioned Corps personnel including active duty Regular Corps, Ready Reservists and of those issues and PHS processes pertinent to retired Corps officers; (2) Develops, issues, implements and maintains all personnel policy issuances and directives related to Corps operations, personnel, training, readiness, assignment, deployment, promotion, and retirement (including publication of such policy in the electronic Commissioned Corps Issuance System (eCCIS)); (3) Manages the process for disciplinary actions and decisions involving Corps officers; (4) Ensures the appropriate exercise of delegated Commissioned Corps authorities and responsibilities; (5) Establishes precepts for appointment, promotion, assimilation, retirement, fitness for duty, awards and commendations, discipline, grievance, and other such matters; (6) With respect to Board of Inquiry (BOI) disciplinary proceedings, ensures documentation of board proceedings, preparation of correspondence to applicants and officers, and timely and accurate advice and assistance to Board members and other support as required; (7) Conducts force planning, including working with agencies, and advises OSG and ASH on Commissioned Corps strategic long-term readiness planning; (8) Maintains liaison with all other relevant Federal Services as appropriate, including with components of the Departments of Defense and Veterans Affairs; (9) Coordinates as appropriate to seek Departmental legal advice, assistance, and legislative support; (10) Advises the OSG on mission nature, size, duration and usage of Regular Corps and Ready Reserve officers; (11) Serves as a central point of contact and prepares necessary communications for all Corps Agency Liaison Offices; (12) Oversees the determination of fitness-for-duty and disability evaluations; and oversees Line of Duty determinations of the evaluation and issuance of medical waivers; (13) Manages and processes compensation and healthcare claims for members of the Corps; and administers the Service members' Group Life Insurance and Traumatic Serviceman's Group Life Insurance Programs; (2 (13)) Serves as the principal advisor to the SG on activities and policy related to preparedness, Corps activation, training, deployment operations and total force fitness of the Corps; (14) Leads and manages the Corps readiness and response activities to include establishing, maintaining and ensuring compliance with force readiness standards; ensuring that members of the Corps are trained, equipped and otherwise prepared to fulfill their public health and emergency response roles; and managing the timely, effective and appropriate response to urgent or emergency public health care needs; (15) Conducts after-action assessments and evaluations for the SG and ASH pertaining to the use of the Corps for deployment and other non-routine use of officers; and (16) Manages and maintains Commissioned Corps officer records; and provides oversight and management of information systems development, integration, and data analytics activities in support of the management of the Commissioned Corps.

Delegations of Authority. Directives and orders of the Secretary, Assistant Secretary for Health, or Surgeon General and all delegations and re-delegations of authority previously made to officials and employees of the affected organizational components will continue in them or their successors pending further re-delegation, provided they are consistent with this reorganization. All delegated authorities associated with or necessary to administer, operate, and manage transferred entities affected by this reorganization are transferred to the Assistant Secretary for Health and may be re-delegated.

Alex M. Azar II,

Secretary.

[FR Doc. 2019–00955 Filed 2–4–19; 8:45 am]

BILLING CODE 4150–49–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; 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: Center for Scientific Review Special Emphasis Panel; Panel Name: Early Life Stressors and Alcohol Use Disorders.

Date: February 21, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Washington Marriott Georgetown, 1221 22nd Street NW, Washington, DC 20037.

Contact Person: Michael Selmanoff, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5164, MSC 7844, Bethesda, MD 20892, 301–435–1119, *selmanom@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Sylvia L. Neal,

Program Analyst. Office of Federal Advisory Committee Policy.

[FR Doc. 2019–00972 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Infectious Diseases and Microbiology Integrated Review Group; Pathogenic Eukaryotes Study Section.

Date: February 21–22, 2019.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Sir Francis Drake Hotel, 450 Powell Street at Sutter, San Francisco, CA 94102.

Contact Person: Tera Bounds, DVM, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3198, MSC 7808, Bethesda, MD 20892, 301 435–2306, *boundst@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–00982 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Oncology 2—Translational Clinical Integrated Review Group; Developmental Therapeutics Study Section.

Date: February 21–22, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westin St. Francis, 335 Powell Street, San Francisco, CA 94102.

Contact Person: Sharon K Gubanich, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6214, MSC 7804, Bethesda, MD 20892, (301) 408–9512, *gubanics@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–00963 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; 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 Diabetes and Digestive and Kidney Diseases Advisory Council.

The meetings 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 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 Diabetes and Digestive and Kidney Diseases Advisory Council.

Date: May 8, 2019.

Open: 8:30 a.m. to 12:00 p.m.

Agenda: To present the Director's Report and other scientific presentations.

Place: National Institutes of Health, Porter Neuroscience Research Center, Conference Room 610, Building 35A Convent Drive, Bethesda, MD 20892.

Closed: 1:00 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Porter Neuroscience Research Center, Conference Room 610, Building 35A Convent Drive, Bethesda, MD 20892.

Contact Person: Karl F. Malik, Ph.D., Director, Division of Extramural Activities, National Institutes of Diabetes and Digestive and Kidney Diseases, 6707 Democracy Blvd. Room 7329, MSC 5452, Bethesda, MD 20892, (301) 594–4757, *malikk@niddk.nih.gov.*

Name of Committee: National Diabetes and Digestive and Kidney Diseases Advisory Council; Diabetes, Endocrinology and Metabolic Diseases.

Date: May 8, 2019.

Closed: 1:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Porter Neuroscience Research Center, Conference Room 630, Building 35A Convent Drive, Bethesda, MD 20892.

Open: 2:00 p.m. to 4:00 p.m.

Agenda: To review the Division's scientific and planning activities.

Place: National Institutes of Health, Porter Neuroscience Research Center, Conference Room 630, Building 35A Convent Drive, Bethesda, MD 20892.

Contact Person: Karl F. Malik, Ph.D., Director, Division of Extramural Activities, National Institutes of Diabetes and Digestive and Kidney Diseases, 6707 Democracy Blvd. Room 7329, MSC 5452, Bethesda, MD 20892, (301) 594–4757, *malikk@niddk.nih.gov.*

Name of Committee: National Diabetes and Digestive and Kidney Diseases Advisory Council; Digestive Diseases and Nutrition.

Date: May 8, 2019.

Closed: 1:00 p.m. to 2:30 p.m.

Agenda: To review the Division's scientific and planning activities.

Place: National Institutes of Health, Porter Neuroscience Research Center, Conference Room 640, Building 35A Convent Drive, Bethesda, MD 20892.

Open: 2:30 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Porter Neuroscience Research Center, Conference Room 640, Building 35A Convent Drive, Bethesda, MD 20892.

Contact Person: Karl F. Malik, Ph.D., Director, Division of Extramural Activities, National Institutes of Diabetes and Digestive and Kidney Diseases, 6707 Democracy Blvd. Room 7329, MSC 5452, Bethesda, MD 20892, (301) 594–4757, *malikk@niddk.nih.gov.*

Name of Committee: National Diabetes and Digestive and Kidney Diseases Advisory Council; Kidney, Urologic and Hematologic Diseases.

Date: May 8, 2019.

Closed: 1:00 p.m. to 2:15 p.m.

Agenda: To review the Division's scientific and planning activities.

Place: National Institutes of Health, Porter Neuroscience Research Center, Conference Room 620, Building 35A Convent Drive, Bethesda, MD 20892.

Open: 2:30 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Porter Neuroscience Research Center, Conference Room 620, Building 35A Convent Drive, Bethesda, MD 20892.

Contact Person: Karl F. Malik, Ph.D., Director, Division of Extramural Activities, National Institutes of Diabetes and Digestive and Kidney Diseases, 6707 Democracy Blvd. Room 7329, MSC 5452, Bethesda, MD 20892, (301) 594–4757, *malikk@niddk.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.niddk.nih.gov/fund/divisions/DEA/Council/coundesc.htm.,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01084 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Secretary; 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 Muscular Dystrophy Coordinating Committee (MDCC).

The meeting will be open to the public and accessible by teleconference. Participation is limited to space available. Individuals who plan to participate and need special assistance, such as reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: Muscular Dystrophy Coordinating Committee.

Type of meeting: Open Meeting.

Date: March 20, 2019.

Time: 8:30 a.m. to 4:30 p.m. *Eastern Time*—Approximate end time.

Agenda: The purpose of this meeting is to bring together committee members, representing government agencies, patient advocacy groups, other voluntary health organizations, and patients and their families to update one another on progress relevant to the Action Plan for the Muscular Dystrophies and to coordinate activities and discuss gaps and opportunities leading to better understanding of the muscular dystrophies, advances in treatments, and improvements in patients' and their families' lives. Prior to the meeting, an agenda will be posted to the MDCC meeting registration website: *https://meetings.ninds.nih.gov/?id=21649.*

Registration: To register, please go to: *https://meetings.ninds.nih.gov/?id=21649.*

Webcast Live: For those not able to attend in person, this meeting will be webcast at: *http://videocast.nih.gov/.*

Place: National Institutes of Health, Neuroscience Center (NSC) Building, 6001 Executive Boulevard, Conference Room C/D, Rockville, MD 20852.

Contact Person: Glen H. Nuckolls, Ph.D., Executive Secretary, Muscular Dystrophy Coordinating Committee, National Institute of Neurological Disorders and Stroke, NIH, 6001 Executive Boulevard, NSC 2203, Bethesda, MD 20892, (301) 496–5745, *glen.nuckolls@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.

All visitors must go through a security check at the building entrance to receive a visitor's badge. A government issued photo ID is required. Further information can be found at the registration website: *https://meetings.ninds.nih.gov/meetings/MDCCMarch2019/.*

More information can be found on the Muscular Dystrophy Coordinating Committee home page: *https://mdcc.nih.gov/.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: January 30, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01018 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Center for Scientific Review Special Emphasis Panel; Academic Research Enhancement Award.

Date: February 22, 2019.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Inna Gorshkova, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, 301–435–178, *gorshkoi@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01002 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Center for Scientific Review Special Emphasis Panel; Pilot

Projects Investigating Understudied G Protein-Coupled Receptors, Ion Channels, and Protein Kinases.

Date: February 27–28, 2019.

Time: 10:00 a.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jonathan Arias, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5170, MSC 7840, Bethesda, MD 20892, 301–435–2406, *ariasj@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–00997 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; 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 Diabetes and Digestive and Kidney Diseases Initial Review Group; Kidney, Urologic and Hematologic Diseases D Subcommittee.

Date: February 27–28, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Capital View, 2850 South Potomac Avenue, Arlington, VA 22202.

Contact Person: Barbara A. Woynarowska, Ph.D., Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7007, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 402–7172, *woynarowskab@niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01089 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Vascular and Hematology Integrated Review Group; Hemostasis and Thrombosis Study Section.

Date: February 22, 2019.

Time: 8:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

Contact Person: Bukhtiar H. Shah, DVM, Ph.D., Scientific Review Officer, Vascular and Hematology IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4120, MSC 7802, Bethesda, MD 20892, (301) 806–7314, *shahb@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–00988 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; 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 Board of Scientific Counselors, National Center for Biotechnology Information.

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 as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for review, discussion, and evaluation of individual intramural programs and projects conducted by the National Library of Medicine, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, National Center for Biotechnology Information.

Date: April 9, 2019.

Open: 8:30 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.

Closed: 12:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Library of Medicine, Building 38, 2nd Floor, The Lindberg Room, 8600 Rockville Pike, Bethesda, MD 20892.

Open: 2:00 p.m. to 3:00 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: Jim Ostell, Ph.D., Director, National Center for Biotechnology Information, National Library of Medicine, Building 38A, Room 8N807, Bethesda, MD 20892, 301–435–5978, *ostell@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.

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: January 31, 2019.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01093 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism Notice of Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of meetings of the National Advisory Council on Alcohol Abuse and Alcoholism.

The meetings 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 meetings. The open session on May 15, 2018 will be videocast and can be accessed from the NIH Videocasting and Podcasting website (*https://videocast.nih.gov*).

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 Advisory Council on Alcohol Abuse and Alcoholism.

Closed: May 14, 2019.

Time: 9:00 a.m. to 9:45 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Bethesda, MD 20817.

Open: May 14, 2019.

Time: 9:45 a.m. to 3:00 p.m.

Agenda: Presentations and other business of the Council.

Place: National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Bethesda, MD 20817.

Contact Person: Abraham P. Bautista, Ph.D., Executive Secretary, National Advisory Council, Director, Office of Extramural Activities, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 6700 B Rockledge Drive, Room 1458, MSC 6902, Bethesda, MD 20892, 301–443–9737, *bautista@mail.nih.gov*.

Name of Committee: National Advisory Council on Alcohol Abuse and Alcoholism, National Cancer Advisory Board, and National Advisory Council on Drug Abuse.

Open: May 15, 2019.

Time: 9:00 a.m. to 1:00 p.m.

Agenda: Presentation of NIAAA, NCI, and NIDA Director's Update, Scientific Reports, and other topics within the scope of the Collaborative Research on Addiction at NIH (CRAN).

Place: National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Bethesda, MD 20817.

Contact Person: Abraham P. Bautista, Ph.D., Executive Secretary, National Advisory Council, Director, Office of Extramural Activities, National Institute on Alcohol Abuse and Alcoholism National, Institutes of Health, 6700 B Rockledge Drive, Room 1458, MSC 6902, Bethesda, MD 20892, 301–443–9737, *bautista@mail.nih.gov*.

Paulette S. Gray, Ph.D., Director, Division of Extramural Activities, National Cancer Institute, National Institutes of Health, 9609 Medical Center Drive, Room 7W444, Bethesda, MD 20892, 240–276–6340, *grayp@dea.nci.nih.gov*.

Susan Weiss, Ph.D., Director, Division of Extramural Research, National Institute on Drug Abuse, National Institutes of Health, 6001 Executive Boulevard, NSC, Room 5274, 301–443–6487, *sweiss@nida.nih.gov*.

Name of Committee: National Advisory Council on Alcohol Abuse and Alcoholism.

Date: September 19, 2019.

Closed: 9:00 a.m. to 9:45 a.m.

Agenda: Grant applications.

Place: National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Bethesda, MD 20817.

Open: 9:45 a.m. to 3:00 p.m.

Agenda: Presentations and other business of the Council.

Place: National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Bethesda, MD 20817.

Contact Person: Abraham P. Bautista, Ph.D., Executive Secretary, National Advisory Council, Director, Office of Extramural Activities, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 6700 B Rockledge Drive, Room 1458, MSC 6902, Bethesda, MD 20892, 301–443–9737, *bautista@mail.nih.gov*.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *https://www.niaaa.nih.gov/news-events/meetings-events-exhibits,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards, National Institutes of Health, HHS)

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01082 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Center for Scientific Review Special Emphasis Panel; Member Conflict: Skeletal Muscle Biology and Therapy.

Date: February 28, 2019.

Time: 1:00 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Yi-Hsin Liu, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4214, MSC 7814, Bethesda, MD 20892, 301–435–1781, *liuyh@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine;

93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–00991 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Brain Disorders and Clinical Neuroscience Integrated Review Group, Clinical Neuroplasticity and Neurotransmitters Study Section.

Date: February 20–21, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Kabuki, 1625 Post Street, San Francisco, CA 94115.

Contact Person: Suzan Nadi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5217B, MSC 7846, Bethesda, MD 20892, 301–435–1259, *nadis@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–00957 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Cardiovascular and Respiratory Sciences Integrated Review Group, Clinical and Integrative Cardiovascular Sciences Study Section.

Date: February 21–22, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Fairmont Hotel San Francisco, 950 Mason Street, San Francisco, CA 94108.

Contact Person: Chee Lim, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4128, Bethesda, MD 20892, 301–435–1850, *limc4@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–00965 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Center for Scientific Review Special Emphasis Panel, AREA (R15) Respiratory.

Date: February 26–27, 2019.

Time: 9:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: George M Barnas, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4220, MSC 7818, Bethesda, MD 20892, 301–435–0696, *barnasg@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–00990 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; 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 grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; Cancer Systems Biology.

Date: March 1, 2019.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute, Shady Grove, 9609 Medical Center Drive, Room 2W030, Rockville, MD 20850, (Telephone Conference Call).

Contact Person: Eun Ah Cho, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W124, Bethesda, MD, 20892–9750, 240–276–6342, *choe@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01079 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Frederick National Laboratory Advisory Committee to the National Cancer Institute.

The meeting will be open to the public, 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 also be videocast and can be accessed from the NIH Videocasting and Podcasting website (*http://videocast.nih.gov/*).

Name of Committee: Frederick National Laboratory Advisory Committee to the National Cancer Institute.

Date: February 20, 2019.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: Ongoing and new activities at the Frederick National Laboratory for Cancer Research.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room TE406, Rockville, MD 20850 (Virtual Meeting).

Contact Person: Caron A. Lyman, Ph.D., Executive Secretary, National Cancer Institute, National Institutes of Health, 9609 Medical Center Drive, Room 7W–126, Bethesda, MD 20892, 240–276–6348, *lymanc@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, NCI Shady Grove has instituted stringent procedures for entrance into the NCI Shady Grove building. 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://deainfo.nci.nih.gov/advisory/fac/fac.htm,* where an agenda and any additional information for the meeting will be posted when available.

This meeting notice is being published less than 15 days in advance of the meeting due to the partial Government shutdown of December 2018.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01008 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis; Panel, NIDCD Chemical Senses Fellowship Review.

Date: February 21, 2019.

Time: 1:00 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health Neuroscience Center Building (NSC) 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Sheo Singh, Ph.D., Scientific Review Officer Scientific Review Branch Division of Extramural Activities, 6001 Executive Blvd., Room 8351, Bethesda, MD 20892, 301–496–8683, *singhs@nidcd.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: January 30, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01016 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Infectious Diseases and Microbiology Integrated Review Group, Bacterial Pathogenesis Study Section.

Date: February 22, 2019.

Time: 8:00 a.m. to 7:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Palomar, 2121 P Street NW, Washington, DC 20037.

Contact Person: Marci Scidmore, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3192, MSC 7808, Bethesda, MD 20892, 301–435–1149, *marci.scidmore@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–00987 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Musculoskeletal, Oral and Skin Sciences Integrated Review Group, Skeletal Biology Structure and Regeneration Study Section.

Date: February 21–22, 2019.

Time: 8:00 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westgate Hotel, 1055 Second Avenue, San Diego, CA 92101.

Contact Person: Yanming Bi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4214, MSC 7814, Bethesda, MD 20892, 301–451–0996, *ybi@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–00983 Filed 2–4–19; 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 Scientific Counselors, Lister Hill National Center for Biomedical Communications.

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 as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for review, discussion, and evaluation of individual intramural programs and projects conducted by the National Library of Medicine, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, Lister Hill National Center for Biomedical Communications.

Date: April 4–5, 2019.

Open: April 4, 2019, 9:00 a.m. to 12:00 p.m.

Agenda: Review of research and development programs and preparation of reports of the Lister Hill National Center for Biomedical Communications.

Place: National Library of Medicine, Building 38, 2nd Floor, The Lindberg Room, 8600 Rockville Pike, Bethesda, MD 20892.

Closed: April 4, 2019, 12:00 p.m. to 4:30 p.m.

Agenda: To review and evaluate personal qualifications, performance, and competence of individual investigators.*Place:* National Library of Medicine, Building 38, 2nd Floor, The Lindberg Room, 8600 Rockville Pike, Bethesda, MD 20892.

Closed: April 5, 2019, 9:00 a.m. to 10:00 a.m.

Agenda: To review and evaluate personal qualifications, performance, and competence of individual investigators.*Place:* National Library of Medicine, Building 38, 2nd Floor, The Lindberg Room, 8600 Rockville Pike, Bethesda, MD 20892.

Contact Person: Karen Steely, Program Assistant, Lister Hill National Center for Biomedical Communications, National Library of Medicine, Building 38A, Room 7S707, Bethesda, MD 20892, 301–827–4385, *ksteely@mail.nih.gov.*

Open: April 5, 2019, 10:00 a.m. to 11:30 a.m.

Agenda: Review of research and development programs and preparation of reports of the Lister Hill National Center for Biomedical Communications.

Place: National Library of Medicine, Building 38, 2nd Floor, The Lindberg Room, 8600 Rockville Pike, Bethesda, MD 20892.

Contact Person: Karen Steely, Program Assistant, Lister Hill National Center for Biomedical Communications, National Library of Medicine, Building 38A, Room 7S707, Bethesda, MD 20892, 301–827–4385, *ksteely@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.

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: January 31, 2019.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01092 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; 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: Arthritis and Musculoskeletal and Skin Diseases Initial

Review Group; Arthritis and Musculoskeletal and Skin Diseases Special Grants Review Committee.

Date: February 21–22, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Canopy by Hilton, 940 Rose Avenue, Bethesda, MD 20852.

Contact Person: Helen Lin, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of Arthritis, Musculoskeletal and Skin Diseases, 6701 Democracy Blvd., Suite 800, Bethesda, MD 20817, 301–594–4952, *linh1@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: January 30, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01014 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Musculoskeletal, Oral and Skin Sciences Integrated Review Group, Oral, Dental and Craniofacial Sciences Study Section.

Date: February 21–22, 2019.

Time: 8:00 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Los Angeles Airport Marriott, 5855 West Century Blvd., Los Angeles, CA 90045.

Contact Person: Yi-Hsin Liu, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4214, MSC 7814, Bethesda, MD 20892, 301–435–1781, *liuyh@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–00977 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Board of Scientific Counselors, National Institute of Neurological Disorders and Stroke.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in sections 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Institute of Neurological Disorders and Stroke, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, National Institute of Neurological Disorders and Stroke.

Date: February 24–26, 2019.

Time: 6:00 p.m. to 12:00 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Avindra Nath, M.D., Chief, Clinical and Acting Scientific Director, National Institute of Neurological Disorders and Stroke, NIH, 10 Center Drive, Room 7C–103, Bethesda, MD 20892, (301) 451–3486, *natha@ninds.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS).

Dated: January 30, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01019 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Center for Scientific Review Special Emphasis Panel, Member Conflict: Molecular Hematology.

Date: February 22, 2019.

Time: 10:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Katherine M Malinda, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4140, MSC 7814, Bethesda, MD 20892, 301–435–0912, *Katherine_Malinda@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01005 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Cardiovascular and Respiratory Sciences Integrated Review Group, Lung Injury, Repair, and Remodeling Study Section.

Date: February 25–26, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW, Washington, DC 20015.

Contact Person: Ghenima Dirami, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4122, MSC 7814, Bethesda, MD 20892, 240–498–7546, *diramig@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01001 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center For Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Molecular, Cellular and Developmental Neuroscience Integrated Review Group, Neural Oxidative Metabolism and Death Study Section.

Date: February 25–26, 2019.

Time: 8:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Zoe Fisherman's Wharf, 425 North Point, San Francisco, CA 94133.

Contact Person: Carol Hamelink, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4192, MSC 7850, Bethesda, MD 20892, (301) 213–9887, *hamelinc@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS).

Dated: January 30, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–00971 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; 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 Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; NIDDK Program Project (P01 A1).

Date: February 28, 2019.

Time: 1:00 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Jason D. Hoffert, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7343, 6707 Democracy Boulevard, Bethesda, MD 20817, 301–496–9010, *hoffertj@niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01088 Filed 2–4–19; 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 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 Heart, Lung, and Blood Institute Special Emphasis Panel, CLTR and R61 Conflict Meeting (UG3 and U24).

Date: March 1, 2019,

Time: 8:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The William F. Bolger Center, 9600 Newbridge Drive, Potomac, MD 20854.

Contact Person: YingYing Li-Smerin, MD, Ph.D., Scientific Review Officer, Office of Scientific Review, National Heart, Lung, and Blood Institute, National Institutes of Health, 6701 Rockledge Drive, Room 7184, Bethesda, MD 20892, 301–827–7942, *lismerin@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: January 30, 2019.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01011 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; 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 Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; High Impact, Interdisciplinary Science in NIDDK Research Areas (RC2)—Diabetes, Endocrinology and Metabolic Diseases.

Date: February 27, 2019.

Time: 1:00 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892.

Contact Person: Dianne Camp, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7013, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, 301–5947682, *campd@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01017 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Cancer Institute Special Emphasis Panel, March 14, 2019, 06:00 p.m. to March 15, 2019, 03:00 p.m., Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD, 20852 which was published in the **Federal Register** on December 18, 2018, 83 FR 64849.

This meeting notice is amended to change to a one-day meeting on March 15, 2019 from 6:30 a.m. to 6:00 p.m. The meeting is closed to the public.

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01009 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Center for Scientific Review Special Emphasis Panel; Member Conflict: Neurogenesis and Bioengineering Special Emphasis Panel.

Date: February 22, 2019.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Mei Qin, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5213, Bethesda, MD 20892, 301–875–2215, *qinmei@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01006 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Center for Scientific Review Special Emphasis Panel; Member Conflict: Vascular Biology.

Date: February 27, 2019.

Time: 10:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Luis Espinoza, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4140, MSC 7814, Bethesda, MD 20892, 301–435–0952, *espinozala@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–00999 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; Review of PRAT Fellowship Applications.

Date: February 28, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at Chevy Chase Pavilion, 4300 Military Road NW, Washington, DC 20015.

Contact Person: John J. Laffan, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN18J, Bethesda, MD 20892, 301–594–2773, *laffanjo@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01091 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; 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 Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, P01 Program Project Review—NuBeta.

Date: February 27, 2019.

Time: 11:30 a.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Charlene J. Repique, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7347, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 451–3638, *charlene.repique@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01083 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of an Exclusive Patent License: Use of the CD47 Phosphorodiamidate Morpholino Oligomers for the Treatment, Prevention, and Diagnosis of Solid Tumors

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The National Cancer Institute, an institute of the National Institutes of Health, Department of Health and Human Services, is contemplating the grant of an Exclusive Patent License to practice the inventions embodied in the Patents and Patent Applications listed in the Supplementary Information section of this notice to Morphiex Biotherapeutics (''Morphiex'') located in Boston, MA.

DATES: Only written comments and/or applications for a license which are received by the National Cancer Institute's Technology Transfer Center on or before February 20, 2019 will be considered.

ADDRESSES: Requests for copies of the patent application, inquiries, and comments relating to the contemplated an Exclusive Patent License should be directed to: Jaime Greene, Senior Licensing and Patenting Manager, NCI Technology Transfer Center, 9609 Medical Center Drive, RM 1E530 MSC 9702, Bethesda, MD 20892–9702 (for business mail), Rockville, MD 20850–9702 Telephone: (240)–276–5530; Facsimile: (240)–276–5504 Email: *greenejaime@mail.nih.gov.*

SUPPLEMENTARY INFORMATION: This is in reference to a previous notice 83 FR 22501, which was a Prospective Grant of an Exclusive Patent License to Morphiex for the field of use ''the use of the CD47 phosphorodiamidate morpholino oligomers (PMO, morpholino, Sequence: 5′-CGTCACAGGCAGGACCCACTGCCCA-3′) for the treatment, prevention, and diagnosis of hematological cancers (*e.g.* lymphoma, leukemia, multiple myeloma), excluding uses in combination with radiotherapy.''

Intellectual Property

1. U.S. Provisional Patent Application No. 60/850,132, filed October 6, 2006, now abandoned (HHS Ref. No. E–227–2006/0–US–01);

2. U.S. Provisional Patent Application No. 60/864,153, filed November 02,

2006, now abandoned (HHS Ref. No. E–227–2006/1–US–01);

3. U.S. Provisional Patent Application No. 60/888,754, filed February 07, 2007, now abandoned (HHS Ref. No. E–227–2006/2–US–01);

4. U.S. Provisional Patent Application No. 60/910,549, filed April 06, 2007, now abandoned (HHS Ref. No. E–227–2006/3–US–01);

5. U.S. Provisional Patent Application No. 60/956,375, filed August 16, 2007, now abandoned (HHS Ref. No. E–227–2006/4–US–01);

6. PCT Patent Application No. PCT/2007/080647, filed October 5, 2007, now abandoned (HHS Ref. No. E–227–2006/5–PCT–01);

7. U.S. Patent No. 8,236,313, filed April 3, 2009, Issued August 7, 2012 (HHS Ref. No. E–227–2006/5–US–02);

8. Canadian Patent Application No. 2,665,287, October 5, 2007 (HHS Ref. No. E–227–2006/5–CA–03);

9. Australian Patent No. 2007319576, filed October 5, 2007, Issued May 1, 2014 (HHS Ref. No. E–227–2006/5–AU–04);

10. European Patent Application No. 07868382.8, filed March 27, 2009 (HHS Ref. No. E–227–2006/5–EP–05);

11. U.S. Patent Application No. 13/546,931, filed July 11, 2012 (HHS Ref. No. E–227–2006/5–US–06);

12. U.S. Patent Number 8,557,788, filed July 11, 2012, Issued October 15, 2013 (HHS Ref. No. E–227–2006/5–US–07);

13. European Patent Application No. 13180563.2, filed October 5, 2007 (HHS Ref. No. E–227–2006/5–EP–08);

14. Australian Patent No. 2014201936, filed October 5, 2007, Issued October 20, 2016 (HHS Ref. No. E–227–2006/5–AU–09);

15. U.S. Patent Application No. 14/500,861, filed September 29, 2014 (HHS Ref. No. E–227–2006/5–US–10);

16. Australian Patent No. 2016238894, filed October 6, 2016, Issued February 22, 2018 (HHS Ref. No. E–227–2006/5–AU–11); and

17. Australian Patent Application No. 2018200921, filed February 8, 2018 (HHS Ref. No. E–227–2006/5–AU–12).

The patent rights in these inventions have been assigned and/or exclusively licensed to the government of the United States of America.

The prospective exclusive license territory may be worldwide, and the field of use may be limited to: ''The use of the CD47 phosphorodiamidate morpholino oligomers (PMO, morpholino, Sequence: 5′-CGTCACAGGCAGGACCCACTGCCCA-3′) for the treatment, prevention, and diagnosis of solid tumors, excluding uses in combination with radiotherapy.''

This technology concerns CD47, originally named integrin-associated protein, which is a receptor for thrombospondin-1 (TSP1), a major component of platelet α-granules from which it is secreted on platelet activation. A number of important roles for CD47 have been defined in regulating the migration, proliferation, and survival of vascular cells, and in regulation of innate and adaptive immunity. Nitric Oxide (NO) plays an important role as a major intrinsic vasodilator, and it increases blood flow to tissues and organs. Disruption of this process leads to peripheral vascular disease, ischemic heart disease, stroke, diabetes and many more significant diseases. The inventors have discovered that TSP1 blocks the beneficial effects of NO and prevents it from dilating blood vessels and increasing blood flow to organs and tissues. Additionally, they discovered that this regulation requires TSP1 interaction with its cell receptor, CD47. These inventors have also found that blocking TSP1-CD47 interaction through the use of antisense morpholino oligonucleotides, peptides or antibodies have several therapeutic benefits including the treatment of cancer.

This notice is made in accordance with 35 U.S.C. 209 and 37 CFR part 404. The prospective exclusive license will be royalty bearing, and the prospective exclusive license may be granted unless within fifteen (15) days from the date of this published notice, the National Cancer Institute receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR part 404.

In response to this Notice, the public may file comments or objections. Comments and objections, other than those in the form of a license application, will not be treated confidentially, and may be made publicly available.

License applications submitted in response to this Notice will be presumed to contain business confidential information and any release of information in these license applications will be made only as required and upon a request under the Freedom of Information Act, 5 U.S.C. 552.

Dated: December 18, 2018.

Richard U. Rodriguez,

Associate Director, Technology Transfer Center, National Cancer Institute.

[FR Doc. 2019–00909 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; 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 Board of Scientific Counselors, NIDDK.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Institute of Diabetes and Digestive and Kidney Diseases, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, NIDDK.

Date: October 10–11, 2019.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institutes of Health, Building 10, Solarium Conference Room 9S233, 10 Center Drive, Bethesda, MD 20892.

Contact Person: Michael W. Krause, Ph.D., Scientific Director, National Institute of Diabetes and Digestive and Kidney Diseases, National Institute of Health, Building 5, Room B104, Bethesda, MD 20892–1818, (301) 402–4633, *mwkrause@helix.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01086 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Cancer Institute Special Emphasis Panel,

February 14, 2019, 04:00 p.m. to February 15, 2019, 02:30 p.m., Gaithersburg Marriott Washingtonian Center, 9751 Washingtonian Boulevard, Gaithersburg, MD, 20878 which was published in the **Federal Register** on November 27, 2018, 83 FR 60880.

This meeting notice is amended to reschedule the meeting to April 9, 2019 from 8:00 a.m. to 4:00 p.m. The meeting is closed to the public.

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01010 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; 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 grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–5 for Provocative Questions.

Date: March 6, 2019.

Time: 7:45 a.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Gaithersburg Marriott Washingtonian Center, 9751 Washingtonian Boulevard Gaithersburg, MD 20878.

Contact Person: Byeong-Chel Lee, Ph.D. Scientific Review Officer Resources and Training Review Branch Division of Extramural Activities National Cancer Institute, NIH 9609 Medical Center Drive, Room 7W238 Bethesda, MD 20892–9750 240–276–7755 *byeong-chel.lee@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01081 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Infectious Diseases and Microbiology Integrated Review Group; Virology—A Study Section.

Date: February 28–March 1, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Bayside, 4875 North Harbor Drive, San Diego, CA 92106.

Contact Person: Kenneth M Izumi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3204,MSC 7808, Bethesda, MD 20892, 301–496–6980, *izumikm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Program Projects: Drug Abuse.

Date: March 1, 2019.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street NW, Washington, DC 20036.

Contact Person: Jasenka Borzan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive Room 4214 MSC 7814, Bethesda, MD 20892–7814, 301–435–1787, *borzanj@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Review: Prediction, Communication, and Intervention for Cancer Patients, Caregivers, and Communities.

Date: March 1, 2019.

Time: 11:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: John H. Newman, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3222, MSC 7808, Bethesda, MD 20892, (301) 435–0628, *newmanjh@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Accelerating the Pace of Drug Abuse Research Using Existing Data.

Date: March 1, 2019.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Kate Fothergill, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive Room 3142, Bethesda, MD 20892, 301–435–2309, *fothergillke@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Healthcare Delivery and Methodologies.

Date: March 1, 2019.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Ping Wu, Ph.D., Scientific Review Officer, HDM IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3166, Bethesda, MD 20892, 301–451–8428, *wup4@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Neurobiology and Neuropathogenesis of Neurodegerative Diseases.

Date: March 1, 2019.

Time: 11:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Wei-Qin Zhao, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5181, MSC 7846, Bethesda, MD 20892–7846, 301–827–7238, *zhaow@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; African Health Professional Education Partnership Initiative.

Date: March 1, 2019.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Shalanda A. Bynum, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3206,

Bethesda, MD 20892, 301–755–4355, *bynumsa@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Topics in Nephrology.

Date: March 1, 2019.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Jianxin Hu, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2156, Bethesda, MD 20892, 301–827–4417, *jianxinh@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowship: Oncology.

Date: March 4–5, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW, Washington, DC 20015.

Contact Person: Reigh-Yi Lin, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Rm. 4152, Bethesda, MD 20892, 301–827–6009, *lin.reigh-yi@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Cancer Immunology and Immunotherapy.

Date: March 4–5, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Ritz-Carlton Hotel, 1700 Tysons Boulevard, McLean, VA 22102.

Contact Person: Sarita Kandula Sastry, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20782, *sarita.sastry@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Risk, Prevention and Health Behavior.

Date: March 4–5, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW, Washington, DC 20015.

Contact Person: Martha M. Faraday, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3110, MSC 7808, Bethesda, MD 20892, (301) 435–3575, *faradaym@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowship: Immunology.

Date: March 4–5, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Westgate Hotel, 1055 2nd Ave., San Diego, CA 92101.

Contact Person: Liying Guo, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health. 6701 Rockledge Drive, Room 4016F, Bethesda, MD 20892, 301–435–0908, *lguo@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: Developing and Testing Interventions for Health-Enhancing Physical Activity.

Date: March 4, 2019.

Time: 10:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Weijia Ni, Ph.D., Chief/Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3100, MSC 7808, Bethesda, MD 20892, 301–594–3292, *niw@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01007 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group, Emerging Imaging Technologies and Applications Study Section.

Date: February 21–22, 2019.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bahia Resort Hotel, 998 West Mission Bay Drive, San Diego, CA 92109.

Contact Person: Songtao Liu, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5118, Bethesda, MD 20817, 301–827–6828, *songtao.liu@nih.gov.*

This meeting notice is being published less than 15 days in advance of the meeting due to the partial Government shutdown of December 2018.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–00958 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Neurotransporters, Receptors, and Calcium Signaling Study Section.

Date: February 21, 2019.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Villa Florence Hotel, 225 Powell Street, San Francisco, CA 94102.

Contact Person: Peter B Guthrie, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4182, MSC 7850, Bethesda, MD 20892, (301) 435–1239, *guthriep@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–00976 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; 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 Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; R13 Conference Grant Applications.

Date: February 28, 2019.

Time: 11:00 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Jian Yang, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7111, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7799, *yangj@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01087 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; 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 contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; TEP–11: SBIR Contract Review.

Date: March 1, 2019.

Time: 11:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute, Shady Grove, 9609 Medical Center Drive, Room 7W248 Rockville, MD 20850 (Telephone Conference Call).

Contact Person: Anita T. Tandle, Ph.D. Scientific Review Officer Research Programs Review Branch Division of Extramural Activities National Cancer Institute, NIH 9609 Medical Center Drive, Room 7W248 Bethesda, MD 20892–9750 240–276–5007 *tandlea@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01080 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; 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 Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; NIDDK–KUH–RC2-Telephone SEP.

Date: February 20, 2019.

Time: 3:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Xiaodu Guo, MD, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7023, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–4719, *guox@extra.niddk.nih.gov.*

This notice is being published less than 15 days in advance of the meeting due to the partial Government shutdown of December 2018.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01090 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Integrative, Functional and Cognitive Neuroscience Integrated Review Group, Neurotoxicology and Alcohol Study Section.

Date: February 21–22, 2019.

Time: 8:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Washington Marriott Georgetown, 1221 22nd Street NW, Washington, DC 20037.

Contact Person: Jana Drgonova, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5213, Bethesda, MD 20892, 301–827–2549, *jdrgonova@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–00975 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; 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 Diabetes and Digestive and Kidney Diseases Advisory Council.

The meetings 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 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 Diabetes and Digestive and Kidney Diseases Advisory Council.

Date: September 11, 2019.

Open: 8:30 a.m. to 12:00 p.m.

Agenda: To present the Director's Report and other scientific presentations.

Place: National Institutes of Health, Natcher Conference Center (Building 45), Conference Room E1/E2, 45 Center Drive, Bethesda, MD 20892.

Closed: 1:00 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Conference Center (Building 45), Conference Room E1/E2, 45 Center Drive, Bethesda, MD 20892.

Contact Person: Karl F. Malik, Ph.D., Director, Division of Extramural Activities, National Institutes of Diabetes and Digestive and Kidney Diseases, 6707 Democracy Blvd., Room 7329, MSC 5452, Bethesda, MD 20892, (301) 594–4757, *malikk@niddk.nih.gov*.

Name of Committee: National Diabetes and Digestive and Kidney Diseases Advisory Council Diabetes, Endocrinology and Metabolic Diseases.

Date: September 11, 2019.

Closed: 1:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Conference Center (Building 45), Conference Room E1/E2, 45 Center Drive, Bethesda, MD 20892.

Open: 2:00 p.m. to 4:00 p.m.

Agenda: To review the Division's scientific and planning activities.

Place: National Institutes of Health, Natcher Conference Center (Building 45), Conference Room E1/E2, 45 Center Drive, Bethesda, MD 20892.

Contact Person: Karl F. Malik, Ph.D., Director, Division of Extramural Activities, National Institutes of Diabetes and Digestive And Kidney Diseases, 6707 Democracy Blvd., Room 7329, MSC 5452, Bethesda, MD 20892, (301) 594–4757, *malikk@niddk.nih.gov*.

Name of Committee: National Diabetes and Digestive and Kidney Diseases Advisory Council Kidney, Urologic and Hematologic Diseases.

Date: September 11, 2019.

Open: 1:00 p.m. to 2:15 p.m.

Agenda: To review the Division's scientific and planning activities.

Place: National Institutes of Health, Natcher Conference Center (Building 45), Conference Room F1/F2, 45 Center Drive, Bethesda, MD 20892.

Closed: 2:30 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Conference Center (Building 45), Conference Room F1/F2, 45 Center Drive, Bethesda, MD 20892.

Contact Person: Karl F. Malik, Ph.D., Director, Division of Extramural Activities, National Institutes of Diabetes and Digestive and Kidney Diseases, 6707 Democracy Blvd., Room 7329, MSC 5452, Bethesda, MD 20892, (301) 594–4757, *malikk@niddk.nih.gov*.

Name of Committee: National Diabetes and Digestive and Kidney Diseases Advisory Council Digestive Diseases and Nutrition.

Date: September 11, 2019.

Open: 1:00 p.m. to 2:30 p.m.

Agenda: To present the Director's Report and other scientific presentations.

Place: National Institutes of Health, Natcher Conference Center (Building 45), Conference Room D, 45 Center Drive, Bethesda, MD 20892.

Closed: 2:30 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Conference Center (Building 45), Conference Room D, 45 Center Drive, Bethesda, MD 20892.

Contact Person: Karl F. Malik, Ph.D., Director, Division of Extramural Activities, National Institutes of Diabetes and Digestive and Kidney Diseases, 6707 Democracy Blvd., Room 7329, MSC 5452, Bethesda, MD 20892, (301) 594–4757, *malikk@niddk.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.niddk.nih.gov/fund/divisions/DEA/Council/coundesc.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01085 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Center for Scientific Review Special Emphasis Panel, RFA Panel: Discovery & Validation of Novel Safe and Effective Pain Treatment.

Date: February 21, 2019.

Time: 12:30 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westgate Hotel, 1055 Second Avenue, San Diego, CA 92101.

Contact Person: Catherine Bennett, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5182, MSC 7846, Bethesda, MD 20892, 301–435–1766, *bennettc3@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–00984 Filed 2–4–19; 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, 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 Child Health and Human Development Special Emphasis Panel; Archiving and Documenting Child Health and Human Development (R03).

Date: March 1, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Minki Chatterji, Scientific Review Officer, Scientific Review Branch, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, DHHS 6710B Rockledge Drive, Rm. 2121D, Bethesda, MD 20892–7501, 301–827–5435, *minki.chatterji@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: January 30, 2019.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01015 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group, Cellular, Molecular and Integrative Reproduction Study Section.

Date: February 20–21, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW, Washington, DC 20015.

Contact Person: Gary Hunnicutt, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6164, MSC 7892, Bethesda, MD 20892, 301–435–0229, *hunnicuttgr@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–00961 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Digestive, Kidney and Urological Systems Integrated Review Group, Gastrointestinal Mucosal Pathobiology Study Section.

Date: February 21–22, 2019.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites DC Convention Center, 900 10th Street NW, Washington, DC 20001.

Contact Person: Aiping Zhao, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2188, Bethesda, MD 20892–7818, (301) 435–0682, *zhaoa2@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–00985 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Center for Scientific Review Special Emphasis Panel; Member Conflict: Addictions, Depression, Bipolar Disorder and Schizophrenia.

Date: February 27, 2019.

Time: 8:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Kristin Kramer, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5205, MSC 7846, Bethesda, MD 20892, (301) 437–0911, *kramerkm@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01003 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 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: Microbiology, Infectious Diseases and AIDS Initial Review; Group Microbiology and Infectious Diseases Research Committee Microbiology and Infectious Diseases Research Committee (MID).

Date: February 19–20, 2019.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion 4300 Military Road NW, Washington, DC 20015.

Contact Person: Amir E. Zeituni, Ph.D., Scientific Review Program, Division of Extramural Activities, SRP, RM 3G51 National Institutes of Health, NIAID, 5601 Fishers Lane, MSC 9823, Rockville, MD 20852–9823, 301–496–2550, *amir.zeituni@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: January 30, 2019.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01013 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflicts: Adult Psychopathology, Cognition, and Aging.

Date: February 25–26, 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, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Jane A. Doussard-Roosevelt, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3184, MSC 7848, Bethesda, MD 20892, (301) 435–4445, *doussarj@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, PAR–16–292 Mobile Health: Technology and Outcomes in Low and Middle Income Countries.

Date: March 1, 2019.

Time: 7:30 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott Wardman Park Washington DC Hotel, 2660 Woodley Road NW, Washington, DC 20008.

Contact Person: Mark Allen Vosvick, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive Room 3110, Bethesda, MD 20892, *mark.vosvick@nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Fellowships in Genes, Genomics and Genetics.

Date: March 1, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard by Marriott, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Alexander Gubin, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4196, MSC 7812, Bethesda, MD 20892, 301–435–2902, *gubina@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Ocular Surface, Cornea, Anterior Segment Glaucoma and Refractive Error New Investigators.

Date: March 5–6, 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, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Kristin Kramer, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5205, MSC 7846, Bethesda, MD 20892, (301) 437–0911, *kramerkm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Radiation Therapy and Biology.

Date: March 5–6, 2019.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Bo Hong, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6194, MSC 7804, Bethesda, MD 20892, 301–996–6208, *hongb@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Fellowships: Physiology and Pathobiology of Cardiovascular and Respiratory Systems.

Date: March 6–7, 2019.

Time: 8:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, Bethesda, MD 20814.

Contact Person: Richard D. Schneiderman, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4138, Bethesda, MD 20817, 301–402–3995, *richard.schneiderman@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Small Business: Digestive Sciences.

Date: March 6, 2019.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW, Washington, DC 20015.

Contact Person: Jonathan K. Ivins, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2190, MSC 7850, Bethesda, MD 20892, (301) 594–1245, *ivinsj@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Small Business: Biomaterials, Delivery, and Nanotechnology.

Date: March 6, 2019.

Time: 8:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Nitsa Rosenzweig, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4152, MSC 7760, Bethesda, MD 20892, (301) 404–7419, *rosenzweign@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Ronald J. Livingston, Jr.,

Program Analyst Office of Federal Advisory Committee Policy.

[FR Doc. 2019–01004 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Oncology 1-Basic Translational Integrated Review Group, Molecular Oncogenesis Study Section.

Date: February 28–March 1, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW, Washington, DC 20015.

Contact Person: Nywana Sizemore, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6204, MSC 7804, Bethesda, MD 20892, 301–435–1718, *sizemoren@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–00968 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Center for Scientific Review Special Emphasis Panel, PAR Panel: Cellular and Molecular Biology of Complex Brain Disorders.

Date: February 21, 2019.

Time: 8:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street NW, Washington, DC 20036.

Contact Person: Afia Sultana, Ph.D., Scientific Review Officer, National Institutes of Health, Center for Scientific Review, 6701 Rockledge Drive, Room 4189, Bethesda, MD 20892, (301) 827–7083, *sultanaa@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–00986 Filed 2–4–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Notice of Issuance of Final Determination Concerning Self-Adhesive Cutaneous Electrodes

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border

Protection (''CBP'') has issued a final determination concerning the country of origin of Rhythmlink International, LLC's self-adhesive cutaneous electrode. Based upon the facts presented, CBP has concluded that the country of origin of the self-adhesive cutaneous electrode is the United States for purposes of U.S. Government procurement.

DATES: The final determination was issued on January 29, 2019. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination no later than March 7, 2019.

FOR FURTHER INFORMATION CONTACT: James Kim, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade (202) 325–0158.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on January 29, 2019, pursuant to subpart B of Part 177, U.S. Customs and Border Protection Regulations (19 CFR part 177, subpart B), CBP issued a final determination concerning the country of origin of Rhythmlink International, LLC's self-adhesive cutaneous electrode, which may be offered to the U.S. Government under an undesignated government procurement contract. This final determination, HQ H300743, was issued under procedures set forth at 19 CFR part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18). In the final determination, CBP concluded that the assembly and processing in China do not result in a substantial transformation. Therefore, the country of origin of Rhythmlink International, LLC's self-adhesive cutaneous electrode is the United States for purposes of U.S. Government procurement.

Section 177.29, CBP Regulations (19 CFR 177.29), provides that a notice of final determination shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Dated: January 29, 2019.

Alice A. Kipel,

Executive Director, Regulations and Rulings, Office of Trade.

HQ H300743

January 29, 2019

OT:RR:CTF:VS H300743 JK

CATEGORY: Origin

David S. Robinson
Nexsen Pruet, PLLC
4141 Parklake Avenue
Suite 200
Raleigh, NC 27612

RE: U.S. Government Procurement; Title III, Trade Agreements Act of 1979 (19 U.S.C. § 2511); Subpart B, Part 177, CBP Regulations; Self-Adhesive Cutaneous Electrode; Substantial Transformation

Dear Mr. Robinson:

This is in response to your letter, dated September 10, 2018, requesting a final determination on behalf of Rhythmlink International, LLC (Rhythmlink) pursuant to subpart B of Part 177 of the U.S. Customs and Border Protection (CBP) Regulations (19 C.F.R. Part 177).

This final determination concerns the country of origin of various self-adhesive cutaneous electrodes. As a U.S. importer, Rhythmlink is a party-at-interest within the meaning of 19 C.F.R. § 177.22(d)(1) and is entitled to request this final determination. In addition, you have requested a country of origin determination for marking purposes. Samples were submitted with your request.

FACTS:

Rhythmlink is headquartered in Columbia, North Carolina and manufactures and distributes medical devices. It seeks a country of origin determination for purposes of government procurement for two types of self-adhesive cutaneous electrodes, marketed as ''Disposable Stimulating Sticky Pad Surface Electrodes'' and ''Disposable Recording Sticky Pad Surface Electrodes.'' You indicate that these products are designed and manufactured specifically for electrocardiogram (ECG) and electromyogram (EMG) monitoring applications. The catalog that you submitted indicates that the electrodes are pre-gelled and especially formulated to perform specific functions. You also state that these products are regulated by the U.S. Food & Drug Administration (FDA) under the category of ''cutaneous electrode,'' which is defined as ''an electrode that is applied directly to a patient's skin either to record physiological signals (e.g., the electroencephalogram) or to apply electrical stimulation.'' *See* 21 C.F.R. § 882.1320.

Each self-adhesive cutaneous electrode consists of a ''sticky pad,'' composed of electrically conductive hydrogel laminated onto conductive plastic and fabric backing, which is attached to a leadwire with a miniscule amount of glue. Rhythmlink sells its self-adhesive cutaneous electrodes in single (one pad) and paired (two pads connected) models with varying lengths and styles, and end users can customize the color of the connecting leadwire. You indicate that the functionality of the Sticky Pad Surface Electrode is common to all lengths and is unchanged by the color of the pre-connected leadwire. The Sticky Pad Surface Electrode also comes in varying pad sizes; the larger the pad size, the greater the conductivity (but lower the specificity) of the electrical signals. The leadwire acts as an electrical conductor that transfers low voltage electrical signals from the electrode to medical diagnostic equipment. However, you also state that other varieties of cutaneous electrodes are available that are not pre-connected to a leadwire. Such cutaneous electrodes may connect to a leadwire by using alligator clips and other removable connectors.

You state that Rhythmlink conducts all of the engineering and design of its self-adhesive cutaneous electrode in the United States. Rhythmlink purchases the hydrogel used in its self-adhesive cutaneous electrodes from a manufacturer in bulk roll form. The hydrogel, including all of its components, is manufactured entirely in the United States and specifically developed as a sensing or stimulating gel for use in medical electrode-related applications in cutaneous electrodes. You state that the hydrogel is manufactured in such a way as to serve as a metal-electrolyte interface, through which current flow within a patient becomes electron flow in the electrode and leadwire. You also state that the quality of the signals generated depends, in part, on the electrical characteristics of the electrode assembly, which is largely determined by the formula of the hydrogel used.

The components used to formulate the hydrogel include deionized water, salts, and a gelling agent. These components are mixed together until homogenous, forming a conductive ''soup.'' The pH of the mixture is adjusted to a very specific level. The mixture is then cast to a specific thickness in sheet form directly onto a clear plastic backing material on a conveyor system, slowly moving along under specific environmental conditions (e.g., temperature and humidity) to allow the gel to set. At the end of the line, thin plastic film is pressed onto the gel as a protective layer prior to rolling the hydrogel product around heavy cardboard tubes in 300 feet lengths. You indicate that the hydrogel has a limited shelf life, after which it ceases to be a medical product. The bulk roll hydrogels are then shipped to China for further processing.

Korean-origin leadwire is also shipped to China. The leadwire is a commercially available 26-gauge twisted copper wire comprising 19 strands of 38-gauge copper wire with medical grade PVC covering. The leadwire is available in a total of 26 color options. The Korean supplier of this wire cuts the wire, crimps a socket pin, attaches a connector to one end of the wire, and ships the wire to China.

In China, the bulk roll hydrogel is first laminated to U.S.-origin conductive plastic and Chinese-origin fabric backing, in a process that occurs in one second for the surface area required to punch out a single self-adhesive cutaneous electrode. Then the laminated bulk roll hydrogel is mechanically die cut one pad at a time, taking less than a second per pad. Subsequently, the Korean-origin leadwire is attached to the pad using U.S.-origin glue, ''sandwiching'' it between the conductive plastic and fabric backing in

a process that takes less than four seconds per electrode. Finally, the finished self-adhesive cutaneous electrodes are inserted into plastic pouches and cardboard packaging for shipment to the United States.

In the United States, the finished products are subject to sterilization and a randomized sampling and testing protocol prior to sale.

ISSUE:

What is the country of origin of the self-adhesive cutaneous electrode for purposes of U.S. Government procurement?

LAW AND ANALYSIS:

CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain ''Buy American'' restrictions in U.S. law or practice for products offered for sale to the U.S. Government, pursuant to subpart B of Part 177, 19 C.F.R. § 177.21 *et seq.,* which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511 *et seq.*) (TAA).

Under the rule of origin set forth under 19 U.S.C. § 2518(4)(B):

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also 19 C.F.R. § 177.22(a).

In rendering advisory rulings and final determinations for purposes of U.S. Government procurement, CBP applies the provisions of subpart B of Part 177 consistent with Federal Acquisition Regulations. *See* 19 C.F.R. § 177.21. In this regard, CBP recognizes that the Federal Acquisition Regulations restrict the U.S. Government's purchase of products to U.S.-made or designated country end products for acquisitions subject to the TAA. *See* 48 C.F.R. § 25.403(c)(1). The Federal Acquisition Regulations define ''U.S.-made end product'' as:

. . . an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

The regulations define a ''designated country end product'' as:

WTO GPA [World Trade Organization Government Procurement Agreement] country end product, an FTA [Free Trade Agreement] country end product, a least developed country end product, or a Caribbean Basin country end product.

A ''WTO GPA country end product'' is defined as an article that:

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

48 C.F.R. § 25.003. We note that Korea is a WTO GPA country, but China is not.

A substantial transformation occurs when an article emerges from a process with a new name, character or use different from that possessed by the article prior to processing. A substantial transformation will not result from a minor manufacturing or combining process that leaves the identity of the article intact. *See United States v. Gibson-Thomsen Co.,* 27 C.C.P.A. 267 (1940); *National Juice Products Association v. United States,* 628 F. Supp. 978 (CIT 1986).

In order to determine whether a substantial transformation occurs when components of various origins are assembled into completed products, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. The country of origin of the item's components, extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. No one factor is decisive; the key issue is the extent of operations performed and whether the parts lose their identity and become an integral part of the new article. *Belcrest Linens v. United States,* 573 F. Supp. 1149 (CIT 1983), *aff'd,* 741 F.2d 1368 (Fed. Cir. 1984). Assembly operations that are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation. *See* C.S.D. 80–111, C.S.D. 85–25, C.S.D. 89–110, C.S.D. 89–118, C.S.D. 90–51, and C.S.D. 90–97. Additionally, factors such as the resources expended on product design and development, extent and nature of post-assembly inspection and testing procedures, and the degree of skill required during the actual manufacturing process may be relevant when determining whether a substantial transformation has occurred.

The Court of International Trade has also looked at the essential character of an article to determine whether its identity has been substantially transformed through assembly or processing. For example, in *Uniroyal, Inc. v. United States,* 3 CIT 220, 225, 542 F. Supp. 1026, 1030 (1982), *aff'd,* 702 F.2d 1022 (Fed. Cir. 1983), the court held that imported shoe uppers added to an outer sole in the United States were the ''very essence of the finished shoe'' and thus the character of the product remained unchanged and did not undergo substantial transformation in the United States. Similarly, in *National Juice Products Association v. United States,* 10 CIT 48, 61, 628 F. Supp. 978, 991 (1986), the court held that imported orange juice concentrate ''imparts the essential character'' to the completed orange juice and thus was not substantially transformed into a product of the United States.

For products used in medical-related applications, we have held that no substantial transformation occurs when the critical components which impart the essential character of the product subsequently undergo simple assembly and processing. In HQ H248851, dated July 8, 2014, CBP held that an Israeli-origin CO2 tube was not substantially transformed in China when cut to length and attached to four other components from Israel and China. CBP found that the CO2 tube performed the essential function of the finished product, which was the delivery of breath for monitoring the CO2 level in a patient's breath. By way of the assembly process in China, the CO2 tube was attached to other components that facilitated its function and did not lose its individual identity in the process.

Similarly, in HQ 560613, dated October 28, 1997, Customs, a predecessor of CBP, held that U.S.-origin components were not substantially transformed in Ireland when made into a pregnancy test kit. The test kit was made from the following U.S. components: top and bottom housing, paper, antibody, wick, laminate, and nitrocellulose. In addition, a splash guard from Ireland and rayon from Germany were used. The critical components of the pregnancy test kit were found to be the three U.S.-origin antibodies. Customs recognized that the U.S.-origin components imparted the essential character of the pregnancy test kit and that the simple assembly of placing the antibodies onto the rayon membrane, and subsequent assembly of the strips into a plastic housing, did not result in a substantial transformation.

In H259473, dated June 30, 2015, CBP found that a single use negative pressure wound therapy system, comprised of a pump from China and two dressings from the United Kingdom, was of U.K.-origin due to the U.K.-origin of the dressings and the programming and final assembly of the pump occurring in the U.K. CBP found that the unique dressing was the ''enabling technology'' that provided the essential therapeutic elements for wound healing to the medical instrument. In addition, CBP noted that the medical instrument could only be used with the dressings included with the system.

Based on the information provided in your letter and consistent with CBP rulings cited above, we note that the majority of the components of the self-adhesive cutaneous electrode are of U.S. or WTO GPA country origin, including the U.S.-origin hydrogel, conductive plastic, and glue, and the Korean-origin leadwire. Only the fabric backing, which merely adds strength to the leadwire connection, is of Chinese-origin. More importantly, we find that the electrically conductive hydrogel, manufactured entirely in the United States, performs the essential function of the finished product, which is to provide the means whereby electrical activity in the body is recorded by the input circuits of an EEG/EMG machine, or electrical impulses are generated when used with stimulating equipment. The hydrogel's adhesive properties are essential to allowing

the product to function as a self-adhesive cutaneous electrode. As indicated in your letter, the hydrogel used in this product is dedicated for use in cutaneous electrodes, as the chemical and mechanical properties of the hydrogel dictate its single intended use in medical electrode-related applications. Furthermore, the product ceases to be a medical product once the shelf life of the hydrogel has been exceeded. Accordingly, we find that the U.S.-origin hydrogel imparts the essential character of the self-adhesive cutaneous electrode.

Regarding the assembly and processing that occurs in China, we note that these constitute relatively simple and minor operations involving highly repetitive, low-skill functions. The lamination of the hydrogel onto the conductive plastic and fabric backing, the mechanical die cutting of the pad, and the gluing of the leadwire occur in less than six seconds per electrode. In contrast, we recognize that all of the engineering and design of the self-adhesive cutaneous electrode occurs in the United States. While the conductive plastic, fabric backing and leadwire facilitate the product's functionality, the hydrogel itself remains unchanged by the Chinese assembly and processing and continues to provide the essential function of the FDA-regulated ''cutaneous electrode'' product. Consequently, we find that the self-adhesive cutaneous electrode is not substantially transformed by the assembly and processing that occur in China.

With regard to your marking question, Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. § 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such a manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. The regulations implementing the country of origin marking requirements and exceptions of 19 U.S.C. § 1304, along with certain marking provisions of the Harmonized Tariff Schedule of the United States (19 U.S.C. § 1202), are set forth in 19 C.F.R. Part 134. ''Country of origin'' is defined, in relevant part, as: the country of manufacture, production, or growth of any article of foreign origin entering the United States. 19 C.F.R. § 134.1(b). Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the ''country of origin'' within the meaning of this part[.]''

For purposes of marking, the same substantial transformation analysis discussed above applies in this case. Accordingly, the self-adhesive cutaneous electrodes which are processed in China are products of the United States. Because the electrodes are products of the United States that are exported and returned without undergoing a substantial transformation, they are excepted from country of origin marking requirements pursuant to 19 C.F.R. § 134.32(m). Please note that if you wish to mark the self-adhesive cutaneous electrodes or the packaging containing these products to indicate that they are ''Made in the USA'', the marking must comply with the requirements of the Federal Trade Commission (FTC). We suggest that you direct any questions on this issue to the FTC.

HOLDING:

Based on the information provided, the country of origin of the self-adhesive cutaneous electrode for U.S. government procurement purposes is the United States.

Notice of this final determination will be given in the **Federal Register**, as required by 19 C.F.R. § 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 C.F.R. § 177.31, that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 C.F.R. § 177.30, any party-at-interest may, within 30 days after publication of the **Federal Register** notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,

Dated: January 29, 2019.

Alice A. Kipel,

Executive Director, Regulations and Rulings, Office of Trade.

[FR Doc. 2019–01116 Filed 2–4–19; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Notice of Issuance of Final Determination Concerning Certain Ethernet Switches, Routers and Network Cards

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection (''CBP'') has issued a final determination concerning the country of origin of certain Ethernet switches, routers and network cards. Based upon the facts presented, CBP has concluded in the final determination that the United States is the country of origin of the Ethernet switches, routers and network cards for purposes of U.S. Government procurement.

DATES: The final determination was issued on January 29, 2019. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR § 177.22(d), may seek judicial review of this final determination within March 7, 2019.

FOR FURTHER INFORMATION CONTACT: Tebsy Paul, Entry Process and Duty Refunds Branch, Regulations and Rulings, Office of Trade (202) 325–0195.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on January 29, 2019, pursuant to subpart B of Part 177, U.S. Customs and Border Protection Regulations (19 CFR part 177, subpart B), CBP issued a final determination concerning the country of origin of certain Ethernet switches, routers and network cards, which may be offered to the U.S. Government under an undesignated government procurement contract. This final determination, HQ H290670, was issued under procedures set forth at 19 CFR part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18). In the final determination, CBP concluded that, based upon the facts presented, the programming and downloading operations performed in the United States, using U.S.-origin software, substantially transform non-TAA country Ethernet switches, routers and network cards. Therefore, the country of origin of the Ethernet switches, routers and network cards is the United States for purposes of U.S. Government procurement.

Section 177.29, CBP Regulations (19 CFR 177.29), provides that a notice of final determination shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Dated: January 29, 2019.

Alice A. Kipel,

Executive Director, Regulations and Rulings, Office of Trade.

HQ H290670

January 29, 2019

OT:RR:CTF:VS H290670 TP

CATEGORY: Origin

Mr. Stuart P. Seidel
Baker & McKenzie, LLP
815 Connecticut Ave., N.W.
Washington, D.C. 20006–4078

RE: U.S. Government Procurement; Country of Origin; Ethernet Switches, Routers and Network Cards; Substantial Transformation

Dear Mr. Seidel:

This is in response to your letter dated September 20, 2017, requesting a final determination on behalf of ALE USA, Inc. (''ALE'') pursuant to subpart B of Part 177 of the U.S. Customs & Border Protection (''CBP'') Regulations (19 C.F.R. Part 177). This final determination concerns the country of origin of ALE's Ethernet switches, routers and network cards. As a U.S. importer, ALE is a party-at-interest within

the meaning of 19 C.F.R. § 177.22(d)(1) and is entitled to request this final determination.

Per your letter dated September 20, 2017, we have reviewed your request for confidentiality pursuant to 19 C.F.R. § 177.2(b)(7) with respect to certain information submitted. As that information constitutes privileged or confidential matters, it has been bracketed and will be deleted from any published versions.

FACTS:

ALE manufactures and imports a group of Ethernet switches, routers and network cards. The group of products consists of the following: OmniSwitch® OS6900–X72, OS6900–Q32, OS6900–C32, OS6900–CX72, OS6860/6860E family, OS 6560 family, OS 6450 family and OS 6865–U28X. You state that the hardware for these products was designed in Taiwan and manufactured in China. You state that the final programming of the EEPROM on the device and majority of the programming for the Alcatel Operating System (''AOS'') are completed and compiled in the United States and will be downloaded in the United States. You also account for the labor hours spent and the qualifications of the coders and developers who worked on developing, programming, and downloading the software in the United States.

You state that the assembly process is the same for all the products mentioned above. The metal fabrication consists of simple punching, bending and painting of sheet steel or aluminum metals to create the protective case. This occurs in Taiwan and takes approximately 20 minutes to complete. The remaining hardware assembly takes place in China. ALE states that the individual components of the hardware include resistors, capacitors, diodes, transistors, memory, application specific integrated circuits, memory modules, CPUs, printed circuit cards, and metal housings. ALE states that the countries of origin for these components are from various parts of Asia, including Singapore, Taiwan and China.

ALE describes the hardware assembly in China as follows:

1. The Surface Mount technology (''SMT'') installation involves the mounting of a preprogrammed [XXXXX] program. SMT involves the mounting of electronic components directly on to the printed circuit board. The [XXXXX] program is compiled codes that allows the CPU to have the necessary configurations to support computer function by using a set of commands. The [XXXXX] program is required to boot the device so that it can load the ALE programs. However, the devices cannot function until the U.S.-developed and programmed software and EEPROM are loaded in the United States.

2. An in circuit test (''ICT'') is performed. This process allows for the ICT to program a complex programmable logic device (''CPLD'') image into the CPLD programmable application-specific integrated circuit (''ASIC''). The CPLDs are integrated circuits that are configured to implement digital hardware and by programming them into an ASIC, the integrated circuits can be suited for a specific purpose, rather than general-purpose use. In this case, the CPLD image contains code that allows the CPU to boot the device for testing. Additionally, the EEPROM is programmed with critical information that is retrieved from ALE's servers.

3. The hardware undergoes mechanical assembly.

4. Installation of a diagnostic file to allow for thorough testing. The purpose of the software that is downloaded on to the hardware in China is to perform diagnostic testing to assure the circuit paths on the printed circuit board are made and function properly.

5. The hardware undergoes functional testing.

6. An environment stress screening (''ESS'') test is performed. This is considered a type of burn-in test to identify manufacturing quality issues.

7. The hardware is packaged.

ALE contends that the programming undertaken in China is to verify that the product has been manufactured correctly. Specifically, the partial tests ensure that the surface mounting of electronic components is complete. You state that at this point, the hardware is missing the majority of programming leaving it incapable of performing the necessary functions of Institute of Electrical and Electronics Engineers (''I.E.E.E.'') Ethernet router functionality; therefore the product enters the United States in a non-functional state. Additionally, you state that in the United States, the systems are unpacked and presented to ALE test executives for proper configuration and labeling through a U.S. secure server. The assembly process in the United States involves the following steps: (1) the EEPROM is re-programmed with valid, proper information originating solely from ALE USA's propriety product Data Management tool; (2) the AOS is loaded onto an electronic storage medium; (3) final tests are conducted; (4) the product is packaged; (5) and quality control mechanisms are carried out which are validated to allow for release of the products to be shipped.

You state that the AOS software enables the OmniSwitch products to function as a switch/router. You assert that the AOS contains the specialized routing algorithms that transform merchant silicon into a functional OmniSwitch/Router and that, as stated above, the software was almost completely architected, developed, programmed and compiled in the United States. The EEPROM is also reprogrammed to incorporate product specific information allowing it to operate as a Layer 2, 3 and 6 device. You state that Layers 2, 3 and 6 refer to the layers that comprise an Open System Interconnection (''OSI'') networking model. You state that the layers are a controlled hierarchy where information is passed from one layer to the next creating a blueprint for how information is passed from physical electrical impulses to applications. The AOS is downloaded onto storage within the device. The software is compiled many times until a final version is approved. Quality checks occur to certify that the code is ready and manufacturing test engineers work with engineering personnel to test the AOS software.

ISSUE:

What is the country of origin of the Ethernet switches, routers and network cards for purposes of U.S. Government procurement?

LAW AND ANALYSIS:

CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain ''Buy American'' restrictions in U.S. law or practice for products offered for sale to the U.S. Government, pursuant to subpart B of Part 177, 19 C.F.R. § 177.21 *et seq.,* which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511 *et seq.*).

Under the rule of origin set forth under 19 U.S.C. § 2518(4)(B):

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also 19 C.F.R. § 177.22(a).

In rendering final determinations for purposes of U.S. Government procurement, CBP applies the provisions of subpart B of Part 177 consistent with the Federal Acquisition Regulations. *See* 19 C.F.R. § 177.21. In this regard, CBP recognizes that the Federal Acquisition Regulations restrict the U.S. Government's purchase of products to U.S.-made or designated country end products for acquisitions subject to the Trade Agreements Act. *See* 48 C.F.R. § 25.403(c)(1). The Federal Acquisition Regulations define ''U.S.-made end product'' as ''an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.'' *See* 48 C.F.R § 25.003.

In *Data General* v. *United States,* 4 C.I.T. 182 (1982), the court determined that the programming of a foreign Programmable Read-Only Memory chip (''PROM'') in the United States substantially transformed the PROM into a U.S. article. In the United States, the programming bestowed upon each integrated circuit its electronic function, that is, its ''memory'' which could be retrieved. A distinct physical change was effected in the PROM by the opening or closing of the fuses, depending on the method of programming. The essence of the article, its interconnections or stored memory, was established by programming. *See also, Texas Instruments* v. *United States,* 681 F.2d 778, 782 (CCPA 1982) (stating the substantial transformation issue is a ''mixed question of technology and customs law''); HQ 735027, dated September 7, 1993 (programming blank media (EEPROM) with instructions that allow it to perform certain functions that

prevent piracy of software constitutes a substantial transformation); and, HQ 734518, dated June 28, 1993 (motherboards are not substantially transformed by the implanting of the central processing unit on the board because, whereas in *Data General* use was being assigned to the PROM, the use of the motherboard had already been determined when the importer imported it).

CBP has examined the effect of downloading U.S.-developed software in previous decisions. For example, in HQ H258960, dated May 19, 2016, CBP considered the country of origin of network transceivers in two different scenarios. In Scenario One, the importer purchased ''blank'' transceivers from Asia. The transceivers were then loaded with U.S.-developed software in the United States, which made the transceivers functional. In Scenario Two, the importer purchased the transceivers with a generic program preinstalled, which was then removed so that the U.S.-developed software could be installed. CBP held that, in Scenario One, because the transceivers could not function as network devices without the U.S.-developed software, the transceivers were substantially transformed as a result of the downloading of the U.S.-developed software performed in the United States. However, in Scenario Two, because the transceivers were already functional when imported, the identity of the transceivers was not changed by the downloading performed in the United States, and no substantial transformation occurred.

Similarly, in HQ H175415 dated October 4, 2011, CBP held that imported Ethernet switches underwent a substantial transformation after U.S.-origin software was downloaded onto the devices' flash memory in the United States, which allowed the devices to function. In China, the printed circuit board assemblies, chassis, top cover, power supply, and fan were assembled. Then, in the United States, U.S.-origin software, which gave the hardware the capability of functioning as local area network devices, was loaded onto the hardware. CBP noted that the U.S.-origin software ''enables the imported switches to interact with other network switches'' and that ''[w]ithout this software, the imported devices could not function as Ethernet switches.'' Under these circumstances, CBP held that the country of origin of the local area network devices was the United States. *See also* HQ H052325, dated March 31, 2009 (holding that imported network devices underwent a substantial transformation in the United States after U.S.-origin software was downloaded onto the devices in the United States, which gave the devices their functionality); and HQ H034843, dated May 5, 2009 (holding that Chinese USB flash drives underwent a substantial transformation in Israel when Israeli-origin software was loaded onto the devices, which made the devices functional).

In this case, the hardware is imported from China in a fully assembled state. However, at the time of importation the devices are not functional because they lack the software needed to run. Here, unlike Scenario Two in HQ H258960, the programming that occurs in China is to perform diagnostic testing to assure the circuit paths on the printed circuit board are made and function properly. Furthermore, contrary to Scenario Two in HQ H258960, the identity of the switches changes after the U.S.-origin software is downloaded onto the switches. Moreover, as in HQ H175415, HQ H052325, and HQ H258960, it is only after the installation of U.S.-origin software that the devices obtain their essence and functionality as switches and routers. Without the U.S. proprietary software, the devices cannot function as a network device in any capacity. Here, the AOS is developed and downloaded in the United States. The development, configuration, and downloading of the AOS helps transform the essence of the products at issue from merchant silicon into fully functional network devices that are capable of performing the intended switching and routing functions. The devices at issue here derive their core functionality as switches and routers from the installation of the U.S.-developed software. The U.S.-developed software enables the system to interact with other network switches or routers through network switching and routing protocols, and allows for the management of functions such as network performance monitoring and security and access control.

Under these circumstances, and consistent with previous CBP rulings, we find that the country of origin of the final product is the United States, where the non-functional devices are substantially transformed as a result of downloading performed in the United States, with software developed in the United States. Furthermore, in the present case, the essence of the articles depends on the information technology found in the software, which allows the devices to communicate with other network switches or routers for their ultimate purpose. For country of origin determinations, it should be noted that the final determination differs based on each article's specific purpose, makeup, and applicable technology.

HOLDING:

The country of origin of the Ethernet switches, routers and network cards for purposes of U.S. Government procurement is the United States.

Notice of this final determination will be given in the Federal Register, as required by 19 C.F.R. § 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 C.F.R. § 177.31, that CBP reexamine the matter anew and issue a new final determination.

Pursuant to 19 C.F.R. § 177.30, any party-at-interest may, within 30 days of publication of the Federal Register Notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,

Alice A. Kipel,

Executive Director, Regulations and Rulings, Office of Trade.

[FR Doc. 2019–01115 Filed 2–4–19; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–6101–N–03]

Notice of Regulatory Waiver Requests Granted for the Third Quarter of Calendar Year 2018

AGENCY: Office of the General Counsel, HUD.

ACTION: Notice.

SUMMARY: Section 106 of the Department of Housing and Urban Development Reform Act of 1989 (the HUD Reform Act) requires HUD to publish quarterly **Federal Register** notices of all regulatory waivers that HUD has approved. Each notice covers the quarterly period since the previous **Federal Register** notice. The purpose of this notice is to comply with the requirements of section 106 of the HUD Reform Act. This notice contains a list of regulatory waivers granted by HUD during the period beginning on July 1, 2018 and ending on September 30, 2018.

FOR FURTHER INFORMATION CONTACT: For general information about this notice, contact Ariel Pereira, Associate General Counsel for Legislation and Regulations, Department of Housing and Urban Development, 451 Seventh Street SW, Room 10282, Washington, DC 20410–0500, telephone 202–708–3055 (this is not a toll-free number). Persons with hearing- or speech-impairments may access this number through TTY by calling the toll-free Federal Relay Service at 800–877–8339.

For information concerning a particular waiver that was granted and for which public notice is provided in this document, contact the person whose name and address follow the description of the waiver granted in the accompanying list of waivers that have been granted in the third quarter of calendar year 2018.

SUPPLEMENTARY INFORMATION: Section 106 of the HUD Reform Act added a new section 7(q) to the Department of Housing and Urban Development Act (42 U.S.C. 3535(q)), which provides that:

1. Any waiver of a regulation must be in writing and must specify the grounds for approving the waiver;

2. Authority to approve a waiver of a regulation may be delegated by the Secretary only to an individual of Assistant Secretary or equivalent rank, and the person to whom authority to waive is delegated must also have authority to issue the particular regulation to be waived;

3. Not less than quarterly, the Secretary must notify the public of all

waivers of regulations that HUD has approved, by publishing a notice in the **Federal Register**. These notices (each covering the period since the most recent previous notification) shall:

a. Identify the project, activity, or undertaking involved;

b. Describe the nature of the provision waived and the designation of the provision;

c. Indicate the name and title of the person who granted the waiver request;

d. Describe briefly the grounds for approval of the request; and

e. State how additional information about a particular waiver may be obtained.

Section 106 of the HUD Reform Act also contains requirements applicable to waivers of HUD handbook provisions that are not relevant to the purpose of this notice.

This notice follows procedures provided in HUD's Statement of Policy on Waiver of Regulations and Directives issued on April 22, 1991 (56 FR 16337). In accordance with those procedures and with the requirements of section 106 of the HUD Reform Act, waivers of regulations are granted by the Assistant Secretary with jurisdiction over the regulations for which a waiver was requested. In those cases in which a General Deputy Assistant Secretary granted the waiver, the General Deputy Assistant Secretary was serving in the absence of the Assistant Secretary in accordance with the office's Order of Succession.

This notice covers waivers of regulations granted by HUD from July 1, 2018 through September 30, 2018. For ease of reference, the waivers granted by HUD are listed by HUD program office (for example, the Office of Community Planning and Development, the Office of Fair Housing and Equal Opportunity, the Office of Housing, and the Office of Public and Indian Housing, etc.). Within each program office grouping, the waivers are listed sequentially by the regulatory section of title 24 of the Code of Federal Regulations (CFR) that is being waived. For example, a waiver of a provision in 24 CFR part 58 would be listed before a waiver of a provision in 24 CFR part 570.

Where more than one regulatory provision is involved in the grant of a particular waiver request, the action is listed under the section number of the first regulatory requirement that appears in 24 CFR and that is being waived. For example, a waiver of both § 58.73 and § 58.74 would appear sequentially in the listing under § 58.73.

Waiver of regulations that involve the same initial regulatory citation are in time sequence beginning with the earliest-dated regulatory waiver.

Should HUD receive additional information about waivers granted during the period covered by this report (the third quarter of calendar year 2018) before the next report is published (the fourth quarter of calendar year 2018), HUD will include any additional waivers granted for the third quarter in the next report.

Accordingly, information about approved waiver requests pertaining to HUD regulations is provided in the Appendix that follows this notice.

Dated: January 30, 2019.

J. Paul Compton, Jr.,

General Counsel.

Appendix

Listing of Waivers of Regulatory Requirements Granted by Offices of the Department of Housing and Urban Development July 1, 2018 Through September 30, 2018

Note to Reader: More information about the granting of these waivers, including a copy of the waiver request and approval, may be obtained by contacting the person whose name is listed as the contact person directly after each set of regulatory waivers granted. The regulatory waivers granted appear in the following order:

I. Regulatory Waivers Granted by the Office of Community Planning and Development

II. Regulatory Waivers Granted by the Office of Housing

III. Regulatory Waivers Granted by the Office of Public and Indian Housing

I. Regulatory Waivers Granted by the Office of Community Planning and Development

For further information about the following regulatory waivers, please see the name of the contact person that immediately follows the description of the waiver granted.

• *Regulation:* 24 CFR 576.106(d)(1).

Project/Activity: HUD granted a waiver of 24 CFR 576.106(d)(1) to the Washington State Department of Commerce to allow its subrecipient, the Whatcom County Health Department (WCHD), to use Fiscal Year (FY) 2016 and 2017 Emergency Solutions Grants (ESG) Program Rapid Re-housing (RRH) and Homelessness Prevention (HP) funds in Whatcom County for housing units with rents up to 118 percent of the HUD-established Fair Market Rent (FMR). The waiver of 24 CFR 576.106(d)(1) is provided for individuals and families who begin receiving ESG rental assistance during the 1-year period beginning on the date of the waiver memorandum (August 7, 2018). WCHD must still comply with the rent reasonableness requirements in 24 CFR 576.106(d)(1).

Nature of Requirement: Under 24 CFR 576.106(d)(1), rental assistance cannot be provided unless the total rent is equal to or less than the FMR established by HUD, as provided under 24 CFR part 888, and complies with HUD's standard of rent reasonableness, as established under 24 CFR 982.507.

Granted By: Neal Rackleff, Assistant Secretary for Community Planning and Development.

Date Granted: August 7, 2018.

Reason Waived: HUD granted the waiver because the recipient sufficiently documented its subrecipient's inability to provide adequate ESG program rental assistance under the current rental market conditions in Whatcom County. Specifically, HUD determined that the 1.8 percent rental vacancy rate in Whatcom County, higher-than-average poverty rate, high demand for low cost rental units, and lack of available units at or below FMR have resulted in prolonged, costly and often futile housing search efforts, participating households remaining homeless for increased periods of time, and inability of the subrecipient to expend all of its ESG funds.

Contact: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7262, Washington, DC 20410, telephone (202) 708–4300.

• *Regulation:* 24 CFR 576.106(d)(1).

Project/Activity: HUD granted a waiver of 24 CFR 576.106(d)(1) to the State of California Department of Housing and Community Development (DHCD) to allow its subrecipient, Families in Transition (FIT) of Santa Cruz County, to use Fiscal Year (FY) 2016 Emergency Solutions Grants (ESG) Program Rapid Re-housing (RRH) funds in Santa Cruz County for housing units with rents up to the payment standard adopted by the Santa Cruz housing authority. The waiver of 24 CFR 576.106(d)(1) is provided for individuals and families who begin receiving ESG RRH rental assistance during the 1-year period beginning on the date of the waiver memorandum (August 7, 2018). DHCD and its subrecipients must still comply with the rent reasonableness requirements in 24 CFR 576.106(d)(1).

Nature of Requirement: Under 24 CFR 576.106(d)(1), rental assistance cannot be provided unless the total rent is equal to or less than the FMR established by HUD, as provided under 24 CFR part 888, and complies with HUD's standard of rent reasonableness, as established under 24 CFR 982.507.

Granted By: Neal Rackleff, Assistant Secretary for Community Planning and Development.

Date Granted: August 7, 2018.

Reason Waived: HUD granted the waiver because the recipient sufficiently documented its subrecipient's inability to provide adequate ESG rental assistance under the current rental market conditions in Santa Cruz County. Specifically, HUD determined that the 2.4 percent rental vacancy rate in Santa Cruz County, extremely high demand for rental units at or below FMR, lack of available units at or below FMR, and stringent tenant screening criteria by many landlords (such as requiring monthly incomes at least 3 times FMR) have resulted in participating households remaining homeless for average periods of 9 to 12

months before being housed, and participants securing only units with rents above FMR (for which ESG rental assistance could not be used).

Contact: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7262, Washington, DC 20410, telephone (202) 708–4300.

II. Regulatory Waivers Granted by the Office of Housing—Federal Housing Administration (FHA)

For further information about the following regulatory waivers, please see the name of the contact person that immediately follows the description of the waiver granted.

• *Regulation:* 24 CFR 200.73 (c).

Project/Activity: Heritage Crossing II, Baltimore, Maryland, Project No. 052–35810

Nature of Requirement: HUD's regulation at 24 CFR 200.73 (c) requiring that ''not less than five rental dwelling units [of an FHA insured multifamily housing project] shall be on one site. The property is a large, scattered-site portfolio of 75 apartment properties on 72 separate parcels of which some are contiguous, but most are not: 4 of the 72 parcels contain 5 or more single units that are contiguously situated (totaling 24 units) and therefore comply with HUD ''Scattered Sites'' requirements; however, the remaining 68 parcels contain less than 5 units each (totaling 51 units), and are therefore non-contiguous separate sites.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 28, 2018.

Reason Waived: The waiver will meet HUD's goal of preserving and maintaining affordable rental housing for low income families. The proposed FHA-insured loan/RAD conversion will preserve and rehabilitate necessary affordable housing and will contribute to the revitalization of this Baltimore community.

Contact: Patricia M. Burke, Acting Director, Office of Multifamily Production, HTD, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 6130, Washington, DC 20410, telephone (202)402–5693.

Regulation: 24 CFR 266.200(b)(2).

Project/Activity: Federal Financing Bank (FFB) Risk Sharing Program regulations for thirteen (13) additional projects for a total of 53 projects, Risk Sharing Initiative through Calendar Year 2019, Substantial Rehabilitation, Massachusetts Housing Finance Agency (Mass Housing), Boston, Massachusetts, no project names listed.

Nature of Requirement: The Waiver of 24 CFR 266.200(b)(2), Substantial Rehabilitation. The Department will permit the revised definition of substantial rehabilitation (S/R) as described in the revised MAP Guide published on January 29, 2016, such that S/R is: Any scope of work that either (a) Exceeds in aggregate cost a sum equal to the 'base per dwelling unit limit' times the applicable High Cost Factor, or (b) Replacement of two or more building systems. 'Replacement' is when the cost of replacement work exceeds 50 percent of the cost of replacing the entire system.

The High Cost Factors for 2018 were recently published through a Housing Notice (HN) on May 23, 2018 and the revised statutory limits were published in the **Federal Register** on November 7, 2017. The 2018 base dwelling unit amount to determine substantial rehabilitation for FHA insured loan programs has been increased from $15,000 (changed from $6,500 per unit in the 2016 MAP guide) to $15,636. This amount will change annually based upon the change in the annual Consumer Price Index (CPI), along with the statutory limits or other inflation cost index published by HUD.

Granted By: Brian D. Montgomery, Assistant Secretary for Housing- Federal Housing Commissioner.

Date Granted: September 21, 2018.

Reason Waived: Granted waivers of certain provisions of the Federal Financing Bank (FFB) Risk-Sharing Program regulations for thirteen (13) projects utilizing the Federal Financing Bank (FFB) Risk-Sharing Initiative through the end of Calendar Year 2019. Under this initiative, FFB provides capital to participating Housing Finance Agencies (HFAs) to make multifamily loans insured under the Multifamily Risk Sharing Program.

Contact: Patricia M. Burke, Acting Director, Office of Multifamily Production, HTD, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 6130, Washington, DC 20410, telephone (202) 402–5693.

Regulation: 24 CFR 266.200(b)(2).

Project/Activity: Federal Financing Bank (FFB) Risk-Sharing Program regulations for an additional five (5) projects for a total of 25 projects utilizing the Federal Financing Bank (FFB) Risk-Sharing Initiative through the end of Calendar Year 2019, Substantial Rehabilitation, the Massachusetts Housing Partnership (MHP), Boston, Massachusetts, no project names listed.

Nature of Requirement: The Waiver of 24 CFR 266.200(b)(2), Substantial Rehabilitation. The Department will permit the revised definition of substantial rehabilitation (S/R) as described in the revised MAP Guide published on January 29, 2016, such that S/R is: Any scope of work that either (a) Exceeds in aggregate cost a sum equal to the 'base per dwelling unit limit' times the applicable High Cost Factor, or (b) Replacement of two or more building systems. 'Replacement' is when the cost of replacement work exceeds 50 percent of the cost of replacing the entire system.

The High Cost Factors for 2018 were recently published through a Housing Notice (HN) on May 23, 2018 and the revised statutory limits were published in the **Federal Register** on November 7, 2017. The 2018 base dwelling unit amount to determine substantial rehabilitation for FHA insured loan programs has been increased from $15,000 (changed from $6,500 per unit in the 2016 MAP guide) to $15,636. This amount will change annually based upon the change in the annual Consumer Price Index (CPI), along with the statutory limits or other inflation cost index published by HUD.

Granted By: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 21, 2018.

Reason Granted: Under this initiative, FFB provides capital to participating Housing Finance Agencies (HFAs) to make multifamily loans insured under the FHA Multifamily Risk Sharing Program. Granted waivers of certain provisions of the Federal Financing Bank (FFB) Risk-Sharing Program regulations for five (5) projects utilizing the Federal Financing Bank (FFB) Risk-Sharing Initiative through the end of Calendar Year 2019.

Contact: Patricia M. Burke, Acting Director, Office of Multifamily Production, HTD, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 6130, Washington, DC 20410, telephone (202) 402–5693.

• *Regulation:* 24 CFR 266.200(c)(2).

Project/Activity: Federal Financing Bank (FFB) Risk Sharing Initiative, Equity Take Outs. Massachusetts Housing Finance Agency (Mass Housing), Boston, Massachusetts

Nature of Requirements: The Waiver of 24 CFR 266.200(c)(2), Existing Projects ''Equity Take-outs''. The Department will permit the insured mortgage to exceed the sum of the total cost of acquisition, cost of financing, cost of repairs, and reasonable transaction costs, or ''equity take-outs'' in refinances of Mass Housing-financed projects and those outside Mass Housing's portfolio if the result is preservation with the following conditions:

1. Occupancy is no less than 93 percent for previous 12 months;

2. No defaults in the last 12 months of the HFA loan to be refinanced;

3. A 20-year affordable housing deed restriction placed on title that conforms to the Section 542(c) statutory definition;

4. A Property Capital Needs Assessment (PCNA) must be performed and funds escrowed for all necessary repairs, and reserves funded for future capital needs; and

5. For projects subsidized by Section 8 Housing Assistance Payment (HAP) contracts:

a. Owner agrees to renew HAP contract(s) for 20-year term, (subject to appropriations and statutory authorization, etc.), and

b. In accordance with regulations in 24 CFR 883.306(e), and Housing Notice 2012–14—Use of ''New Regulation'' Section 8 Housing Assistance Payments (HAP) Contracts Residual Receipts of Offset Project-Based Section 8 Housing Assistance Payments, if at any time Mass Housing determines that a project's excess funds (surplus cash) after project operations, reserve requirements and permitted distributions are met, Mass Housing must place the excess funds into a separate interest-bearing account. Upon renewal of a HAP Contract the excess funds can be used to reduce future HAP payments or other project operations/purposes. When the HAP Contract expires, is terminated, or any extensions are terminated, any unused funds remaining in the Residual Receipt Account at the time of the contract's termination must be returned to HUD.

Granted By: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 21, 2018.

Reason Waived: Under this Initiative, FFB provides capital to participating Housing Finance Agencies (HFAs) to make multifamily loans insured under the FHA Multifamily Risk Sharing Program.

Contact: Patricia M. Burke, Acting Director, Office of Multifamily Production, HTD, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 6130, Washington, DC 20410, telephone (202)402–5693.

• *Regulation:* 24 CFR 266.200(c)(2).

Project/Activity: Federal Financing Bank (FFB) Risk Sharing Initiative, Equity Take Outs. Massachusetts Housing Partnership (MHP), Boston, Massachusetts.

Nature of Requirement: The Waiver of 24 CFR 266.200(c)(2), Existing Projects ''Equity Take-outs''. The Department will permit the insured mortgage to exceed the sum of the total cost of acquisition, cost of financing, cost of repairs, and reasonable transaction costs, or ''equity take-outs'' in refinances of MHP-financed projects and those outside MHP's portfolio if the result is preservation with the following conditions:

1. Occupancy is no less than 93 percent for previous 12 months;

2. No defaults in the last 12 months of the HFA loan to be refinanced;

3. A 20-year affordable housing deed restriction placed on title that conforms to the Section 542(c) statutory definition;

4. A Property Capital Needs Assessment (PCNA) must be performed and funds escrowed for all necessary repairs, and reserves funded for future capital needs; and

5. For projects subsidized by Section 8 Housing Assistance Payment (HAP) contracts:

a. Owner agrees to renew HAP contract(s) for 20-year term, (subject to appropriations and statutory authorization, etc.), and

b. In accordance with regulations in 24 CFR 883.306(e), and Housing Notice 2012–14—Use of ''New Regulation'' Section 8 Housing Assistance Payments (HAP) Contracts Residual Receipts of Offset Project-Based Section 8 Housing Assistance Payments, if at any time MHP determines that a project's excess funds (surplus cash) after project operations, reserve requirements and permitted distributions are met, MHP must place the excess funds into a separate interest-bearing account. Upon renewal of a HAP Contract the excess funds can be used to reduce future HAP payments or other project operations/purposes. When the HAP Contract expires, is terminated, or any extensions are terminated, any unused funds remaining in the Residual Receipt Account at the time of the contract's termination must be returned to HUD.

Granted By: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 21, 2018.

Reason Waived: Under this Initiative, FFB provides capital to participating Housing Finance Agencies (HFAs) to make multifamily loans insured under the FHA Multifamily Risk Sharing Program.

Contact: Patricia M. Burke, Acting Director, Office of Multifamily Production, HTD, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 6130, Washington, DC 20410, telephone (202) 402–5693.

• *Regulation:* 24 CFR 266.200(d).

Project/Activity: Federal Financing Bank (FFB) Risk Sharing Initiative, Underwriting of Projects with Section 8 HAP Contracts. Massachusetts Housing Finance Agency (Mass Housing), Boston, Massachusetts

Nature of Requirement: The Waivers of 24 CFR 266.200(d), Projects receiving Section 8 rental subsidies or other rental subsidies. For refinancing of Section 202 projects, and for Public Housing Authority (PHA) projects converting to Section 8 through the Rental Assistance Demonstration (RAD) Initiative, the Department will permit Mass Housing to underwrite the financing using current or to be adjusted project-based Section 8 assisted rents, even though they exceed the market rates. This is consistent with HUD Housing Notice 04–21, ''Amendments to Notice 02–16: Underwriting Guidelines for Refinancing of Section 202, and Section 202/8 Direct Loan Repayments'', which grants authority only to those lenders refinancing with mortgage programs under the National Housing Act.

Granted By: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 21, 2018.

Reason Waived: Under this Initiative, FFB provides capital to participating Housing Finance Agencies (HFAs) to make multifamily loans insured under the FHA Multifamily Risk Sharing Program.

Contact: Patricia M. Burke, Acting Director, Office of Multifamily Production, HTD, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 6130, Washington, DC 20410, telephone (202) 402–5693.

• *Regulation:* 24 CFR 266.200(d).

Project/Activity: Federal Financing Bank (FFB) Risk Sharing Initiative, Underwriting of Projects with Section 8 HAP Contracts. Massachusetts Housing Partnership (MHP), Boston, Massachusetts.

Nature of Requirement: The Waivers of 24 CFR 266.200(d), Projects receiving Section 8 rental subsidies or other rental subsidies. For refinancing of Section 202 projects, and for Public Housing Authority (PHA) projects converting to Section 8 through the Rental Assistance Demonstration (RAD) Initiative, the Department will permit MHP to underwrite the financing using current or to be adjusted project-based Section 8 assisted rents, even though they exceed the market rates. This is consistent with HUD Housing Notice 04–21, ''Amendments to Notice 02–16: Underwriting Guidelines for Refinancing of Section 202, and Section 202/8 Direct Loan Repayments'', which grants authority only to those lenders refinancing with mortgage programs under the National Housing Act.

Granted By: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 21, 2018.

Reason Waived: Under this Initiative, FFB provides capital to participating Housing Finance Agencies (HFAs) to make multifamily loans insured under the FHA Multifamily Risk Sharing Program.

Contact: Patricia M. Burke, Acting Director, Office of Multifamily Production, HTD, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 6130, Washington, DC 20410, telephone (202) 402–5693.

• *Regulation:* 24 CFR 266.410(e).

Project/Activity: District of Columbia Housing Finance Agency (DCHFA), Washington, DC no project name or number.

Nature of Requirement: The 24 CFR 266.410(e), which requires mortgages insured under the 542(c) Housing Finance Agency Risk Sharing Program to be fully amortized over the term of the mortgage. The waiver would permit DCHFA to use balloon loans that would have a minimum term of 17 years and a maximum amortization period of 40 years for the projects identified in the ''Multifamily Pipeline Projects''.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 17, 2018.

Reason Waived: The waiver was granted to allow DCHFA's clients additional financing options to their customers and to align DCHFA business practices with industry standards. This waiver is effective through December 31, 2019. The regulatory waiver is subject to the following conditions:

1. This waiver expires on December 31, 2019.

2. DCHFA must elect to take 50 percent or more of the risk of loss on all transactions.

3. Loans made under this waiver may have amortization periods of up to 40 years, but terms as short as 17 years.

4. All other requirements of 24 CFR 266.410 remain applicable. The waiver is applicable only to loans made under DCHFA's Risk Sharing Agreement.

5. In accordance with 24 CFR 266.200(d), the mortgage may not exceed an amount supportable by the lower of the Section 8 or comparable unassisted rents.

6. Projects must comply with Davis-Bacon labor standards in accordance with 24 CFR 266.225.

7. DCHFA must comply with regulations stated in 24 CFR 266.210 for insured advances or insurance upon completion transactions.

8. An Affordable Housing Deed restriction for at least 20 years must be recorded.

9. The loans exceeding $50 million require a separate waiver request

Contact: Patricia M. Burke, Acting Director, Office of Multifamily Production, HTD, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 6130, Washington, DC 20410, telephone (202) 402–5693.

• *Regulation:* 24 CFR 266.620(e).

Project/Activity: Federal Financing Bank (FFB) Risk Sharing Initiative, Termination of Mortgage Insurance. Massachusetts Housing Finance Agency (Mass Housing), Boston, Massachusetts

Nature of Requirement: The waiver of 24 CFR 266.620(e) Termination of Mortgage Insurance. As required by the Initiative, Mass Housing agrees to indemnify HUD for all amount paid to FFB if ''the HFA or its successors commit fraud or make a material misrepresentation to the Commissioner with

respect to information culminating in the Contract of Insurance on the mortgage, or while the Contract of Insurance is in existence''.

Granted By: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 21, 2018.

Reason Waived: Under this Initiative, FFB provides capital to participating Housing Finance Agencies (HFAs) to make multifamily loans insured under the FHA Multifamily Risk Sharing Program.

Contact: Patricia M. Burke, Acting Director, Office of Multifamily Production, HTD, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 6130, Washington, DC 20410, telephone (202) 402–5693.

• *Regulation:* 24 CFR 266.620(e).

Project/Activity: Federal Financing Bank (FFB) Risk Sharing Initiative, Termination of Mortgage Insurance. Massachusetts Housing Partnership (MHP).

Nature of Requirement: The Waiver of 24 CFR 266.620(e) Termination of Mortgage Insurance. As required by the Initiative, MHP agrees to indemnify HUD for all amount paid to FFB if ''the HFA or its successors commit fraud or make a material misrepresentation to the Commissioner with respect to information culminating in the Contract of Insurance on the mortgage, or while the Contract of Insurance is in existence''.

Granted By: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 21, 2018.

Reason Waived: Under this Initiative, FFB provides capital to participating Housing Finance Agencies (HFAs) to make multifamily loans insured under the FHA Multifamily Risk Sharing Program.

Contact: Patricia M. Burke, Acting Director, Office of Multifamily Production, HTD, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 6130, Washington, DC 20410, telephone (202) 402–5693.

• *Regulation:* 24 CFR part 891.520.

Project/Activity: Broadway Arms, FHA Contract Number IN36–T801–033, Lewistown, Illinois. Lewistown Broadway, LLC (Owner) seeks approval to rent to all eligible families 18 and over on the subject project.

Nature of Requirement: The regulation at 24 CFR 891.520 defines terms applicable to Section 202 loans, and under this section ''eligible family'' means an *elderly* or *handicapped* family that meets the project occupancy requirements approved by HUD. 24 CFR 891.575(a)(1) states that ''during the term of the HAP contract, a Borrower shall make available for occupancy by eligible families the total number of units for which assistance is committed under the HAP contract.''

Granted by: Brian D. Montgomery, Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: September 24, 2018.

Reason Waived: The owner requested and was granted waiver of the requirement to lease units to other than elderly or handicap eligible families 18 and over, and waiver of the regulatory provision 24 CFR part 891.520 ''definition of eligible family''. The waiver enabled the project to better service the housing needs in Lewistown, IL.

Contact: Crystal Martinez, Account Executive, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 6174, Washington, DC 20410, telephone (202) 402–3718.

IV. Regulatory Waivers Granted by the Office of Public and Indian Housing

For further information about the following regulatory waivers, please see the name of the contact person that immediately follows the description of the waiver granted.

• *Regulation:* 1006.410(a)(2).

Project: Department of Hawaiian Home Lands (DHHL) request a 60-day extension of the regulatory deadline to submit the Annual Performance Report (APR) on the use of the Native Hawaiian Housing Block Grant.

Nature of Requirement: Pursuant to 24 CFR 1006.410(a)(2), each FY, DHHL must submit a performance report to HUD within 60 days of the end of DHHL's FY. DHHL's FY ended on June 30, 2018. DHHL requests that the APR submission deadline be extended from August 30, 2018 to October 31, 2018.

Granted By: Dominique Blom, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: August 30, 2018.

Reason Waived: DHHL requested an extension of the deadline because unexpected staff shortages required DHHL to procure an external self-monitor to conduct the the required self-monitoring that was needed to complete the APR. Pursuant to 24 CFR 1006.30, ONAP determined there was good cause to waive the regulatory deadline and provide DHHL an additional 60 days to submit their APR.

Contact: Claudine Allen, Native Hawaiian Program Specialist, HUD Honolulu Field Office, Office of Public and Indian Housing, 1132 Bishop Street, Suite 1400, Honolulu, HI 96813, telephone (808) 457–4674.

• *Regulation:* 24 CFR 5.801(c) and 24 CFR 5.801(d)(1).

Project/Activity: Municipality of San German (RQ030).

Nature of Requirement: The regulation establishes certain reporting compliance dates. The audited financial statements are required to be submitted to the Real Estate Assessment Center (REAC) no later than nine months after the housing authority's (HA) fiscal year end (FYE), in accordance with the Single Audit Act and OMB Circular A–133.

Granted By: Dominique Blom, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: August 13, 2018.

Reason Waived: The HA requested relief from compliance for additional to submit its financial reporting requirements for the fiscal year end (FYE) of June 30, 2017. The HA is still recovering from damages resulting from Hurricane Irma and is in Category C of the applicable Major Disaster Declaration for Hurricane Maria. The circumstances preventing the HA from submitting its FYE 2017 audited financial data by the due date was acceptable. Accordingly, the HA has until September 30, 2018, to submit its audited financial information to the Department. The approval of the Financial Assessment Subsystem (FASS) audited financial submission only permits the extension for filing. The HA is required to contact the HUDOIG Single Audit Coordinator at *HUDOIGSingleAuditCoordinator@hudoig.gov* for Single Audit extensions applicable to the Federal Audit Clearinghouse.

Contact: Dee Ann R. Walker, Program Manager, NASS, Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street SW, Suite 100, Washington, DC 20410, telephone (202) 475–7908.

• *Regulation:* 24 CFR 5.801(c) and 24 CFR 5.801(d)(1).

Project/Activity: Municipality of Aguas Buenas (RQ082).

Nature of Requirement: The regulation establishes certain reporting compliance dates. The audited financial statements are required to be submitted to the Real Estate Assessment Center (REAC) no later than nine months after the housing authority's (HA) fiscal year end (FYE), in accordance with the Single Audit Act and OMB Circular A–133.

Granted By: Dominique Blom, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: August 30, 2018.

Reason Waived: The HA requested relief from compliance for an additional 240-days to submit its financial reporting requirements for the fiscal year end (FYE) of June 30, 2017. The HA is still recovering from damages resulting from Hurricane Irma and is in Category C of the applicable Major Disaster Declaration for Hurricane Maria. The circumstances preventing the HA from submitting its FYE 2017 audited financial data by the due date was acceptable. Accordingly, the HA has until March 31, 2019, to submit its audited financial information to the Department. The approval of the Financial Assessment Subsystem (FASS) audited financial submission only permits the extension for filing. The HA is required to contact the HUDOIG Single Audit Coordinator at *HUDOIGSingleAuditCoordinator@hudoig.gov* for Single Audit extensions applicable to the Federal Audit Clearinghouse.

Contact: Dee Ann R. Walker, Program Manager, NASS, Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street SW, Suite 100, Washington, DC 20410, telephone (202) 475–7908.

• *Regulation:* 24 CFR 5.801(c) and 24 CFR 5.801(d)(1).

Project/Activity: Municipality of Yaco (RQ083).

Nature of Requirement: The regulation establishes certain reporting compliance dates. The audited financial statements are required to be submitted to the Real Estate Assessment Center (REAC) no later than nine months after the housing authority's (HA) fiscal year end (FYE), in accordance with the Single Audit Act and OMB Circular A–133.

Granted By: Dominique Blom, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: August 30, 2018.

Reason Waived: The HA requested relief from compliance for an additional 91-days to submit its financial reporting requirements for the fiscal year end (FYE) of June 30, 2017. The HA is still recovering from damages resulting from Hurricane Irma and is in Category C of the applicable Major Disaster Declaration for Hurricane Maria. The circumstances preventing the HA from submitting its FYE 2017 audited financial data by the due date was acceptable. Accordingly, the HA has until October 31, 2018, to submit its audited financial information to the Department. The approval of the Financial Assessment Subsystem (FASS) audited financial submission only permits the extension for filing. The HA is required to contact the HUDOIG Single Audit Coordinator at *HUDOIGSingleAuditCoordinator@hudoig.gov* for Single Audit extensions applicable to the Federal Audit Clearinghouse.

Contact: Dee Ann R. Walker, Program Manager, NASS, Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street SW, Suite 100, Washington, DC 20410, telephone (202) 475–7908.

• *Regulation:* 24 CFR 960.206(b)(3).

Project/Activity: Alexandria Redevelopment and Housing Authority (ARHA), Virginia.

Nature of Requirement: This requirement provides that a PHA may not adopt a preference for admission of persons with a specific disability.

Granted By: General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: August 27, 2018.

Reason Waived: Based upon the information provided, the Department determined that good cause existed to allow ARHA to implement a tenant selection preference for persons with specific disabilities under the public housing program to assist the State of Virginia with complying with the requirements set forth in the State of Virginia's Olmstead Settlement Agreement.

Contact: Monica Shepherd, Public Housing Management and Occupancy Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 4208, Washington, DC 20410, telephone (202) 402–5687 or at *Monica.C.Shepherd@hud.gov.*

• *Regulation:* 24 CFR 960.206(b)(3).

Project/Activity: Rockford Housing Authority, Illinois.

Nature of Requirement: This requirement provides that a PHA may not adopt a preference for admission of persons with a specific disability.

Granted By: General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: September 21, 2018.

Reason Waived: Based upon the information provided, the Department determined that good cause existed to extend the previously approved waiver to establish a limited tenant selection preference for persons with specific disabilities in its public housing and HCV programs in order to assist the State of Illinois with complying with the requirements set forth in the State of Illinois' Olmstead Coordinated Remedial Plan (the Plan). The Plan is pursuant to an agreement with the Department of Justice stemming from the *Olmstead* v. *L.C.* litigation under Title II of the Americans with Disabilities Act (ADA) and three Olmstead-related Consent Decrees.

Contact: Monica Shepherd, Public Housing Management and Occupancy Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 4208, Washington, DC 20410, telephone (202) 402–5687 or at *Monica.C.Shepherd@hud.gov.*

[FR Doc. 2019–01077 Filed 2–4–19; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–ES–2018–N112; FXES11130100000C4–189–FF02ENEH00]

Endangered and Threatened Wildlife and Plants; 26 Draft Recovery Plan Amendments for 42 Species Across the United States

Correction

In notice document 2019–00436 appearing on pages 790–795 in the issue of Thursday, January 31, 2019, make the following correction:

Beginning on page 792, the table ''Proposed Recovery Plan Amendments,'' is being republished to correct the URL addresses in the sixth column:

PROPOSED RECOVERY PLAN AMENDMENTS

Common name	Scientific name	Listing status [1]	Current range	Recovery plan name	Uniform resource locator to proposed recovery plan amendment	Contact person, phone, email	Contact person's U.S. mail address
Pacific Region (Idaho, Oregon, Washington, Hawaii, and the Pacific Islands)							
Snails, Oahu tree	*Achatinella* spp.	E	HI	Recovery Plan for the Oahu Tree Snails of the Genus *Achatinella.*	*https://ecos.fws.gov/docs/recovery_plan/Achatinella_Draft%20Recovery%20Plan%20Amendment_20180801.pdf.*	Gregory A. Koob, Assistant Field Supervisor, 808–792–9449, *gregory_koob@fws.gov.*	Pacific Islands Fish and Wildlife Office, 300 Ala Moana Boulevard, Room 3–122, Box 50088, Honolulu, HI 96850.
Silversword, Mauna Loa (=Ka'u).	*Argyroxiphium kauense.*	T	HI	Recovery Plan for the Ka'u Silversword (*Argyroxiphium kauense*).	*https://ecos.fws.gov/docs/recovery_plan/ARGKAU_Draft%20Recovery%20Plan%20Amendment_20180801.pdf.*		
'Ahinahina	*Argyroxiphium sandwicense* ssp. *sandwicense.*	E	HI	Recovery Plan for the Mauna Kea Silversword (*Argyroxiphium sandwicense* ssp. *sandwicense*).	*https://ecos.fws.gov/docs/recovery_plan/ARGSANSAN_Draft%20Recovery%20Plan%20Amendment_20180801.pdf.*		
Koki'o	*Kokia drynarioides*	E	HI	Recovery Plan for *Caesalpinia kavaiensis* and *Kokia drynarioides.*	*https://ecos.fws.gov/docs/recovery_plan/KOKDRY_Draft%20Recovery%20Plan%20Amendment_20180801.pdf.*		
Uhi uhi	*Mezoneuron kavaiense*	E	HI		*https://ecos.fws.gov/docs/recovery_plan/MEZKAV_Draft%20Recovery%20Plan%20Amendment_20180801.pdf.*		
Aupaka	*Isodendrion hosakae*	E	HI	Recovery Plan for *Lipochaeta venosa* and *Isodendrion hosakae.*	*https://ecos.fws.gov/docs/recovery_plan/ISOHOS_Draft%20Recovery%20Plan%20Amendment_20180801.pdf.*		

PROPOSED RECOVERY PLAN AMENDMENTS—Continued

Common name	Scientific name	Listing status [1]	Current range	Recovery plan name	Uniform resource locator to proposed recovery plan amendment	Contact person, phone, email	Contact person's U.S. mail address
No common name	*Lipochaeta venosa*	E	HI		*https://ecos.fws.gov/docs/recovery_plan/LIPVEN_Draft%20Recovery%20Plan%20Amendment_20180801.pdf.*		
Hawaiian petrel	*Pterodroma sandwichensis.*	E	HI	Hawaiian Dark-rumped Petrel and Newell's Manx Shearwater Recovery Plan.	*https://ecos.fws.gov/docs/recovery_plan/HAPE_Draft_Recovery_Plan_Amendment_20180806.pdf.*		
Newell's Townsend's shearwater.	*Puffinus auricularis newelli.*	T	HI		*https://ecos.fws.gov/docs/recovery_plan/NESH_Draft_Recovery_Plan_Amendment_20180806.pdf.*		
Vetch, Hawaiian	*Vicia menziesii*	E	HI	*Vicia menziesii* Recovery Plan.	*https://ecos.fws.gov/docs/recovery_plan/VICMEN_Draft%20Recovery%20Plan%20Amendment_20180801.pdf.*		
Rabbit, Columbia Basin Pygmy.	*Brachylagus idahoensis*	E	WA	Recovery Plan for the Columbia Basin Distinct Population Segment of the Pygmy Rabbit (*Brachylagus idahoensis*).	*https://ecos.fws.gov/docs/recovery_plan/Pygmy%20Rabbit%20Draft%20Recovery%20Plan%20Amendment%2020180731.pdf.*	Michelle Eames, Fish and Wildlife Biologist, 509–891–6839, *michelle_eames@fws.gov.*	Eastern Washington Field Office, 11103 E Montgomery Dr., Spokane Valley, WA 99206.
Stickseed, showy	*Hackelia venusta*	E	WA	Recovery Plan for *Hackelia venusta* (Showy Stickseed).	*https://ecos.fws.gov/docs/recovery_plan/Hackelia_venusta_Draft_Recovery_Plan_Amendment_20180806.pdf.*	Gregg Kurz, 509–665–3508, *gregg_kurz@fws.gov.*	Central Washington Field Office, 215 Melody Lane, Suite 103, Wenatchee, WA 98801.
Southwest Region (Arizona, New Mexico, Oklahoma, and Texas)							
Brady pincushion cactus	*Pediocactus bradyi*	E	AZ	Brady Pincushion Cactus (*Pediocactus bradyi*) Recovery Plan.	*https://ecos.fws.gov/docs/recovery_plan/Draft%20Recovery%20Plan%20Amendment_Brady%20Pincushion_clean.pdf.*	Field Supervisor, 602–242–0210, *AZcriteria@fws.gov.*	Arizona Ecological Services Field Office, 9828 North 31st Avenue, #C#, Phoenix, Arizona 85051.
Siler pincushion cactus	*Pediocactus sileri*	T	AZ, UT	Siler Pincushion Cactus (*Pediocactus sileri*) Recovery Plan.	*https://ecos.fws.gov/docs/recovery_plan/Draft%20Recovery%20Plan%20Amendment_Siler%20Pincushion_clean.pdf.*		
Sacramento prickly poppy.	*Argemone pleiacantha* ssp. *pinnatisecta.*	E	NM	Sacramento Prickly-Poppy (*Argemone pleiacantha* ssp. *pinnatisecta*) Recovery Plan.	*https://ecos.fws.gov/docs/recovery_plan/20180816_Draft%20Recovery%20Plan%20Amendment_Sacramento%20prickly%20poppy_clean.pdf.*	Susan Millsap, Field Office Supervisor, 505–761–4781, *susan_millsap@fws.gov.*	New Mexico Ecological Services Field Office, 2105 Osuna NE, Albuquerque, New Mexico 87113.
Lee pincushion cactus	*Coryphantha sneedii* var. *leei.*	T	NM	Sneed and Lee Pincushion Cacti (*Coryphantha sneedii* var. *sneedii* and *Coryphantha sneedii* var. *leei*) Recovery Plan.	*https://ecos.fws.gov/docs/recovery_plan/Draft%20Recovery%20Plan%20Amendment_SneedLee%20Pincuschion_clean.pdf.*		
Sneed pincushion cactus.	*Coryphantha sneedii* var. *sneedii.*	E	NM, TX				
Kuenzler hedgehog cactus.	*Echinocereus fendleri* var. *kuenzleri.*	T	NM	Kuenzler Hedgehog Cactus (*Echinocereus fendleri* var. *kuenzleri*) Recovery Plan.	*https://ecos.fws.gov/docs/recovery_plan/Draft%20Recovery%20Plan%20Amendment_Kuenzler%20Hedgehog%20Cactus_clean.pdf.*		
Zuni fleabane	*Erigeron rhizomatus*	T	AZ, NM	Zuni Fleabane (*Erigeron rhizomatus*) Recovery Plan.	*https://ecos.fws.gov/docs/recovery_plan/Draft%20Recovery%20Plan%20Amendment_Zuni%20Fleabane_clean.pdf.*		
Holy Ghost ipomopsis	*Ipomopsis sancti-spiritus*	E	NM	Holy Ghost Ipomopsis (*Ipomopsis sancti-spiritus*) Recovery Plan.	*https://ecos.fws.gov/docs/recovery_plan/20180816_Draft%20Recovery%20Plan%20Amendment_Holy%20Ghost%20Ipomopsis_clean.pdf.*		
Knowlton's cactus	*Pediocactus knowltonii*	E	CO, NM	Knowlton's Cactus (*Pediocactus knowltonii*) Recovery Plan.	*https://ecos.fws.gov/docs/recovery_plan/Draft%20Recovery%20Plan%20Amendment_Knowltons%20cactus_clean.pdf.*		
Socorro isopod	*Thermosphaeroma thermophilus.*	E	NM	Soccoro Isopod Recovery Plan.	*https://ecos.fws.gov/docs/recovery_plan/Draft%20Recovery%20Plan%20Amendment_Socorro%20Isopod_clean.pdf.*		

PROPOSED RECOVERY PLAN AMENDMENTS—Continued

Common name	Scientific name	Listing status [1]	Current range	Recovery plan name	Uniform resource locator to proposed recovery plan amendment	Contact person, phone, email	Contact person's U.S. mail address
Star cactus	*Astrophytum asterias*	E	TX	Star Cactus (*Astrophytum asterias*) Recovery Plan.	*https://ecos.fws.gov/docs/recovery_plan/Draft%20Recovery%20Plan%20Amendment_Star%20Cactus_clean.pdf.*	Dawn Gardiner, Assistant Field Supervisor, 361–994–9005x259, *dawn_gardiner@fws.gov.*	Texas Coastal Ecological Services Field Office—Corpus Christi, 4444 Corona Drive, Suite 215, Corpus Christi, Texas 78411.
Zapata bladderpod	*Lesquerella thamnophila.*	E	TX	Zapata Bladderpod (*Lesquerella thamnophila*) Recovery Plan.	*https://ecos.fws.gov/docs/recovery_plan/Draft%20Rec%20Plan%20Amendment_Z%20bladderpod_clean.pdf.*		
Coffin Cave mold beetle	*Batrisodes texanus*	E	TX	Endangered Karst Invertebrates (Travis and Williamson Counties, Texas) Recovery Plan.	*https://ecos.fws.gov/docs/recovery_plan/Draft%20Recovery%20Plan%20Amendment_Travis-Williamson-Karst-Inverts_clean.pdf.*	Adam Zerrenner, Field Supervisor, 512–490–0057x248, *adam_zerrenner@fws.gov.*	Austin Ecological Services Field Office, 10711 Burnet Road, Suite 200, Austin, Texas 78758.
Tooth Cave spider	*Neoleptoneta myopica*	E	TX				
Tooth Cave ground beetle.	*Rhadine persephone*	E	TX				
Tooth Cave pseudoscorpion.	*Tartarocreagris texana*	E	TX				
Kretschmarr Cave mold beetle.	*Texamaurops reddelli*	E	TX				
Bee Creek Cave harvestman.	*Texella reddelli*	E	TX				
Bone Cave harvestman	*Texella reyesi*	E	TX				
Tobusch fishhook cactus	*Sclerocactus brevihamatus* ssp. *tobuschii.*	E	TX	Tobusch Fishhook Cactus (*Ancistrocactus tobuschii*) Recovery Plan.	*https://ecos.fws.gov/docs/recovery_plan/Draft%20SCLTOB%20Recovery%20Plan%20Amendment_clean.pdf.*		
Pacific Southwest Region (California, Nevada, and the Klamath Basin area of Oregon)							
Marsh sandwort	*Arenaria paludicola*	E	CA, WA	Recovery Plan for Marsh Sandwort (*Arenaria paludicola*) and Gambel's Watercress (*Rorippa gambelii*).	*https://ecos.fws.gov/docs/recovery_plan/Draft%20Recovery%20Plan%20Amendment%20NAGA%20ROGA.pdf.*	Cat Darst, Assistant Field Supervisor, 805–644–1766, *r8ventura-recoverycomments@fws.gov.*	Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, CA 93003.
Gambel's watercress	*Rorippa gambellii*	E	CA				
Pismo clarkia	*Clarkia speciosa* ssp. *immaculata.*	E	CA	Recovery Plan for the Morro Shoulderband Snail and Four Plants from San Luis Obispo County, California.	*https://ecos.fws.gov/docs/recovery_plan/Draft%20Recovery%20Plan%20Amendment%20IKMB%20CCBT%20PismoClarkia.pdf.*		
Chorro Creek bog thistle.	*Cirsium fontinale* var. *obispoense.*	E	CA				
Indian Knob mountainbalm.	*Eriodictyon altissimum*	E	CA				
Scotts Valley spineflower	*Chorizanthe robusta* var. *hartwegii.*	E	CA	Recovery Plan for Insect and Plant Taxa from the Santa Cruz Mountains in California.	*https://ecos.fws.gov/docs/recovery_plan/Draft%20Recovery%20Plan%20Amendment%20ScottsValleySpineflower.pdf.*		
Coastal dunes milk-vetch	*Astragalus tener* var. *titi*	E	CA	Recovery Plan for Five Plants from Monterey County, California.	*https://ecos.fws.gov/docs/recovery_plan/Draft%20Recovery%20Plan%20Amendment%20MClover%20CDMVetch%20YAPP%20HickPot.pdf.*		
Yadon's piperia	*Piperia yadonii*	E	CA				
Hickman's potentilla	*Potentilla hickmanii*	E	CA				
Monterey clover	*Trifolium trichocalyx*	E	CA				

[1] E = endangered; T = threatened.

[FR Doc. C1–2019–00436 Filed 2–4–19; 8:45 am]

BILLING CODE 1301–00–D

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–591 and 731–TA–1399 (Final)]

Common Alloy Aluminum Sheet From China; Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that an industry in the United States is materially injured by reason of imports of common alloy aluminum sheet from China, provided for in subheadings 7606.11.30, 7606.11.60, 7606.12.30, 7606.12.60, 7606.91.30, 7606.91.60, 7606.92.30, and 7606.92.60 of the Harmonized Tariff Schedule of the United States, that have been found by the U.S. Department of Commerce (''Commerce'') to be sold in the United States at less than fair value (''LTFV''), and to be subsidized by the government of China.[2]

Background

The Commission, pursuant to sections 705(b) and 735(b) of the Act (19 U.S.C. 1671d(b) and 19 U.S.C. 1673d(b)), instituted these investigations in response to a notification of investigations self-initiated by the U.S. Department of Commerce deemed by the Commission as having been filed on December 1, 2017. The final phase of the investigations was scheduled by the Commission following notification of preliminary determinations by Commerce that imports of common alloy aluminum sheet from China were subsidized within the meaning of section 703(b) of the Act (19 U.S.C. 1671b(b)) and sold at LTFV within the meaning of 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on July

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] The Commission also finds that imports subject to Commerce's affirmative critical circumstances determinations are not likely to undermine seriously the remedial effect of the countervailing and antidumping duty orders on common alloy aluminum sheet from China.

18, 2018 (83 FR 33946).[3] The hearing was held in Washington, DC, on October 30, 2018, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission made these determinations pursuant to sections 705(b) and 735(b) of the Act (19 U.S.C. 1671d(b) and 19 U.S.C. 1673d(b)). It completed and filed its determinations in these investigations on January 30, 2019. The views of the Commission are contained in USITC Publication 4861 (January 2019), entitled *Common Alloy Aluminum Sheet from China: Investigation Nos. 701–TA–591 and 731–TA–1399 (Final).*

By order of the Commission.

Issued: January 30, 2019.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2019–01069 Filed 2–4–19; 8:45 am]

BILLING CODE 7020–02–P

[3] Due to the lapse in appropriations and ensuing cessation of Commission operations, all import injury investigations conducted under authority of Title VII of the Tariff Act of 1930 accordingly have been tolled pursuant to 19 U.S.C. 1671d(b)(2), 1673d(b)(2).

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–593 and 594 and 731–TA–1402 and 1404 (Final)]

Large Diameter Welded Pipe From China and India; Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (''Commission'') determines,[2] pursuant to the Tariff Act of 1930 (''the Act''), that an industry in the United States is materially injured by reason of imports of carbon and alloy (other than stainless) steel large diameter welded line pipe from India provided for in subheadings 7305.11.10, 7305.11.50, 7305.12.10, 7305.12.50, 7305.19.10, and 7305.19.50 of the Harmonized Tariff Schedule of the United States (''HTSUS'') that have been found by the U.S. Department of Commerce (''Commerce'') to be sold in the United States at less than fair value (''LTFV'') and subsidized by the government of India. The Commission also determines that an industry in the United States is threatened with material injury by reason of LTFV imports of carbon and alloy (other than stainless) steel large diameter welded line pipe from China. Further, the Commission terminates the countervailing duty investigation on carbon and alloy (other than stainless) steel large diameter welded line pipe from China.

The Commission also determines that an industry in the United States is materially injured by reason of imports of carbon and alloy (other than stainless) steel large diameter welded structural pipe from China provided for in subheadings 7305.31.40, 7305.31.60, 7305.39.10, and 7305.39.50 of the HTS that have been found by Commerce to be sold in the United States at LTFV and subsidized by the government of China. In addition, the Commission terminates the antidumping and countervailing duty investigations on carbon and alloy (other than stainless) steel large diameter welded structural pipe from India.

Finally, the Commission determines that an industry in the United States is not materially injured or threatened with material injury by reason of imports of stainless steel large diameter welded pipe from China and India provided for in subheading 7305.31.60 of the HTSUS, that have been found by Commerce to be sold in the United States at LTFV, and to be subsidized by the governments of China and India.

Background

The Commission, pursuant to sections 705(b) and 735(b) of the Act (19 U.S.C. 1671d(b) and 19 U.S.C. 1673d(b)), instituted these investigations effective January 17, 2018, following receipt of a petition filed with the Commission and Commerce by American Cast Iron Pipe Company (Birmingham, Alabama), Berg Steel Pipe Corp. (Panama City, Florida), Berg Spiral Pipe Corp. (Mobile, Alabama), Dura-Bond Industries, Inc. (Export, Pennsylvania), Skyline Steel (Newington, Virginia), and Stupp Corporation (Baton Rouge, Louisiana). The final phase of the investigations was scheduled by the Commission following notification of preliminary determinations by Commerce that imports of large diameter welded pipe from China, India, Korea, and Turkey were subsidized within the meaning of section 703(b) of the Act (19 U.S.C. 1671b(b)) and that imports of large diameter welded pipe from Canada, China, Greece, India, Korea, and Turkey were being sold at LTFV within the meaning of 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on September 6, 2018 (83 FR 45279).[3] The hearing was held in Washington, DC, on November 6, 2018, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission made these determinations pursuant to sections 705(b) and 735(b) of the Act (19 U.S.C. 1671d(b) and 19 U.S.C. 1673d(b)). It completed and filed its determinations in these investigations on January 30, 2019. The views of the Commission are contained in USITC Publication 4859 (January 2019), entitled *Large Diameter Welded Pipe from China and India, Investigation Nos. 701–TA–593 and 594 and 731–TA–1402 and 1404 (Final).*

By order of the Commission.

Issued: January 30, 2019.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2019–01024 Filed 2–4–19; 8:45 am]

BILLING CODE P

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] Commissioner Meredith M. Broadbent dissenting with respect to the affirmative determinations regarding imports of carbon and alloy (other than stainless) steel large diameter welded line pipe from China and India. Commissioner Jason E. Kearns voting in the affirmative with respect to carbon and alloy (other than stainless) steel large diameter welded pipe from China and India.

[3] Due to the lapse in appropriations and ensuing cessation of Commission operations, all import injury investigations conducted under authority of Title VII of the Tariff Act of 1930 accordingly have been tolled pursuant to 19 U.S.C. 1671d(b)(2), 1673d(b)(2).

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Taurine (2-Aminoethanesulfonic Acid), Methods of Production and Processes for Making the Same, and Products Containing the Same, DN 3360;* the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW, Washington, DC

20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov,* and 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 United States International Trade Commission (USITC) at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's Electronic Document Information System (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 has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Vitaworks IP, LLC; Vitaworks, LLC; and Dr. Songzhou Hu on January 30, 2019. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain taurine (2-aminoethanesulfonic acid), methods of production and processes for making the same, and products containing the same. The complaint names as respondents: A to Z Nutrition, Inc. of Miramar, FL; Ampak Company, Inc. of Larchmont, NY; Armada Nutrition LLC of Spring Hill, TN; Atlantic Chemicals Trading of North America, Inc. of Boston, MA; Crossroad Ingredients LLC of Fairfield, NJ; Emote International, Inc. of La Verne, CA; Epikix, Inc. of Irvine, CA; Fuerst Day Lawson (USA), Ltd. of England; Glanbia Nutritional (NA) Inc. of Carlsbad, CA; Greating Shipping Co. of Alhambra, CA; Green Wave Ingredients, Inc. of La Mirada, CA; Hard Eight Nutrition, LLC of Henderson, NV; Fuchi Pharmaceutical Co., Ltd. d/b/a Hubei Grand Life Science and Technology Co., Ltd. of China; Jiangyin Huachang Food Additive Co., Ltd. of China; Natural Ingredient Corp. of Pasadena, CA; JSW Enterprises, LLC d/b/a Nutravative Ingredients of Allen, TX; N.V.E., Inc. a/k/a N.V. E. Pharmaceuticals, Inc. of Andover, NJ; Pacific Rainbow International, Inc. of City of Industry, CA; Pharmachem Laboratories, Inc. of Kearny, NJ; Prinova USA, LLC of Carol Stream, IL; Qianjiang Yongan Pharma. Co., Ltd. of China; SEM Minerals, L.P. of Quincy, IL; Signo, LLC of Houston, TX; Stauber Holdings, Inc., f/k/a Stauber Performance Ingredients, Inc. of Fullerton, CA; Shandong Xinhua Pharmaceutical USA, Inc. d/b/a SX Pharma of South El Monte, CA; Uniprime International, LLC of Eatontown, NJ; and Wild Flavors, Inc. of Erlanger, KY. The complainant requests that the Commission issue a limited exclusion order, cease and desist orders and impose a bond during the 60-day review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five (5) pages in length, inclusive of attachments, on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions on the public interest must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation. Any written submissions on other issues should be filed no later than by close of business nine calendar days after the date of publication of this notice in the **Federal Register**. Complainant may file a reply to any written submission no later than the date on which complainant's reply would be due under § 210.8(c)(2) of the Commission's Rules of Practice and Procedure (19 CFR 210.8(c)(2)).

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to § 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number (''Docket No. 3360) in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures).[1] Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

personnel,[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: January 31, 2019.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2019–01120 Filed 2–4–19; 8:45 am]

BILLING CODE 7020–02–P

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov.*

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Botulinum Toxin Products, Processes for Manufacturing or Relating to Same and Certain Products Containing the Same, DN 3359;* the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov,* and 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 United States International Trade Commission (USITC) at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's Electronic Document Information System (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 has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Medytox Inc., Allergan plc, and Allergan, Inc. on January 30, 2019. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain botulinum toxin products, processes for manufacturing or relating to same and certain products containing the same. The complaint names as respondents: Daewoong Pharmaceuticals Co., Ltd of South Korea; Daewoong Co., Ltd. of South Korea; and Evolus, Inc. of Irvine, CA. The complainant requests that the Commission issue a limited exclusion order, cease and desist orders and impose a bond during the 60-day review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five (5) pages in length, inclusive of attachments, on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions on the public interest must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation. Any written submissions on other issues should be filed no later than by close of business nine calendar days after the date of publication of this notice in the **Federal Register**. Complainant may file a reply to any written submission no later than the date on which complainant's reply would be due under § 210.8(c)(2) of the Commission's Rules of Practice and Procedure (19 CFR 210.8(c)(2)).

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to § 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number (''Docket No. 3359) in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures).[1] Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information,

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: January 31, 2019.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2019–01044 Filed 2–4–19; 8:45 am]

BILLING CODE 7020–02–P

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov.*

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0073]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Revision of a Currently Approved Collection; Furnishing of Samples

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed collection OMB 1140–0073 (Furnishing of Samples) is being revised due to a change in burden, since there is a reduction in both the total responses and total burden hours due to less respondents, since the last renewal in 2016.

DATES: Comments are encouraged and will be accepted for 60 days until April 8, 2019.

FOR FURTHER INFORMATION CONTACT: If you have additional comments, regarding the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please contact: Anita Scheddel, Program Analyst, Explosives Industry Programs Branch, either by mail 99 New York Ave. NE, Washington, DC 20226, or by email at *eipb-informationcollection@atf.gov* or by telephone at 202–648–7158.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection (check justification or form 83):* Revision of a currently approved collection.

(2) *The Title of the Form/Collection:* Furnishing of Samples.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number (if applicable): None.

Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profits.

Other (if applicable): None.

Abstract: Pursuant to 18 U.S.C. Chapter 40 § 843 (i) (1), ATF requires licensed manufacturers and importers and persons who manufacture or import explosives materials or ammonium nitrate to submit samples at the request of the Director. This collection of information is contained in 27 CFR 555.110.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 100 respondents will utilize this information collection, and it will take each respondent approximately 30 minutes to provide their response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 50 hours, which is equal to 100 (# of respondents) * 1 (# of responses per respondents) * .5 (30 minutes).

(7) *An Explanation of the Change in Estimates:* The adjustments associated with this collection from the previous renewal include a reduction in the total respondents and burden hours by 2,250 and 1,125 hours respectively, since the previous renewal in 2016.

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: January 31, 2019.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2019–01048 Filed 2–4–19; 8:45 am]

BILLING CODE 4410–14–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Water Act

On January 30, 2019, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the Western District of Louisiana in the lawsuit entitled *United States of America and Louisiana Department of Environmental Quality* v. *Sunoco Pipeline L.P. and Mid-Valley Pipeline Company,* Civil Action No. 5:19–cv–00107.

The Complaint in this Clean Water Act case was filed against Sunoco Pipeline L.P. (Sunoco) and Mid-Valley Pipeline Company (Mid-Valley) concurrently with the lodging of the proposed Consent Decree. The Complaint alleges federal and state claims relating to three crude oil spills: A 2013 spill of 550 barrels in Tyler County, Texas; a 2014 spill of approximately 4,500 barrels in Caddo Parish, near Mooringsport; and a 2015 spill of 40 barrels in Grant County, Oklahoma. The Texas spill affected Russell Creek, which flows to the Neches River. The Louisiana spill—the largest of the three—flowed to Tete Bayou, a tributary of Caddo Lake. The Oklahoma spill flowed into two creeks that flow to the Arkansas River, affecting an area of about a half a mile. All three spills resulted from pipeline corrosion. The Complaint alleges violations of Sections 311(b) and 309(b) of the Clean Water Act (CWA), 33 U.S.C. 1321(b) and 1319(b). In addition, the Louisiana Department of Environmental Quality (LDEQ) alleges violations of La. R.S. 30:2076(A)(1) and (A)(3), LAC 33:IX.501.A, LAC 33:IX.1701.B, Defendants' LPDES General Permit, and Louisiana Administrative Code section LAC 33:I.3925.A.3. The Complaint seeks civil penalties, state response costs, and injunctive relief for three discharges of oil into navigable waters of the United States.

Under the proposed Consent Decree, Sunoco will pay $5 million in civil penalties to the United States and $437,274.20 in civil penalties and response costs to LDEQ. Additionally, Sunoco is required to take actions to prevent future spills by identifying and remediating the types of problems that caused the prior spills. This includes performing pipeline inspections and repairing pipeline defects that could lead to future spills. Sunoco is also required to take steps to prevent and detect corrosion in pipeline segments that Sunoco in no longer using. Mid-Valley, the owner of the pipeline that spilled oil in Louisiana, is responsible, along with Sunoco, for payment of the civil penalties and state response costs relating to the Louisiana spill.

The publication of this notice opens a period for public comment on the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States of America and Louisiana Department of Environmental Quality* v. *Sunoco Pipeline L.P. and Mid-Valley Pipeline Company,* D.J. Ref. No. 90–5–1–1–11673. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted by either email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the proposed Consent Decree may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the proposed Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $63.50 (25 cents per page reproduction cost) payable to the United States Treasury. For a paper copy without the appendices and signature pages, the cost is $9.75.

Thomas Carroll,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2019–01102 Filed 2–4–19; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under The Clean Air Act

On January 30, 2019, the U. S. Department of Justice (DOJ) lodged a proposed Consent Decree with the United States District Court for the Northern District of Ohio in *United States* v. *Toledo Refining Company,* Civil Action No. 3:19–cv–00232. The lodging of the proposed Decree immediately followed DOJ's filing in the same court of a civil complaint (Complaint) against Toledo Refining Company (Toledo Refining).

The proposed Consent Decree resolves Clean Air Act claims in the Complaint by the United States on behalf of the U.S. Environmental Protection Agency (EPA). Under the proposed Decree, Toledo Refining agrees, among other things, to undertake measures to improve its flare gas recovery system at its oil refinery facility in Oregon, Ohio. Toledo Refining will adhere to detailed flare gas recovery requirements and provisions addressing the Leak Detection and Repair Program, pay a civil penalty, perform a Supplemental Environmental Project, and conduct three mitigation projects.

The publication of this notice opens a period for public comment on the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Toledo Refining Company,* D.J. Ref. No. 90–5–2–1–10924. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the proposed Consent Decree may be examined and downloaded at this Justice Department website: *http://www.justice.gov/enrd/consent-decrees.*

We will provide a paper copy of the proposed Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $37.75 (25 cents per page reproduction cost), payable to the United States Treasury.

Randall M. Stone,

Acting Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2019–01109 Filed 2–4–19; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Resource Conservation and Recovery Act

On January 29, 2019, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the Northern District of Ohio in *United States* v. *Bedford Environmental Services, LLC and Krick Road Holdings, LLC,* Civil Action No. 1:19–cv–224.

The Consent Decree settles claims brought by the United States for violations of the Resource Conservation

and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq.,* in connection with a hazardous waste disposal, treatment, and storage facility owned and operated by Defendants in Bedford, Ohio. The Consent Decree requires the Defendants to undertake measures to address the RCRA violations and prevent future RCRA violations and pay a civil penalty of $90,000.

The publication of this notice opens a period for public comment on the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Bedford Environmental Services, LLC, et al.,* D.J. Ref. No. 90–7–1–11845. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.*

We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $13.50 (25 cents per page reproduction cost) payable to the United States Treasury.

Randall M. Stone,

Acting Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2019–00940 Filed 2–4–19; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Air Act

On January 29, 2019, the Department of Justice lodged a proposed consent decree with the United States District Court for the District of Massachusetts in the lawsuit entitled *United States* v. *wTe Recycling, Inc.,* Civil Action Number 3:19-cv-30016. The proposed consent decree resolves the claims set forth in the Complaint filed in this matter asserted by the United States against Defendant wTe Recycling, Inc. (''wTe''), pursuant to the Clean Air Act, 42 U.S.C. 7401–7671q, with respect to wTe's metals recycling facility located at 75 Southern Avenue in Greenfield, Massachusetts (''Facility''). The claims alleged in the complaint pertain to a change in operations at the Facility in 1991 that caused continuing excess emissions of volatile organic compounds above applicable emissions thresholds and wTe's failure to implement appropriate control technology and obtain required regulatory approvals, as well as violations relating to the operation of the recycling engines at the Facility. The proposed consent decree would require wTe to pay a civil penalty of $277,000 as well as to begin a scheduled phase-out of its acceptance of the materials causing the excess emissions culminating in total cessation by mid-2021 and to mitigate the excess emissions by purchasing and retiring discrete emission reduction credits.

The publication of this notice opens a period for public comment on the proposed consent decree and proposed settlement agreement. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *wTe Recycling, Inc.,* Civil Action Number 3:19–cv–30016, D.J. Ref. No. 90–5–2–1–11810. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the proposed consent decree and proposed settlement agreement may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of these documents upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $7.75 (25 cents per page reproduction cost) payable to the United States Treasury.

Robert Maher,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2019–01021 Filed 2–4–19; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation and Liability Act

On January 30, 2019, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the District of New Jersey in the lawsuit entitled *United States* v. *The Sherwin-Williams Company,* Civil Action No. 1:19-cv-01907.

The complaint in this case, brought under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601, *et seq.,* seeks the recovery of costs incurred by the U.S. Environmental Protection Agency (''EPA'') in response to the release of hazardous substances at the Sherwin-Williams/Hilliards Creek Site, Route 561 Dump Site, and United States Avenue Burn Site (the ''Sites''), located in Gibbsboro and Voorhees, New Jersey, and the performance of the soils and sediments operable unit remedy selected by EPA for the United States Avenue Burn Site. Under the proposed consent decree, The Sherwin-Williams Company will reimburse the United States $1,460,758.94 for EPA past costs relating to the Sites and will perform the United States Avenue Burn Site soils and sediments operable unit remedy. The proposed decree also includes a mechanism that provides for the potential incorporation into the decree of performance by Sherwin-Williams of additional operable unit remedies that will be selected by EPA for the Sites.

The publication of this notice opens a period for public comment on the proposed consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *The Sherwin-Williams Company,* D.J. Ref. No. 90–11–3–09023/2. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	Send them to:
By email	pubcomment-ees.enrd@usdoj.gov.
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the consent decree may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the consent decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $21.25 (25 cents per page reproduction cost) payable to the United States Treasury.

Robert Maher,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2019–01020 Filed 2–4–19; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2011–0861]

OSHA Strategic Partnership Program (OSPP) for Worker Safety and Health

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend the OMB approval of the information collection requirements specified in the OSHA Strategic Partnership Program (OSPP) for Worker Safety and Health.

DATES: Comments must be submitted (postmarked, sent, or received) by April 8, 2019.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2011–0861, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3653, 200 Constitution Avenue NW, Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Office's normal business hours, 10:00 a.m. to 3:00 p.m., ET.

Instructions: All submissions must include the agency name and the OSHA docket number (OSHA–2011–0861) for the Information Collection Request (ICR). All documents, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION.**

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download from the website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney at the address below to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Seleda Perryman or Theda Kenney, Directorate of Standards and Guidance, OSHA, Department of Labor, telephone: (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of the continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with a minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining said information (29 U.S.C. 657).

The OSPP allows OSHA to enter into an extended, voluntary, cooperative relationship with groups of employers, employees, and representatives (sometimes including other stakeholders, and sometimes involving only one employer) to encourage, assist, and recognize their efforts to eliminate serious hazards and to achieve a high level of worker safety and health that goes beyond what historically has been achieved from traditional enforcement methods. Each OSHA Strategic Partnership (OSP) determines what information will be needed, determining the best collection method, and clarifying how the information will be used. At a minimum, each OSP must identify baseline injury and illness data corresponding to all summary line items on the OSHA 300 logs, and must track changes at either the worksite level or participant-aggregate level. An OSP may also include other measures of success, such as training activity, self-inspections, and/or workers' compensation data. In this regard, the information collection requirements for the OSPP are used by the agency to gauge the effectiveness of programs, identify needed improvements, and ensure that resources are being used effectively and appropriately.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions, including whether the information is useful;
- the accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- the quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for

example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

OSHA is proposing to adjust the information collection burden hour requirements contained in the agency's Strategic Partnership Program for Worker Safety and Health (5 CFR 1320.5). The agency is requesting an adjustment decrease in the number of burden hours from 67,518 to 14,014 hours for a total decrease of 53,504 hours. The reduction is the result of a decrease in the number of employers and participants.

The agency will summarize the comments submitted in response to this notice and will include this summary in the request to OMB.

Type of Review: Extension of a currently approved collection.

Title: OSHA Strategic Partnership Program (OSPP) for Worker Safety and Health.

OMB Control Number: 1218–0244.

Affected Public: Businesses or other for-profits.

Number of Respondents: 49.

Total Number of Responses: 2,236.

Frequency of Responses: On occasion.

Average Time Various.

Estimated Total Burden Hours: 14,014.

Estimated Cost (Operation and Maintenance): $0.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the agency name and the OSHA docket number for this ICR (Docket No. OSHA–2011–0861). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or a facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify electronic comments by your name, date, and the docket number so the agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger or courier service, please contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627)).

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information, such as their social security number and date of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download from this website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

Information on using the *http://www.regulations.gov* website to submit comments and access the docket is available at the website's ''User Tips'' link.

Contact the OSHA Docket Office for information about materials not available from the website and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

Loren Sweatt, Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Signed at Washington, DC, on January 30, 2019.

Loren Sweatt,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2019–01037 Filed 2–4–19; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2007–0039]

Intertek Testing Services NA, Inc.: Application for Expansion of Recognition

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice.

SUMMARY: In this notice, OSHA announces the application of Intertek Testing Services NA, Inc., for expansion of recognition as a Nationally Recognized Testing Laboratory (NRTL) and presents the agency's preliminary finding to grant the application.

DATES: Submit comments, information, and documents in response to this notice, or requests for an extension of time to make a submission, on or before February 20, 2019.

ADDRESSES: Submit comments by any of the following methods:

Electronically: You may submit comments and attachments electronically at: *https://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2007–0039, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3653, 200 Constitution Avenue NW, Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Docket Office's normal business hours, 10:00 a.m. to 3:00 p.m., ET.

Instructions: All submissions must include the agency name and the OSHA docket number (OSHA–2007–0039). OSHA places comments and other materials, including any personal information, in the public docket without revision, and these materials will be available online at *http://www.regulations.gov.* For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION:**

Docket: To read or download comments or other material in the docket, go to *https://www.regulations.gov* or the OSHA Docket Office at the above address. All documents in the docket (including this **Federal Register** notice) are listed in the *https://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the website. All submissions, including copyrighted material, are available for inspection at the OSHA Docket Office.

Extension of comment period: Submit requests for an extension of the comment period on or before February 20, 2019 to the Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution

Avenue NW, Room N–3653, Washington, DC 20210, or by fax to (202) 693–1644.

FOR FURTHER INFORMATION CONTACT: Information regarding this notice is available from the following sources:

Press inquiries: Contact Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor, telephone: (202) 693–1999; email: *meilinger.francis2@dol.gov.*

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor, phone: (202) 693–2110 or email: *robinson.kevin@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Notice of the Application for Expansion

OSHA is providing notice that Intertek Testing Services NA, Inc. (ITSNA), is applying for expansion of recognition as a NRTL. ITSNA requests the addition of three test standards to the NRTL scope of recognition.

OSHA recognition of a NRTL signifies that the organization meets the requirements specified in 29 CFR 1910.7. Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within the scope of recognition. Each NRTL's scope of recognition includes (1) the type of products the NRTL may test, with each type specified by its applicable test standard; and (2) the recognized site(s) that has/have the technical capability to perform the product-testing and product-certification activities for test standards within the NRTL's scope. Recognition is not a delegation or grant of government authority; however, recognition enables employers to use products approved by the NRTL to meet OSHA standards that require product testing and certification.

The agency processes applications by a NRTL for initial recognition and for an expansion or renewal of this recognition, following requirements in Appendix A to 29 CFR 1910.7. This appendix requires that the agency publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application and provides a preliminary finding. In the second notice, the agency provides the final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope. OSHA maintains an informational web page for each NRTL, including ITSNA, which details the NRTL's scope of recognition. These pages are available from the OSHA website at *http://www.osha.gov/dts/otpca/nrtl/index.html.*

ITSNA currently has fourteen facilities (sites) recognized by OSHA for product testing and certification, with its headquarters located at: Intertek Testing Services NA, Inc., 545 East Algonquin Road, Suite F, Arlington Heights, IL 60005. A complete list of ITSNA's scope of recognition is available at *https://www.osha.gov/dts/otpca/nrtl/its.html.*

II. General Background on the Application

ITSNA submitted an application, dated July 12, 2018 (OSHA–2007–0039–0029), to expand recognition to include three additional test standards. OSHA staff performed a detailed analysis of the application packet and reviewed other pertinent information. OSHA did not perform any on-site reviews in relation to this application.

Table 1 lists the appropriate test standards found in ITSNA's application for expansion for testing and certification of products under the NRTL Program.

TABLE 1—PROPOSED LIST OF APPROPRIATE TEST STANDARDS FOR INCLUSION IN ITSNA'S NRTL SCOPE OF RECOGNITION

Test standard	Test standard title
UL 1990	Standard for Nonmetallic Underground Conduit with Conductors.
UL 60745–2–19	Hand-Held Motor-Operated Electric Tools—Safety—Part 2–19: Particular Requirements For Jointers.
UL 60745–2–22	Hand-Held Motor-Operated Electric Tools—Safety—Part 2–22: Particular Requirements For Cut-Off Machines.

III. Preliminary Findings on the Application

ITSNA submitted an acceptable application for expansion of the scope of recognition. OSHA's review of the application file, and pertinent documentation, indicate that ITSNA can meet the requirements prescribed by 29 CFR 1910.7 for expanding recognition to include the addition of these three test standards for NRTL testing and certification listed in Table 1. This preliminary finding does not constitute an interim or temporary approval of ITSNA's application.

OSHA welcomes public comment as to whether ITSNA meets the requirements of 29 CFR 1910.7 for expansion of recognition as a NRTL. Comments should consist of pertinent written documents and exhibits. Commenters needing more time to comment must submit a request in writing, stating the reasons for the request. Commenters must submit the written request for an extension by the due date for comments. OSHA will limit any extension to 10 days unless the requester justifies a longer period. OSHA may deny a request for an extension if the request is not adequately justified. To obtain or review copies of the exhibits identified in this notice, as well as comments submitted to the docket, contact the Docket Office, Room N–3653, Occupational Safety and Health Administration, U.S. Department of Labor, at the above address. These materials also are available online at *http://www.regulations.gov* under Docket No. OSHA–2007–0039.

OSHA staff will review all comments to the docket submitted in a timely manner. After addressing the issues raised by these comments, the agency will make a recommendation to the Assistant Secretary for Occupational Safety and Health whether to grant ITSNA's application for expansion of its scope of recognition. The Assistant Secretary will make the final decision on granting the application. In making this decision, the Assistant Secretary may undertake other proceedings prescribed in Appendix A to 29 CFR 1910.7.

OSHA will publish a public notice of its final decision in the **Federal Register**.

IV. Authority and Signature

Loren Sweatt, Deputy Assistant Secretary of Labor for Occupational Safety and Health, authorized the preparation of this notice. Accordingly, the agency is issuing this notice pursuant to 29 U.S.C. 657(g)(2), Secretary of Labor's Order No. 1–2012

(77 FR 3912, Jan. 25, 2012), and 29 CFR 1910.7.

Signed at Washington, DC, on January 30, 2019.

Loren Sweatt,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2019–01030 Filed 2–4–19; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2012–0016]

Marine Terminals and Longshoring Standards; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend the Office of Management and Budget's (OMB) approval of the information collection requirements contained in the standards on Marine Terminals and Longshoring.

DATES: Comments must be submitted (postmarked, sent, or received) by April 8, 2019.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2012–0016, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–3653, 200 Constitution Avenue NW, Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Docket Office's normal business hours, 10:00 a.m. to 3:00 p.m., ET.

Instructions: All submissions must include the agency name and OSHA docket number (OSHA–2012–0016) for the Information Collection Request (ICR). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION.**

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the above address. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney at the phone number below to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Seleda Perryman, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of a continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

The standards on Marine Terminals and Longshoring contain a number of collections of information which are used by employers to ensure that employees are properly informed about the safety and health hazards associated with marine terminals and longshoring operations. OSHA uses the records developed in response to the collection of information requirements to find out if the employer is complying adequately with the provisions of the standards.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend approval of the information collection requirements contained in the standards on Marine Terminals (29 CFR part 1917) and Longshoring (29 CFR part 1918). The agency is requesting a decrease in the current burden hour estimate from 65,694 hours to 58,033, a difference of 7,661 hours. The adjustment in burden is due to an increase in the number of longshoring operations from 871 to 916 establishments, and a reduction in the number of establishments in port and harbor operations from 525 to 332 establishments. The Agency will summarize any comments submitted in response to this notice and will include this summary in the request to OMB.

Type of Review: Extension of currently approved collections.

Title: Marine Terminals (29 CFR part 1917) and Longshoring (29 CFR part 1918).

OMB Number: 1218–0196.

Affected Public: Business or other for-profits; Not-for-profit organizations; Federal Government; State, Local, or Tribal Government.

Number of Respondents: 1,248.

Frequency of Response: On occasion.

Average Time per Response: Varies from one minute (.02 hour) to 50 hours.

Estimated Total Burden Hours: 58,033.

Estimated Cost (Operation and Maintenance): $0.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the agency name and the OSHA docket number for the ICR (Docket No. OSHA–2012–0016). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download through this website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* website to submit comments and access the docket is available at the website's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available through the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

Loren Sweatt, Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Signed at Washington, DC, on January 30, 2019.

Loren Sweatt,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2019–01111 Filed 2–4–19; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2012–0038]

The Standard on Personal Protective Equipment (PPE) for Shipyard Employment; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend the Office of Management and Budget's (OMB) approval of the information collection requirements specified in the Standard on Personal Protective Equipment (PPE) for Shipyard Employment.

DATES: Comments must be submitted (postmarked, sent, or received) by April 8, 2019.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2012–0038, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3653, 200 Constitution Avenue NW, Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Docket Office's normal business hours, 10:00 a.m. to 3:00 p.m., ET.

Instructions: All submissions must include the agency name and the OSHA docket number (OSHA–2012–0038) for this Information Collection Request (ICR). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION.**

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the above address. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download from the website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney at the phone number below to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Seleda Perryman, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of a continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

Subpart I specifies several paperwork requirements which are described below. Section 1915.152(b) requires the employer to assess work activities to determine whether there are hazards present, or likely to be present, which necessitate the worker's use of PPE. If such hazards are present, or likely to be present, the employer must: (1) Select the type of PPE that will protect the affected workers from the hazards identified in the occupational hazard assessment; (2) communicate PPE selection decisions to the affected workers; (3) select PPE that properly fits each affected worker; and (4) maintain documentation to verify that the required occupational hazard assessment has been performed. The verification must contain the following information: occupation or trade assessed, the date(s) of the hazard assessment, and the name of the person performing the hazard assessment.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend the approval of the collection of information requirements contained in the Standard on Personal Protective Equipment (PPE) for Shipyard Employment (29 CFR part 1915, subpart I). The agency is requesting an adjustment increase of 29 burden hours (from 172 hours to 201 hours). This increase is the result of identifying additional establishments that have been covered by the Shipyard Employment PPE Standard.

OSHA will summarize the comments submitted in response to this notice, and will include this summary in the request to OMB to extend the approval of the information collection requirements contained in the Standard on Personal Protective Equipment (PPE) for Shipyard Employment (29 CFR part 1915, subpart I).

Type of Review: Extension of a currently approved collection.

Title: Personal Protective Equipment Standard for Shipyard Employment (29 CFR part 1915, subpart I).

OMB Control Number: 1218–0215.

Affected Public: Business or other for-profits.

Number of Respondents: 4,518.

Total Responses: 2,522.

Frequency of Response: On Occasion.

Average Time per Response: An estimated 5 minutes (.08 hour) for employers to record the hazard assessment.

Estimated Burden Hours: 201.

Estimated Cost (Operation and Maintenance): $0.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal e-Rulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the agency name and the OSHA docket number (Docket No. OSHA–2012–0038) for the ICR. You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627). Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and date of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publically available to read or download from this website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* website to submit comments and access the docket is available through the website's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available from the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

Loren Sweatt, Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Signed at Washington, DC, on January 30, 2019.

Loren Sweatt,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2019–01110 Filed 2–4–19; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

Privacy Act of 1974; System of Records

AGENCY: Institute of Museum and Library Services (IMLS).

ACTION: Notice of modified systems of records.

SUMMARY: The Institute of Museum and Library Services (IMLS), is publishing an amendment of its systems of records to reflect the agency's change of address and update outdated information, with descriptions of the systems of records and the ways they are maintained, as required by the Privacy Act of 1974.

DATES: The amended system notice is effective upon date of publication.

ADDRESSES: Benjamin Sweezy, Senior Agency Official for Privacy, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, 4th Floor, Washington, DC 20024. Email: *bsweezy@imls.gov.* Telephone: (202) 653–4657.

FOR FURTHER INFORMATION CONTACT: Nancy E. Weiss, General Counsel, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, 4th Floor, Washington, DC 20024. Email: *nweiss@imls.gov.* Telephone: (202) 653–4657. Benjamin Sweezy, Chief Information Officer, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, 4th Floor,

Washington, DC 20024. Email: *bsweezy@imls.gov.* Telephone: (202) 653–4657.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 552a(e)(4), IMLS today is publishing an amended notice of the existence and character of its systems of records in order to make available in one place in the **Federal Register** the most up-to-date information regarding these systems.

Statement of General Routine Uses

The following general routine uses are incorporated by reference into each system of records set forth herein, unless specifically limited in the system description.

1. A record may be disclosed as a routine use to a Member of Congress or his or her staff, when the Member of Congress or his or her staff requests the information on behalf of, and at the request of, the individual who is the subject of the record.

2. A record may be disclosed as a routine use to designated officers and employees of other agencies and departments of the Federal government having an interest in the subject individual for employment purposes (including the hiring or retention of any employee; the issuance of a security clearance; the letting of a contract; or the issuance of a license, grant, or other benefits by the requesting agency) to the extent that the information is relevant and necessary to the requesting agency's decision on the matter involved.

3. In the event that a record in a system of records maintained by IMLS indicates, either by itself or in combination with other information in IMLS's possession, a violation or potential violation of the law (whether civil, criminal, or regulatory in nature, and whether arising by statute or by regulation, rule, or order issued pursuant thereto), that record may be referred, as a routine use, to the appropriate agency, whether Federal, State, local, or foreign, charged with investigating or prosecuting such violation, or charged with enforcing or implementing the statute, rule, regulation, or order issued pursuant thereto. Such referral shall be deemed to authorize: (1) Any and all appropriate and necessary uses of such records in a court of law or before an administrative board or hearing; and (2) Such other interagency referrals as may be necessary to carry out the receiving agencies' assigned law enforcement duties.

4. The names, Social Security numbers, home addresses, dates of birth, dates of hire, quarterly earnings, employer identifying information, and State of hire of employees may be disclosed as a routine use to the Office of Child Support Enforcement, Administration for Children and Families, Department of Health and Human Services, as follows:

(a) For use in the Federal Parent Locator System (FPLS) and the Federal Tax Offset System for the purpose of locating individuals to establish paternity, establishing and modifying orders of child support, identifying sources of income, and for other child support enforcement actions as required by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. L. 104–193);

(b) For release to the Social Security Administration for the purpose of verifying Social Security numbers in connection with the operation of FPLS; and

(c) For release to the U.S. Department of the Treasury (Treasury) for the purpose of payroll, savings bonds, and other deductions; administering the Earned Income Tax Credit Program (section 32, Internal Revenue Code of 1986); and verifying a claim with respect to employment on a tax return, as required by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. L. 104–193);

5. A record may be disclosed as a routine use in the course of presenting evidence to a court, magistrate, or administrative tribunal of appropriate jurisdiction, and such disclosure may include disclosures to opposing counsel in the course of settlement negotiations.

6. Information from any system of records may be used as a data source for management information, for the production of summary descriptive statistics and analytical studies in support of the function for which the records are collected and maintained, or for related personnel management functions or manpower studies. Information also may be disclosed to respond to general requests for statistical information (without personal identification of individuals) under the Freedom of Information Act.

7. A record may be disclosed as a routine use to a contractor, expert, or consultant of IMLS (or an office within IMLS) when the purpose of the release is to perform a survey, audit, or other review of IMLS's procedures and operations.

8. A record from any system of records may be disclosed as a routine use to the National Archives and Records Administration as part of records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

9. A record may be disclosed to a contractor, grantee, or other recipient of Federal funds when the record to be released reflects serious inadequacies with the recipient's personnel, and disclosure of the record is for the purpose of permitting the recipient to effect corrective action in the government's best interest.

10. A record may be disclosed to a contractor, grantee, or other recipient of Federal funds when the recipient has incurred indebtedness to the government through its receipt of government funds, and the release of the record is for the purpose of allowing the debtor to effect a collection against a third party.

11. Information in a system of records may be disclosed as a routine use to the Treasury; other Federal agencies; ''consumer reporting agencies'' (as defined in the Fair Credit Reporting Act, 15 U.S.C. 1681a(f), or the Federal Claims Collection Act of 1966, 31 U.S.C. 3701(a)(3)); or private collection contractors for the purpose of collecting a debt owed to the Federal Government as provided in the regulations promulgated by IMLS at 45 CFR 1183.

Table of Contents

This document gives notice that the following IMLS systems of records are in effect:

IMLS–1 IMLS Reviewers—Automated Systems

IMLS–3 Personnel/Payroll System

IMLS–4 Financial Management System

IMLS–1

SYSTEM NAME:

IMLS Reviewers—Automated Systems.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Office of the Chief Information Officer, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, 4th Floor, Washington, DC 20024.

SYSTEM MANAGER(S):

Deputy Directors of the Office of Museum Services and Office of Library Services, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, 4th Floor, Washington, DC 20024.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Museum and Library Services Act of 2018 (20 U.S.C. 9101 *et seq.*)

PURPOSE(S) OF THE SYSTEM:

To provide a central repository for information about expert reviewers and

to enable staff to retrieve and manage reviewer information.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals whom IMLS may ask or has asked to serve as application reviewers.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name, address, telephone number, telefax number, email address, identification numbers assigned by IMLS, review group assignments, and other data concerning potential and actual reviewers, including area of expertise, resumes, reviewer profile forms, and contracts concerning participation in review groups.

RECORD SOURCE CATEGORIES:

Data in this system is obtained from individuals covered by the system, as well as from IMLS employees involved in the administration of grants.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Data in this system may be used for the selection of reviewers, as well as general administration of the grant review process. See also the list of General Routine Uses contained in the Preliminary Statement.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are maintained in shared electronic files and databases.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records in this system are retrieved by name, area of expertise, review group assignment, state and other data elements.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records in this system are updated on a continuing basis when reviewers are assigned to a review group and as new information is received. IMLS staff periodically will request updated information from individuals who are included as reviewers in the AAMS. Records will be removed only with the concurrence of the appropriate discipline directors.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

This system is maintained in a locked computer room that can be accessed only by authorized employees of IMLS. Access to records in this system is further controlled by password, with different levels of modification rights assigned to individuals and offices at IMLS based upon their specific job functions.

RECORD ACCESS PROCEDURES:

See 45 CFR part 1182.

CONTESTING RECORD PROCEDURES:

See 45 CFR part 1182.

NOTIFICATION PROCEDURES:

See 45 CFR part 1182.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

78 FR 73890.

IMLS–3

SYSTEM NAME:

Payroll/Personnel System.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, 4th Floor, Washington, DC 20024, U.S. Department of Interior, Interior Business Center, Denver, Colorado.

SYSTEM MANAGER(S):

Human Resources Officer, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, 4th Floor, Washington, DC 20024.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Museum and Library Services Act of 2018 (20 U.S.C. 9101 *et seq.*); Federal Personnel Manual and Treasury Fiscal Requirements Manual.

PURPOSE(S) OF THE SYSTEM:

To document IMLS's personnel processes and to calculate and process payroll.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Employees of IMLS.

CATEGORIES OF RECORDS IN THE SYSTEM:

Payroll and personnel information, such as time and attendance data, statements of earnings and leave, training data, wage and tax statements, and payroll and personnel transactions. This system includes data that also is maintained in IMLS's official personnel folders, which are managed in accordance with Office of Personnel Management (OPM) regulations. The OPM has given notice of its system of records covering official personnel folders in OPM/GOVT–1.

RECORD SOURCE CATEGORIES:

Data in this system is obtained from individuals covered by the system, as well as from IMLS employees involved in the administration of personnel and payroll processes.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Data in this system may be transmitted to the U.S. Department of Interior, Interior Business Center, U.S. Department of Treasury, and employee-designated financial institutions to affect issuance of paychecks to employees and distributions of pay according to employee directions for authorized purposes. Data in this system also may be used to prepare payroll, meet government recordkeeping and reporting requirements, and retrieve and apply payroll and personnel information as required for agency needs. See also the list of General and Routine Uses contained in the Preliminary Statement.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Electronic records in this system are maintained off-site by the Department of Interior, Interior Business Center (IBC). Paper records generated through the NBC are maintained in file cabinets in secured storage areas by the Offices of the Chief Financial Officer and Human Resources after arriving at IMLS. Discipline offices also may use file cabinets in secured storage areas to maintain paper records concerning performance reviews and other personnel actions in their divisions.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records in this system are retrieved by name, Social Security number, or date of birth.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

The Human Resources Officer maintains paper records in this system in accordance with the General Services Administration's General Records Schedule 2. Division offices may maintain paper records concerning performance reviews and other personnel actions in their divisions for the duration of an individual's employment with IMLS.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Access to the electronic records in this system is controlled by password on the limited number of IMLS computers that can be used to draw information from the IBC. File cabinets containing the paper records in this system either are kept locked during non-business hours, or are located in rooms that are kept locked during non-business hours.

RECORD ACCESS PROCEDURES:

See 45 CFR part 1182.

CONTESTING RECORD PROCEDURES:

See 45 CFR part 1182.

NOTIFICATION PROCEDURES:

See 45 CFR part 1182.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

78 FR 73890.

IMLS–4

SYSTEM NAME:

Financial Management System—Delphi.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Enterprise Services Center, 6500 MacArthur Boulevard, Oklahoma City, OK 73169.

SYSTEM MANAGERS(S):

Office of the Chief Financial Officer, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, 4th Floor, Washington, DC 20024.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Museum and Library Services Act of 2018 (20 U.S.C. 9101 *et seq.*)

PURPOSE(S) OF THE SYSTEM:

To provide a central repository of all financial transactions to enable IMLS to meet its statutory reporting requirements to the Office of Management and Budget, the U.S. Department of Treasury, and Congress.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Employees of IMLS, application reviewers, grantees, vendors and other Federal Government organizations.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name, address, telephone number, telefax number, email address, payment information, including banking information. This system data is maintained in an Oracle Database.

RECORD SOURCE CATEGORIES:

Data in this system is obtained from individuals covered by the system, as well as from IMLS employees involved in the administration of grants, travel, and vendor processes.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Data in this system may be used for the general administration of the grant management process and the IMLS accounting process. See also the list of General Routine Uses contained in the Preliminary Statement.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Electronic records in this system are maintained off-site by the Department of Transportation's Enterprise Services Center. Associated paper records are also maintained at the Enterprise Services Center. Discipline offices also may use locking file cabinets to maintain paper records concerning financial transactions processed in their divisions.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records in this system are retrieved by name and/or purchase order number.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records in this database are maintained and updated on a daily basis as financial transactions are processed. Discipline offices maintain paper files that grow as financial transactions are submitted to the Enterprise Services Center for processing. Records are disposed of in accordance with the General Services Administration's General Records Schedule.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Authorized IMLS staff use passwords via a remote secure VPN to gain access to the database. Rooms containing the records in this system are kept locked during non-working hours.

RECORD ACCESS PROCEDURES:

See 45 CFR part 1182.

CONTESTING RECORD PROCEDURES:

See 45 CFR part 1182.

NOTIFICATION PROCEDURES:

See 45 CFR part 1182.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

78 FR 73890.

Dated: January 30, 2019.

Danette Hensley,

Staff Assistant, Office of the General Counsel.

[FR Doc. 2019–00945 Filed 2–4–19; 8:45 am]

BILLING CODE 7036–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

Privacy Act of 1974; System of Records

AGENCY: Institute of Museum and Library Services (IMLS).

ACTION: Rescindment of a System of Records Notice.

SUMMARY: In accordance with the Privacy Act of 1974, as amended, the Institute of Museum and Library Services (IMLS) provides notice that it is rescinding IMLS–2, ''IMLS Reviewers—Paper Files,'' from its inventory of record systems. The System of Records Notice was intended to complement IMLS–1 with information well-suited for maintenance in hard copy form, including information about potential and actual reviewers such as resumes, profiles, and contracts concerning participation on review panels. The collection had been used for the general administration of the grant review and award process, as well as identification of reviewers and their activities in this capacity.

IMLS is now rescinding this System of Records Notice because IMLS no longer collects or uses reviewer information in hard copy form. All remaining records from IMLS–2 maintained by IMLS will be expunged in accordance with applicable record retention or disposition schedule(s) approved by the National Archives and Records Administration.

DATES: The notice of rescindment is effective upon date of publication.

ADDRESSES: Benjamin Sweezy, Senior Agency Official for Privacy, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, 4th Floor, Washington, DC 20024. Email: *bsweezy@imls.gov.* Telephone: (202) 653–4657.

FOR FURTHER INFORMATION CONTACT: Nancy E. Weiss, General Counsel, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, 4th Floor, Washington, DC 20024. Email: *nweiss@imls.gov.* Telephone: (202) 653–4657. Benjamin Sweezy, Chief Information Officer, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, 4th Floor, Washington, DC 20024. Email: *bsweezy@imls.gov.* Telephone: (202) 653–4657.

SYSTEM NAME AND NUMBER:

IMLS–2: IMLS Reviewers—Paper Files.

HISTORY:

78 FR 73890.

Dated: January 30, 2019.

Danette Hensley,

Staff Assistant, Office of the General Counsel.

[FR Doc. 2019–00946 Filed 2–4–19; 8:45 am]

BILLING CODE 7036–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

Special Meeting of the National Museum and Library Services Board

AGENCY: Institute of Museum and Library Services (IMLS), NFAH.

ACTION: Notice of Meeting.

SUMMARY: The National Museum and Library Services Board, which advises the Director of the Institute of Museum and Library Services in awarding national awards and medals, will meet by teleconference on February 14, 2019, to review nominations for the 2019 National Medal for Museum and Library Service.

DATES: Thursday, February 14, 2019, at 1 p.m. EST.

ADDRESSES: The meeting will be held by teleconference originating at the Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Katherine Maas, Program Specialist and Alt. Designated Federal Officer, Institute of Museum and Library Services, Suite 4000, 955 L'Enfant Plaza North SW, Washington, DC 20024; (202) 653–4798.

SUPPLEMENTARY INFORMATION: The National Museum and Library Services Board is meeting pursuant to the National Museum and Library Service Act, 20 U.S.C., 9105a, and the Federal Advisory Committee Act (FACA) as amended, 5 U.S.C. App. to review nominations for the 2019 National Medal for Museum and Library Service.

The meeting will be closed to the public pursuant to subsections (c)(4), (c)(6) and (c)(9) of section 552b of Title 5, United States Code, as amended. The closed meeting will consider information that may disclose: Trade secrets and commercial or financial information obtained from a person and privileged or confidential; and information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action.

Signed: January 30, 2019.

Danette Hensley,

Staff Assistant, Office of the General Counsel.

[FR Doc. 2019–00947 Filed 2–4–19; 8:45 am]

BILLING CODE 7036–01–P

NATIONAL SCIENCE FOUNDATION

Committee on Equal Opportunities in Science and Engineering; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces the following meeting:

Name and Committee Code: Committee on Equal Opportunities in Science and Engineering (CEOSE) Advisory Committee Meeting (#1173).

Date and Time: February 13, 2019; 11:00 a.m.–3:30 p.m.

Place: National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314.

Note: CEOSE members will participate virtually. If you are interested in attending this meeting, you are required to attend in person. To help facilitate your entry into the building, please contact Una Alford (*ualford@nsf.gov* or 703–292–7111) on or prior to February 11, 2019.

Type of Meeting: Open.

Contact Person: Dr. Bernice Anderson, Senior Advisor and CEOSE Executive Secretary, Office of Integrative Activities (OIA), National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314. Contact Information: 703–292–8040/ *banderso@nsf.gov.*

Minutes: Meeting minutes and other information may be obtained from the CEOSE Executive Secretary at the above address or the website at *http://www.nsf.gov/od/oia/activities/ceose/index.jsp.*

Purpose of Meeting: To study data, programs, policies, and other information pertinent to the National Science Foundation and to provide advice and recommendations concerning broadening participation in science and engineering.

Agenda:

- Opening Statement and Chair Report by the CEOSE Chair
- NSF Executive Liaison Report
- Reports and Updates from the CEOSE Liaisons
- Working Session and Discussion: Reviewing the 2017–2018 Biennial Report to Congress
- Discussion: CEOSE Recommendation and Future Directions
- Announcements

Reason for Late Notice: Scheduling complications resulting from the recent lapse in appropriations.

Dated: January 31, 2019.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2019–01118 Filed 2–4–19; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

Meeting of the Advisory Committee on Reactor Safeguards (ACRS) Subcommittee on Planning and Procedures

The ACRS Subcommittee on Planning and Procedures will hold a meeting on February 6, 2019, at the U.S. Nuclear Regulatory Commission, Two White Flint North, Conference Room T3D50, 11545 Rockville Pike, Rockville, MD 20852.

The meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Wednesday, February 6, 2019—12:00 p.m. until 1:00 p.m.

The Subcommittee will discuss proposed ACRS activities and related matters. 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), Quynh Nguyen (Telephone 301–415–5844 or Email: *Quynh.Nguyen@nrc.gov*) five days prior to the meeting, if possible, so that 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 December 7, 2018 (83 FR 26506).

Information regarding changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained 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

the DFO if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, Maryland. After registering with Security, please contact Paula Dorm (Telephone 301–415–7799) to be escorted to the meeting room.

Dated: January 31, 2019.

Mark L. Banks,

Chief, Technical Support Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2019–01028 Filed 2–4–19; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2019–0025]

Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving Proposed No Significant Hazards Considerations and Containing Sensitive Unclassified Non-Safeguards Information and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment request; notice of opportunity to comment, request a hearing, and petition for leave to intervene; order imposing procedures.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) received and is considering approval of three amendment requests. The amendment requests are for Monticello Nuclear Generating Plant, Palisades Nuclear Plant, and River Bend Station Unit 1. For each amendment request, the NRC proposes to determine that they involve no significant hazards consideration. Because each amendment request contains sensitive unclassified non-safeguards information (SUNSI), an order imposes procedures to obtain access to SUNSI for contention preparation.

DATES: Comments must be filed by March 7, 2019. A request for a hearing must be filed by April 8, 2019. Any potential party as defined in § 2.4 of Title 10 of the *Code of Federal Regulations* (10 CFR), who believes access to SUNSI is necessary to respond to this notice must request document access by February 15, 2019.

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–2019–0025. Address questions about Docket IDs in *Regulations.gov* to Krupskaya Castellon; telephone: 301–287–9221; email: *Krupskaya.Castellon@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M,

U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

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

FOR FURTHER INFORMATION CONTACT: Janet Burkhardt, Office of U.S. Nuclear Regulatory Commission, Washington DC 20555–0001; telephone: 301–415–1384, email: *Janet.Burkhardt@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2019–0025, facility name, unit number(s), plant docket number, application date, and subject 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–2019–0025.
- *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–2019–0025, facility name, unit number(s), plant docket number, application date, and subject 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. Background

Pursuant to Section 189a.(2) of the Atomic Energy Act of 1954, as amended (the Act), the NRC is publishing this notice. The Act requires the Commission to publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license or combined license, as applicable, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This notice includes notices of amendments containing SUNSI.

III. Notice of Consideration of Issuance of Amendments to Facility Operating Licenses and Combined Licenses, Proposed No Significant Hazards

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated, or (2) create the possibility of a new or different kind of accident from any

accident previously evaluated, or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period if circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility. If the Commission takes action prior to the expiration of either the comment period or the notice period, it will publish a notice of issuance in the **Federal Register**. If the Commission makes a final no significant hazards consideration determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

A. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any persons (petitioner) whose interest may be affected by this action may file a request for a hearing and petition for leave to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309. The NRC's regulations are accessible electronically from the NRC Library on the NRC's website at *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* Alternatively, a copy of the regulations is available at the NRC's Public Document Room, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. If a petition is filed, the Commission or a presiding officer will rule on the petition and, if appropriate, a notice of a hearing will be issued.

As required by 10 CFR 2.309(d) the petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements for standing: (1) The name, address, and telephone number of the petitioner; (2) the nature of the petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the petitioner's interest.

In accordance with 10 CFR 2.309(f), the petition must also set forth the specific contentions which the petitioner seeks to have litigated in the proceeding. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner must provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to the specific sources and documents on which the petitioner intends to rely to support its position on the issue. The petition must include sufficient information to show that a genuine dispute exists with the applicant or licensee on a material issue of law or fact. Contentions must be limited to matters within the scope of the proceeding. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to satisfy the requirements at 10 CFR 2.309(f) with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene. Parties have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that party's admitted contentions, including the opportunity to present evidence, consistent with the NRC's regulations, policies, and procedures.

Petitions must be filed no later than 60 days from the date of publication of this notice. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii). The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document.

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to establish when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of the amendment unless the Commission finds an imminent danger to the health or safety of the public, in which case it will issue an appropriate order or rule under 10 CFR part 2.

A State, local governmental body, Federally-recognized Indian Tribe, or agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h)(1). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission no later than 60 days from the date of publication of this notice. The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document, and should meet the requirements for petitions set forth in this section, except that under 10 CFR 2.309(h)(2) a State, local governmental body, or Federally-recognized Indian Tribe, or agency thereof does not need to address the standing requirements in 10 CFR 2.309(d) if the facility is located within its boundaries. Alternatively, a State, local governmental body, Federally-recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

If a hearing is granted, any person who is not a party to the proceeding and is not affiliated with or represented by a party may, at the discretion of the presiding officer, be permitted to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of his or her position on the issues but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any

prehearing conference, subject to the limits and conditions as may be imposed by the presiding officer. Details regarding the opportunity to make a limited appearance will be provided by the presiding officer if such sessions are scheduled.

B. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including a request for hearing and petition for leave to intervene (petition), any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities that request to participate under 10 CFR 2.315(c), must be filed in accordance with the NRC's E-Filing rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562; August 3, 2012). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Detailed guidance on making electronic submissions may be found in the Guidance for Electronic Submissions to the NRC and on the NRC website at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *http://www.nrc.gov/site-help/e-submittals/getting-started.html.* Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit adjudicatory documents. Submissions must be in Portable Document Format (PDF). Additional guidance on PDF submissions is available on the NRC's public website at *http://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed so that they can obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *http://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing adjudicatory documents in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the Commission or the presiding officer. If you do not have an NRC-issued digital ID certificate as described above, click cancel when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or personal phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. For example, in some instances, individuals provide home addresses in order to demonstrate proximity to a facility or site. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Northern States Power Company, Docket No. 50–263, Monticello Nuclear Generating Plant, Wright County, Minnesota

Date of amendment request: November 12, 2018. A publicly-available version is in ADAMS under Accession No. ML18317A181.

Description of amendment request: This amendment request contains sensitive unclassified non-safeguards information (SUNSI). The amendment would revise the safety limit minimum critical power ratio (SLMCPR) in reactor core safety limit in Technical Specification (TS) 2.1.1.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The probability of an evaluated accident is derived from the probabilities of the individual precursors to that accident. The proposed amendment does not involve any plant modifications or operational changes that could affect system reliability or performance, or that could affect the probability of operator error. As such, the proposed changes do not affect any postulated accident precursors. Since no individual precursors of an accident are affected, the proposed amendment does not involve a significant increase in the probability of a previously analyzed event.

The consequences of an evaluated accident are determined by the operability of plant systems designed to mitigate those consequences. The basis for the SLMCPR calculation is to ensure that during normal operation and during anticipated operational occurrences, at least 99.9 percent of all fuel rods in the core do not experience transition boiling if the safety limit is not exceeded.

The revised SLMCPR values provide sufficient margin to transition boiling and the probability of fuel damage is not increased. The derivation of the cycle specific SLMCPR values have been performed applying the NRC approved applicable Framatome fuel licensing methodologies. As such, the proposed amendment involves no changes to the operation of any system or component during normal, accident, or transient operating conditions. The change does not affect the initiators of any accident.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The revised SLMCPR are calculated applying NRC approved fuel analysis methodologies. Creation of the possibility of a new or different kind of accident requires creating one or more new accident precursors. New accident precursors may be created by modifications of plant configuration, including changes in allowable modes of operation. The proposed TS changes do not involve any new modes of operation or any changes to setpoints or any plant modifications. The revised SLMCPR have been shown to be acceptable by analysis for the next cycle of operation. The core operating limits will continue to be developed using NRC approved methods. The proposed SLMCPRs and the methods for establishing the core operating limits do not result in the creation of any new precursors to an accident.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The SLMCPR provides a margin of safety by ensuring that at least 99.9 percent of the fuel rods do not experience transition boiling during normal operation and anticipated operational occurrences if the limit is not exceeded. Revision of the SLMCPR values using an NRC approved methodology, ensures that the required level of fuel protection is maintained by continuing to ensure that the fuel design safety criterion is met, *i.e.,* that no more than 0.1 percent of the rods are expected to be in boiling transition if the SLMCPR is not exceeded.

The margin of safety is established through the design of plant structures, systems, and components, and through the parameters for safe operation and setpoints of equipment relied upon to respond to transients and design basis accidents. The proposed change in SLMCPR does not change the requirements governing operation or availability of safety equipment assumed to operate to preserve the margin of safety. The change does not alter the behavior of the plant equipment.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Peter M. Glass, Assistant General Counsel, Xcel Energy Services, Inc., 414 Nicollet Mall, Minneapolis, MN 55401.

NRC Branch Chief: David J. Wrona.

Entergy Nuclear Operations, Inc., Docket No. 50–255, Palisades Nuclear Plant (PNP), Van Buren County, Michigan

Date of amendment request: November 1, 2018. A publicly-available version is in ADAMS under Package Accession No. ML18305B320.

Description of amendment request: This amendment request contains sensitive unclassified non-safeguards information (SUNSI). The amendment would clarify ten modifications and cancel six modifications from Attachment S, Table S–2, ''Plant Modification Committed,'' which is referenced in Renewed Facility Operating License (RFOL) DPR–20, National Fire Protection Association 805 transition license condition 2.C(3)(c)2.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change to the PNP RFOL to change the Attachment S, Table S–2 modification scope does not alter accident analysis assumptions, add any initiators, or affect the function of plant systems or the manner in which systems are operated, maintained, tested, or inspected. The proposed change does not require any plant modifications which affect the performance capability of the structures, systems, and components relied upon to mitigate the consequences of postulated accidents, and has no impact on the probability or consequences of an accident previously evaluated. The impact of cancelling these modifications was considered in aggregate with the other modifications being cancelled. The probabilistic risk assessment (PRA) model impact of removing these modifications demonstrates no change in aggregate core damage frequency (CDF) and large early release frequency (LERF).

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change to the PNP RFOL to change the Attachment S, Table S–2 modification scope does not create the possibility of a new or different kind of accident from any accident previously evaluated. This change does not alter accident analysis assumptions, add any initiators, or create the possibility of a new or different kind of accident. The proposed change does not eliminate any plant modifications which affect the performance capability of the structures, systems, and components relied upon to mitigate the consequences of postulated accidents, and has no impact on the probability or consequences of an accident previously evaluated.

Therefore, the proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed change to the PNP RFOL to change the Attachment S, Table S–2 modification scope does not involve a significant reduction in a margin of safety. Plant safety margins are established through limiting conditions for operation, limiting safety system settings, and safety limits specified in the technical specifications. Because there is no change to established safety margins as a result of these changes, the proposed change does not involve a significant reduction in a margin of safety.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three

standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Ms. Anna V. Jones, Senior Counsel, Entergy Services, Inc., 101 Constitution Ave. NW, Suite 200 East, Washington, DC 20001.

NRC Branch Chief: David J. Wrona.

Entergy Louisiana, LLC, and Entergy Operations, Inc., Docket No. 50–458, River Bend Station, Unit 1 (RBS), West Feliciana Parish, Louisiana

Date of amendment request: October 24, 2018. A publicly-available version is in ADAMS under Accession No. ML18297A103.

Description of amendment request: This amendment request contains sensitive unclassified non-safeguards information (SUNSI). The amendment would (1) revise the criticality safety analysis (CSA) for the fuel handling building spent fuel pool (SFP) to credit new neutron absorbing rack inserts to be inserted into the fuel storage rack cells, (2) change technical specifications (TS) concerning design features of the spent fuel storage racks specifically to identify the neutron absorbing inserts and fuel-related parameters used in the CSA, and (3) add an additional TS requirement for the monitoring of the neutron absorber material in the storage racks.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Will operation of the facility in accordance with this proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change involves a new CSA for the RBS SFP to credit the neutron absorbing capability of the NETCO–SNAP–IN® rack inserts installed in the SFP storage rack cells for criticality control. The neutron absorbing capability of the Boraflex material contained in the SFP storage racks would no longer be credited. The new CSA is not a physical change to the plant and does not affect the ability of any structures, systems or components (SSCs) to perform a design function. The proposed new CSA demonstrates adequate margin to criticality for spent fuel storage rack cells and therefore does not affect the consequences of any accident previously evaluated.

The proposed change also involves changes to the requirements specified in TS 4.3.1.1 for spent fuel storage racks. These changes are consistent with the new CSA and impose additional requirements in the plant's Technical Specifications. These new requirements for the spent fuel storage racks do not involve a physical change to any plant systems and do not affect the ability of any SSCs to perform a design function. The new requirements support the assumptions of the new CSA and therefore do not affect the consequences of any accident previously evaluated.

Finally, the proposed change involves the addition of a new programmatic requirement in TS 5.5 to perform monitoring of the NETCO–SNAP–IN® rack inserts to ensure that they continue to perform their design function, consistent with the assumptions of the new CSA. Monitoring of the SFP neutron absorber does not affect the ability of any SSCs to perform a design function. A SFP storage rack neutron absorber monitoring program is not an initiator to any accident previously evaluated and does not affect the consequences of any accident previously evaluated.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Will operation of the facility in accordance with this proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

Onsite storage of spent fuel assemblies in the RBS spent fuel pool is a normal activity for which RBS has been designed and licensed. The new CSA does not involve any physical changes to the plant and does not change the method of spent fuel movement or storage. It only provides an analysis of the existing SFP storage racks, with credit for the NETCO–SNAP–IN® rack inserts, to demonstrate adequate margin to criticality.

Similarly, the addition of new requirements in TS 4.3.1.1 for the spent fuel storage racks and a requirement in TS 5.5 for a new SFP storage rack neutron absorber monitoring program does not involve any physical changes to the plant and does not change the method of spent fuel movement or storage.

Based on the above information, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Will operation of the facility in accordance with this proposed change involve a significant reduction in a margin of safety?

Response: No.

The safety margin which is relevant to the proposed change is the safety margin for criticality in spent fuel storage racks. This margin is 5% (*i.e.,* Keff [effective multiplication factor] less than or equal to 0.95 when fully flooded with unborated water), including a conservative margin to account for engineering and manufacturing uncertainties. The new CSA demonstrates that this margin is maintained when the NETCO–SNAP–IN® rack inserts are credited for criticality control in the RBS SFP, without credit for Boraflex.

The safety margin is unaffected by the addition of new requirements in TS 4.3.1.1 for the spent fuel storage racks. The new requirements are consistent with the assumptions of the new CSA and therefore support the basis of the safety margin demonstrated in the CSA.

The addition of a new programmatic requirement in TS 5.5 to perform monitoring of the SFP neutron absorber inserts does not affect the margin to safety for criticality. Performance of monitoring in accordance with this new requirement will support the criticality safety margin as it provides assurance that the inserts continue to perform their assumed design function which is credited in the new CSA.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Ms. Anna Vinson Jones, Senior Counsel, Entergy Services, Inc., 101 Constitution Avenue NW, Suite 200 East, Washington, DC 20001.

NRC Branch Chief: Robert J. Pascarelli.

Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation

Northern States Power Company, Docket No. 50–263, Monticello Nuclear Generating Plant, Wright County, Minnesota

Entergy Nuclear Operations, Inc., Docket No. 50–255, Palisades Nuclear Plant, Van Buren County, Michigan

Entergy Louisiana, LLC, and Entergy Operations, Inc., Docket No. 50–458, River Bend Station, Unit 1 (RBS), West Feliciana Parish, Louisiana

A. This Order contains instructions regarding how potential parties to this proceeding may request access to documents containing Sensitive Unclassified Non-Safeguards Information (SUNSI).

B. Within 10 days after publication of this notice of hearing and opportunity to petition for leave to intervene, any potential party who believes access to SUNSI is necessary to respond to this notice may request access to SUNSI. A ''potential party'' is any person who intends to participate as a party by demonstrating standing and filing an admissible contention under 10 CFR 2.309. Requests for access to SUNSI submitted later than 10 days after publication of this notice will not be considered absent a showing of good cause for the late filing, addressing why

the request could not have been filed earlier.

C. The requester shall submit a letter requesting permission to access SUNSI to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and provide a copy to the Deputy General Counsel for Hearings and Administration, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. The expedited delivery or courier mail address for both offices is: U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852. The email address for the Office of the Secretary and the Office of the General Counsel are *Hearing.Docket@nrc.gov* and *RidsOgcMailCenter.Resource@nrc.gov,* respectively.[1] The request must include the following information:

(1) A description of the licensing action with a citation to this **Federal Register** notice;

(2) The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by the action identified in C.(1); and

(3) The identity of the individual or entity requesting access to SUNSI and the requester's basis for the need for the information in order to meaningfully participate in this adjudicatory proceeding. In particular, the request must explain why publicly available versions of the information requested would not be sufficient to provide the basis and specificity for a proffered contention.

D. Based on an evaluation of the information submitted under paragraph C.(3) the NRC staff will determine within 10 days of receipt of the request whether:

(1) There is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding; and

(2) The requestor has established a legitimate need for access to SUNSI.

E. If the NRC staff determines that the requestor satisfies both D.(1) and D.(2) above, the NRC staff will notify the requestor in writing that access to SUNSI has been granted. The written notification will contain instructions on how the requestor may obtain copies of the requested documents, and any other conditions that may apply to access to those documents. These conditions may include, but are not limited to, the signing of a Non-Disclosure Agreement or Affidavit, or Protective Order[2] setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI by each individual who will be granted access to SUNSI.

F. Filing of Contentions. Any contentions in these proceedings that are based upon the information received as a result of the request made for SUNSI must be filed by the requestor no later than 25 days after receipt of (or access to) that information. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.

G. Review of Denials of Access.

(1) If the request for access to SUNSI is denied by the NRC staff after a determination on standing and requisite need, the NRC staff shall immediately notify the requestor in writing, briefly stating the reason or reasons for the denial.

(2) The requester may challenge the NRC staff's adverse determination by filing a challenge within 5 days of receipt of that determination with: (a) The presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an Administrative Law Judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

(3) Further appeals of decisions under this paragraph must be made pursuant to 10 CFR 2.311.

H. Review of Grants of Access. A party other than the requester may challenge an NRC staff determination granting access to SUNSI whose release would harm that party's interest independent of the proceeding. Such a challenge must be filed within 5 days of the notification by the NRC staff of its grant of access and must be filed with: (a) The presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an Administrative Law Judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

If challenges to the NRC staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The availability of interlocutory review by the Commission of orders ruling on such NRC staff determinations (whether granting or denying access) is governed by 10 CFR 2.311.[3]

I. The Commission expects that the NRC staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SUNSI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the specificity and basis requirements in 10 CFR part 2. The attachment to this Order summarizes the general target schedule for processing and resolving requests under these procedures.

It is so ordered.

Dated at Rockville, Maryland, this 29th day of January 2019.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

Attachment 1—General Target Schedule for Processing and Resolving Requests for Access to Sensitive Unclassified Non-Safeguards Information in This Proceeding

Day	Event/activity
0	Publication of **Federal Register** notice of hearing and opportunity to petition for leave to intervene, including order with instructions for access requests.

[1] While a request for hearing or petition to intervene in this proceeding must comply with the filing requirements of the NRC's ''E-Filing Rule,'' the initial request to access SUNSI under these procedures should be submitted as described in this paragraph.

[2] Any motion for Protective Order or draft Non-Disclosure Affidavit or Agreement for SUNSI must be filed with the presiding officer or the Chief Administrative Judge if the presiding officer has not yet been designated, within 30 days of the deadline for the receipt of the written access request.

[3] Requesters should note that the filing requirements of the NRC's E-Filing Rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562; August 3, 2012) apply to appeals of NRC staff determinations (because they must be served on a presiding officer or the Commission, as applicable), but not to the initial SUNSI request submitted to the NRC staff under these procedures.

Day	Event/activity
10	Deadline for submitting requests for access to Sensitive Unclassified Non-Safeguards Information (SUNSI) with information: supporting the standing of a potential party identified by name and address; describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding.
60	Deadline for submitting petition for intervention containing: (i) demonstration of standing; and (ii) all contentions whose formulation does not require access to SUNSI (+25 Answers to petition for intervention; +7 petitioner/requestor reply).
20	U.S. Nuclear Regulatory Commission (NRC) staff informs the requester of the staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows need for SUNSI. (NRC staff also informs any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information.) If NRC staff makes the finding of need for SUNSI and likelihood of standing, NRC staff begins document processing (preparation of redactions or review of redacted documents).
25	If NRC staff finds no ''need'' or no likelihood of standing, the deadline for petitioner/requester to file a motion seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate). If NRC staff finds ''need'' for SUNSI, the deadline for any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information to file a motion seeking a ruling to reverse the NRC staff's grant of access.
30	Deadline for NRC staff reply to motions to reverse NRC staff determination(s).
40	(Receipt +30) If NRC staff finds standing and need for SUNSI, deadline for NRC staff to complete information processing and file motion for Protective Order and draft Non-Disclosure Affidavit. Deadline for applicant/licensee to file Non-Disclosure Agreement for SUNSI.
A	If access granted: issuance of presiding officer or other designated officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC staff.
A + 3	Deadline for filing executed Non-Disclosure Affidavits. Access provided to SUNSI consistent with decision issuing the protective order.
A + 28	Deadline for submission of contentions whose development depends upon access to SUNSI. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of opportunity to request a hearing and petition for leave to intervene), the petitioner may file its SUNSI contentions by that later deadline.
A + 53	(Contention receipt +25) Answers to contentions whose development depends upon access to SUNSI.
A + 60	(Answer receipt +7) Petitioner/Intervenor reply to answers.
>A + 60	Decision on contention admission.

[FR Doc. 2019–00807 Filed 2–4–19; 8:45 am]

BILLING CODE 7590–01–P

POSTAL SERVICE

Product Change—Priority Mail Express and Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* February 5, 2019.

FOR FURTHER INFORMATION CONTACT: Elizabeth Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 27, 2018, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express & Priority Mail Contract 81 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2019–68, CP2019–73.

Elizabeth Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2019–01094 Filed 2–4–19; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, & First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* February 5, 2019.

FOR FURTHER INFORMATION CONTACT: Elizabeth Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 28, 2018, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail, & First-Class Package Service Contract 50 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2019–73, CP2019–78.

Elizabeth Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2019–01101 Filed 2–4–19; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, & First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* February 5, 2019.

FOR FURTHER INFORMATION CONTACT: Elizabeth Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 28, 2018, it filed with the Postal Regulatory

Commission a *USPS Request to Add Priority Mail Express, Priority Mail, & First-Class Package Service Contract 49 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2019–72, CP2019–77.

Elizabeth Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2019–01100 Filed 2–4–19; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express and Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* February 5, 2019.

FOR FURTHER INFORMATION CONTACT: Elizabeth Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 28, 2018, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express & Priority Mail Contract 85 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2019–75, CP2019–80.

Elizabeth Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2019–01098 Filed 2–4–19; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express and Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* February 5, 2019.

FOR FURTHER INFORMATION CONTACT: Elizabeth Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 27, 2018, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express & Priority Mail Contract 82 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2019–69, CP2019–74.

Elizabeth Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2019–01095 Filed 2–4–19; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express and Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* February 5, 2019.

FOR FURTHER INFORMATION CONTACT: Elizabeth Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 27, 2018, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express & Priority Mail Contract 83 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2019–70, CP2019–75.

Elizabeth Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2019–01096 Filed 2–4–19; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* February 5, 2019.

FOR FURTHER INFORMATION CONTACT: Elizabeth Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 27, 2018, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 502 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2019–66, CP2019–71.

Elizabeth Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2019–01073 Filed 2–4–19; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, & First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* February 5, 2019.

FOR FURTHER INFORMATION CONTACT: Elizabeth Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 28, 2018, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail, & First-Class Package Service Contract 48 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2019–71, CP2019–76.

Elizabeth Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2019–01099 Filed 2–4–19; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* February 5, 2019.

FOR FURTHER INFORMATION CONTACT: Elizabeth Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 27, 2018, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 503 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2019–67, CP2019–72.

Elizabeth Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2019–01074 Filed 2–4–19; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express and Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* February 5, 2019.

FOR FURTHER INFORMATION CONTACT: Elizabeth Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 28, 2018, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express & Priority Mail Contract 84 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2019–74, CP2019–79.

Elizabeth Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2019–01097 Filed 2–4–19; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–85003; File No. SR–FINRA–2018–040]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change Relating to FINRA Rule 4512 (Customer Account Information)

January 30, 2019.

On November 28, 2018, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend paragraph (a)(3) of FINRA Rule 4512 (Customer Account Information) to permit the use of electronic signatures and to clarify the scope of the rule. The proposed rule change was published for comment in the **Federal Register** on December 17, 2018.[3] The Commission has received two comment letters regarding the proposed rule change.[4]

Section 19(b)(2) of the Act [5] provides that, within 45 days of 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 find 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 January 31, 2019. The Commission is extending this 45-day time period.

The Commission finds it 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.[6] Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[7] designates March 17, 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 No. SR–FINRA–2018–040).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019–00943 Filed 2–4–19; 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. 84788 (December 11, 2018), 83 FR 64609 (December 17, 2018).

[4] *See* Letter from Paul J. Tolley, Senior Vice President, Chief Compliance Officer, Commonwealth Financial Network, dated December 31, 2018; letter from Kevin Zambrowicz, Associate General Counsel & Managing Director, SIFMA, dated January 7, 2019.

[5] 15 U.S.C. 78s(b)(2).

[6] By letter dated December 27, 2018, FINRA also consented to extending to March 17, 2019 the time period for Commission action on SR–FINRA–2018–040. *See https://www.finra.org/sites/default/files/rule_filing_file/SR-FINRA-2018-40-Extension-1.pdf.*

[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736.

Extension:

Rule 17e–1, SEC File No. 270–224, OMB Control No. 3235–0217

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (''Paperwork Reduction Act''), the Securities and Exchange Commission (the ''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for extension of the previously approved collection of information described below.

Rule 17e–1 (17 CFR 270.17e–1) under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (the ''Investment Company Act'') deems a remuneration as ''not exceeding the usual and customary broker's commission'' for purposes of Section 17(e)(2)(A) of the Act (15 U.S.C. 80a–17(e)(2)(A)) if, among other things, a registered investment company's (''fund's'') board of directors has adopted procedures reasonably designed to provide that the remuneration to an affiliated broker is reasonable and fair compared to that received by other brokers in connection with comparable transactions involving similar securities being purchased or sold on a securities exchange during a comparable period of time and the board makes and approves such changes as it deems necessary. In addition, each quarter, the board must determine that

all transactions effected under the rule during the preceding quarter complied with the established procedures. Rule 17e–1 also requires the fund to (i) maintain permanently a written copy of the procedures adopted by the board for complying with the requirements of the rule; and (ii) maintain for a period of six years, the first two in an easily accessible place, a written record of each transaction subject to the rule, setting forth the amount and source of the commission, fee, or other remuneration received; the identity of the broker; the terms of the transaction; and the materials used to determine that the transactions were effected in compliance with the procedures adopted by the board. The recordkeeping requirements under rule 17e–1 enable the Commission to ensure that affiliated brokers receive compensation that does not exceed the usual and customary broker's commission. Without the recordkeeping requirements, Commission inspectors would have difficulty ascertaining whether funds were complying with rule 17e–1.

Based on an analysis of fund filings, the staff estimates that approximately 266 funds enter into subadvisory agreements each year.[1] Based on discussions with industry representatives, the staff estimates that it will require approximately 3 attorney hours to draft and execute additional clauses in new subadvisory contracts in order for funds and subadvisers to be able to rely on the exemptions in rule 17e–1. Because these additional clauses are identical to the clauses that a fund would need to insert in their subadvisory contracts to rely on rules 12d3–1, 10f–3, and 17a–10, and because we believe that funds that use one such rule generally use all of these rules, we apportion this 3 hour time burden equally to all four rules. Therefore, we estimate that the burden allocated to rule 17e–1 for this contract change would be 0.75 hours.[2] Assuming that all 266 funds enter into new subadvisory contracts each year make the modification to their contract required by the rule, we estimate that the rule's contract modification requirement will result in 200 burden hours annually.[3]

Based on an analysis of fund filings, we estimate that approximately 1,609 funds use at least one affiliated broker. Based on staff experience and conversations with fund representatives, the staff estimates approximately 40 percent of transactions (and thus, 40% of funds) that occur under the rule 17e–1 would be exempt from its recordkeeping and review requirements. This would leave approximately 965 funds[4] still subject to the rule's recordkeeping and review requirements. Based on staff experience and conversations with fund representatives, we estimate that the burden of compliance with rule 17e–1 is approximately 50 hours per fund per year. This time is spent, for example, reviewing the applicable transactions and maintaining records. Accordingly, we calculate the total estimated annual internal burden of complying with the review and recordkeeping requirements of rule 17e–1 to be approximately 48,250 hours,[5] and the total annual burden of the rule's paperwork requirements is 48,450 hours.[6]

Estimates of the average burden hours are made solely for the purposes of the Paperwork Reduction Act and are not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms. The collection of information under rule 17e–1 is mandatory. The information provided under rule 17e–1 will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The public may view the background documentation for this information collection at the following website, *www.reginfo.gov.* Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Lindsay.M.Abate@omb.eop.gov* and (ii) Charles Riddle, Acting Director/Chief Information Officer, Securities and Exchange Commission, c/o Candace Kenner, 100 F Street NE, Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

Dated: January 31, 2019.

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019–01042 Filed 2–4–19; 8:45 am]

BILLING CODE 8011–01–P

[1] Based on data from Morningstar, as of June 30, 2018, there are 12,393 registered funds (open-end funds, closed-end funds, and exchange-traded funds), 4,594 funds of which have subadvisory relationships (approximately 37%). Based on data from the 2018 ICI Factbook, 720 new funds were established in 2017 (705 open-end funds and exchange-traded funds + 15 closed-end funds (from the ICI Research Perspective, April 2018)). 720 new funds × 37% = 266 funds.

[2] 3 hours ÷ 4 rules = 0.75 hours.

[3] This estimate is based on the following calculation: 0.75 hours × 266 funds = 200 burden hours.

[4] 1,609 funds × 0.6 = 965 funds.

[5] 965 funds × 50 hours per fund = 48,250 hours.

[6] 200 hours + 48,250 hours = 48,450 hours.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–85018; File No. SR–CBOE–2018–075]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend its Fees Schedule With Respect to the SPX Select Market-Maker Program

January 31, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 19, 2018, Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') proposes to amend its Fees Schedule with respect to the SPX Select Market-Maker Program. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to amend the SPX Select Market-Maker (''SMM'') Program, effective December 31, 2018. By way of background, the Exchange recently established a financial incentive program for SPX SMMs, which provides that any appointed SPX SMM will receive a monthly waiver of the cost of one Market-Maker Trading Permit and one SPX Tier Appointment provided that the SMM satisfies a heightened quoting standard for that month, which standard is set forth in Footnote 49 of the Fees Schedule. Footnote 49 currently provides that an SMM will receive the monthly Trading Permit and SPX Tier Appointment waiver if it (1) provides continuous electronic quotes in 95% of all SPX series 90% of the time in a given month, (2) submits opening quotes that are no wider than the Opening Exchange Prescribed Width (''OEPW'') within one minute of the initiation of an opening rotation in any series that is not open due to the lack of a qualifying quote, on all trading days, to ensure electronic quotes on the open that allow the series to open, (3) submit [sic] opening quotes that are no wider than the OEPW quote by 8:00 a.m. (CT) on volatility index derivative settlement days in the SPX series that expire in the month used to calculate the settlement value for expiring volatility index derivatives and (4) provides quotes for the end-of-month fair value closing rotation on a rotating basis.[3]

The Exchange proposes to amend the criteria currently set forth in the fourth prong of the heightened quoting standard described above. Specifically, the Exchange proposes to no longer require that a designated SMM provide quotes for the end-of-month fair value closing rotation (''closing rotation'') on a rotating basis and instead require that within 30 minutes from the initiation of the end-of-month fair value closing rotation, the Exchange must disseminate end-of-month closing quotations pursuant to Cboe Options Rule 6.2(.06)(a) in order for the 4th prong to be satisfied. By way of background, Interpretation and Policy .06(a) of Rule 6.2 provides that on the last business day of each month, the Exchange will conduct special end-of-month non-trading rotations for each series of SPX options in order to determine the theoretical ''fair value'' of such series as [sic] of SPX as of the time of close of trading in the underlying cash market.[4] The Exchange proposes to condition the SMM financial benefit on the closing rotation resulting in the dissemination of quotes pursuant to Cboe Options Rule 6.2(.06)(a) as the Exchange believes the proposed change will encourage all SMMs to provide end-of-month non-trading settlement pricing quotations in SPX and SPXW as it would be in the interest of the SMMs to each participate in order to ensure that the Exchange is ultimately able to disseminate the fair value quotes, thereby satisfying the fourth prong. The Exchange also believes the proposed amendment to the fourth prong is commensurate with the financial benefit the Exchange offers through the SMM program.

The Exchange lastly proposes to make non-substantive clean up changes to correct two typographical errors. First, the Exchange notes that the word ''to'' is missing from the second prong of Footnote 49 and as such, proposes to add ''to'' in the second prong. Second, the Exchange proposes to add an ''s'' to the end of ''submit'' in the third prong so that the language in each prong is grammatically consistent.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[5] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[6] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Additionally, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[7] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

The Exchange believes amending the fourth prong in Footnote 49 is reasonable as it does not change the financial benefit offered. Additionally, the Exchange believes the proposed amendment is reasonable, equitable and not unfairly discriminatory because it applies to all SMMs uniformly and because if the fourth prong, as amended, is not met, the SMMs merely will not receive the offered financial benefit. The Exchange also believes the requirement under the amended fourth prong is commensurate with the financial benefit offered. Additionally, the Exchange notes that its closing rotation is designed to foster consistency in the S&P 500 Index-related markets by aligning the price of SPX options and S&P 500 futures prices. The Exchange believes that its proposed rule change removes impediments to and perfects the mechanism of a free and open national market system as it continues to allow traders and investors to realize consistency across the different S&P 500 Index-related markets at the end of each month. Particularly, as noted above, the proposed amendment is designed to encourage all SMMs to provide end-of-month non-trading settlement pricing quotations in SPX and SPXW, which would increase the probability that the Exchange would be able to disseminate fair value quotes pursuant to Rule 6.2(.06)(a).

The Exchange believes the proposal to fix two typographical errors makes the fees schedule easier to read and reduces potential confusion, thereby removing impediments to and perfecting the mechanism of a free and open market and a national market system, and, in general, protecting investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule changes will impose any burden on competition that are not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because it applies uniformly to all SPX

[3] The end-of-month fair value closing rotation is governed by Cboe Options Rule 6.2, Interpretation and Policy .06.

[4] *See* Cboe Options Rule 6.2, Interpretation and Policy .06.(a).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78f(b)(4).

SMMs. The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because SPX options are proprietary products that will only be traded on Cboe Options. To the extent that the proposed changes make Cboe Options a more attractive marketplace for market participants at other exchanges, such market participants are welcome to become Cboe Options market participants.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [8] and paragraph (f) of Rule 19b–4 [9] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2018–075 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2018–075. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2018–075, and should be submitted on or before February 20, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019–01179 Filed 2–4–19; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–85005; File No. SR–NYSE–2018–54]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Designation of Longer Period for Commission Action on a Proposed Rule Change Amending Sections 312.03 and 312.04 of the Listed Company Manual To Amend the Price Requirements for Certain Exceptions From the Shareholder Approval Rules

January 30, 2019.

On December 3, 2018, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Sections 312.03 and 312.04 of the Listed Company Manual to modify the price requirements that companies must meet in order to avail themselves of certain exceptions from the shareholder approval requirements set forth in Section 312.03. The proposed rule change was published for comment in the **Federal Register** on December 20, 2018.[3] No comments have been received on the proposed rule change.

Section 19(b)(2) of the Act [4] provides that, within 45 days of the publication of the 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 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 February 3, 2019. 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 March

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 84821 (December 14, 2018), 83 FR 65378 (December 20, 2018).

[4] 15 U.S.C. 78s(b)(2).

[5] *Id.*

20, 2019, as the date by which the Commission should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change (File No. SR–NYSE–2018–54).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019–00944 Filed 2–4–19; 8:45 am]

BILLING CODE 8011–01–P

[6] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: 2:00 p.m. on Thursday, February 7, 2019.

PLACE: The meeting will be held at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matters at the closed meeting.

Commissioner Peirce, as duty officer, voted to consider the items listed for the closed meeting in closed session.

The subject matters of the closed meeting will be:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

Resolution of litigation claims; and

Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

CONTACT PERSON FOR MORE INFORMATION: For further information and to ascertain what, if any, matters have been added, deleted or postponed; please contact Brent J. Fields from the Office of the Secretary at (202) 551–5400.

Dated: January 31, 2019.

Brent J. Fields,

Secretary.

[FR Doc. 2019–01185 Filed 2–1–19; 11:15 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice: 10667]

Notice of Intent To Re-Establish a Federal Advisory Committee

AGENCY: Department of State.

ACTION: Notice of Intent to Re-Establish the Overseas Schools Advisory Council.

Under the provisions of Public Law 92–463, Federal Advisory Committee Act, notice is hereby given that the Department intends to re-establish the Overseas School Advisory Council. The Department affirms that this advisory committee is necessary and in the public interest.

Good cause: This committee's charter expired on January 27, 2019. The Department was unable to renew the committee's charter prior to the expiration date due to the recent lapse in federal government appropriations. Notices of re-establishment must appear in the **Federal Register** at least 15 calendar days before a charter is filed unless the Secretariat approves a shorter timeframe for good cause (41 CFR 102–3.65(b)). The Department has requested, and the Secretariat has approved, publication of this notice concurrent with the filing of the charter due to the lapse in appropriations.

Nature and Purpose: The Overseas Schools Advisory Council was established on March 1, 1967, by the Department of State to seek the advice of a selected group of American leaders from the business, foundation, and educational communities, on issues affecting the American-sponsored elementary and secondary schools abroad (hereinafter referred to as ''overseas schools'') that are assisted by the Department of State. The main objectives of the Council are:

(a) To advise the Department of State regarding matters of policy and funding for the overseas schools.

(b) To help the overseas schools become showcases for excellence in education.

(c) To help make service abroad more attractive to American citizens who have school-age children, both in the business community and in Government.

(d) To identify methods to mitigate risks to American private sector interests worldwide.

For further information about this advisory committee, please contact: Thomas Shearer, Director of the Office of Overseas Schools, and Executive Secretary for the Committee at (202) 261–8201 or email: *shearertp@state.gov.*

Thomas P. Shearer,

Director, Office of Overseas Schools, U.S. Department of State.

[FR Doc. 2019–01041 Filed 2–4–19; 8:45 am]

BILLING CODE 4710–24–P

DEPARTMENT OF STATE

[Public Notice: 10665]

Notice of Determinations; Culturally Significant Objects Imported for Exhibition—Determinations: ''Gainsborough's Family Album'' Exhibition

SUMMARY: Notice is hereby given of the following determinations: I hereby determine that certain objects to be included in the exhibition ''Gainsborough's Family Album,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Princeton University Art Museum, Princeton, New Jersey, from on or about February 23, 2019, until on or about June 9, 2019, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Elliot Chiu, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, SA–5, Suite 5H03, Washington, DC 20522–0505.

SUPPLEMENTARY INFORMATION: The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999,

and Delegation of Authority No. 236–3 of August 28, 2000.

Marie Therese Porter Royce,

Assistant Secretary, Educational and Cultural Affairs, Department of State.

[FR Doc. 2019–01032 Filed 2–4–19; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 10664]

Notice of Determinations; Culturally Significant Objects Imported for Exhibition—Determinations: "Treasures from the Zhiguan Museum" Exhibition

SUMMARY: Notice is hereby given of the following determinations: I hereby determine that certain objects to be included in the exhibition ''Treasures from the Zhiguan Museum,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit objects at the Rubin Museum of Art, New York, New York, from on or about March 9, 2019, until on or about March 23, 2020, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Elliot Chiu, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, SA–5, Suite 5H03, Washington, DC 20522–0505.

SUPPLEMENTARY INFORMATION: The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000.

Marie Therese Porter Royce,

Assistant Secretary, Educational and Cultural Affairs, Department of State.

[FR Doc. 2019–01034 Filed 2–4–19; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 10662]

Notice of Determinations; Culturally Significant Object Imported for Exhibition—Determinations: "Giorgione's La Vecchia" Exhibition

SUMMARY: Notice is hereby given of the following determinations: I hereby determine that a certain object to be included in the exhibition ''Giorgione's La Vecchia,'' imported from abroad for temporary exhibition within the United States, is of cultural significance. The object is imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit object at the Cincinnati Art Museum, Cincinnati, Ohio, from on or about February 15, 2019, until on or about May 5, 2019, at the Wadsworth Atheneum Museum of Art, Hartford, Connecticut, from on or about May 15, 2019, until on or about August 4, 2019, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Elliot Chiu, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, SA–5, Suite 5H03, Washington, DC 20522–0505.

SUPPLEMENTARY INFORMATION: The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000.

Marie Therese Porter Royce,

Assistant Secretary, Educational and Cultural Affairs, Department of State.

[FR Doc. 2019–01035 Filed 2–4–19; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket No. FHWA–2018–0040]

Surface Transportation Project Delivery Program; Alaska Department of Transportation Audit Report

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: The Moving Ahead for Progress in the 21st Century Act (MAP–21) established the Surface Transportation Project Delivery Program that allows a State to assume FHWA's environmental responsibilities for environmental review, consultation, and compliance under the National Environmental Policy Act (NEPA) for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for the responsibilities it has assumed, in lieu of FHWA. This program mandates annual audits during each of the first 4 years to ensure the State's compliance with program requirements. This notice makes available the final report of the Alaska Department of Transportation and Public Facilities (DOT&PF) first audit under the program.

FOR FURTHER INFORMATION CONTACT: Mr. David T. Williams, Office of Project Development and Environmental Review, (202) 366–4074, *David.Williams@dot.gov,* or Mr. Jomar Maldonado, Office of the Chief Counsel, (202) 366–1373, *Jomar.Maldonado@dot.gov,* Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this notice may be downloaded from the specific docket page at *www.regulations.gov.*

Background

The Surface Transportation Project Delivery Program, codified at 23 U.S.C. 327, commonly known as the NEPA Assignment Program, allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely liable for carrying out the responsibilities, in lieu of FHWA.

The DOT&PF published its application for NEPA assumption on May 1, 2016, and made it available for public comment for 30 days. After considering public comments, DOT&PF submitted its application to FHWA on July 12, 2016. The application served as the basis for developing a Memorandum of Understanding (MOU) that identifies the responsibilities and obligations that the DOT&PF would assume. The FHWA published a notice of the draft MOU in the **Federal Register** on August 25, 2017, with a 30-day comment period to solicit the views of the public and Federal Agencies. After the end of the comment period, FHWA and DOT&PF considered comments and proceeded to execute the MOU. Effective November 13, 2017, DOT&PF assumed FHWA's responsibilities under NEPA, and the responsibilities for NEPA-related Federal environmental laws described in the MOU.

Section 327(g) of Title 23, U.S.C., requires the Secretary of Transportation to conduct annual audits during each of the first 4 years of State participation. After the fourth year, the Secretary shall monitor the State's compliance with the written agreement. The results of each audit must be made available for public comment. The FHWA published a notice in the **Federal Register** at 83 FR 45181 on September 5, 2018, soliciting public comment for 30-days, pursuant to 23 U.S.C. 327(g). The FHWA received comments on the draft report from the American Road & Transportation Builders Association (ARTBA). The ARTBA's comments were supportive of the Surface Transportation Project Delivery Program and did not relate specifically to audit 1. The team has considered these comments in finalizing this audit report. This notice makes available the final report of DOT&PF 's first audit under the program.

Authority: Section 1313 of Public Law 112–141; Section 6005 of Public Law 109–59; 23 U.S.C. 327; 23 CFR 773.

Issued on: January 7, 2019.

Brandye L. Hendrickson,

Deputy Administrator, Federal Highway Administration.

Final FHWA Audit of the Alaska Department of Transportation

April 16–20, 2018

The Audit Team finds Alaska Department of Transportation and Public Facilities (DOT&PF) is carrying out the National Environmental Policy Act (NEPA) Assignment Program responsibilities (assumed November 2017) and is compliant with the provisions of the NEPA Assignment Program Memorandum of Understanding (MOU). The Alaska DOT&PF has established written internal policies and procedures for the assumed Federal responsibilities. Following 5 months after execution of the MOU, the Audit Team identified one non-compliance observation, seven general observations, and six successful practices. Overall, DOT&PF has carried out the environmental responsibilities it assumed through the MOU and the application for the NEPA Assignment Program.

Executive Summary

This report summarizes the results of the Federal Highway Administration's (FHWA) first audit of the Alaska DOT&PF NEPA review responsibilities and obligations that FHWA has assigned and DOT&PF has assumed pursuant to 23 U.S.C. 327. Throughout this report, FHWA uses the term ''NEPA Assignment Program'' to refer to the program codified at 23 U.S.C. 327. Under the authority of 23 U.S.C. 327, DOT&PF and FHWA signed a MOU on November 3, 2017, to memorialize DOT&PF's NEPA responsibilities and liabilities for Federal-aid highway projects and certain other FHWA approvals for transportation projects in Alaska. Except for three projects that FHWA retained, FHWA's only NEPA responsibilities in Alaska are oversight and review of how DOT&PF executes its NEPA Assignment Program obligations. The MOU covers environmental review responsibilities for projects that require the preparation of environmental assessments (EA), environmental impact statements (EIS), and categorical exclusions (CE).

As part of its review responsibilities under 23 U.S.C. 327, FHWA formed a team in October 2017 to plan and conduct an audit of NEPA responsibilities DOT&PF assumed. Prior to the on-site visit, the Audit Team reviewed DOT&PF's NEPA project documentation, DOT&PF's response to FHWA's pre-audit information request (PAIR), and DOT&PF's self-assessment of its NEPA Program. The Audit Team reviewed additional documents and conducted interviews with DOT&PF staff in Alaska on April 16–20, 2018.

The DOT&PF entered into the NEPA Assignment Program after more than 8 years of experience making FHWA NEPA CE determinations pursuant to 23 U.S.C. 326 (beginning September 22, 2009). The DOT&PF's environmental review procedures are compliant for CEs, and DOT&PF is implementing procedures and processes for CEs, EAs, and EISs as part of its new responsibilities under the NEPA Assignment Program. Overall, the Audit Team found that DOT&PF is successfully adding EA and EIS project review responsibilities to an already successful CE review program. The Audit Team identified one non-compliance observation, seven general observations, as well as several successful practices. The Audit Team finds DOT&PF is carrying out the responsibilities it has assumed and is in compliance with the provisions of the MOU.

Background

The NEPA Assignment Program allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal-aid highway projects. Under 23 U.S.C. 327, a State that assumes these Federal responsibilities becomes solely responsible and solely liable for carrying them out. Effective November 13, 2017, DOT&PF assumed FHWA's responsibilities under NEPA and other related environmental laws. Examples of responsibilities DOT&PF has assumed in addition to NEPA include Section 7 consultation under the Endangered Species Act (ESA) and consultation under Section 106 of the National Historic Preservation Act (NHPA).

Following this first audit, FHWA will conduct three more annual audits to satisfy provisions of 23 U.S.C. 327(g) and Section 11 of the MOU. Audits are the primary mechanism through which FHWA oversees DOT&PF's compliance with the MOU and the NEPA Assignment Program requirements. This includes ensuring compliance with applicable Federal laws and policies, evaluating DOT&PF's progress toward achieving the performance measures identified in MOU Section 10.2, and collecting information needed for the Secretary's annual report to Congress. The FHWA must present the results of each audit in a report and make it available for public comment in the Federal Register.

The Audit Team consisted of NEPA subject matter experts from FHWA Alaska Division, as well as from FHWA offices in Washington, District of Columbia; Atlanta, Georgia; Sacramento, California; and Lakewood, Colorado. These experts received training on how to evaluate implementation of the NEPA Assignment Program. In addition, FHWA Alaska Division designated their Environmental Program Manager to serve as a NEPA Assignment Program liaison to DOT&PF.

Scope and Methodology

The Audit Team conducted an examination of DOT&PF's NEPA project files, DOT&PF responses to the PAIR, and DOT&PF's self-assessment. The audit also included interviews with staff and reviews of DOT&PF policies, guidance, and manuals pertaining to NEPA responsibilities. All reviews focused on objectives related to the six NEPA Assignment Program elements: program management; documentation and records management; quality assurance/quality control (QA/QC); legal sufficiency; training; and performance measurement.

The focus of the audit was on DOT&PF's individual project compliance and adherence to program practices and procedures. Therefore, while the Audit Team reviewed project documentation to evaluate DOT&PF's NEPA process and procedures, the team did not evaluate DOT&PF's project-specific decisions to determine if they were, in FHWA's opinion, correct or not. The Audit Team reviewed NEPA documents from 41 projects including Programmatic CEs, CEs, EAs and re-evaluations, a representative sample of all NEPA documents in process or initiated after the MOU's effective date. The Audit Team also interviewed environmental staff in all three DOT&PF regions as well as their headquarters office.

The PAIR consisted of 66 questions about specific elements in the MOU. The Audit Team appreciates the efforts of DOT&PF staff to meet the review schedule in supplying

their response. These responses were used to develop specific follow-up questions for the on-site interviews with DOT&PF staff.

The Audit Team conducted 22 on-site and 6 phone interviews. Interviewees included staff from each of DOT&PF's three regional offices and DOT&PF headquarters. The Audit Team invited DOT&PF staff, middle management, and executive management to participate in interviews to ensure the interviews represented a diverse range of staff expertise, experience, and program responsibility.

Throughout the document reviews and interviews, the Audit Team verified information on DOT&PF NEPA Assignment Program including DOT&PF policies, guidance, manuals, and reports. This included the NEPA QA/QC Plan, the NEPA Assignment Program Training Plan, and the NEPA Assignment Self-Assessment Report.

The Audit Team utilized information obtained during interviews and project file documentation reviews to consider the State's implementation of the assignment program through DOT&PF environmental manuals, procedures, and policy. This audit is a compliance review of DOT&PF's adherence to their own documented procedures in compliance with the terms of the MOU. The team documented observations under the six NEPA Assignment Program topic areas. Below are the audit results.

Overall Audit Opinion

The Audit Team acknowledges DOT&PF's effort to establish written internal policies and procedures for the new responsibilities they have assumed. This report identifies one non-compliant observation that DOT&PF will need to address through corrective action. These non-compliance observations come from a review of DOT&PF procedures, project file documentation, and interview information. This report also identifies several notable observations and successful practices that we recommend be expanded. Overall, DOT&PF has carried out the environmental responsibilities it assumed through the MOU and the application for the NEPA Assignment Program, and as such the Audit Team finds that DOT&PF is substantially compliant with the provisions of the MOU.

Non-Compliance Observations

Non-compliance observations are instances where the team found DOT&PF was out of compliance or deficient in proper implementation of a Federal regulation, statute, guidance, policy, the terms of the MOU, or DOT&PF's own procedures for compliance with the NEPA process. Such observations may also include instances where DOT&PF has failed to maintain technical competency, adequate personnel, and/or financial resources to carry out the assumed responsibilities. Other non-compliance observations could suggest a persistent failure to adequately consult, coordinate, or consider the concerns of other Federal, State, Tribal, or local agencies with oversight, consultation, or coordination responsibilities. The FHWA expects DOT&PF to develop and implement corrective actions to address all non-compliance observations. The FHWA will conduct follow up reviews of non-compliance observations in Audit #2 from this review.

Observations and Successful Practices

This section summarizes the Audit Team's observations of DOT&PF's NEPA Assignment Program implementation, including successful practices DOT&PF may want to continue or expand. Successful practices are positive results that FHWA would like to commend DOT&PF on developing. These may include ideas or concepts that DOT&PF has planned but not yet implemented. Observations are items the Audit Team would like to draw DOT&PF's attention to, which may benefit from revisions to improve processes, procedures, or outcomes. The DOT&PF may have already taken steps to address or improve upon the Audit Team's observations, but at the time of the audit they appeared to be areas where DOT&PF could make improvements. This report addresses all six MOU topic areas as separate discussions. Under each area, this report discusses successful practices followed by observations.

This audit report provides an opportunity for DOT&PF to begin implementing actions to improve their program. The FHWA will consider the status of areas identified for potential improvement in this audit's observations as part of the scope of Audit #2. The second Audit Report will include a summary discussion that describes progress since the last audit.

Program Management

The review team acknowledges the DOT&PF's efforts to accommodate their environmental program to the 23 U.S.C. 327 responsibilities they have assumed. These efforts include updating their Environmental Procedures Manual, developing and implementing an expanded QA/QC Plan, establishing an Environmental Program Training Plan, and implementing a self-assessment process identifying deficiencies that were described and addressed in a report.

Successful Practices

The Audit Team found that DOT&PF has, overall, appropriately implemented its project-level review and compliance responsibility for CEs, EAs, and EISs. The DOT&PF has established a vision and direction for incorporating the NEPA Assignment Program into its overall project development process. This was clear in the DOT&PF's responses to FHWA's PAIR and in interviews with staff in the regions and at DOT&PF's headquarters office, commonly known as the Statewide Environmental Office (SEO).

The DOT&PF increased environmental staff in the SEO to support the new responsibilities under the NEPA Assignment Program. Staff at SEO are responsible for the review of some projects classified as CEs and all projects classified as EAs and EISs. Regional environmental staff coordinate their NEPA work through Regional Environmental Managers and NEPA Program Managers at SEO. Some staff responsibilities have changed under the NEPA Assignment Program, but positions have essentially remained unchanged. Following assumption of NEPA responsibilities, DOT&PF hired a statewide NEPA Assignment Program Manager who is responsible for overseeing DOT&PF's policies, manuals, guidance, and training under the NEPA Assignment Program.

The Audit Team would also like to recognize DOT&PF efforts to bring a lawyer into the early stages of project development to ensure a legally defensible document.

Non-Compliance Observation #1: Opportunity of a public hearing

Section 7.2.1 of the MOU requires the DOT&PF to develop procedures to implement the responsibilities assumed. This review identified one example of deficient adherence to these State procedures. This Audit Team identified one project file where DOT&PF did not offer the opportunity for a public hearing for the release of the Draft EA consistent with its own public involvement procedures in the January 2005 Preconstruction Manual Section 520.4.1 or the February 2018 Environmental Procedures Manual Section 4.4.2. The Audit Team confirmed with SEO that although public meetings were held, no opportunity for a public hearing was provided.

Observation #1: Programmatic Section 106 compliance and Section 4(f) compliance

The DOT&PF's November 2017 Section 106 Programmatic Agreement (PA) established an alternate procedure for Section 106 compliance in Alaska which allows the use of a streamlined process. The Audit Team identified a risk to DOT&PF in the application of their Section 106 PA to projects that require integrating the Section 106 process results to comply with the requirements of Section 4(f).

a. The PA notes that the streamlined process is applicable to projects with low potential to affect historic properties. The DOT&PF staff characterized how they apply the streamlined Section 106 process to individual projects as ones that result in little or no potential to affect historic properties. The DOT&PF project documentation for the streamlined Section 106 compliance is a form that does not identify either a project effect or the effect to a specific historic property.

b. Because the use of the streamlined form does not identify a Section 106 effect for any individual historic property, the DOT&PF documentation cannot support any required Section 4(f) de minimis impact determinations. (see 23 CFR 774.5(b)(1))

Observation #2: Lack of a process to implement planning consistency at time of a NEPA decision

Section 3.3.1 of the MOU requires DOT&PF to, at the time they make a NEPA approval (CE determination, finding of no significant impact, or record of decision) check to ensure that the project's design concept, scope, and funding is consistent with current planning documents. Reviews of project documents provided no evidence that DOT&PF staff had reviewed planning documents for availability of funding. Through interviews it was clear that their understanding of this requirement varied. Through reviews of DOT&PF

manuals, the Audit Team could not find a procedure for staff to follow so that at the time staff makes a NEPA approval, they are also checking (and documenting) that the project's design concept, scope, and funding is consistent with planning documents.

Observation #3: Staff Capacity

Sections 4.2.1 and 4.2.2 discuss the State's commitment of resources and adequate organizational and staff capability. Several DOT&PF staff explained through interviews, that since the State's entry into the full NEPA Assignment Program, their required review and documentation efforts dramatically increased. We learned from two region office staff that, because of the increased workload, the region office did not have sufficient resources to manage the workload associated with the NEPA Assignment Program. A related concern was the challenge in retaining qualified staff, possibly leading to a delay in project delivery. (MOU Section 4.2.1 and 4.2.2)

Observation #4: Government-to-Government Consultation

Section 3.2.3 of the MOU excludes assignment of the responsibility for Government-to-Government consultation with Tribes, to DOT&PF. The Audit Team learned through interviews, and a check of DOT&PF's environmental manual, that the DOT&PF has no written procedures on how its staff are to accommodate a Tribal request for Government-to-Government consultation with FHWA. Through interviews it was apparent that DOT&PF's staff has an inconsistent understanding of how to handle this scenario. Staff indicated they would like written guidance that addresses the process that includes FHWA's role. (MOU Section 3.2.3)

Documentation and Records Management

The NEPA Assignment Program became effective on November 13, 2017. From that effective date through February 28, 2018, the DOT&PF made 56 project decisions. By employing both judgmental and random sampling methods, the Audit Team reviewed NEPA project documentation for 41 of these decisions.

Successful Practices

The Audit Team recognizes several efforts to improve consistency of filing project documentation learned through project documentation reviews and interviews. These include: the use of a standardized electronic folder structure developed by Central Region; a spreadsheet template used in Central Region to manage tasks and standardize filing of project documents; and Southcoast Region utilizing a document specialist to ensure that project files are complete.

The Audit Team would also like to commend DOT&PF's use of the optional 23 CFR 771.117(e) form for CE projects classified as (c)(26), (c)(27), or (c)(28) because it clearly and efficiently demonstrates that the conditions required for the project to be processed as a ''c-list'' CE have been met. We urge DOT&PF management to consider making this form a required part of CE documentation.

Observation #5: Section 106 Compliance

Section 5.1.1 of the MOU requires the State to follow Federal laws, regulations, policy, and procedures to implement the responsibilities assumed, and Section 4.2.3 specifically calls out requirements pertaining to historic properties. This review identified two examples of deficient adherence to these Federal Section 106 compliance procedures. The regulations that implement Section 106 of the NHPA require the Agency Official to consider the impacts of their undertaking on historic properties and to afford the State Historic Preservation Officer (SHPO) an opportunity to comment. Through project file reviews, the Audit Team identified one instance where the Section 106 review did not consider the full extent of the project's undertaking. This was a project where an off-ramp bypass lane was added to the project but was not considered as part of Section 106 compliance. Note that this error was also discovered by DOT&PF during their self-assessment and corrective action has been completed. In the second instance, the review of project file documentation revealed that DOT&PF incorrectly made a decision that Section 106 compliance requirements to make an effect determination did not apply.

Quality Assurance/Quality Control

The Audit Team recognizes that the DOT&PF is in the early stages of the NEPA Assignment Program. However, the Audit Team made the following observations related to QA/QC.

Successful Practices

The MOU requires the DOT&PF to conduct an annual self-assessment of its QA/QC process and performance. The Audit Team found the DOT&PF's self-assessment report to be well-written and comprehensive with in-depth analyses. This documents their commitment to implementing a compliant NEPA Assignment Program.

The Audit Team would like to recognize the SEO's use of the QA/QC database for tracking QA/QC reviews. This allows them to quantify the review results to better identify trends or areas of concern that should be addressed.

The Audit Team learned through interviews that the Section 106 professionally qualified individuals in SEO review the information the regions submit to the SHPO. The SEO staff said that the records were adequate overall, but occasional follow up with individual regions was necessary to increase the clarity and address possible omissions. This SEO feedback should result in increased consistency and clarity in Section 106 documentation subject to interagency review.

Observation #6: QC staff roles and responsibilities

The DOT&PF's QA/QC plan identifies a Project Development Team who would review documents to ensure consistency, conciseness, and overall quality, but it does not discuss specific responsibilities of individual members for the QA/QC process. In addition, staff did not consistently articulate the QA/QC responsibilities of the Project Development Team members. The Audit Team would like to draw the DOT&PF's attention to what appears to be an inconsistent awareness of the use of Project Development Teams and the roles and responsibilities of team members for QC.

Training Program

Per MOU Section 12 Training, the DOT&PF committed to implementing training necessary to meet its environmental obligations assumed under the NEPA Assignment Program. As required in the MOU the DOT&PF also committed to assessing its need for training, developing a training plan, and updating the training plan on an annual basis in consultation with FHWA and other Federal Agencies as deemed appropriate.

The DOT&PF developed the 2018 Environmental Program Training Plan to fulfill the requirements of Section 12 of the MOU. The 2018 Environmental Program Training Plan is a comprehensive document that addresses a number of issues related to training including:

- a variety of in-person and virtual training methods that could be used by DOT&PF;
- the timing of, and approach to, updating the 2018 Environmental Program Training Plan;
- the development of an individual training plan (ITP) that outlines both mandatory and non-mandatory training;
- the training and experience the employees must acquire to be considered for promotion; and
- maintaining a record of trainings that were taken by employees in the last 3 years and their anticipated training requests for the upcoming year.

Successful Practices

Tracking environmental training is required by the DOT&PF's 2018 Environmental Program Training Plan. One Preliminary Design and Environmental Group Chief shared a spreadsheet developed to track all the training taken by his staff, including environmental courses. The Audit Team believes this tool will help ensure employees received required training to advance the NEPA Assignment Program.

Observations:

Observation #7: Training Program

MOU Sections 12.2, 4.2.2 and 4.2.3 require the DOT&PF to retain staff and the organizational capacity to implement their program and to implement training. Training often is an important tool for attaining and maintaining staff and organizational capacity. The Audit Team asked DOT&PF staff to share their perceptions about the training requirements in the plan; the adequacy of the training budget; and how training relates to their job responsibilities, performance, and employee development and promotion. The Audit Team urges the DOT&PF to consider ways to accommodate training needs and consider various approaches to deliver necessary training in a timely manner:

a) Regarding training requirements, some interviewees said that the DOT&PF's training plan requirements were unrealistic because

either: 1) staff was too busy working on projects to have the time to complete the training courses identified in the plan; or 2) given the turnover rates in their office and the frequency of training offered, employees were unlikely to get all required training during their tenure. The Audit Team considers the plan to be realistic and urges the DOT&PF to consider ways to address these challenges.

b) Regarding the training budget, interview responses revealed no consensus. The DOT&PF management indicated a strong desire to have a robust NEPA Program and some interviewees responded that they felt that the training budget was adequate. However, responses from other interviewees indicated that the training budget was inadequate, especially as it relates to travel. The Audit Team was unable to resolve whether the budget was inadequate and will consider this issue again in the next audit.

c) The 2018 Environmental Program Training Plan links training to employee development and promotion. Interviews revealed: (1) inconsistent preparation and use of an ITP as is required for employees; (2) perceptions that training requirements for flexing from an Analyst 1 to Analyst 2 position are clearly spelled out, but not for advancement beyond an Analyst 2 position; (3) concerns that training opportunities are too limited or not available; and (4) some employees have not had a performance review in several years. Based on this input, the Audit Team suggests that the DOT&PF focus on additional ways to improve implementation of their Training Plan.

d) Regarding training needs, DOT&PF staff indicated a need for Section 4(f) training, according to interviews in all three regions and SEO. Multiple interviewees also identified a need for training in noise and floodplains. Training needs cited at a lesser frequency included ESA, cumulative effects, Section 408, EA/EIS, QA/QC, Planning and Environmental Linkages, stream enhancement, NEPA, conflict resolution and mediation. Given that the DOT&PF is now implementing additional environmental review responsibilities based on the MOU, and staff recognize the need to be prepared to embrace those responsibilities, the Audit Team urges the DOT&PF to address these training needs expeditiously, and be sensitive to ongoing training needs.

Performance Measures

The DOT&PF has demonstrated it has taken an active interest in developing, monitoring, and implementing the performance measures required by the MOU. The March 21, 2018, DOT&PF NEPA Assignment Self-Assessment Summary Report contained the results of the DOT&PF's first report of its assessment of NEPA Assignment and DOT&PF procedures compliance. The DOT&PF's March 1, 2017, response to FHWA's PAIR included answers to questions posed on performance measures. Because of the information provided in these two documents, combined with the fact that a relatively brief period of time has transpired since the MOU became effective, the Audit Team has not identified any observations or successful practices here. However, the following discussion describes the current status of the DOT&PF's performance measures.

The DOT&PF's performance measure to assess change in communication among the DOT&PF, Federal and State resource agencies, and the public resulting from assumption of responsibilities under this MOU was based on the experience of a single EA project, according to DOT&PF's self-assessment summary report. Through interviews, the Audit Team learned that the DOT&PF believes the resource agencies will observe little change in communication and consultation because DOT&PF had been operating under a 23 U.S.C. 326 MOU since September 2009.

The DOT&PF's self-assessment summary report suggests some early efficiencies have been observed, but the consensus from interviews was that it is too early to determine if substantial increased efficiencies and timeliness will result from the program. Some individuals indicated that over time the program should result in increased efficiencies and timeliness.

Through interviews, the Audit Team learned that data for performance measures are being collected and presented quarterly to DOT&PF management for use in decisionmaking. Also, that DOT&PF believes the existing performance measures are comprehensive and adequate. The DOT&PF leadership said that performances measures will be evaluated annually to determine if adjustment is needed.

Legal Sufficiency

Interviews with both staff and management attorneys emphasized the legal sufficiency review process emulated FHWA's ''early legal involvement'' concept, i.e., bringing a lawyer onto the reviewing team at an early stage in project development. We learned that DOT&PF staff do not need to go through management to talk to an attorney, but may call or email at any time (and, with regard to EAs, have done so under NEPA Assignment). Management noted specific review steps are to take place at the both draft and final stages for assigned EISs and Individual Section 4(f) Evaluations.

At this time, the Alaska Department of Law (DOL) expressed no intention of expanding the number of staff attorneys assigned to document review; however, it has a contingency plan should workload increase significantly in future. Specifically, should DOT&PF be sued over an assigned project, DOL tentatively intends to contract with outside counsel (per 23 U.S.C. 327(a)(2)(G)) to handle the litigation rather than make a single staff attorney divide his time between document review and defending the case. The Transportation Section attorney would act as support counsel to the litigators in a manner similar to the way FHWA counsel provide litigation support to the U.S. Department of Justice when it defends FHWA's environmental decisions in court. (MOU Section 6.1.1)

[FR Doc. 2019–01061 Filed 2–4–19; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2019–0001]

Establishment of an Emergency Relief Docket for Calendar Year 2019

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of establishment of public docket.

SUMMARY: This Notice announces the establishment of FRA's emergency relief docket (ERD) for calendar year 2019. The designated ERD for calendar year 2019 is docket number FRA–2019–0001.

ADDRESSES: See **SUPPLEMENTARY INFORMATION** section for further information regarding submitting petitions and/or comments to Docket No. FRA–2019–0001.

SUPPLEMENTARY INFORMATION: On May 19, 2009, FRA published a direct final rule establishing ERDs and the procedures for handling petitions for emergency waivers of safety rules, regulations, or standards during an emergency situation or event. 74 FR 23329. That direct final rule became effective on July 20, 2009 and made minor modifications to 49 CFR 211.45 in FRA's Rules of Practice in 49 CFR part 211. Section 211.45(b) provides that each calendar year FRA will establish an ERD in the publicly accessible DOT docket system (available at *www.regulations.gov*). Section 211.45(b) further provides that FRA will publish a notice in the **Federal Register** identifying by docket number the ERD for that year. FRA established the ERD and emergency waiver procedures to provide an expedited process for FRA to address the needs of the public and the railroad industry during emergency situations or events. This Notice announces the designated ERD for calendar year 2019 is docket number FRA–2019–0001.

As detailed in § 211.45, if the FRA Administrator determines an emergency event as defined in 49 CFR 211.45(a) has occurred, or that an imminent threat of such an emergency occurring exists, and public safety would benefit from providing the railroad industry with operational relief, the emergency waiver procedures of 49 CFR 211.45 will go into effect. In such an event, the FRA Administrator will issue a statement in the ERD indicating the emergency waiver procedures are in effect and FRA will make every effort to post the statement on its website at *www.fra.dot.gov.* Any party desiring

relief from FRA regulatory requirements as a result of the emergency should submit a petition for emergency waiver under 49 CFR 211.45(e) and (f). Specific instructions for filing petitions for emergency waivers under 49 CFR 211.45 are found at 49 CFR 211.45(f). Specific instructions for filing comments in response to petitions for emergency waivers are at 49 CFR 211.45(h).

Privacy

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.transportation.gov/privacy.* See also *www.regulations.gov/privacyNotice* for the privacy notice of *regulations.gov.*

Issued in Washington, DC.

Robert C. Lauby,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2019–01036 Filed 2–4–19; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2018–0075]

Paperwork Reduction Act 30-Day Notice; Request for Comments

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice and request for comments on an extension of a previously-approved information collection.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Request (ICR) abstracted below is being forwarded to the Office of Management and Budget (OMB) for review, and requests comments on the ICR. A **Federal Register** Notice with a 60-day comment period soliciting comments on the following information collection was published on July 23, 2018. NHTSA received three comments on the 60-day notice. One supported the information collection, another addressed an issue unrelated to information collection, and a third stated that the research is a waste of money without providing any support for the statement. NHTSA has concluded that it is not necessary to make any changes to the information collection based on those comments.

DATES: Comments must be submitted on or before March 7, 2019.

ADDRESSES: Send comments regarding the burden estimate, including suggestions for reducing the burden, to the Office of Management and Budget, Attention: Desk Officer for the Office of the Secretary of Transportation, 725–17th Street NW, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: For additional information or access to background documents, contact Timothy M. Pickrell, NHTSA, 1200 New Jersey Avenue SE, W55–320, NSA–210, Washington, DC 20590. Mr. Pickrell's telephone number is (202) 366–2903. Please identify the relevant collection of information by referring to its OMB Control Number.

SUPPLEMENTARY INFORMATION: Before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). In compliance with these requirements, this notice announces that the following information collection request has been forwarded to OMB.

A **Federal Register** notice with a 60-day comment period soliciting comments on the information collection was published on July 23, 2018 (83 FR 34912). NHTSA received three comments on the 60-day notice. Consumer Reports supported the information collection. Of the other two comments, one addressed a subject other than the subject of the information collection, and therefore was not relevant, and the other stated that the research is a waste of money but did not provide support for that view. NHTSA has concluded that it is not necessary to make any changes to the information collection based on those comments.

Title: The National Survey of the Use of Booster Seats.

OMB Control Number: 2127–0644.

Affected Public: Motorists in passenger vehicles at gas stations, fast food restaurants, and other types of sites frequented by children during the time in which the survey is conducted.

Form Number: NHTSA Form 1010.

Abstract: NHTSA began conducting the National Survey of the Use of Booster Seats to respond to Section 14(i) of the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act of 2000. Section 14(i), ''Booster seat education program,'' directed the Department of Transportation to develop a 5-year plan to reduce deaths and injuries caused by failure to use an appropriate booster seat among children in the 4- to 8-year old age group by twenty-five percent. Conducting the National Survey of the Use of Booster Seats provided the Department with invaluable information on use and non-use of booster seats, helping the Department to improve its booster seat outreach programs. NHTSA has continued the survey to obtain current data on booster seat use, to ensure that children ages 4 to 8 are protected to the greatest extent possible when they ride in motor vehicles. NHTSA also seeks to collect information about child restraint use by children of other ages.

The OMB approval for the survey is scheduled to expire on May 31, 2019. NHTSA seeks an extension of this approval to obtain this important survey data. With up-to-date data of consumers' use and non-use of booster seats and other child restraint systems, the agency will be better able to maximize the effectiveness of its outreach and consumer education programs in increasing correct booster and other child restraint use, and save more children from death and injury.

Estimated Total Annual Burden Hours: 340 hours.

Estimated Number of Respondents: Approximately 4,800 adult motorists in passenger vehicles at gas stations, fast food restaurants, and other types of sites frequented by children during the time in which the survey is conducted.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for the Department's performance; (b) the accuracy of the estimated burden; (c) ways for the Department to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.95.

Cem Hatipoglu,

Acting Associate Administrator for the National Center for Statistics and Analysis.

[FR Doc. 2019–01057 Filed 2–4–19; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary of Transportation

[Docket No. DOT–OST–2017–0069]

Notice of Review of Guidance

AGENCY: Office of the Secretary of Transportation (OST); DOT.

ACTION: Notice.

SUMMARY: The U.S. Department of Transportation (Department or DOT) is reviewing its existing guidance documents to evaluate their continued necessity and determine whether they need to be updated or revised. As part of this review, the Department invites the public to identify and provide input on existing guidance documents that are good candidates for repeal, replacement, or modification. In addition, the Federal Motor Carrier Safety Administration (FMCSA) will publish a separate notice in the **Federal Register** inviting public comment on specific actions that FMCSA would like to take on FMCSA guidance documents dealing with commercial drivers' licenses.

DATES: Comments should be received on or before April 8, 2019. Late-filed comments will be considered to the extent practicable.

ADDRESSES: You may file comments identified by the docket number [insert number] by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* The Docket Management Facility is located on the West Building, Ground Floor, of the U.S. Department of Transportation, 1200 New Jersey Ave. SE, Room W12–140, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

Instructions: You must include the agency name and the Docket Number DOT–OST–2017–0069 at the beginning of your comment. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* In order to facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or to the street address listed above. Follow the online instructions for accessing the docket.

FOR FURTHER INFORMATION CONTACT: Jonathan Moss, Assistant General Counsel for Regulation, U.S. Department of Transportation, 1200 New Jersey Ave. SE, Washington, DC 20590, 202–366–4723 (phone), *jonathan.moss@dot.gov* (email).

SUPPLEMENTARY INFORMATION:

DOT Responsibilities for Regulations and Transportation Infrastructure

The mission of the Department is to serve the United States by ensuring a safe, fast, efficient, accessible, and convenient transportation system that meets our vital national interests and enhances the quality of life of the American people, today and into the future. The Department carries out its mission through the Office of the Secretary (OST) and its operating administrations (OAs): Federal Aviation Administration (FAA); Federal Highway Administration (FHWA); Federal Motor Carrier Safety Administration (FMCSA); National Highway Traffic Safety Administration (NHTSA); Federal Railroad Administration (FRA); Federal Transit Administration (FTA); Maritime Administration (MARAD); Pipeline and Hazardous Materials Safety Administration; (PHMSA); and St. Lawrence Seaway Development Corporation (SLSDC).

DOT has statutory responsibility for a wide range of regulations and guidance documents. For example, DOT regulates safety in the aviation, motor carrier, railroad, motor vehicle, commercial space, transit, and pipeline transportation areas. The Department also regulates aviation consumer and economic issues, and provides financial assistance and writes the necessary implementing rules for programs involving highways, airports, mass transit, the maritime industry, railroads, and motor transportation and vehicle safety. Finally, DOT has responsibility for developing policies that implement a wide range of regulations that govern programs such as acquisition and grants management, access for people with disabilities, environmental protection, energy conservation, information technology, occupational safety and health, property asset management, seismic safety, security, and the use of aircraft and vehicles.

Review of Guidance Documents

The Department produces guidance documents in order to communicate with the public, its stakeholders, the regulated entities, and DOT staff. These documents can serve a number of purposes including: (1) Clarifying the pertinent statutory and regulatory requirements; (2) assisting with statutory and regulatory compliance; and (3) communicating the Department's position on an issue. As required by the Administrative Procedure Act, the Department does not use guidance documents as a substitute for rulemaking and does not use guidance documents to impose new requirements on entities outside the Executive Branch. However, the Department recognizes that in some instances, even non-binding guidance may spur cost-inducing actions by regulated entities. The Department also recognizes that some guidance documents may need to be rescinded or updated to reflect developments, such as technological changes, that took place after the guidance was issued.

Public Participation and Request for Comments

Section 5203(c)(2) of the Fixing America's Surface Transportation (FAST) Act requires FMCSA to publish a notice in the **Federal Register** requesting comment on which FMCSA guidance documents ''should be updated or eliminated.'' This notice satisfies this statutory requirement.

The Department also emphasizes that improvement of guidance documents is a focus for all components of the Department. Accordingly, the Department seeks written input from the public on all DOT guidance documents (not just those issued by FMCSA) that are good candidates for repeal or revision. The public is encouraged to identify guidance documents that (a) are no longer necessary; (b) spur cost-inducing action by the regulated entities; (c) are inconsistent or unclear; (d) may not be conducive to uniform or consistent enforcement; or (e) need to be updated to reflect developments that have taken place since the guidance was issued.

The FAST Act also requires FMCSA to undertake a comprehensive review of its guidance. FMCSA has now completed its review of guidance documents dealing with commercial drivers' licenses and will publish a separate notice in the **Federal Register** seeking public comment on the specific actions that FMCSA would like to undertake as a result of this review.

Content of Comments

The Department will review all comments submitted timely to the docket associated with this notice [insert docket number]. To maximize the usefulness of comments, the Department encourages commenters to provide the following information:

1. *A specific reference to the guidance document and associated statutes or regulations that the comment discusses.* This should include the agency that issued the guidance document (*e.g.,* FHWA, FMCSA), the title or subject, the date of issuance, and a guidance document number or an internet link. If possible, the reference also should include citations to the associated statutes (*e.g.,* FAST Act) or regulations in the Code of Federal Regulations. A specific reference will assist the Department in identifying the guidance document and any associated statutory or regulatory requirements.

2. *A description of the problem with the specific guidance document.* A comment that explains why the guidance document should be eliminated or revised is more useful than a comment that merely asserts that the guidance should be eliminated/revised. Comments that reflect experience with the guidance or a related statutory or regulatory requirement and provide data describing that experience are more helpful than comments that are not tied to direct experience. Verifiable, quantifiable data describing burdens are more useful than anecdotal descriptions.

3. *A description of alternatives that are better than the specific guidance document.* If the commenter believes that the objective that motivated the guidance document may be achieved using a better alternative, the commenter should describe that alternative in detail. Likewise, if the commenter believes that there is not a better alternative or there is not a legitimate objective served by the guidance document, then that should be explained in the comment.

4. *Examples of entities that are, have been, or will be negatively affected by the specific guidance document and examples of entities that will benefit if the guidance is removed or revised.* A comment listing specific entities is more useful because it will assist the Department in investigating the guidance document and its impact.

Scope of Comments

The Department is interested in comments on any guidance document issued by OST or any DOT operating administration that is a good candidate for repeal or revision.

Issued on: January 30, 2019.

Jeffrey A. Rosen,

Deputy Secretary.

[FR Doc. 2019–01065 Filed 2–4–19; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Renewal; Comment Request; Community and Economic Development Entities, Community Development Projects, and Other Public Welfare Investments

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to take this opportunity to comment on a continuing information collection as required by the Paperwork Reduction Act of 1995 (PRA).

An agency may not conduct or sponsor, and respondents are not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The OCC is soliciting comment concerning its information collection titled, ''Community and Economic Development Entities, Community Development Projects, and Other Public Welfare Investments.''

DATES: Comments must be submitted on or before April 8, 2019.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email: prainfo@occ.treas.gov.*
- *Mail:* Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, Attention: 1557–0194, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Fax:* (571) 465–4326.

Instructions: You must include ''OCC'' as the agency name and ''1557–0194'' in your comment. In general, the OCC will publish comments on *www.reginfo.gov* without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this information collection beginning on the date of publication of the second notice for this collection [1] by any of the following methods:

- *Viewing Comments Electronically:* Go to *www.reginfo.gov.* Click on the ''Information Collection Review'' tab. Underneath the ''Currently under Review'' section heading, from the drop-down menu, select ''Department of Treasury'' and then click ''submit.'' This information collection can be located by searching by OMB control number ''1557–0194'' or ''Community and Economic Development Entities, Community Development Projects, and Other Public Welfare Investments.'' Upon finding the appropriate information collection, click on the related ''ICR Reference Number.'' On the next screen, select ''View Supporting Statement and Other Documents'' and then click on the link to any comment listed at the bottom of the screen.
- For assistance in navigating *www.reginfo.gov,* please contact the Regulatory Information Service Center at (202) 482–7340.
- Viewing Comments Personally: You may personally inspect comments at the OCC, 400 7th Street SW, Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect comments.

[1] Following the close of the 60-day comment period for this notice, the OCC will publish a notice for 30 days of comment for this collection.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, Clearance Officer, (202) 649–5490 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from OMB for each collection of information that they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of title 44 requires federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the OCC is publishing notice of the renewal of the collection of information set forth in this document.

Title: Community and Economic Development Entities, Community Development Projects, and Other Public Welfare Investments.

OMB Control No.: 1557–0194.

Description: This submission covers an existing regulation (12 CFR part 24), including the CD–1, National Bank Community Development Investments form, contained in the regulation, pursuant to which a national bank may notify the OCC, or request OCC approval, of certain community development investments.

Section 24.5(a) provides that an eligible national bank may make a public welfare investment without prior notification to, or approval by, the OCC if the bank submits an after-the-fact notification of an investment within 10 days of making the investment.

Section 24.4(a) provides that a national bank may submit a written request to the OCC to exceed five percent of its capital and surplus for its aggregate, outstanding public welfare investments. The OCC may grant permission to the bank to make subsequent public welfare investments up to the approved investment limit without prior notification to, or approval by the OCC, using the after-the-fact notification process consistent with § 24.5(a).

Section 24.5(a)(5) provides that a national bank that is not an eligible bank, consistent with § 24.2(e), but that is at least adequately capitalized and has a composite rating of at least 3 with improving trends under the Uniform Financial Institutions Rating System, may submit a letter to the OCC requesting authority to submit after-the-fact notices of its public welfare investments.

Section 24.5(b)(1) provides that if a national bank does not meet the requirements for after-the-fact notification, including if the bank's aggregate outstanding investments exceed the five percent limit, unless previously approved by the OCC for subsequent public welfare investments, the bank must submit an investment proposal to the OCC seeking permission to make the public welfare investment.

Type of Review: Regular.

Affected Public: Individuals; Businesses or other for-profit.

Estimated Number of Respondents: 1,110.

Frequency of Response: On occasion.

Estimated Total Annual Burden: 1,632.52 hours.

Comments submitted in response to this notice will be summarized, included in the request for OMB approval, and become a matter of public record. Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the burden of the collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: January 7, 2019.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2019–00951 Filed 2–4–19; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Renewal; Comment Request; Reverse Mortgage Products: Guidance for Managing Compliance and Reputation Risks

AGENCY: Office of the Comptroller of the Currency, Treasury (OCC).

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to comment on the renewal of an information collection, as required by the Paperwork Reduction Act of 1995 (PRA).

An agency may not conduct or sponsor, and respondents are not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The OCC is soliciting comment concerning renewal of its information collection titled ''Reverse Mortgage Products: Guidance for Managing Compliance and Reputation Risks'' (Guidance).

DATES: Comments must be submitted on or before April 8, 2019.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email: prainfo@occ.treas.gov.*
- *Mail:* Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, Attention: 1557–0246, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Fax:* (571) 465–4326.

Instructions: You must include ''OCC'' as the agency name and ''1557–0246'' in your comment. In general, the OCC will publish comments on *www.reginfo.gov* without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this information collection beginning on the date of publication of the second notice for this collection [1] by any of the following methods:

• Viewing Comments Electronically: Go to *www.reginfo.gov.* Click on the ''Information Collection Review'' tab. Underneath the ''Currently under Review'' section heading, from the drop-down menu, select ''Department of Treasury'' and then click ''submit.'' This information collection can be located by searching by OMB control number ''1557–0246'' or ''Reverse Mortgage Products: Guidance for Managing Compliance and Reputation Risks.'' Upon finding the appropriate information collection, click on the related ''ICR Reference Number.'' On the next screen, select ''View Supporting Statement and Other Documents'' and then click on the link to any comment listed at the bottom of the screen.

• For assistance in navigating *www.reginfo.gov,* please contact the Regulatory Information Service Center at (202) 482–7340.

• Viewing Comments Personally: You may personally inspect comments at the OCC, 400 7th Street SW, Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect comments.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, Clearance Officer, (202) 649–5490 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the OMB for each collection of information that they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of title 44 requires federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the OCC is publishing this notice of the renewal of the collection of information set forth in this document.

Description: On December 16, 2009, the OCC, Federal Deposit Insurance Corporation, Board of Governors of the Federal Reserve System, and the National Credit Union Administration issued final guidance entitled ''Reverse Mortgage Products: Guidance for Managing Compliance and Reputation Risk'' on August 17, 2010. [2] The guidance focuses on the need to provide adequate information to consumers about reverse mortgage products, to provide qualified independent counseling to consumers considering these products, and to avoid potential conflicts of interest. The guidance also addresses related policies, procedures, internal controls, and third party risk management.

The information collection requirements contained in the guidance address the implementation of policies and procedures, training, and program maintenance. The guidance provides that institutions offering reverse mortgages should have written policies and procedures that prohibit the practice of directing a consumer to a particular counseling agency or contacting a counselor on the consumer's behalf.

Title of Information Collection: Reverse Mortgage Products: Guidance for Managing Compliance and Reputation Risks.

OMB Control No.: 1557–0246.

Affected Public: National banks, federal savings associations, subsidiaries of national banks and federal savings associations, and federal branches or agencies of foreign banks.

Type of Review: Regular.

Estimated number of respondents: 15.

Total estimated annual burden: 160 hours.

Frequency of Response: On occasion.

Comments submitted in response to this notice will be summarized, included in the request for OMB approval, and become a matter of public record. Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the OCC's functions, including whether the information has practical utility; (b) The accuracy of the estimates of the burden of the information collection, 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 information collection on respondents, including the use of automated collection techniques or other forms of information technology; and (e) Estimates of capital or start up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: January 25, 2019.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2019–01075 Filed 2–4–19; 8:45 am]

BILLING CODE P

[1] Following the close of the 60-day comment period for this notice, the OCC will publish a notice for 30 days of comment for this collection.

[2] 75 FR 50801.

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Renewal; Comment Request; Domestic First Lien Residential Mortgage Data

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to take this opportunity to comment on the renewal of an information collection as required by the Paperwork Reduction Act of 1995 (PRA).

In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and respondents are not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC is soliciting comment concerning the renewal of its information collection titled ''Domestic First Lien Residential Mortgage Data.''

DATES: Comments must be received by: April 8, 2019.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

• *Email: prainfo@occ.treas.gov.*

• *Mail:* Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, Attention: 1557–0331, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

• *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

• *Fax:* (571) 465–4326.

Instructions: You must include ''OCC'' as the agency name and ''1557–0331'' in your comment. In general, the OCC will publish comments on *www.reginfo.gov* without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this information collection beginning on the date of publication of the second notice for this collection [1] by any of the following methods:

• *Viewing Comments Electronically:* Go to *www.reginfo.gov.* Click on the ''Information Collection Review'' tab. Underneath the ''Currently under Review'' section heading, from the drop-down menu, select ''Department of Treasury'' and then click ''submit.'' This information collection can be located by searching by OMB control number ''1557–0331'' or ''Domestic First Lien Residential Mortgage Data.'' Upon finding the appropriate information collection, click on the related ''ICR Reference Number.'' On the next screen, select ''View Supporting Statement and Other Documents'' and then click on the link to any comment listed at the bottom of the screen.

• For assistance in navigating *www.reginfo.gov,* please contact the Regulatory Information Service Center at (202) 482–7340.

• *Viewing Comments Personally:* You may personally inspect comments at the OCC, 400 7th Street SW, Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect comments.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, Clearance Officer, (202) 649–5490 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219.

[1] Following the close of the 60-day comment period for this notice, the OCC will publish a notice for 30 days of comment for this collection.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from OMB for each collection of information that they conduct or sponsor. Collection of information is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the OCC is publishing notice of the proposed extension of this collection of information.

Title: Domestic First Lien Residential Mortgage Data.

OMB Control No.: 1557–0331.

Description: Section 104(a) of the Helping Families Save Their Homes Act of 2009 (12 U.S.C. 1715z–25(a) (Act), as amended by section 1493(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, requires the OCC to submit a quarterly report to Congress on mortgage modification activity in the federal banking system. Section 104(b) of the Act (12 U.S.C. 1715z–25(b)) requires the OCC to collect mortgage modification data from national banks and federal savings associations and provides for the collection of all data necessary to fulfill the reporting requirements of section 104(a). Those requirements include information on the number of mortgage modifications in each state that have certain characteristics, such as changes to the principal amount of a loan or changes to a homeowner's total monthly principal and interest payment.

The OCC currently collects aggregate data on first-lien residential mortgage loans serviced by seven national banks with large mortgage-servicing portfolios. The required aggregate data are industry standard measures of portfolio performance, including: (1) Outstanding loan count and unpaid principal balance; (2) delinquency and liquidation ratios; and (3) the number of loss mitigation actions completed.

Type of Review: Extension without change of an existing information collection.

Affected Public: Businesses or other for-profit.

Frequency of Response: On occasion.

Estimated Number of Respondents: 61.

Estimated Total Annual Burden: 29,280 hours.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval. All comments become a matter of public record. Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information shall have practical utility;

(b) The accuracy of the OCC's estimate of the burden of the collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: January 23, 2019.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2019–00949 Filed 2–4–19; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Renewal; Comment Request; Interagency Guidance on Asset Securitization Activities

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to comment on a continuing information collection as required by the Paperwork Reduction Act of 1995 (PRA).

In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and respondents are not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The OCC is soliciting comment concerning renewal of its information collection titled ''Interagency Guidance on Asset Securitization Activities.''

DATES: Comments must be submitted on or before April 8, 2019.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email: prainfo@occ.treas.gov.*
- *Mail:* Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, Attention: 1557–0217, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Fax:* (571) 465–4326.

Instructions: You must include ''OCC'' as the agency name and ''1557–0217'' in your comment. In general, the OCC will publish comments on *www.reginfo.gov* without change, including any business or personal information, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this information collection beginning on the date of publication of the second notice for this collection [1] by any of the following methods:

- Viewing Comments Electronically: Go to *www.reginfo.gov.* Click on the ''Information Collection Review'' tab. Underneath the ''Currently under Review'' section heading, from the drop-down menu, select ''Department of Treasury'' and then click ''submit.'' This information collection can be located by searching by OMB control number ''1557–0217'' or ''Interagency Guidance on Asset Securitization Activities.'' Upon finding the appropriate information collection, click on the related ''ICR Reference Number.'' On the next screen, select ''View Supporting Statement and Other Documents'' and then click on the link to any comment listed at the bottom of the screen.
- For assistance in navigating *www.reginfo.gov,* please contact the Regulatory Information Service Center at (202) 482–7340.
- Viewing Comments Personally: You may personally inspect comments at the OCC, 400 7th Street SW, Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect comments.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, OCC Clearance Officer, (202) 649–5490 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from OMB for each collection of information that they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of title 44 requires federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the OCC is publishing notice of the renewal of the collection of information set forth in this document.

Title: Interagency Guidance on Asset Securitization Activities.

OMB Control No.: 1557–0217.

Description: In 1999, the OCC issued the Interagency Guidance on Asset Securitization Activities [2] (guidance) in response to a determination that some institutions involved in asset securitization activities had significant weaknesses in their asset securitization practices. The information collection contained in the guidance applies to financial institutions engaged in asset securitization activities and provides that any institution engaged in these activities should maintain a written asset securitization policy, document the fair value of retained interests, and maintain a management information system to monitor asset securitization activities. Financial institution management uses the information collected to ensure the safe and sound operation of the institution's asset securitization activities. The OCC uses the information to evaluate the quality of an institution's risk management practices.

Affected Public: Businesses or other for-profit.

Type of Review: Regular.

Estimated Number of Respondents: 35.

Estimated Annual Burden: 1,827 hours.

Frequency of Response: On occasion.

Comments submitted in response to this notice will be summarized, included in the request for OMB approval, and become a matter of public record. Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility; (b) The accuracy of the OCC's estimate of the information collection burden; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; (d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: January 19, 2019.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2019–01114 Filed 2–4–19; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Renewal; Submission for OMB Review; Margin and Capital Requirements for Covered Swap Entities

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to take this opportunity to comment on a continuing information collection as required by the Paperwork Reduction Act of 1995 (PRA).

In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and respondents are not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

[1] Following the close of the 60-day comment period for this notice, the OCC will publish a notice for 30 days of comment for this collection.

[2] OCC Bulletin 1999–46, December 13, 1999, *https://www.occ.gov/news-issuances/bulletins/1999/bulletin-1999-46a.pdf.*

The OCC is soliciting comment concerning the renewal of its information collection titled ''Margin and Capital Requirements for Covered Swap Entities.'' The OCC also is giving notice that it has sent the collection to OMB for review.

DATES: Comments must be received by March 7, 2019.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible.

You may submit comments by any of the following methods:

- *Email: prainfo@occ.treas.gov.*
- *Mail:* Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, Attention: 1557–0251, 400 7th Street, SW, suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Fax:* (571) 465–4326.

Instructions: You must include ''OCC'' as the agency name and ''1557–0251'' in your comment. In general, the OCC will publish comments on *www.reginfo.gov* without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

Additionally, please send a copy of your comments by mail to: OCC Desk Officer, 1557–0251, U.S. Office of Management and Budget, 725 17th Street NW, #10235, Washington, DC 20503 or by email to *oira_submission@omb.eop.gov.*

You may review comments and other related materials that pertain to this information collection [1] following the close of the 30-day comment period for this notice by any of the following methods:

- *Viewing Comments Electronically:* Go to *www.reginfo.gov.* Click on the ''Information Collection Review'' tab. Underneath the ''Currently under Review'' section heading, from the drop-down menu, select ''Department of Treasury'' and then click ''submit.'' This information collection can be located by searching by OMB control number ''1557–0251'' or ''Margin and Capital Requirements for Covered Swap Entities.'' Upon finding the appropriate information collection, click on the related ''ICR Reference Number.'' On the next screen, select ''View Supporting Statement and Other Documents'' and then click on the link to any comment listed at the bottom of the screen.
- For assistance in navigating *www.reginfo.gov,* please contact the Regulatory Information Service Center at (202) 482–7340.
- *Viewing Comments Personally:* You may personally inspect comments at the OCC, 400 7th Street SW, Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect comments.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, Clearance Officer, (202) 649–5490 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the OMB for each collection of information that they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. The OCC is soliciting comment on the renewal of the following collection.

Title: Margin and Capital Requirements for Covered Swap Entities.

OMB Control No.: 1557–0251 (Merging in 1557–0335).

Description: Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) established a comprehensive regulatory framework for derivatives, which are generally characterized as swaps and security-based swaps. Sections 731 and 764 of the Dodd-Frank Act require the registration and regulation of swap dealers and major swap participants and security-based swap dealers and major security-based swap participants, respectively (collectively, ''swap entities''). For certain types of swap entities that are prudentially regulated by one of the Agencies,[2] sections 731 and 764 of the Dodd-Frank Act required the Agencies to jointly adopt rules for swap entities under their respective jurisdictions imposing capital requirements and initial and variation margin requirements on all non-cleared swaps. Swap entities that are prudentially regulated by the Agencies and therefore subject to the proposed rule are referred to herein as ''covered swap entities.''

Section 302 of the Terrorism Risk Insurance Program Reauthorization Act of 2015 (TRIPRA),[3] amended sections 731 and 764 of the Dodd-Frank Act to provide that the initial and variation margin requirements do not apply to certain transactions with specified counterparties that qualify for an exemption or exception from clearing. Non-cleared swaps and non-cleared security-based swaps that are exempt under section 302 of TRIPRA are not subject to the Agencies' rules implementing margin requirements. TRIPRA augmented provisions that would allow swap entities to collect no initial or variation margin from certain ''other counterparties'' like commercial end-users with a provision that grants an exception from the margin requirements for certain swaps with these and certain additional counterparties. In addition, swap entities could continue with the current practice of collecting initial or variation margin at such times and in such forms and amounts (if any) as the covered swap entity determines appropriate consistent with its overall credit risk management of its exposures to ''other counterparties.''

Section by Section Analysis

The reporting requirements found in 12 CFR 45.1(d) refer to other statutory provisions that set forth conditions for an exemption from clearing. Section 45.1(d)(1) provides an exemption for non-cleared swaps if one of the counterparties to the swap is not a financial entity, is using swaps to hedge or mitigate commercial risk, and notifies the Commodity Futures Trading Commission of how it generally meets its financial obligations associated with entering into non-cleared swaps. Section 45.1(d)(2) provides an exemption for security-based swaps if the counterparty notifies the Securities and Exchange Commission (SEC) of how it generally meets its financial obligations associated with entering into non-cleared security-based swaps.

[1] On November 6, 2018, the OCC published a 60-day notice for this information collection.

[2] The Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, and the Farm Credit Administration.

[3] Public Law 114–1, 129 Stat. 3 (2015).

Section 45.2 defines terms used in part 45, including the definition of ''eligible master netting agreement,'' which provides that a covered swap entity that relies on the agreement for purpose of calculating the required margin must: (1) Conduct sufficient legal review of the agreement to conclude with a well-founded basis that the agreement meets specified criteria; and (2) establish and maintain written procedures for monitoring relevant changes in law and to ensure that the agreement continues to satisfy the requirements of this section. The term ''eligible master netting agreement'' is used elsewhere in part 45 to specify instances in which a covered swap entity may: (1) Calculate variation margin on an aggregate basis across multiple non-cleared swaps and security-based swaps; and (2) calculate initial margin requirements under an initial margin model for one or more swaps and security-based swaps.

Section 45.5(c)(2)(i) specifies that a covered swap entity shall not be deemed to have violated its obligation to collect or post margin from or to a counterparty if the covered swap entity has made the necessary efforts to collect or post the required margin, including the timely initiation and continued pursuit of formal dispute resolution mechanisms, or has otherwise demonstrated upon request to the satisfaction of the agency that it has made appropriate efforts to collect or post the required margin.

Section 45.7 generally requires a covered swap entity to ensure that any initial margin collateral that it collects or posts is held at a third-party custodian. Section 45.7(c) requires the custodian to act pursuant to a custody agreement that: (1) Prohibits the custodian from rehypothecating, repledging, reusing, or otherwise transferring (through securities lending, securities borrowing, repurchase agreement, reverse repurchase agreement or other means) the collateral held by the custodian, except that cash collateral may be held in a general deposit account with the custodian if the funds in the account are used to purchase an asset held in compliance with § 45.7, and such purchase takes place within a time period reasonably necessary to consummate such purchase after the cash collateral is posted as initial margin; and (2) is a legal, valid, binding, and enforceable agreement under the laws of all relevant jurisdictions, including in the event of bankruptcy, insolvency, or a similar proceeding. A custody agreement may permit the posting party to substitute or direct any reinvestment of posted collateral held by the custodian under certain conditions. With respect to collateral collected by a covered swap entity pursuant to § 45.3(a) or posted by a covered swap entity pursuant to § 45.3(b), the agreement must require the posting party to substitute only funds or other property that would qualify as eligible collateral under § 45.6 and for which the amount net of applicable discounts described in Appendix B would be sufficient to meet the requirements of § 45.3 and direct reinvestment of funds only in assets that would qualify as eligible collateral under § 45.6.

Section 45.8 establishes standards for the use of initial margin models. These standards include: (1) A requirement that the covered swap entity receive prior approval from the relevant Agency based on demonstration that the initial margin model meets specific requirements (§§ 45.8(c)(1) and 45.8(c)(2)); (2) a requirement that a covered swap entity notify the relevant Agency in writing 60 days before extending use of the model to additional product types, making certain changes to the initial margin model, or making material changes to modeling assumptions (§ 45.8(c)(3)); and (3) a variety of quantitative requirements, including requirements that the covered swap entity validate and demonstrate the reasonableness of its process for modeling and measuring hedging benefits, demonstrate to the satisfaction of the relevant Agency that the omission of any risk factor from the calculation of its initial margin is appropriate, demonstrate to the satisfaction of the relevant Agency that incorporation of any proxy or approximation used to capture the risks of the covered swap entity's non-cleared swaps or non-cleared security-based swaps is appropriate, periodically review and, as necessary, revise the data used to calibrate the initial margin model to ensure that the data incorporate an appropriate period of significant financial stress (§§ 45.8(d)(5), 45.8(d)(10), 45.8(d)(11), 45.8(d)(12), and 45.8(d)(13)). Also, if the validation process reveals any material problems with the initial margin model, the covered swap entity must promptly notify the Agency of the problems, describe to the Agency any remedial actions being taken, and adjust the initial margin model to ensure an appropriately conservative amount of required initial margin is being calculated (§ 45.8(f)(3)).

Section 45.8 also establishes requirements for the ongoing review and documentation of initial margin models. These standards include: (1) A requirement that a covered swap entity review its initial margin model annually (§ 45.8(e)); (2) a requirement that the covered swap entity validate its initial margin model at the outset and on an ongoing basis, describe to the relevant Agency any remedial actions being taken, and report internal audit findings regarding the effectiveness of the initial margin model to the covered swap entity's board of directors or a committee thereof (§§ 45.8(f)(2), 45.8(f)(3), and 45.8(f)(4)); (3) a requirement that the covered swap entity adequately document all material aspects of its initial margin model (§ 45.8(g)); and

(4) that the covered swap entity must adequately document internal authorization procedures, including escalation procedures, that require review and approval of any change to the initial margin calculation under the initial margin model, demonstrable analysis that any basis for any such change is consistent with the requirements of this section, and independent review of such demonstrable analysis and approval (§ 45.8(h)).

Section 45.9 addresses the treatment of cross-border transactions and, in certain limited situations, will permit a covered swap entity to comply with a foreign regulatory framework for non-cleared swaps (as a substitute for compliance with the prudential regulators' rule) if the prudential regulators jointly determine that the foreign regulatory framework is comparable to the requirements in the prudential regulators' rule. Section 45.9(e) allows a covered swap entity to request that the prudential regulators make a substituted compliance determination and must provide the reasons therefore and other required supporting documentation. A request for a substituted compliance determination must include: (1) A description of the scope and objectives of the foreign regulatory framework for non-cleared swaps and non-cleared security-based swaps; (2) the specific provisions of the foreign regulatory framework for non-cleared swaps and security-based swaps (scope of transactions covered; determination of the amount of initial and variation margin required; timing of margin requirements; documentation requirements; forms of eligible collateral; segregation and re-hypothecation requirements; and approval process and standards for models); (3) the supervisory compliance program and enforcement authority exercised by a foreign financial regulatory authority or authorities in

such system to support its oversight of the application of the non-cleared swap and security-based swap regulatory framework; and (4) any other descriptions and documentation that the prudential regulators determine are appropriate. A covered swap entity may make a request under this section only if directly supervised by the authorities administering the foreign regulatory framework for non-cleared swaps and non-cleared security-based swaps.

Section 45.10 requires a covered swap entity to execute trading documentation with each counterparty that is either a swap entity or financial end user regarding credit support arrangements that: (1) Provides the contractual right to collect and post initial margin and variation margin in such amounts, in such form, and under such circumstances as are required; and (2) specifies the methods, procedures, rules, and inputs for determining the value of each non-cleared swap or non-cleared security-based swap for purposes of calculating variation margin requirements and the procedures for resolving any disputes concerning valuation.

Section 45.11(b)(1) provides that the requirement for a covered swap entity to post initial margin under § 45.3(b) does not apply with respect to any non-cleared swap or non-cleared security-based swap with a counterparty that is an affiliate. A covered swap entity shall calculate the amount of initial margin that would be required to be posted to an affiliate that is a financial end user with material swaps exposure pursuant to § 45.3(b) and provide documentation of such amount to each affiliate on a daily basis.

Type of Review: Extension without change of a currently approved information collection.

Affected Public: Businesses or other for-profit.

Frequency of Response: On occasion.

Estimated Number of Respondents: 10.

Estimated Total Annual Burden: 17,390 hours.

The OCC published a notice for 60 days of comment regarding this collection on November 6, 2018, 83 FR 55598. No comments were received. Comments continue to be requested on:

(a) Whether the information collections are necessary for the proper performance of the OCC's functions, including whether the information has practical utility;

(b) The accuracy of the OCC's estimates of the burden of the information collections, 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 information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: January 23, 2019.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2019–00952 Filed 2–4–19; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Renewal; Comment Request; Interagency Statement on Complex Structured Finance Transactions

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to take this opportunity to comment on a continuing information collection as required by the Paperwork Reduction Act of 1995 (PRA).

An agency may not conduct or sponsor, and respondents are not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The OCC is soliciting comment concerning the renewal of an information collection titled ''Interagency Statement on Complex Structured Finance Transactions.''

DATES: Comments must be submitted on or before April 8, 2019.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email: prainfo@occ.treas.gov.*
- *Mail:* Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, Attention: 1557–0229, 400 7th Street SW, suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, suite 3E–218, Washington, DC 20219.
- *Fax:* (571) 465–4326.

Instructions: You must include ''OCC'' as the agency name and ''1557–0229'' in your comment. In general, the OCC will publish comments on *www.reginfo.gov* without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this information collection beginning on the date of publication of the second notice for this collection [1] by any of the following methods:

- *Viewing Comments Electronically:* Go to *www.reginfo.gov.* Click on the ''Information Collection Review'' tab. Underneath the ''Currently under Review'' section heading, from the drop-down menu, select ''Department of Treasury'' and then click ''submit.'' This information collection can be located by searching by OMB control number ''1557–0229'' or ''Interagency Statement on Complex Structured Finance Transactions.'' Upon finding the appropriate information collection, click on the related ''ICR Reference Number.'' On the next screen, select ''View Supporting Statement and Other Documents'' and then click on the link to any comment listed at the bottom of the screen.
- For assistance in navigating *www.reginfo.gov,* please contact the Regulatory Information Service Center at (202) 482–7340.
- *Viewing Comments Personally:* You may personally inspect comments at the OCC, 400 7th Street SW, Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect comments.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, OCC Clearance Officer, (202) 649–5490 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597, Chief Counsel's Office,

[1] Following the close of the 60-day comment period for this notice, the OCC will publish a notice for 30 days of comment for this collection.

Office of the Comptroller of the Currency, 400 7th Street SW, suite 3E–218, Washington, DC 20219.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the OMB for each collection of information that they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of title 44 requires federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the OCC is publishing notice of the renewal of the collection of information set forth in this document.

Title: Interagency Statement on Complex Structured Finance Transactions.

OMB Control No.: 1557–0229.

Description: The Interagency Statement on Sound Practices Concerning Elevated Risk Complex Structured Finance Activities [2] describes the types of internal controls and risk management procedures that the agencies (OCC, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and Securities and Exchange Commission) consider particularly effective in helping financial institutions identify and address the reputational, legal, and other risks associated with complex structured finance transactions. Those internal controls and risk management procedures form the basis of this information collection.

Affected Public: Businesses or other for-profit.

Type of Review: Regular.

Estimated Number of Respondents: 9.

Estimated Annual Burden: 225 hours.

Frequency of Response: On occasion.

Comments submitted in response to this notice will be summarized, included in the request for OMB approval, and become a matter of public record. Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the information collection burden;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: January 25, 2019.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2019–01076 Filed 2–4–19; 8:45 am]

BILLING CODE 4810–33–P

[2] 72 FR 1372 (January 11, 2007).

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Renewal; Submission for OMB Review; Market Risk

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to take this opportunity to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995 (PRA).

In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC is soliciting comment concerning the renewal of its information collection titled, ''Market Risk.'' The OCC also is giving notice that it has sent the collection to OMB for review.

DATES: Comments must be submitted on or before March 7, 2019.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email: prainfo@occ.treas.gov.*
- *Mail:* Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, Attention: 1557–0247, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Fax:* (571) 465–4326.

Instructions: You must include ''OCC'' as the agency name and ''1557–0247'' in your comment. In general, the OCC will publish your comment on *www.reginfo.gov* without change, including any business or personal information that you provide, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

Additionally, please send a copy of your comments by mail to: OCC Desk Officer, 1557–0247, U.S. Office of Management and Budget, 725 17th Street NW, #10235, Washington, DC 20503 or by email to *oira_submission@omb.eop.gov.*

You may review comments and other related materials that pertain to this information collection [1] following the close of the 30-Day comment period for this notice by any of the following methods:

- *Viewing Comments Electronically:* Go to *www.reginfo.gov.* Click on the ''Information Collection Review'' tab. Underneath the ''Currently under Review'' section heading, from the drop-down menu, select ''Department of Treasury'' and then click ''submit.'' This information collection can be located by searching by OMB control number ''1557–0247'' or ''Market Risk.'' Upon finding the appropriate information collection, click on the related ''ICR Reference Number.'' On the next screen, select ''View Supporting Statement and Other Documents'' and then click on the link to any comment listed at the bottom of the screen.
- For assistance in navigating *www.reginfo.gov,* please contact the Regulatory Information Service Center at (202) 482–7340.
- *Viewing Comments Personally:* You may personally inspect comments at the OCC, 400 7th Street SW, Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo

[1] On November 9, 2018, the OCC published a 60-day notice for this information collection.

identification and submit to security screening in order to inspect comments.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, Clearance Officer, (202) 649–5490, for persons who are deaf or hearing impaired, TTY, (202) 649–5597, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from OMB for each collection of information that they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. The OCC requests that OMB extend its approval of the following collection.

Title: Market Risk.

OMB Control No.: 1557–0247.

Description: The Office of the Comptroller of the Currency's (OCC) market risk capital rules (12 CFR part 3, subpart F) apply to national banks and federal savings associations with significant exposure to market risk, which include those national banks and federal savings associations with aggregate trading assets and trading liabilities (as reported in the national bank's or federal savings association's most recent Call Report) equal to 10 percent or more of quarter-end total assets or $1 billion or more. The rules capture positions for which the market risk capital rules are appropriate; reduce procyclicality in market risk capital requirements; enhance the risk sensitivity of the OCC's capital requirements by measuring risks that are not adequately captured under the requirements for credit risk; and increase transparency through enhanced disclosures.

The information collection requirements are located at 12 CFR 3.203 through 3.212. The rules enhance risk sensitivity and include requirements for the public disclosure of certain qualitative and quantitative information about the market risk of national banks and federal savings associations. The collection of information is necessary to ensure capital adequacy appropriate for the level of market risk.

Section 3.203 sets forth the requirements for applying the market risk framework. Section 3.203(a)(1) requires national banks and federal savings associations to have clearly defined policies and procedures for determining which trading assets and trading liabilities are trading positions and specifies the factors a national bank or federal savings association must take into account in drafting those policies and procedures. Section 3.203(a)(2) requires national banks and federal savings associations to have clearly defined trading and hedging strategies for trading positions that are approved by senior management and specifies what those strategies must articulate. Section 3.203(b)(1) requires national banks and federal savings associations to have clearly defined policies and procedures for actively managing all covered positions and specifies the minimum requirements for those policies and procedures. Sections 3.203(c)(4) through 3.203(c)(10) require the review, at least annually, of internal models and specify certain requirements for those models. Section 3.203(d)(4) requires the internal audit group of a national bank or federal savings association to report, at least annually, to the board of directors on the effectiveness of controls supporting the market risk measurement systems.

Section 3.204(b) requires national banks and federal savings associations to conduct quarterly backtesting. Section 3.205(a)(5) requires institutions to demonstrate to the OCC the appropriateness of proxies used to capture risks within value-at-risk models. Section 3.205(c) requires institutions to develop, retain, and make available to the OCC value-at-risk and profit and loss information on sub-portfolios for two years. Section 3.206(b)(3) requires national banks and federal savings associations to have policies and procedures that describe how they determine the period of significant financial stress used to calculate the institution's stressed value-at-risk models and to obtain prior OCC approval for any material changes to these policies and procedures.

Section 3.207(b)(1) details requirements applicable to a national bank or federal savings association when the national bank or federal savings association uses internal models to measure the specific risk of certain covered positions. Section 3.208 requires national banks and federal savings associations to obtain prior written OCC approval for incremental risk modeling. Section 3.209(a) requires prior OCC approval for the use of a comprehensive risk measure. Section 3.209(c)(2) requires national banks and federal savings associations to retain and report the results of supervisory stress testing. Section 3.210(f)(2)(i) requires national banks and federal savings associations to document an internal analysis of the risk characteristics of each securitization position in order to demonstrate an understanding of the position. Section 3.212 requires quarterly quantitative disclosures, annual qualitative disclosures, and a formal disclosure policy approved by the board of directors that addresses the approach for determining the market risk disclosures it makes.

Type of Review: Extension of a currently approved collection. *Affected Public:* Individuals; Businesses or other for-profit.

Number of Respondents: 12.

Estimated Burden per Respondent: 1,964 hours.

Total Estimated Annual Burden: 23,568 hours.

The OCC issued a notice for 60 days of comment concerning this collection on November 9, 2018, 83 FR 56148. No comments were received. Comments continue to be invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the burden of the collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: January 25, 2019.

Theodore J. Dowd,

Deputy Chief Counsel, Comptroller of the Currency.

[FR Doc. 2019–00953 Filed 2–4–19; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Renewal; Comment Request; Survey of Minority Owned Institutions

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the

general public and other federal agencies to take this opportunity to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995 (PRA).

An agency may not conduct or sponsor, and respondents are not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The OCC is soliciting comment concerning a renewal of an information collection titled ''Survey of Minority Owned Institutions.''

DATES: Comments must be submitted on or before April 8, 2019.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email: prainfo@occ.treas.gov.*
- *Mail:* Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, Attention: 1557–0236, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Fax:* (571) 465–4326.

Instructions: You must include ''OCC'' as the agency name and ''1557–0236'' in your comment. In general, the OCC will publish comments on *www.reginfo.gov* without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this information collection beginning on the date of publication of the second notice for this collection [1] by any of the following methods:

- *Viewing Comments Electronically:* Go to *www.reginfo.gov.* Click on the ''Information Collection Review'' tab. Underneath the ''Currently under Review'' section heading, from the drop-down menu, select ''Department of Treasury'' and then click ''submit.'' This information collection can be located by searching by OMB control number ''1557–0236'' or ''Survey of Minority Owned Institutions.''

Upon finding the appropriate information collection, click on the related ''ICR Reference Number.'' On the next screen, select ''View Supporting Statement and Other Documents'' and then click on the link to any comment listed at the bottom of the screen.

- For assistance in navigating *www.reginfo.gov,* please contact the Regulatory Information Service Center at (202) 482–7340.
- *Viewing Comments Personally:* You may personally inspect comments at the OCC, 400 7th Street SW, Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect comments.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, Clearance Officer, (202) 649–5490 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the OMB for each collection of information that they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of title 44 requires federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the OCC is publishing notice of the renewal of the collection of information set forth in this document.

Title: Survey of Minority Owned Institutions.

OMB Control No.: 1557–0236.

Type of Review: Regular review.

Description: The OCC is committed to assessing its efforts to provide supervisory support, technical assistance, education, and other outreach to the minority-owned institutions under its supervision, in accordance with meeting the goals prescribed under section 308 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.[2] To perform this assessment, it is necessary to obtain feedback from the individual institutions on the effectiveness of OCC's current efforts in these areas and suggestions on how the OCC might enhance or augment its supervision and technical assistance going forward. The OCC uses the information gathered to assess the needs of minority-owned institutions and its efforts to meet those needs. The OCC also uses the information to focus and enhance its supervisory, technical assistance, education and other outreach activities with respect to minority-owned institutions.

Affected Public: Businesses or other for-profit.

Type of Review: Regular.

Estimated Number of Respondents: 50.

Estimated Annual Burden: 100 hours.

Frequency of Response: On occasion.

Comments submitted in response to this notice will be summarized, included in the request for OMB approval, and become a matter of public record. Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the information collection burden;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: January 7, 2019.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2019–00950 Filed 2–4–19; 8:45 am]

BILLING CODE 4810–33–P

[1] Following the close of the 60-day comment period for this notice, the OCC will publish a notice for 30 days of comment for this collection.

[2] 12 U.S.C. 1463 note.

DEPARTMENT OF THE TREASURY

Bureau of the Fiscal Service

Proposed Collection of Information: Report/Application for Relief on Account of Loss, Theft, or Destruction of U.S. Bearer Securities (Individuals)

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently the Bureau of the Fiscal Service within the Department of the Treasury is soliciting comments concerning the Report/Application for Relief on Account of Loss, Theft, or Destruction of U.S. Bearer Securities (Individuals).

DATES: Written comments should be received on or before April 8, 2019 to be assured of consideration.

ADDRESSES: Direct all written comments and requests for additional information to Bureau of the Fiscal Service, Bruce A. Sharp, Room #4006–A, P.O. Box 1328, Parkersburg, WV 26106–1328, or *bruce.sharp@fiscal.treasury.gov.*

SUPPLEMENTARY INFORMATION:

Title: Report/Application for Relief on Account of Loss, Theft, or Destruction of U.S. Bearer Securities (Individuals).

OMB Number: 1530–0033.

Form Number: FS Form 1022–1.

Abstract: The information is requested to establish ownership and support a request for relief due to the loss, theft, or destruction of United States Bearer Securities owned by individuals.

Current Actions: Extension of a currently approved collection.

Type of Review: Regular.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 100.

Estimated Time per Respondent: 55 minutes.

Estimated Total Annual Burden Hours: 92.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: 1. Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; 2. the accuracy of the agency's estimate of the burden of the collection of information; 3. ways to enhance the quality, utility, and clarity of the information to be collected; 4. ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and 5. estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: January 2, 2019.

Bruce A. Sharp,

Bureau Clearance Officer.

[FR Doc. 2019–00928 Filed 2–4–19; 8:45 am]

BILLING CODE 4810–AS–P

DEPARTMENT OF THE TREASURY

Bureau of the Fiscal Service

Proposed Collection of Information: Affidavit by Individual Surety

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently the Bureau of the Fiscal Service within the Department of the Treasury is soliciting comments concerning the Affidavit by Individual Surety.

DATES: Written comments should be received on or before April 8, 2019 to be assured of consideration.

ADDRESSES: Direct all written comments and requests for additional information to Bureau of the Fiscal Service, Bruce A. Sharp, Room #4006–A, P.O. Box 1328, Parkersburg, WV 26106–1328, or *bruce.sharp@fiscal.treasury.gov.*

SUPPLEMENTARY INFORMATION:

Title: Affidavit by Individual Surety.

OMB Number: 1530–0047.

Form Number: FS Form 4094.

Abstract: The information on the completed form is submitted to support a request to serve as surety for an indemnification agreement on a Bond of Indemnity.

Current Actions: Extension of a currently approved collection.

Type of Review: Regular.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 200.

Estimated Time per Respondent: 55 minutes.

Estimated Total Annual Burden Hours: 183.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: 1. Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; 2. the accuracy of the agency's estimate of the burden of the collection of information; 3. ways to enhance the quality, utility, and clarity of the information to be collected; 4. ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and 5. estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: January 2, 2019.

Bruce A. Sharp,

Bureau Clearance Officer.

[FR Doc. 2019–00932 Filed 2–4–19; 8:45 am]

BILLING CODE 4810–AS–P

DEPARTMENT OF THE TREASURY

Bureau of the Fiscal Service

Proposed Collection of Information: ACH Vendor/Miscellaneous Payment Enrollment Form

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently the Bureau of the Fiscal Service within the Department of the Treasury is soliciting comments concerning the ACH Vendor/Miscellaneous Payment Enrollment Form.

DATES: Written comments should be received on or before April 8, 2019 to be assured of consideration.

ADDRESSES: Direct all written comments and requests for additional information

to Bureau of the Fiscal Service, Bruce A. Sharp, Room #4006–A, P.O. Box 1328, Parkersburg, WV 26106–1328, or *bruce.sharp@fiscal.treasury.gov.*

SUPPLEMENTARY INFORMATION:

Title: ACH Vendor/Miscellaneous Payment Enrollment Form.

OMB Number: 1530–0069.

Form Number: SF 3881.

Abstract: The form is used by multiple agencies to collect payment data from vendors doing business with the Federal Government. The Treasury Department, Bureau of the Fiscal Service, will use the information to electronically transmit payment to vendors' financial institutions.

Current Actions: Extension of a currently approved collection.

Type of Review: Regular.

Affected Public: Business or other for-profit institutions.

Estimated Number of Respondents: 50,000.

Estimated Time per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 12,500.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: 1. Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; 2. the accuracy of the agency's estimate of the burden of the collection of information; 3. ways to enhance the quality, utility, and clarity of the information to be collected; 4. ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and 5. estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: January 31, 2019.

Bruce A. Sharp,

Bureau Clearance Officer.

[FR Doc. 2019–01031 Filed 2–4–19; 8:45 am]

BILLING CODE 4810–AS–P

DEPARTMENT OF THE TREASURY

Bureau of the Fiscal Service

Proposed Collection of Information: Description of United States Savings Bonds Series HH/H and Description of United States Bonds/Notes

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently the Bureau of the Fiscal Service within the Department of the Treasury is soliciting comments concerning the Description of United States Savings Bonds Series HH/H and Description of United States Bonds/Notes.

DATES: Written comments should be received on or before April 8, 2019 to be assured of consideration.

ADDRESSES: Direct all written comments and requests for additional information to Bureau of the Fiscal Service, Bruce A. Sharp, Room #4006–A, P.O. Box 1328, Parkersburg, WV 26106–1328, or *bruce.sharp@fiscal.treasury.gov.*

SUPPLEMENTARY INFORMATION:

Title: Description of United States Savings Bonds Series HH/H and Description of United States Bonds/Notes.

OMB Number: 1530–0037.

Form Number: FS Form 1980; and FS Form 2490.

Abstract: The information collected is necessary to obtain information describing an owner's holding of United States Securities.

Current Actions: Extension of a currently approved collection.

Type of Review: Regular.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 3,100.

Estimated Time per Respondent: 6 minutes.

Estimated Total Annual Burden Hours: 310.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: 1. Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; 2. the accuracy of the agency's estimate of the burden of the collection of information; 3. ways to enhance the quality, utility, and clarity of the information to be collected; 4. ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and 5. estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: January 2, 2019.

Bruce A. Sharp,

Bureau Clearance Officer.

[FR Doc. 2019–00930 Filed 2–4–19; 8:45 am]

BILLING CODE 4810–35–P

DEPARTMENT OF THE TREASURY

Bureau of the Fiscal Service

Proposed Collection of Information: Claim for Relief on Account of Loss, Theft, or Destruction of U.S. Registered Securities

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently the Bureau of the Fiscal Service within the Department of the Treasury is soliciting comments concerning the Claim for Relief on Account of Loss, Theft, or Destruction of U.S. Registered Securities.

DATES: Written comments should be received on or before April 8, 2019 to be assured of consideration.

ADDRESSES: Direct all written comments and requests for additional information to Bureau of the Fiscal Service, Bruce A. Sharp, Room #4006–A, P.O. Box 1328, Parkersburg, WV 26106–1328, or *bruce.sharp@fiscal.treasury.gov.*

SUPPLEMENTARY INFORMATION:

Title: Claim for Relief on Account of Loss, Theft, or Destruction of U.S. Registered Securities.

OMB Number: 1530–0029.

Form Number: FS Form 1025.

Abstract: The information is requested to establish ownership and support a request for relief due to the loss, theft, or destruction of United

States Registered Securities. Current Actions: Extension of a currently approved collection.

Type of Review: Regular.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 200.

Estimated Time per Respondent: 55 minutes.

Estimated Total Annual Burden Hours: 183.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: 1. Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; 2. the accuracy of the agency's estimate of the burden of the collection of information; 3. ways to enhance the quality, utility, and clarity of the information to be collected; 4. ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and 5. estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: January 2, 2019.

Bruce A. Sharp,

Bureau Clearance Officer.

[FR Doc. 2019–00927 Filed 2–4–19; 8:45 am]

BILLING CODE 4810–AS–P

DEPARTMENT OF THE TREASURY

Bureau of the Fiscal Service

Proposed Collection of Information: Report/Application for Relief on Account of Loss, Theft, or Destruction of U.S. Bearer Securities (Organizations)

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently the Bureau of the Fiscal Service within the Department of the Treasury is soliciting comments concerning the Report/Application for Relief on Account of Loss, Theft, or Destruction of U.S. Bearer Securities (Organizations).

DATES: Written comments should be received on or before April 8, 2019 to be assured of consideration.

ADDRESSES: Direct all written comments and requests for additional information to Bureau of the Fiscal Service, Bruce A. Sharp, Room #4006–A, P.O. Box 1328, Parkersburg, WV 26106–1328, or *bruce.sharp@fiscal.treasury.gov.*

SUPPLEMENTARY INFORMATION:

Title: Report/Application for Relief on Account of Loss, Theft, or Destruction of U.S. Bearer Securities (Organizations).

OMB Number: 1530–0034.

Form Number: FS Form 1022.

Abstract: The information is requested to establish ownership and support a request for relief due to the loss, theft, or destruction of United States Bearer Securities owned by individuals. Current Actions: Extension of a currently approved collection.

Type of Review: Regular.

Affected Public: Private Sector.

Estimated Number of Respondents: 100.

Estimated Time per Respondent: 55 minutes.

Estimated Total Annual Burden Hours: 92.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: 1. Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; 2. the accuracy of the agency's estimate of the burden of the collection of information; 3. ways to enhance the quality, utility, and clarity of the information to be collected; 4. ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and 5. estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: January 2, 2019.

Bruce A. Sharp,

Bureau Clearance Officer.

[FR Doc. 2019–00929 Filed 2–4–19; 8:45 am]

BILLING CODE 4810–AS–P

DEPARTMENT OF THE TREASURY

Bureau of the Fiscal Service

Proposed Collection of Information: Special Form of Request for Payment of U.S. Savings and Retirement Securities Where Use of a Detached Request Is Authorized

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently the Bureau of the Fiscal Service within the Department of the Treasury is soliciting comments concerning the Special Form of Request for Payment of U.S. Savings and Retirement Securities Where Use of a Detached Request is Authorized.

DATES: Written comments should be received on or before April 8, 2019 to be assured of consideration.

ADDRESSES: Direct all written comments and requests for additional information to Bureau of the Fiscal Service, Bruce A. Sharp, Room #4006–A, P.O. Box 1328, Parkersburg, WV 26106–1328, or *bruce.sharp@fiscal.treasury.gov.*

SUPPLEMENTARY INFORMATION:

Title: Special Form of Request for Payment of U.S. Savings and Retirement Securities Where Use of a Detached Request is Authorized

OMB Number: 1530–0028.

Form Number: FS Form 1522.

Abstract: The information on the completed form is submitted by the owner, co-owner, surviving beneficiary, or legal representative of the estate of a deceased or incompetent owner, persons entitled to the estate of a deceased registrant, or such other persons to request payment of United States Savings Bonds, Savings Notes, Retirement Plan Bonds, and Individual Retirement Bonds.

Current Actions: Extension of a currently approved collection.

Type of Review: Regular.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 23,000.

Estimated Time per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 5,750.

Request for Comments: Comments submitted in response to this notice will

be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: 1. Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; 2. the accuracy of the agency's estimate of the burden of the collection of information; 3. ways to enhance the quality, utility, and clarity of the information to be collected; 4. ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and 5. estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: January 2, 2019.

Bruce A. Sharp,

Bureau Clearance Officer.

[FR Doc. 2019–00926 Filed 2–4–19; 8:45 am]

BILLING CODE 4810–AS–P

DEPARTMENT OF THE TREASURY

Bureau of the Fiscal Service

Proposed Collection of Information: Affidavit of Forgery for United States Bonds/Notes

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently the Bureau of the Fiscal Service within the Department of the Treasury is soliciting comments concerning the Affidavit of Forgery for United States Bonds/Notes.

DATES: Written comments should be received on or before April 8, 2019 to be assured of consideration.

ADDRESSES: Direct all written comments and requests for additional information to Bureau of the Fiscal Service, Bruce A. Sharp, Room #4006–A, P.O. Box 1328, Parkersburg, WV 26106–1328, or *bruce.sharp@fiscal.treasury.gov.*

SUPPLEMENTARY INFORMATION:

Title: Affidavit of Forgery for United States Bonds/Notes.

OMB Number: 1530–0040.

Form Number: FS Form 0974.

Abstract: The information is requested to certify that the signatures to the requests for payment, form, or application related to United States Savings Securities were forged.

Current Actions: Extension of a currently approved collection.

Type of Review: Regular.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 1,000.

Estimated Time per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 250.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: 1. Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; 2. the accuracy of the agency's estimate of the burden of the collection of information; 3. ways to enhance the quality, utility, and clarity of the information to be collected; 4. ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and 5. estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: January 2, 2019.

Bruce A. Sharp,

Bureau Clearance Officer.

[FR Doc. 2019–00931 Filed 2–4–19; 8:45 am]

BILLING CODE 4810–AS–P

DEPARTMENT OF THE TREASURY

Bureau of the Fiscal Service

Proposed Collection of Information: Certificate of Identity

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently the Bureau of the Fiscal Service within the Department of the Treasury is soliciting comments concerning Certificate of Identity.

DATES: Written comments should be received on or before April 8, 2019 to be assured of consideration.

ADDRESSES: Direct all written comments and requests for additional information to Bureau of the Fiscal Service, Bruce A. Sharp, Room #4006–A, P.O. Box 1328, Parkersburg, WV 26106–1328, or *bruce.sharp@fiscal.treasury.gov.*

SUPPLEMENTARY INFORMATION:

Title: Certificate of Identity.

OMB Number: 1530–0026.

Form Number: FS Form 0385.

Abstract: The information on the completed form is used to establish an individual's identity in a claim for payment of United States savings and retirement securities.

Current Actions: Extension of a currently approved collection.

Type of Review: Regular.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 5,000.

Estimated Time per Respondent: 10 minutes.

Estimated Total Annual Burden Hours: 835.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: 1. Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; 2. the accuracy of the agency's estimate of the burden of the collection of information; 3. ways to enhance the quality, utility, and clarity of the information to be collected; 4. ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and 5. estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: January 2, 2019.

Bruce A. Sharp,

Bureau Clearance Officer.

[FR Doc. 2019–00925 Filed 2–4–19; 8:45 am]

BILLING CODE 4810–AS–P

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Part II

Department of the Treasury

Internal Revenue Service

26 CFR Part 1

Regulations Regarding the Transition Tax Under Section 965 and Related Provisions; Final Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9846]

RIN 1545–BO51

Regulations Regarding the Transition Tax Under Section 965 and Related Provisions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations implementing section 965 of the Internal Revenue Code (the ''Code''). Section 965 was amended by the Tax Cuts and Jobs Act, which was enacted on December 22, 2017. This document finalizes the proposed regulations published on August 9, 2018. The final regulations affect United States persons with direct or indirect ownership interests in certain foreign corporations.

DATES: *Effective date:* These regulations are effective on February 5, 2019.

Applicability dates: For dates of applicability, see §§ 1.962–2(d), 1.965–9(a), 1.965–9(b), and 1.986(c)–1(d).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations §§ 1.962–2, 1.965–1 through 1.965–4, 1.965–7 through 1.965–9, and 1.986(c)–1, Natalie Punchak at (202) 317–6934; concerning the regulations §§ 1.965–5 and 1.965–6, Karen J. Cate at (202) 317–6926 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

On August 9, 2018, the Department of the Treasury (''Treasury Department'') and the IRS published proposed regulations (REG–104226–18) under sections 962, 965, and 986 in the **Federal Register** (83 FR 39514) (the ''proposed regulations''). The proposed regulations were issued following guidance announcing and describing regulations intended to be issued under section 965, which was amended by section 14103 of the Tax Cuts and Jobs Act, Public Law 115–97 (2017) (the ''Act''). *See* Notice 2018–07, 2018–4 I.R.B. 317; Notice 2018–13, 2018–6 I.R.B. 341; and Notice 2018–26, 2018–16 I.R.B. 480. Additional guidance describing certain provisions included in these regulations (the ''final regulations'') was published on October 15, 2018. *See* Notice 2018–78, 2018–42 I.R.B. 604. Terms used but not defined in this preamble have the meaning provided in the final regulations.

A public hearing was held on October 22, 2018. The Treasury Department and the IRS also received written comments with respect to the proposed regulations. Comments received before the final regulations were substantially developed, including all comments received on or before the deadline for comments on October 9, 2018, were carefully considered in developing the final regulations. Several comments were received that do not pertain to the rules in the proposed regulations or that are otherwise outside the scope of this rulemaking. For example, certain comments regarding the payment and reporting of net tax liability under section 965 as addressed in the document containing Questions and Answers about Reporting Related to Section 965 on 2017 Tax Returns (available at *https://www.irs.gov/newsroom/questions-and-answers-about-reporting-related-to-section-965-on-2017-tax-returns*) are beyond the scope of the final regulations. Comments that are outside the scope of this rulemaking are generally not addressed in this preamble. The Treasury Department and the IRS will consider these comments in connection with any future guidance projects addressing the issues discussed in the comments. All written comments received in response to the proposed regulations are available at *www.regulations.gov* or upon request.

Summary of Comments and Explanation of Revisions

I. Overview

The final regulations retain the basic approach and structure of the proposed regulations, with certain revisions. This Summary of Comments and Explanation of Revisions section discusses those revisions as well as comments received in response to the solicitation of comments in the notice of proposed rulemaking accompanying the proposed regulations.

II. Comments and Changes to Proposed § 1.965–1—Overview, General Rules, and Definitions

Proposed § 1.965–1 provides general rules and definitions under section 965, including general rules concerning section 965(a) inclusion amounts, general rules concerning section 965(c) deduction amounts, and rules concerning the treatment of certain specified foreign corporations as controlled foreign corporations (as defined in section 957) (''CFCs'') and certain controlled domestic partnerships as foreign partnerships. The comments and modifications with respect to these rules are discussed in this Part II.

A. Application of Exchange Rate for Determining Section 965(a) Inclusion Amount

The proposed regulations provide that a section 965(a) inclusion amount is determined by translating a section 958(a) U.S. shareholder's pro rata share of the section 965(a) earnings amount of a deferred foreign income corporation (''DFIC'') into U.S. dollars using the spot rate on December 31, 2017. Proposed § 1.965–1(b)(1). A comment suggested that the average exchange rate for the section 958(a) U.S. shareholder's 2017 fiscal year should be used under section 989(b)(3) and stated that the approach of the proposed regulations created unnecessary complexity but did not elaborate on how complexity was created. The Treasury Department and the IRS have determined that while section 989(b)(3) would generally apply the average exchange rate for the inclusion year of the DFIC (not the section 958(a) U.S. shareholder, as the comment suggested) for purposes of translating an amount included in income under section 951(a)(1)(A), like a section 965(a) inclusion amount, it is appropriate to use the grant of regulatory authority in section 989 to instead provide for translation at the spot rate on December 31, 2017. As explained in Notice 2018–13, a single spot rate on December 31, 2017, is more administrable for the IRS and less burdensome for taxpayers than the yearly average approach of section 989(b)(3) because under the yearly average approach, certain amounts required for the determination of the section 965(a) inclusion amount (for example, a DFIC's allocable share of an aggregate foreign E&P deficit) would not be determinable until the closing of the last year of a specified foreign corporation beginning before January 1, 2018. Accordingly, the final regulations do not adopt the comment.

B. Application of Controlled Domestic Partnership Rule

Proposed § 1.965–1(e) contains a rule treating certain controlled domestic partnerships as foreign partnerships for purposes of determining the section 958(a) U.S. shareholders of a specified foreign corporation owned by the controlled domestic partnership and the section 958(a) stock owned by such shareholders. A comment suggested that because controlled domestic partnership is defined by reference to a specific United States shareholder, the rule could be read to apply only with respect to such shareholder but not with respect

to other partners of the controlled domestic partnership, for which it would therefore still be treated as domestic. The definition of controlled domestic partnership is accordingly revised to not be defined only with respect to a United States shareholder, so that a controlled domestic partnership is clearly treated as a foreign partnership for all partners if the rule applies. *See* § 1.965–1(e)(2).

The comment also recommended that a controlled domestic partnership treated as a foreign partnership be treated as such for purposes of the specified basis adjustment rules discussed in Part III.D of this Summary of Comments and Explanation of Revisions. The final regulations adopt this recommendation and provide that a controlled domestic partnership treated as a foreign partnership is treated as a foreign pass-through entity. Section 1.965–2(i)(2).

C. Determination of Accumulated Post-1986 Deferred Foreign Income

1. Application of Previously Taxed E&P Exception to Non-CFCs

Proposed § 1.965–1(f)(7)(i)(B) and (C) exclude from accumulated post-1986 deferred foreign income certain earnings and profits (''E&P'') described in section 959(c)(1) or 959(c)(2) (''previously taxed E&P'') and amounts that would be treated as previously taxed E&P in the case of shareholders that are not United States shareholders on an E&P measurement date. These exclusions (consistent with section 965(d)(2)(B)) apply only to E&P of a CFC. A comment requested that the exclusion be expanded to previously taxed E&P and amounts that would be treated as previously taxed E&P of specified foreign corporations that are no longer CFCs as of the relevant E&P measurement date, given that section 959 can apply to distributions by foreign corporations that are no longer CFCs. The Treasury Department and the IRS have determined that the recommendation is inconsistent with the clear statutory language of section 965(d)(2)(B), which applies solely to CFCs. Accordingly, the final regulations do not reflect this recommendation. See Part II.J of this Summary of Comments and Explanation of Revisions for a discussion of the consequences of an actual distribution of previously taxed E&P for purposes of section 965.

2. Expansion of Previously Taxed E&P Exception To Address Distributions

Another comment suggested that the final regulations expand on the rationale of section 965(d)(2)(B) and proposed § 1.965–1(f)(7)(i)(B) and (C) to provide that accumulated post-1986 deferred foreign income is reduced by post-1986 earnings and profits described in section 959(c)(3) that have been distributed to an unrelated foreign corporation pursuant to a dividend pro rata to such corporation and a specified foreign corporation, given that the ''no diminution rule'' discussed in Part II.G.1 of this Summary of Comments and Explanation of Revisions would decrease the post-1986 earnings and profits by the amount distributed to the specified foreign corporation but not the unrelated foreign corporation. As discussed in more detail in Part II.G.1 of this Summary of Comments and Explanation of Revisions, the Treasury Department and the IRS have determined that the application of the statutory ''no diminution rule'' is clear, and the special rules in section 965(d)(2)(B) for previously taxed E&P have no bearing on the fact pattern highlighted by the comment. Accordingly, the final regulations do not adopt this comment, nor a similar comment suggesting that step 2 of the ordering rule in proposed § 1.965–2(b), discussed in Part III.A of this Summary of Comments and Explanation of Revisions, permit such dividends to persons other than specified foreign corporations to be taken into account before the application of section 965 is determined.

3. Expansion of Previously Taxed E&P Exception To Address Section 951(a)(1)(B) Inclusions

A comment suggested that a pre-inclusion year inclusion under sections 951(a)(1)(B) and 956 with respect to a DFIC whose inclusion year ends November 30, 2018, may not be properly accounted for in determining accumulated post-1986 deferred foreign income as of the measurement date on November 2, 2017. The comment notes that a distribution of an amount of E&P that would be described in section 959(c)(1) as a result of an inclusion under sections 951(a)(1)(B) and 956 during a pre-inclusion year taxable year would prevent sections 951(a)(1)(B) and 956 from applying. Accordingly, such E&P would not qualify for the exception from accumulated post-1986 deferred foreign income for previously taxed E&P in § 1.965–1(f)(7)(i)(B). The comment suggested that the final regulations provide an additional exception from the definition of accumulated post-1986 deferred foreign income for E&P that would be included in the income of a United States shareholder under sections 951(a)(1)(B) and 956.

The Treasury Department and the IRS have determined that the statutory definition of accumulated post-1986 deferred foreign income is clear in not excluding such E&P. Moreover, modifications to reduce a section 965(a) inclusion amount to the extent of an inclusion under sections 951(a)(1)(B) and 956 in such circumstances are not warranted for the same reasons that modifications to address dividends with comparable results are not warranted, as discussed in Part II.G.1 of this Summary of Comments and Explanation of Revisions. A new example illustrates the treatment of E&P of a specified foreign corporation as of the E&P measurement date on November 2, 2017, which is described in section 959(c)(1) as a result of an inclusion under section 951(a)(1)(B) with respect to the specified foreign corporation's taxable year ending on November 30, 2017. *See* § 1.965–2(j)(5).

4. Application of Previously Taxed E&P Exception in the Case of Section 962 Elections

Under section 962(d), E&P giving rise to inclusions under section 951(a)(1) with respect to which an election under section 962 applies are, notwithstanding section 959(a)(1), includible in the gross income of a United States shareholder when distributed except to the extent of tax paid on the inclusions. Therefore, those E&P (that is, the non-excludable amount) are included in accumulated post-1986 deferred foreign income in an inclusion year. *See* section 965(d)(2)(B) (excluding from accumulated post-1986 deferred foreign income earnings that, if distributed, would be excluded from gross income under section 959). A comment suggested that accumulated post-1986 deferred foreign income should exclude all previously taxed E&P attributable to a prior year inclusion under section 951(a)(1) by a United States shareholder when a section 962 election applied with respect to the prior year inclusion. In the alternative, the comment suggested that the final regulations allow foreign income taxes deemed paid with respect to the original inclusion under section 951(a)(1) to be treated as deemed paid again with respect to a section 965(a) inclusion with respect to such previously taxed E&P. The Treasury Department and the IRS have determined that the statute is clear that a reduction to accumulated post-1986 deferred income is allowed only for E&P that would be excluded from income under section 959 upon distribution. In addition, there is no authority under the Code to allow the same foreign income taxes to be credited twice. Therefore, because there is no

statutory authority for such modifications, the suggested modifications to the statutory definition of accumulated post-1986 deferred foreign income and operation of the foreign tax credit rules are not warranted and are not adopted in the final regulations.

D. Determination of Aggregate Foreign Cash Position and Cash Position

The proposed regulations define ''aggregate foreign cash position'' to mean the greater of the aggregate of a section 958(a) U.S. shareholder's pro rata share of the cash position of each specified foreign corporation determined on the final cash measurement date or the average of the aggregate of a section 958(a) U.S. shareholder's pro rata share of the cash position of each specified foreign corporation determined as of each specified foreign corporation's first and second cash measurement dates. Proposed § 1.965–1(f)(8). For purposes of this calculation, a specified foreign corporation's cash position consists of cash held by the corporation, the net accounts receivable of the corporation, and the fair market value of the cash-equivalent assets held by the corporation. Proposed § 1.965–1(f)(16)(i). Cash-equivalent assets include (i) personal property which is of a type that is actively traded and for which there is an established financial market; (ii) commercial paper, certificates of deposit, the securities of the Federal government and of any State or foreign government; (iii) any foreign currency; (iv) any obligation with a term of less than one year (''short-term obligation''); and (v) derivative financial instruments, other than bona fide hedging transactions. Proposed § 1.965–1(f)(13).

1. Exclusions From Cash Position

Guidance was requested about the exclusion of certain assets from the cash position of a specified foreign corporation. Specifically, comments recommended that cash subject to local regulatory restrictions, held in a fiduciary or trust capacity, derived from domestic E&P, earmarked to fund a foreign acquisition pursuant to a legal contract entered into before November 2, 2017, obligated to be paid to a third party, or corresponding to previously taxed E&P not be taken into account in determining a specified foreign corporation's cash position. Comments also requested that obligations with respect to which there was an inclusion under sections 951(a)(1)(B) and 956 be excluded from a specified foreign corporation's cash position. In addition, comments requested guidance exempting certain assets that would otherwise be considered personal property which is of a type that is actively traded and for which there is an established financial market. For example, comments suggested that the stock of a publicly traded company be excluded from a specified foreign corporation's cash position if the stock represents a controlling interest in a corporation, meets an annual trading volume threshold, is the stock of a specified foreign corporation, is held in the ordinary course of a section 958(a) U.S. shareholder's trade or business, or was not reported as a current asset on the audited financial statements of a section 958(a) U.S. shareholder or its specified foreign corporation. Similarly, comments requested that certain products or raw materials held as inventory that are a type of property that may be actively traded on, for example, commodities markets, and forward contracts with respect to those items be excluded from a specified foreign corporation's cash position if the items are part of the corporation's ongoing operations or are disposed of in the normal course of business. One comment requested guidance that actively traded personal property be presumptively treated as cash, subject to the ability of the taxpayer to rebut the presumption by submitting a statement with its tax return that establishes, based on all of the relevant facts and circumstances, that the property is illiquid. Another comment stated that the proposed regulations struck an appropriate balance and requested that the exceptions from the definition of cash position be limited to those in the proposed regulations and that no additional exceptions be given.

The Treasury Department and the IRS have determined that a narrow exemption from the definition of ''cash position'' is appropriate for certain assets held by a specified foreign corporation in the ordinary course of its trade or business as well as for certain privately negotiated contracts to buy or sell such assets. Therefore, in response to comments, the final regulations provide that a commodity that is described in section 1221(a)(1) or 1221(a)(8) in the hands of the specified foreign corporation is excluded from the category of personal property which is of a type that is actively traded and for which there is an established market, except with respect to dealers or traders in commodities. Section 1.965–1(f)(13)(i)(A) and (ii). Additionally, the final regulations exclude forward contracts and short positions with respect to such commodities from the definition of derivative financial instrument to the extent that they could have been identified as a hedging transaction with respect to such commodities. *See* § 1.965–1(f)(18)(iii) and (v). This exemption does not raise the administrability concerns that are inherent in a liquidity-based test of widespread applicability.

However, the Treasury Department and the IRS decline to adopt the recommendations for additional cash position exceptions. Congress developed a statutory definition of ''cash position'' that includes all cash and certain assets held by a specified foreign corporation regardless of whether the cash or assets are illiquid or were transferred from the United States. *See* section 965(c)(3)(B). The legislative history is consistent with the unambiguous language in the statute. *See, e.g.,* H.R. Rep. No. 115–446, at 609–10 (2017) (''The cash position of an entity consists of all cash, net accounts receivable, and the fair market value of similarly liquid assets, specifically including personal property that is actively traded on an established financial market, government securities, certificates of deposit, commercial paper, foreign currency, and short-term obligations.''). Therefore, the final regulations continue to provide that, for example, the fair market value of publicly traded stock held by a specified foreign corporation is included in a specified foreign corporation's cash position, regardless of the specified foreign corporation's ownership percentage in the publicly traded corporation, because such stock is ''of a type'' that is actively traded on an established securities market.

Additionally, creating broad regulatory exceptions to the statutory definition would require administratively complex tracing and facts-and-circumstances rules. For example, an exclusion for cash that originated in the United States and was earmarked to fund a foreign acquisition pursuant to a legal contract entered into before November 2, 2017, would necessarily require difficult-to-administer rules to identify such cash, which may currently be or may have previously been comingled with foreign-derived cash in a single account. Similarly, it would be challenging to administer a presumption or a test that assesses the liquidity of every asset based on the facts and circumstances.

Accordingly, the final regulations generally retain the definitions of ''aggregate foreign cash position'' and ''cash position'' set forth in the

proposed regulations. *See* § 1.965–1(f)(8) and (16).

2. Accounts Receivable and Accounts Payable

The proposed regulations provide that for purposes of determining net accounts receivable taken into account in determining the cash position of a specified foreign corporation, the term ''accounts receivable'' means receivables described in section 1221(a)(4), and the term ''accounts payable'' means payables arising from the purchase of property described in section 1221(a)(1) or 1221(a)(8) or the receipt of services from vendors or suppliers, and only receivables or payables with a term upon issuance that is less than one year are taken into account. Proposed § 1.965–1(f)(5) and (6).

Comments requested that the definition of accounts payable for purposes of determining a specified foreign corporation's cash position be expanded. Specifically, comments recommended that accounts payable be defined to include payables to employees in the ordinary course of business, payables arising from the purchase of depreciable property, payables related to the licensing of intellectual property, payables for taxes other than income taxes, payables for debt with a term of less than one year, and payables established under Revenue Procedure 99–32, 1999–2 C.B. 296. Although the statute does not define the term ''accounts payable,'' generally accepted accounting principles define the term to mean amounts owed to vendors and suppliers for the purchase of goods and services on credit, to the exclusion of obligations such as accrued taxes, interest expense, commission or royalty expense, and compensation payable, which are treated as accrued liabilities. The definition of accounts payable set forth in the proposed regulations therefore reflects the ordinary meaning of the term, and the final regulations do not adopt these recommendations.

3. Short-Term Obligations

The proposed regulations provide that for purposes of determining a specified foreign corporation's cash position, the term ''short-term obligation'' means any obligation with a term at issuance that is less than one year and any loan that must be repaid at the demand of the lender (or that must be repaid within one year of such demand) but does not include any accounts receivable. Proposed § 1.965–1(f)(43). Comments requested that the definition of short-term obligation be modified to allow netting of short-term notes payable against short-term notes receivable for purposes of computing a specified foreign corporation's cash position.

The Treasury Department and the IRS decline to adopt these comments. The statute explicitly allows accounts payable to be netted against accounts receivable for purposes of determining the cash position of a specified foreign corporation but does not provide the same treatment with respect to short-term obligations. *See* section 965(c)(3)(B)(ii), (c)(3)(B)(iii)(IV), and (c)(3)(C). The legislative history is consistent with the statute's plain meaning. *See* H.R. Rep. No. 115–446, at 615 (2017). Accordingly, the final regulations retain the definition of ''short-term obligation'' set forth in the proposed regulations. *See* § 1.965–1(f)(43).

4. Cash-Equivalent Asset Hedging Transactions

For purposes of determining the cash position of a specified foreign corporation, the proposed regulations include special rules regarding the treatment of cash-equivalent asset hedging transactions. The term ''cash-equivalent asset hedging transaction'' is defined as a bona fide hedging transaction identified on a specified foreign corporation's books and records as hedging a cash-equivalent asset. Proposed § 1.965–1(f)(14). A bona fide hedging transaction is defined to mean a hedging transaction that meets (or that would meet if the specified foreign corporation were a CFC) the requirements of a bona fide hedging transaction described in § 1.954–2(a)(4)(ii) (without regard to the identification requirements, in the case of a specified foreign corporation that is not a CFC). Proposed § 1.965–1(f)(12).

The proposed regulations do not address whether, and the extent to which, a bona fide hedging transaction that hedges an aggregate risk (an ''aggregate hedging transaction''), including risks with respect to one or more cash-equivalent assets, may be treated as a cash-equivalent asset hedging transaction. For example, a bona fide hedging transaction may hedge the risk with respect to multiple assets, some of which are cash-equivalent assets and some of which are not cash-equivalent assets. *See generally* § 1.954–2(a)(4)(ii)(A) (defining a bona fide hedging transaction, in part, by reference to the requirements of § 1.1221–2(a) through (d)); § 1.1221–2(c)(3) (providing that a hedging transaction may manage aggregate risk).

The Treasury Department and the IRS have determined that it is appropriate to permit bona fide hedging transactions that are aggregate hedging transactions to be treated as cash-equivalent asset hedging transactions to the extent that the risks managed by the aggregate hedging transaction relate to cash-equivalent hedging transactions. Accordingly, the final regulations provide that an aggregate hedging transaction may be treated as a cash-equivalent asset hedging transaction and allocate the value of an aggregate hedging transaction between cash-equivalent hedging transactions and other assets, if any, being hedged. *See* § 1.965–1(f)(14)(ii).

One comment requested guidance clarifying that hedging transactions that use cash-equivalent assets that are not derivative financial instruments as hedging instruments, in addition to hedging transactions that use derivative financial instruments as hedging instruments, are eligible to be treated as bona fide hedging transactions. The Treasury Department and the IRS have determined that it is clear that a hedging transaction that uses a cash-equivalent asset as a hedging instrument will qualify as a bona fide hedging transaction if the requirements in proposed § 1.965–1(f)(12) are met, and no clarification is necessary.

E. Cash Measurement Dates

The proposed regulations provide that a specified foreign corporation's final cash measurement date is the close of the last taxable year of the specified foreign corporation that begins before January 1, 2018, and ends on or after November 2, 2017, if any. Proposed § 1.965–1(f)(24). The second cash measurement date of a specified foreign corporation is the close of the last taxable year of the specified foreign corporation that ends after November 1, 2016, and before November 2, 2017, if any. Proposed § 1.965–1(f)(31). The first cash measurement date of a foreign corporation is the close of the last taxable year of the specified foreign corporation that ends after November 1, 2015, and before November 2, 2016, if any. Proposed § 1.965–1(f)(25). Under the proposed regulations, a section 958(a) U.S. shareholder takes into account its pro rata share of the cash position of a specified foreign corporation as of the close of any cash measurement date of the specified foreign corporation on which the section 958(a) U.S. shareholder is a section 958(a) U.S. shareholder of the specified foreign corporation, without regard to whether the section 958(a) U.S. shareholder is a section 958(a) U.S. shareholder as of any other cash measurement date, including the final

cash measurement date of the specified foreign corporation. *See* proposed § 1.965–1(f)(30)(iii).

A comment recommended that the proposed regulations be modified such that a section 958(a) U.S. shareholder would not take into account the pro rata share of the cash position of any specified foreign corporation liquidated before November 2, 2017. The comment is premised on the view that the references to ''each such specified foreign corporation'' in section 965(c)(3)(A)(ii) expressly link the specified foreign corporations whose cash positions are measured on the first and second cash measurement dates to those whose cash positions are measured on the final cash measurement date. Accordingly, the comment reads the statute to provide that if a specified foreign corporation did not exist or was not held by a section 958(a) U.S. shareholder on the final cash measurement date, its cash position may not be taken into account under section 965(c)(3)(A)(ii).

The Treasury Department and the IRS have determined that the comment's reading of section 965(c)(3)(A)(ii) is an inferior reading and have determined that the cash measurement date rules in the proposed regulations are consistent with the text and underlying purposes of the relevant statutory provision and that the legislative history supports this conclusion. The phrase ''each such specified foreign corporation'' in section 965(c)(3)(A)(ii)(I) and (II) refers only to the phrase ''each specified foreign corporation of such United States shareholder'' in section 965(c)(3)(A)(i), and not the additional language in section 965(c)(3)(A)(i) referring to the final cash measurement date. Additionally, given that the purpose of the multiple cash measurement dates was to mitigate any incentive for taxpayers to manipulate their cash position as of the final cash measurement date, it is appropriate to ensure that the cash position of a specified foreign corporation in existence on a cash measurement date is taken into account by a United States shareholder on such date. For example, a rule that ignored the cash position of specified foreign corporations that did not exist or were not held by a section 958(a) U.S. shareholder on the final cash measurement date could allow a section 958(a) U.S. shareholder with an aggregate foreign cash position that was determined as of the earlier cash measurement dates described in section 965(c)(3)(A) to retroactively reduce its aggregate foreign cash position by liquidating or otherwise disposing of specified foreign corporations with significant cash positions, even when cash and cash-equivalent assets of the specified foreign corporation continued to be held by one or more other specified foreign corporations of the section 958(a) U.S. shareholder.

Finally, the Joint Committee on Taxation explanation of the Act also indicates that, for purposes of section 965, the cash position of a specified foreign corporation that no longer exists must still be taken into account by a section 958(a) U.S. shareholder in determining its aggregate foreign cash position. See Staff, Joint Committee on Taxation, General Explanation of Public Law 115–97, JCS–1–18, at 359–360 (2018) (''If a specified foreign corporation does not exist on any particular cash measurement date, its cash position would be zero with respect to that date.''). Accordingly, the Treasury Department and the IRS do not adopt this recommendation.

Another comment requested confirmation that United States shareholder status, the United States shareholder's pro rata share, and specified foreign corporation status are determined based on the facts and applicable law at the time of each cash measurement date. The Treasury Department and the IRS have determined that that is clear under proposed § 1.965–1(f)(8) and (f)(30)(iii), as illustrated by the example in § 1.965–1(g)(7). Accordingly, no changes are made in the final regulations in this regard.

F. Domestic Pass-Through Entities

A comment made a number of suggestions premised on the assumption that aggregate foreign E&P deficits, section 965(a) inclusion amounts, and section 965(c) deductions are not determined at the section 958(a) U.S. shareholder level when the section 958(a) U.S. shareholder is a domestic pass-through entity, and instead that shares of the components of those amounts (such as specified E&P deficits, section 965(a) earnings amounts, and aggregate foreign cash positions) are taken into account separately by the domestic pass-through owners. As discussed in more detail in this Part II.F with respect to the specific suggestions made by the comment, the Treasury Department and the IRS have determined that the statute clearly provides otherwise, and the proposed regulations and final regulations are consistent with the statute.

The comment requested that the final regulations clarify that if a domestic pass-through entity is a United States shareholder of an E&P deficit foreign corporation, a domestic pass-through owner of the domestic pass-through entity can take into account its shares of the domestic pass-through entity's pro rata share of the specified E&P deficit of the E&P deficit foreign corporation to reduce the domestic pass-through owner's pro rata share of a section 965(a) earnings amount of a DFIC. In support of its recommendation, the comment cited the rule provided in proposed § 1.965–1(e) treating a controlled domestic partnership as a foreign partnership, such that its partners could be treated as having a pro rata share of specified E&P deficits of E&P deficit foreign corporations owned by the partnership. However, that rule is intended to ensure that the accumulated post-1986 deferred foreign income of DFICs of such a partnership is subject to U.S. tax. The Treasury Department and the IRS have determined that it should not be extended to structures that do not present the same tax-avoidance concerns, such as the one raised by the comment involving a United States person that is a partner in a domestic partnership. The Treasury Department and the IRS have determined that it is clear under the statute that a domestic pass-through entity's pro rata share of a specified E&P deficit can only be used to reduce the domestic pass-through entity's pro rata share of section 965(a) earnings amounts, and the proposed and final regulations are consistent with the statute.

Similarly, under the statute, a domestic pass-through owner's distributive share of a domestic pass-through entity's section 965(a) inclusion amount cannot be reduced by the domestic pass-through owner's pro rata share of a specified E&P deficit of an E&P deficit foreign corporation of which it is a section 958(a) U.S. shareholder. The proposed and final regulations are consistent with the statute. Accordingly, the comment's suggestion is not adopted.

The comment also suggested clarifying that if a domestic pass-through entity's aggregate foreign cash position exceeds its aggregate section 965(a) inclusion amounts, the domestic pass-through owners of the domestic pass-through entity need only take into account their share of the excess aggregate foreign cash position, and not their share of the aggregate foreign cash position taken into account in determining the section 965(c) deduction amount of the domestic pass-through entity. The Treasury Department and the IRS have determined that because only a section 958(a) U.S. shareholder can have an aggregate foreign cash position, and there is no mechanism for treating a

domestic pass-through owner of a domestic pass-through entity that is a section 958(a) U.S. shareholder as having a share of an aggregate foreign cash position, it is clear under the statute, the proposed regulations, and the final regulations, that domestic pass-through owners do not take into account any amount of a domestic pass-through entity's aggregate foreign cash position. Accordingly, no clarification is needed, and the comment is not adopted.

G. Post-1986 Earnings and Profits

1. Treatment of Distributions

Under the proposed regulations, a specified foreign corporation's post-1986 earnings and profits are determined without diminution by reason of dividends distributed during the last taxable year of the foreign corporation that begins before January 1, 2018, other than dividends distributed to another specified foreign corporation (''no diminution rule''). Proposed § 1.965–1(f)(29)(i)(B). Comments noted that the no diminution rule may result in overinclusion of a specified foreign corporation's post-1986 earnings and profits and suggested that the final regulations limit the rule's application (that is, to allow diminution of a specified foreign corporation's post-1986 earnings and profits) in the case of dividends to a seller before a sale during the inclusion year. The statute explicitly provides that dividend distributions, other than distributions to another specified foreign corporation, must not be taken into account for purposes of computing a specified foreign corporation's post-1986 earnings and profits. Section 965(d)(3)(B). The legislative history supports the plain language of the statute. *See* H.R. Rep. No. 115–446, at 619 (2017). *See* Part II.H of this Summary of Comments and Explanation of Revisions for additional discussion of rules affecting the treatment of pre-sale distributions by a DFIC. Therefore, the comments are not adopted.

Similarly, comments have suggested reducing post-1986 earnings and profits by dividends to a United States shareholder between November 2, 2017, and December 1, 2017, by a DFIC with an inclusion year ending November 30, 2018, in order to mitigate double counting of E&P in connection with such dividends. However, the legislative history to section 965(o) makes clear that the Treasury Department and the IRS were expected to provide regulations to address double counting resulting from transactions between specified foreign corporations but is silent with respect to transactions between specified foreign corporations and United States shareholders. *Id.* Accordingly, the Treasury Department and the IRS have determined that the grant of regulatory authority in section 965 was not intended to address such fact patterns. Further, and as the preamble to the proposed regulations notes, payments by a specified foreign corporation to a United States shareholder can have attendant U.S. tax effects that do not occur with respect to payments between specified foreign corporations. For example, a distribution to a United States shareholder may permit that shareholder to take into account foreign tax credits under section 902 and avoid the limitation under section 965(g)(1) that would apply if the underlying foreign taxes had been deemed paid with respect to the shareholder's section 965(a) inclusion amount. Accordingly, the Treasury Department and the IRS decline to adopt this recommendation. The alternative recommendations in some of the comments, to treat the dividend as out of previously taxed E&P arising in the subsequent taxable year or to allow the same foreign income taxes to be deemed paid with respect to both the dividend and the section 965(a) inclusion, are inconsistent with the statute and the Code at large, and, accordingly, these recommendations are not adopted.

2. Foreign Income Tax Rule

The proposed regulations provide that for purposes of determining a specified foreign corporation's post-1986 earnings and profits as of the E&P measurement date on November 2, 2017, in the case in which foreign income taxes (as defined in section 901(m)(5)) of the specified foreign corporation accrue after November 2, 2017, but on or before December 31, 2017, and during the specified foreign corporation's U.S. taxable year that includes November 2, 2017, the specified foreign corporation's post-1986 earnings and profits as of November 2, 2017, are reduced by the applicable portion of such foreign income taxes. Proposed § 1.965–1(f)(29)(ii). Comments requested that the rule be expanded to permit reduction for foreign income taxes accrued after December 31, 2017, for purposes of determining post-1986 earnings and profits on the measurement dates on both November 2, 2017, and December 31, 2017, and regardless of whether the foreign corporation's U.S. taxable year includes November 2, 2017. The Treasury Department and the IRS have determined that it would be inappropriate to allow taxes accrued in a U.S. tax year after the one that includes November 2, 2017, to be taken into account in determining post-1986 earnings and profits on November 2, 2017, because such taxes could not have accrued for the first year under the general foreign tax credit rules. Moreover, expanding the rule to take into account taxes accrued after December 31, 2017, would prevent section 965-related amounts from being determined with certainty as of December 31, 2017. As discussed in Part II.A of this Summary of Comments and Explanation of Revisions, the Treasury Department and the IRS have determined that it continues to be important to have certainty about section 965-related amounts as of December 31, 2017, and accordingly decline to adopt the comments.

Another comment recommended modifying how the applicable portion of foreign income taxes taken into account on November 2, 2017, is determined. For ease of implementation, instead of basing the determination on the portion of the income for the foreign taxable period that includes November 2, 2017, as computed under foreign tax law, that had accrued as of such date, this comment recommended basing the determination on the ratio of the E&P for the U.S. taxable year, as computed under U.S. tax principles, as of November 2, 2017, to that as of December 31, 2017. The Treasury Department and the IRS have determined that taxpayers are generally required under § 1.904–6 to associate foreign income taxes with taxable income computed under foreign law, such that the rule in § 1.965–1(f)(29)(ii) does not create a significant additional burden. Moreover, the suggested approach could result in significant distortions if the foreign corporation's U.S. and foreign taxable years differed. Accordingly, the recommendation is not adopted.

3. Other Exclusions From Post-1986 Earnings and Profits

A comment also requested that the definition of post-1986 earnings and profits exclude cashless earnings generated by foreign corporations while they were not controlled by United States shareholders. In the same vein, it requested that dividends paid out of earnings earned before a foreign corporation became a specified foreign corporation be excluded from the post-1986 earnings and profits of the recipient specified foreign corporation. Because the term ''post-1986 earnings and profits'' clearly includes E&P (which is not tied to cash and is often attributable to cashless income) earned while a corporation was a specified

foreign corporation, without regard to whether it was controlled by United States shareholders, and because section 965(d)(3)(B) clearly evidences consideration for the impact of dividends between foreign corporations on post-1986 earnings and profits, the Treasury Department and the IRS decline to adopt this comment.

4. Alternative Measurement Methods

A comment requested guidance permitting taxpayers to determine their specified foreign corporations' post-1986 earnings and profits and cash positions using an alternative measurement method. The comment noted that before the enactment of section 965, foreign corporations other than CFCs or section 902 corporations (as defined under former section 909(d)(5)) had no reason to track E&P under U.S. tax principles; therefore, requiring a United States shareholder to obtain information from a foreign corporation that the corporation would not have known to maintain is unduly burdensome.

Section 965(d)(3) provides, without exception, that for purposes of determining post-1986 earnings and profits, the E&P of a specified foreign corporation must be ''computed in accordance with sections 964(a) and 986.'' Likewise, section 965(c)(3)(B), which contains rules for determining a specified foreign corporation's cash position, applies to ''any specified foreign corporation.'' Moreover, there is no indication in the legislative history that Congress intended to ease the requirements for computing the post-1986 earnings and profits and the cash position for those specified foreign corporations that may not have previously calculated E&P under U.S. tax principles. Accordingly, the Treasury Department and the IRS do not adopt this comment.

H. Determination of Pro Rata Share of Section 965(a) Earnings Amount

The proposed regulations provide that a section 958(a) U.S. shareholder's pro rata share of the section 965(a) earnings amount of a DFIC is the portion of the section 965(a) earnings amount that would be treated as distributed to the section 958(a) U.S. shareholder under section 951(a)(2)(A) and § 1.951–1(e), determined as of the last day of the inclusion year of the DFIC. Proposed § 1.965–1(f)(30)(i). The Treasury Department and the IRS have determined that this definition is inconsistent with the statutory language of sections 951 and 965 in the case in which a specified foreign corporation, whether it is or is not a CFC, ceases to be a specified foreign corporation during its inclusion year. Under section 951, a section 958(a) U.S. shareholder of such a specified foreign corporation would generally have an inclusion under section 951 with respect to the corporation if it were a DFIC because it would own stock of the specified foreign corporation on the last day of the inclusion year on which the corporation was a specified foreign corporation.

Because a specified foreign corporation is treated as a CFC for purposes of section 951, the Treasury Department and the IRS have determined that the final regulations should be consistent with section 951 in requiring a section 965(a) inclusion by such a section 958(a) U.S. shareholder. Moreover, the Treasury Department and the IRS have concluded that it would not be appropriate to prorate a section 965(a) earnings amount based on the portion of the inclusion year that the DFIC is a specified foreign corporation, as the reference in proposed § 1.965–1(f)(30)(i) to section 965(a)(2)(A) might suggest, given that the limitation of post-1986 earnings and profits to E&P accumulated in periods in which the DFIC was a specified foreign corporation would already prevent E&P accrued after the DFIC ceased to be a specified foreign corporation from being taken into account. The definitions of ''pro rata share'' and ''section 958(a) U.S. shareholder inclusion year'' are revised accordingly in the final regulations. *See* § 1.965–1(f)(30) and (f)(34). The definition of pro rata share continues to preclude reduction by distributions to other owners under section 951(a)(2)(B) in order to be consistent with section 965(d)(3)(B) and prevent double non-taxation in the case of certain 2018 dispositions of specified foreign corporations. *Id.; see* § 1.965–2(j)(6).

I. Determination of Pro Rata Share of Specified E&P Deficit

The proposed regulations provide that, for purposes of determining a section 958(a) U.S. shareholder's pro rata share of a specified E&P deficit of an E&P deficit foreign corporation, the specified E&P deficit is allocated among the shareholders of the corporation's common stock in proportion to the value of the common stock held by such shareholders. Proposed § 1.965–1(f)(30)(ii). The Treasury Department and the IRS have determined that a specified E&P deficit should be allocated to shareholders of an E&P deficit corporation's preferred stock in cases involving common stock with no liquidation value. The final regulations therefore provide that any amount of a specified E&P deficit that would otherwise be allocated in a hypothetical distribution to a class of common stock that has no liquidation value is instead allocated to the most junior class of equity with a positive liquidation value to the extent of the liquidation value. Section 1.965–1(f)(30)(ii)(A). The final regulations also provide that, in cases in which a corporation's common stock has a liquidation value of zero and there is no class of equity with a liquidation preference relative to the common stock, the specified E&P deficit is allocated among the common stock using any reasonable method consistently applied. Section 1.965–1(f)(30)(ii)(B).

J. Determination of Specified E&P Deficit

The proposed regulations provide that previously taxed E&P are not excluded in determining the existence and amount of an E&P deficit foreign corporation's specified E&P deficit. *See* proposed § 1.965–1(f)(22)(ii). Comments requested that the final regulations provide to the contrary. The Treasury Department and the IRS have determined that it is clear that previously taxed E&P are not excluded in determining a specified E&P deficit. Section 965(b)(3)(B) and (C) provide that a specified E&P deficit is, with respect to an E&P deficit foreign corporation, a deficit in post-1986 earnings and profits as of November 2, 2017. For purposes of section 965, the term post-1986 earnings and profits is defined in section 965(d)(3) and is computed in accordance with sections 964(a) and 986. Under section 964(a), E&P are determined according to rules substantially similar to those applicable to domestic corporations. Previously taxed E&P are a type of E&P. *See* section 959(c). No express exclusion of previously taxed E&P is provided in section 965(d)(3) for purposes of determining post-1986 earnings and profits. In contrast, the term accumulated post-1986 deferred foreign income, as defined in section 965(d)(2), starts with post-1986 earnings and profits and then explicitly excludes previously taxed E&P. *See* section 965(d)(2)(B). Accordingly, the comments are not adopted. While previously taxed E&P is not excluded in the statutory definition of post-1986 earnings and profits, there is no double taxation of previously taxed E&P related to the E&P deficit foreign corporations because section 959 continues to apply when the previously taxed E&P are distributed.

A comment also requested that the final regulations confirm that E&P or

deficits in E&P attributable to income that is effectively connected with the conduct of a trade or business within the United States and subject to tax under chapter 1 (''effectively connected E&P'') are taken into account in determining the specified E&P deficit of an E&P deficit foreign corporation. The Treasury Department and the IRS have determined that section 965 clearly allows deficits in effectively connected E&P to be included in an E&P deficit foreign corporation's specified E&P deficit. No express exclusion for effectively connected E&P is provided in section 965(d)(3) for purposes of determining post-1986 earnings and profits. Moreover, the term accumulated post-1986 deferred foreign income, as defined in section 965(d)(2), expressly excludes effectively connected E&P. Accordingly, no clarification is made to the proposed regulations with respect to effectively connected E&P.

A comment also requested confirmation that a distribution of previously taxed E&P in the last taxable year of a CFC beginning before January 1, 2018, can affect an E&P deficit foreign corporation's specified E&P deficit. Because previously taxed E&P can only be distributed pursuant to a dividend, which, pursuant to section 316, requires positive E&P, the Treasury Department and IRS have determined that a distribution of previously taxed E&P could not affect a specified E&P deficit. Accordingly, the comment is not adopted.

K. Application of Attribution Rules for Purposes of Determining Status of Foreign Corporation as a Specified Foreign Corporation

To limit the administrative and compliance difficulties associated with determining whether a foreign corporation is a specified foreign corporation solely by reason of downward attribution of its stock under section 318(a)(3)(A) from a partner to a partnership when the partner has only a de minimis interest in the partnership, proposed § 1.965–1(f)(45)(ii) provides a special attribution rule for purposes of determining whether a foreign corporation is a specified foreign corporation within the meaning of section 965(e)(1)(B) and proposed § 1.965–1(f)(45)(i)(B). Specifically, the definition of specified foreign corporation provides that, solely for purposes of determining whether a foreign corporation is a specified foreign corporation within the meaning of section 965(e)(1)(B), stock owned, directly or indirectly, by or for a partner (''tested partner'') will not be considered as being owned by a partnership under sections 958(b) and 318(a)(3)(A) if the tested partner owns less than five percent of the interests in the partnership's capital and profits. Proposed § 1.965–1(f)(45)(ii). Similar rules apply with respect to S corporations. *See* sections 318(a)(5)(E) and 1373(a).

1. Downward Attribution to Trusts

A comment requested that the final regulations adopt a similar rule for trusts, noting that downward attribution of stock to trusts is also possible when a beneficiary has a de minimis interest in the trust, unless that interest is a remote contingent interest. *See* section 318(a)(3)(B). The Treasury Department and the IRS agree that downward attribution of stock to a trust from de minimis beneficiaries of the trust presents similar administrative and compliance difficulties to those addressed in the proposed regulations. Accordingly, the final regulations extend the special rules concerning downward attribution (as modified per the discussion in Part II.K.2 of this Summary of Comments and Explanation of Revisions) to trusts. *See* § 1.965–1(f)(45)(ii)(A)(*2*).

2. Other Relief From Attribution

A comment indicated that, in determining specified foreign corporation status under section 965(e)(1)(B), the final regulations should take into account domestic corporations that are United States shareholders only if they own (within the meaning of section 958(a)) stock of the specified foreign corporation. Another comment indicated that the Treasury Department and the IRS should generally consider additional de minimis constructive ownership exceptions in determining specified foreign corporation status without specifically identifying the nature of such relief. A comment also recommended that the five percent threshold in proposed § 1.965–1(f)(45)(ii) be increased to a more significant percentage, such as ten percent. A similar comment suggested that the five percent threshold apply only to managing and controlling partners, and that a threshold of fifteen percent apply to partners who have no ability to manage or control the partnership. In response to these comments, the Treasury Department and the IRS have determined that a ten-percent threshold for application of the special attribution rules relating to partnerships and trusts would strike the appropriate balance between mitigating administrative and compliance burdens and accurately identifying which foreign corporations are, in fact, specified foreign corporations. Accordingly, the final regulations increase the threshold for application of this special attribution rule for partnerships from five percent to ten percent, and similarly use a ten-percent threshold for the newly-added special attribution rule for trusts.

Another comment suggested that a foreign corporation that is a CFC solely by reason of downward attribution not be treated as a CFC for purposes of determining whether it is a specified foreign corporation with respect to a United States shareholder that is not a related person (within the meaning of section 954(d)(3)) with respect to the domestic corporation to which ownership was attributed. Nothing in the plain statutory language of section 965 or 958(b), as amended by the Act, prevents the application of section 318(a)(3) so as to treat a foreign corporation as a CFC with respect to a United States shareholder as a result of downward attribution of stock from a foreign person to a United States person if the United States person and the United States shareholder are not related persons as defined by section 954(d)(3). Furthermore, it may benefit taxpayers for a specified foreign corporation with respect to which section 965 would otherwise apply to be respected as a CFC for purposes of section 965, as that could permit deemed paid credits to be claimed with respect to a section 965(a) inclusion with respect to the specified foreign corporation that would not otherwise be permitted. Consistent with the statutory text, the final regulations therefore do not adopt the exclusion from the definition of specified foreign corporation recommended by the comment.

3. Application of Section 318(a)(5)(A) and (C)

A comment stated that *Example 1* and *Example 2* in proposed § 1.965–1(g), which illustrate the special attribution rule, apply section 318(a)(5)(A) and (a)(5)(C) inconsistently with informal advice issued by the IRS. Because the interpretation of those provisions reflected in the examples is irrelevant to the application of the special attribution rule, the final regulations modify the examples to avoid the issue raised by the comment. *See* § 1.965–1(g)(1) and (2). No inference, however, is intended regarding the proper interpretation of section 318(a)(5)(A) and (a)(5)(C).

III. Comments and Changes to Proposed § 1.965–2—Adjustments to E&P and Basis

Proposed § 1.965–2 contains rules relating to adjustments to E&P and basis to determine and account for the application of section 965(a) and (b) and proposed § 1.965–1(b), and a rule that limits the amount of gain recognized in connection with the application of section 961(b)(2). The comments and modifications with respect to these rules are discussed in this Part III.

A. Ordering Rule

The proposed regulations set forth an ordering rule relating to adjustments to E&P for purposes of determining a section 958(a) U.S. shareholder's inclusions under section 951(a)(1) and the treatment of distributions under section 959. *See* proposed § 1.965–2(b).

1. Application in the Case of E&P Measurement Dates in Two Taxable Years

The Treasury Department and the IRS have determined that the ordering rule's limited application to E&P for a specified foreign corporation's last taxable year beginning before January 1, 2018, is too narrow, given that it is intended to apply for purposes of determining post-1986 earnings and profits and accumulated post-1986 deferred foreign income on the E&P measurement date on November 2, 2017; that measurement date may not fall within a specified foreign corporation's last taxable year beginning before January 1, 2018. The final regulations address this issue by providing that the ordering rule applies for the taxable year of a specified foreign corporation in which an E&P measurement date occurs, as well as for the last taxable year of a specified foreign corporation that begins before January 1, 2018.

2. Section 1248

Comments have also raised questions about the proper point in the sequence at which to determine and take into account inclusions under section 1248. Although one comment suggested that section 965 should be taken into account before section 1248 amounts are determined, the Treasury Department and the IRS have determined that such an approach would not mitigate double taxation in the case of a sale in which the buyer (as opposed to the seller, as in the example provided by the comment) was subject to tax under section 965. However, such double taxation is mitigated by the approach suggested by another comment and taken by the final regulations, which provide that, for purposes of the ordering rules, section 1248 amounts are determined at the same time as the determination of amounts included under section 951(a)(1)(A) other than amounts included by reason of section 965. As a result, section 1248 amounts are determined before, and may reduce, a buyer's section 965(a) inclusion amount with respect to a DFIC. The application of the ordering rule in connection with a sale to which section 1248 applies is illustrated in a new example in § 1.965–2(j)(6).

The comment also suggested that the final regulations include an example addressing the interaction of the section 367 gain recognition agreement rules and the determination of section 965(a) inclusions. The Treasury Department and the IRS have determined that those rules are outside of the scope of these regulations and do not adopt the comment.

3. Interaction of Ordering Rule, Foreign Tax Credit Rules, and Disregard Rules

Comments have raised questions concerning the interaction of the ordering rule with the rule disregarding payments in proposed § 1.965–4(f) and the determination of the foreign tax credit consequences of inclusions with respect to, and distributions by, a specified foreign corporation.

The final regulations address these issues by providing rules concerning the ordering of the determination of foreign income taxes deemed paid with respect to an inclusion or distribution, after the E&P adjustments are determined in accordance with § 1.965–2(b). The final regulations provide that for purposes of determining the consequences under sections 902 and 960 of a dividend or an inclusion under section 951(a)(1), respectively, the ordering rule in § 1.960–1(i)(2) applies except that section 902 is applied with respect to any distributions from the specified foreign corporation described in § 1.965–2(b)(2) that are not disregarded under § 1.965–4 before section 960 is applied with respect to an inclusion or a distribution described in § 1.965–2(b)(3), (b)(4), or (b)(5). Section 1.965–2(b). As discussed in more detail in Parts VI.C.3 and 4 of this Summary of Comments and Explanation of Revisions, the final regulations confirm that the other rules of sections 902 and 960 apply. *See* § 1.965–6(b). The final regulations also provide that the E&P consequences of a distribution between specified foreign corporations that is disregarded for purposes of section 965 pursuant to § 1.965–4 are redetermined after adjustments for section 965(a) inclusions, at the same time that the consequences of other distributions are determined. *See* § 1.965–2(b)(1) and (4).

Modified and new examples illustrate the determination of the section 902 consequences of a distribution between specified foreign corporations before November 2, 2017, before the determination of the section 960 consequences of a section 965(a) inclusion and the foreign tax credit consequences of a distribution disregarded pursuant to § 1.965–4. *See* § 1.965–2(j)(1) and (4).

A comment recommended that the ordering rule be further modified to allow the foreign tax credit consequences of a distribution to a United States shareholder to be determined before applying section 965. The Treasury Department and the IRS decline to adopt the recommendation because ordering section 965(a) inclusions before distributions to United States shareholders is required to be consistent with section 965(d)(3)(B), which precludes diminution of post-1986 earnings and profits by distributions during the relevant year other than by dividends distributed to another specified foreign corporation, as well as to be consistent with the general treatment of inclusions under section 951 as being taken into account before distributions, as discussed in this Part III.A.3.

B. Adjustments to the E&P of DFICs

Under proposed § 1.965–2(c), the E&P of a DFIC that are described in section 959(c)(3) (or that would be described in section 959(c)(3) but for the application of section 965(a) and the section 965 regulations) are reduced (or, in the case of a deficit, increased) by an amount equal to the DFIC's section 965(a) previously taxed earnings and profits. A comment requested that the final regulations clarify that earnings described in section 959(c)(3) cannot be reduced below zero by reason of the rule in proposed § 1.965–2(c), in order to ensure that the DFIC would be able to make a distribution of the section 965(a) previously taxed earnings and profits. The comment was also concerned that a deficit in E&P described in section 959(c)(3) could prevent foreign income taxes accrued on future subpart F income from being deemed paid with respect to inclusions under section 951(a)(1)(A) with respect to such income and requested that, in the alternative, guidance be provided allowing foreign income taxes to be deemed paid under those circumstances. The sum of a foreign corporation's E&P described in each of the categories in section 959(c) must equal the foreign corporation's total

E&P. *See* Rev. Rul. 86–131, 1986–2 C.B. 135 (''[T]he section 959(c) components are intended to reflect the composition of the CFC's total earnings and profits. . . .''). In order to ensure that a specified foreign corporation's E&P are not distorted by the adjustment to section 959(c)(2) E&P required by the proposed regulations, the Treasury Department and the IRS have determined that it is appropriate for the reduction provided for in proposed § 1.965–2(c) to create a deficit in E&P described in section 959(c)(3) if there are insufficient E&P to be reclassified and accordingly do not adopt the comment. The suggestion concerning deemed paid taxes is outside of the scope of this rulemaking.

Under proposed § 1.965–2(d)(1), the E&P described in section 959(c)(2) of a DFIC are increased by an amount equal to the reduction to a section 958(a) U.S. shareholder's pro rata share of the section 965(a) earnings amount of the DFIC under section 959(b), ''provided the section 958(a) U.S. shareholder includes the section 965(a) inclusion amount with respect to the deferred foreign income corporation in income.'' A comment noted that the rule would seem to preclude the creation of section 965(b) previously taxed earnings and profits in a DFIC if its section 965(a) earnings amount was completely offset by section 958(a) U.S. shareholders' aggregate foreign E&P deficits. Because the rule was intended to limit the availability of section 965(b) previously taxed earnings and profits to situations in which a section 965(a) inclusion amount was included only if there was a section 965(a) inclusion amount, the rule is revised to so clarify. *See* § 1.965–2(d)(1).

Comments also requested that the final regulations clarify that section 965(b) previously taxed earnings and profits are treated as E&P attributable to an amount previously included in the income of a person under section 951 for purposes of section 1248(d)(1). The Treasury Department and the IRS have determined that this treatment is appropriate, notwithstanding the fact that, as discussed in Part III.D.2 of this Summary of Comments and Explanation of Revisions, these amounts have not been included in income under section 951, because it is necessary to ensure the ability to take into account section 965(b) previously taxed earnings and profits upon a disposition of specified foreign corporation stock. Accordingly, the final regulations reflect this clarification. *See* § 1.965–2(d)(1).

C. Adjustments to the E&P Described in Section 959(c)(3) of E&P Deficit Foreign Corporations

Under the proposed regulations, the E&P described in section 959(c)(3) of an E&P deficit foreign corporation are increased by an amount equal to the portion of a section 958(a) U.S. shareholder's pro rata share of the specified E&P deficit of the E&P deficit foreign corporation taken into account under section 965(b), translated (if necessary) into the functional currency of the E&P deficit foreign corporation using the spot rate on December 31, 2017. Proposed § 1.965–2(d)(2)(i)(A). A comment recommended that the proposed regulations be modified such that any increase to the earnings and profits described in section 959(c)(3) of an E&P deficit foreign corporation is allocated only to a section 958(a) U.S. shareholder that takes into account its E&P deficit foreign corporation's specified E&P deficit under section 965(b) and not to any other shareholders of the E&P deficit foreign corporation. E&P described in section 959(c)(3) are not generally allocated to specific shareholders, and creating a rule that tracks section 959(c)(3) E&P resulting from a section 958(a) U.S. shareholder's use of each E&P deficit foreign corporation's specified E&P deficit in a shareholder-level account would entail considerable complexity. Accordingly, the final regulations do not adopt the recommended change. *See* § 1.965–2(d)(2)(i)(A).

D. Basis Election

1. Requirements for Making and Revoking Basis Election

The proposed regulations clarify that, in general, no adjustments to basis of stock or property are made under section 961 (or any other provision of the Code) to account for the reduction to a section 958(a) U.S. shareholder's pro rata share of the section 965(a) earnings amount of a DFIC by a portion of its aggregate foreign E&P deficit. *See* proposed § 1.965–2(f)(1). However, consistent with the legislative history, the proposed regulations allow a section 958(a) U.S. shareholder to elect to make certain basis adjustments (''specified basis adjustments'') with respect to each DFIC and each E&P deficit foreign corporation. Proposed § 1.965–2(f)(2). Specifically, an election under the proposed regulations allows a section 958(a) U.S. shareholder's basis in the section 958(a) stock of a DFIC or applicable property with respect to the DFIC to be increased by an amount equal to the section 965(b) previously taxed earnings and profits of the DFIC with respect to the section 958(a) U.S. shareholder. *See* proposed § 1.965–2(f)(2)(ii)(A). The basis election also requires that the section 958(a) U.S. shareholder's basis in the section 958(a) stock of an E&P deficit foreign corporation or applicable property with respect to an E&P deficit foreign corporation be reduced by an amount equal to the portion of the section 958(a) U.S. shareholder's pro rata share of the specified E&P deficit of the E&P deficit foreign corporation taken into account under the reduction rules. *See* proposed § 1.965–2(f)(2)(ii)(B).

The proposed regulations provide the general rule that the basis election must be made no later than the due date (taking into account extensions, if any) for the section 958(a) U.S. shareholder's return for the first taxable year that includes the last day of the last taxable year of a DFIC or E&P deficit foreign corporation of the section 958(a) U.S. shareholder that begins before January 1, 2018. Proposed § 1.965–2(f)(2)(iii)(B)(*1*)(*i*). If the relevant return was due before September 10, 2018, the proposed regulations provide that the basis election must be made by October 9, 2018 (the ''transition rule''). Proposed § 1.965–2(f)(2)(iii)(B)(*1*)(*ii*). The proposed regulations further require that, in order for the basis election to be effective, a section 958(a) U.S. shareholder and each section 958(a) U.S. shareholder that is related to the section 958(a) U.S. shareholder under section 267(b) or 707(b) (''related section 958(a) U.S. shareholder'') must make the election. Proposed § 1.965–2(f)(2)(iii)(A).

Section 2 of Notice 2018–78 announced that the Treasury Department and the IRS had determined that requiring taxpayers to make a binding basis election before the finalization of the proposed regulations would be too onerous for taxpayers. Consistent with that announcement, the final regulations provide that the transition rule will apply with respect to returns due (determined with regard to any extension) before May 6, 2019, and that in such cases the basis election must be made no later than May 6, 2019. Section 1.965–2(f)(2)(iii)(B)(*1*)(*ii*). Additionally, as explained in section 2 of Notice 2018–78, the final regulations provide that if a basis election was made on or before February 5, 2019, the basis election may be revoked by attaching a statement to an amended return filed no later than May 6, 2019. *Id.*

Clarification was requested regarding whether a basis election must be made by a related section 958(a) U.S. shareholder if that shareholder owns a DFIC but does not own an E&P deficit

foreign corporation and does not reduce its pro rata share of any section 965(a) earnings amount under section 965(b), proposed § 1.965–1(b)(2), or proposed § 1.965–8(b). The Treasury Department and the IRS have concluded that the requirement to make a basis election should not apply to such persons. Accordingly, the final regulations provide that the basis election must be made by a section 958(a) U.S. shareholder and any related section 958(a) U.S. shareholder of an E&P deficit foreign corporation or of a DFIC with respect to which the section 958(a) U.S. shareholder's pro rata share of the section 965(a) earnings amount is reduced under section 965(b), § 1.965–1(b)(2), or § 1.965–8(b). Section 1.965–2(f)(2)(iii)(A). However, the final regulations do not adopt a comment's suggestion that the consistency requirement be eliminated in its entirety because the Treasury Department and the IRS have determined that the requirement is necessary to prevent related taxpayers from applying the rules only where they are advantageous.

Another comment requested that the basis election be considered made by default unless a taxpayer affirmatively elects not to make specified basis adjustments. Given the potentially significant ramifications of the specified basis adjustments, the Treasury Department and the IRS have determined that providing for automatic basis adjustments and putting the onus on taxpayers to affirmatively elect out is not appropriate. Accordingly, the comment is not adopted.

2. Level and Consequences of Basis Adjustments

Comments requested that the final regulations provide that positive basis adjustments with respect to section 965(b) previously taxed earnings and profits apply down a chain of foreign corporations under section 961(c) and thus that they apply by default, such that the basis election and its concomitant downward basis adjustments with respect to E&P deficit foreign corporations need not be made. Comments also suggested that even if downward basis adjustments were required, the final regulations should not require them to be made for the entire amount of a specified E&P deficit taken into account, but instead allow taxpayers to elect an amount of basis that ''shifted.'' The comments were particularly concerned that downward adjustments not offset upward adjustments. Comments also recommended that the final regulations not require gain recognition to the extent that downward basis adjustments would exceed basis, and that, if such gain recognition is required, a special reduced rate of tax be provided for such gain.

The Treasury Department and the IRS have determined that it is clear under proposed § 1.965–2(f)(1) that no adjustments are made under section 961 with respect to section 965(b) previously taxed earnings and profits, given that section 965(b) previously taxed earnings and profits do not represent amounts included in income by a section 958(a) U.S. shareholder, as required by section 961, and that adjustments apply only with respect to section 958(a) stock or applicable property owned directly by a section 958(a) U.S. shareholder (or in certain cases, through foreign pass-through entities). *Id.* Accordingly, the final regulations do not modify the proposed regulations in this regard.

The Treasury Department and the IRS have also determined that it would create economic distortions to provide for upward basis adjustments with respect to section 965(b) previously taxed earnings and profits without providing for corresponding downward basis adjustments with respect to portions of specified E&P deficits taken into account to reduce section 965(a) inclusion amounts and requiring gain recognition to the extent such adjustments exceed basis. Accordingly, it would not be appropriate to provide that section 965(b) previously taxed earnings and profits are treated as included in income under section 951 for purposes of section 961, even though the final regulations provide as much for purposes of section 1248(d), as discussed in Part III.B of this Summary of Comments and Explanation of Revisions. Moreover, the Treasury Department and the IRS have concluded that rules coordinating upward and downward tiered-basis adjustments are not warranted. Additionally, given the electivity of the specified basis adjustments and the ability of taxpayers to take into account factors like the tax rate at which gain is recognized as a result of the basis election, the Treasury Department and the IRS decline to provide rules resulting in the application of a special tax rate to such gain.

However, the Treasury Department and the IRS have determined that it is appropriate to not require downward basis adjustments in excess of basis (in order to avoid gain recognition under § 1.965–2(h)(3) to the extent of such excess) if the corresponding upward basis adjustments are correspondingly limited. Accordingly, § 1.965–2(f)(2)(ii)(B)(*2*) provides that downward basis adjustments to the stock of, or applicable property with respect to, an E&P deficit foreign corporation may be limited to the available basis with the result that gain is not recognized (the ''to-the-extent rule''). If the to-the-extent rule limits downward basis adjustments, the corresponding upward basis adjustments are correspondingly limited. *See* § 1.965–2(f)(2)(ii)(A)(*2*)(*ii*). However, the section 958(a) U.S. shareholder can (subject to certain limitations) designate the stock of, or applicable property with respect to, a DFIC with respect to which the upward adjustments are made. *Id.* A taxpayer may also choose to make the full amounts of the adjustments that would have been required under the proposed regulations and recognize gain under § 1.965–2(h)(3) as necessary. *See* § 1.965–2(f)(2)(ii)(A)(*1*) and (f)(2)(ii)(B)(*1*).

3. Timing of Basis Adjustments

The proposed regulations provide that the specified basis adjustments are made as of the close of the last day of the last taxable year of the specified foreign corporation that begins before January 1, 2018. Proposed § 1.965–2(h)(1). Questions have been raised about the application of the proposed rules in the case of a specified foreign corporation that ceases to be a CFC during its last taxable year of the specified foreign corporation that begins before January 1, 2018, due to a disposition of its stock. As discussed in Part II.H of this Summary of Comments and Explanation of Revisions, under section 951, a section 958(a) U.S. shareholder of such a specified foreign corporation would generally have an inclusion under section 951 with respect to the corporation if it were a DFIC because it would own stock of the specified foreign corporation on the last day on which the corporation was a controlled foreign corporation. Accordingly, under § 1.961–1(a), a basis adjustment would generally be allowed as of the last day in the taxable year of such corporation on which it is a controlled foreign corporation.

As discussed in Part II.H of this Summary of Comments and Explanation of Revisions, because a specified foreign corporation is treated as a CFC for purposes of § 1.965–1(b) and sections 951 and 961, the Treasury Department and the IRS have determined that income inclusion provisions in the final regulations should be consistent with these rules, and thus the basis adjustment provisions should as well, and the relevant rules in the final regulations are revised accordingly. *See* §§ 1.965–1(f)(30)(i) and (f)(34) and

1.965–2(h)(1) (providing that a specified basis adjustment is made as of the last day of the last taxable year of the specified foreign corporation that begins before January 1, 2018, on which it is a specified foreign corporation).

4. Share-by-Share Requirement for Basis Adjustments

Proposed § 1.965–2(h)(3) requires that the specified basis adjustments be made on a share-by-share basis. A comment suggested that the specified basis adjustments be made in the aggregate to mitigate taxpayer burden in tracking and prevent what it described as inappropriate gain recognition. However, adjustments to basis under section 961 for inclusions under section 951 and distributions of previously taxed E&P are generally required to be made on a share-by-share basis, and it will be necessary to have information concerning basis share-by-share going forward. Furthermore, the to-the-extent rule included in the final regulations will provide relief to taxpayers that have low-basis and high-basis shares. Accordingly, the comment is not adopted.

5. Basis Adjustments With Respect to Foreign Pass-Through Entity

A comment suggested that the final regulations provide that for purposes of the specified basis adjustments with respect to foreign pass-through entities, the principles of section 743(b) apply for associating a specified basis adjustment with a section 958(a) U.S. shareholder with respect to whom it is made. The comment also recommended clarification of the basis consequences of a distribution in a structure with a foreign pass-through entity. The Treasury Department and the IRS will consider these recommendations in connection with future guidance concerning the application of sections 959 and 961 generally.

See Part II.B of this Summary of Comments and Explanation of Revisions for a discussion of the treatment of a controlled domestic partnership treated as a foreign partnership under § 1.965–1(e) for purposes of the specified basis adjustment rules relating to foreign pass-through entities.

6. Section 962 Elections

The proposed regulations reserve on the issue of basis adjustments with respect to a section 958(a) U.S. shareholder that made a section 962 election. A comment noted that section 961(a)'s limitation on a basis increase to the amount of tax paid under chapter 1 of the Code with respect to amounts required to be included in income under section 951(a) (in the case of a United States shareholder who has made a section 962 election for the taxable year) means that a section 958(a) U.S. shareholder that makes a section 965(h) election may only increase its basis as it pays its section 965(h) net tax liability over time. As suggested by the comment, the final regulations include this rule. *See* § 1.965–2(e)(2) and (h)(1). Consistent with this rule, no adjustments apply for section 965(b) previously taxed earnings and profits and the use of specified E&P deficits. *See* § 1.965–2(f)(2)(ii)(C).

A comment requested that the final regulations provide guidance concerning the consequences if an individual section 958(a) U.S. shareholder that made both a section 962 election and a section 965(h) election that applied to a section 965(a) inclusion with respect to a DFIC disposed of the DFIC stock before all of its section 965(h) net tax liability had been paid, and thus before all corresponding basis adjustments had been made. The comment recommended that the basis adjustments be treated as made immediately before the disposition. The Treasury Department and the IRS have determined that this treatment would not be appropriate, because it would allow the shareholder to obtain the benefits of the basis increase without having paid the corresponding tax, and do not adopt the comment.

The comment also requested that the final regulations clarify the basis adjustments to be made in the case of a domestic pass-through owner that has made a section 962 election applicable to its distributive share of a domestic pass-through entity's section 965(a) inclusion amount. The issue raised by the comment is a longstanding issue of general applicability within subpart F that is outside of the scope of regulations concerning section 965. Accordingly, the Treasury Department and the IRS decline to adopt the comment, and the final regulations, like the proposed regulations, address only basis adjustments applicable to section 958(a) U.S. shareholders of DFICs.

E. Gain Reduction Rule and Translation Rates

The proposed regulations provide that, for purposes of section 986(c), foreign currency gain or loss with respect to distributions of section 965(a) previously taxed earnings and profits is determined based on movements in the exchange rate between December 31, 2017, and the date on which such E&P are actually distributed. *See* proposed § 1.986(c)–1(a). The proposed regulations also provide that any gain or loss recognized under section 986(c) with respect to distributions of section 965(a) previously taxed earnings and profits is reduced in the same proportion as the reduction by a section 965(c) deduction amount of the section 965(a) inclusion amount that gave rise to such section 965(a) previously taxed earnings and profits. *See* proposed § 1.986(c)–1(b). Moreover, proposed § 1.986(c)–1(c) provides that section 986(c) does not apply with respect to distributions of section 965(b) previously taxed earnings and profits.

The proposed regulations also provide that if a section 958(a) U.S. shareholder receives a distribution from a DFIC (including through a chain of ownership described under section 958(a)) during the inclusion year of the DFIC that is attributable to section 965 previously taxed earnings and profits of the DFIC, then the amount of gain that otherwise would be recognized under section 961(b)(2) by the section 958(a) U.S. shareholder with respect to the section 958(a) U.S. shareholder's section 958(a) stock of the DFIC or interest in applicable property with respect to the DFIC by reason of the distribution is reduced (but not below zero) by an amount equal to the section 965 previously taxed earnings and profits of the DFIC with respect to the section 958(a) U.S. shareholder. Proposed § 1.965–2(g)(1)(i).

The proposed regulations do not specify the translation rate to be used for purposes of reducing the amount of gain that otherwise would be recognized under section 961(b)(2) when a DFIC that has a functional currency other than the U.S. dollar distributes section 965(b) previously taxed earnings and profits. In the absence of a rule providing that section 965(b) previously taxed earnings and profits should be translated into U.S. dollars at the spot rate on December 31, 2017, fluctuations in exchange rates would cause distortions in the application of the gain reduction rule to distributions of section 965(b) previously taxed earnings and profits. For example, distributions of section 965(b) previously taxed earnings and profits denominated in a currency other than the U.S. dollar during an inclusion year could result in gain recognition attributable to fluctuations in exchange rates, notwithstanding the fact that proposed § 1.986(c)–1 specifically provides that a taxpayer is not required to recognize foreign currency gain or loss on such distributions. To prevent recognition of gain under these circumstances, the final regulations provide that the translation rate to be used with respect

to section 965(b) previously taxed earnings and profits for purposes of the gain reduction rule is the spot rate on December 31, 2017.

The Treasury Department and the IRS are considering proposing regulations under section 961 to similarly ensure that a taxpayer is not required to recognize gain by reason of fluctuations in exchange rates on distributions of section 965(b) previously taxed earnings and profits in taxable years after the inclusion year. In addition, the Treasury Department and the IRS intend to study the proper amount of gain or loss, including foreign currency gain or loss, to be recognized on distributions of previously taxed E&P, including previously taxed E&P other than section 965(a) previously taxed earnings and profits and section 965(b) previously taxed earnings and profits.

IV. Comments and Changes to Proposed § 1.965–3—Section 965(c) Deductions

Proposed § 1.965–3 provides rules regarding the determination of section 965(c) deductions and section 965(c) deduction amounts. The comments and modifications with respect to these rules are discussed in this Part IV.

A. Disregard of Certain Assets To Prevent Double Counting

The proposed regulations contain rules for disregarding certain assets for purposes of determining the aggregate foreign cash position of a section 958(a) U.S. shareholder. *See* proposed § 1.965–3(b).

1. Disregard of Certain Obligations Between Related Specified Foreign Corporations

One such rule in the proposed regulations provides that, for purposes of determining the aggregate foreign cash position of a section 958(a) U.S. shareholder, accounts receivable, accounts payable, short-term obligations, and derivative financial instruments between related specified foreign corporations are disregarded, if applicable, on a cash measurement date of the specified foreign corporations to the extent of the smallest of the section 958(a) U.S. shareholder's ownership percentages of section 958(a) stock of the specified foreign corporations owned by the section 958(a) U.S. shareholder on the cash measurement date. Proposed § 1.965–3(b)(1).

A comment suggested that the rule in proposed § 1.965–3(b)(1) be extended to permit the same treatment for third-party accounts payable and third-party accounts receivable held by related specified foreign corporations of a section 958(a) U.S. shareholder. The comment also suggested that all members of a consolidated group that are section 958(a) U.S. shareholders be treated as a single section 958(a) U.S. shareholder for purposes of such a rule. The Treasury Department and the IRS do not adopt this comment for several reasons. First, although the statute explicitly allows third-party accounts payable held by a specified foreign corporation to be netted against the same specified foreign corporation's third-party accounts receivable for purposes of determining its cash position, it does not provide for netting of third-party payables and third-party receivables among a section 958(a) U.S. shareholder's specified foreign corporations for purposes of determining that section 958(a) U.S. shareholder's aggregate foreign cash position. *See* section 965(c)(3)(B)(ii) and (c)(3)(C). Second, the statutory language and the legislative history direct the Secretary to address the double counting of accounts receivable and accounts payable between related specified foreign corporations of a section 958(a) U.S. shareholder but do not grant authority to issue rules allowing one specified foreign corporation's third-party accounts payable to offset another specified foreign corporation's third-party accounts receivable. *See* section 965(c)(3)(D); H.R. Rep. No. 115–446, at 615 (2017). Furthermore, allowing third-party payables and third-party receivables of all related specified foreign corporations of a section 958(a) U.S. shareholder to be netted would require administratively onerous allocation rules. The final regulations therefore do not extend the rule in proposed § 1.965–3(b)(1) to cover third-party accounts payable and third-party accounts receivable held by related specified foreign corporations with a common section 958(a) U.S. shareholder.

2. Disregard of Other Assets Upon Demonstration of Double-Counting

Another rule in the proposed regulations intended to prevent double counting provides that, in determining the aggregate foreign cash position of a section 958(a) U.S. shareholder, amounts of net accounts receivable, actively traded property, and short-term obligations of a specified foreign corporation are disregarded to the extent such amounts are attributable to amounts taken into account in determining the section 958(a) U.S. shareholder's pro rata share of the cash position of another specified foreign corporation on the same cash measurement date. Proposed § 1.965–3(b)(2). In order for the rule in proposed § 1.965–3(b)(2) to apply, a section 958(a) U.S. shareholder must explain, in a statement attached to its timely filed return for its inclusion year, why there would otherwise be double-counting. *Id.*

a. Expansion

Comments recommended that the rule in proposed § 1.965–3(b)(2) be expanded to cover all assets constituting a specified foreign corporation's cash position, which are enumerated in section 965(c)(3)(B). Under this formulation, a section 958(a) U.S. shareholder would be able to disregard cash held by its specified foreign corporation (or any other asset described in section 965(c)(3)(B)) on a cash measurement date to the extent attributable to amounts already taken into account in determining the section 958(a) U.S. shareholder's pro rata share of the cash position of another specified foreign corporation on such cash measurement date.

The Treasury Department and the IRS do not adopt this recommendation for a number of reasons. First, extending the rule in proposed § 1.965–3(b)(2) to apply to assets other than net accounts receivable, actively traded property, and short-term obligations would be inconsistent with section 965(c)(3)(D), which expressly identifies net accounts receivable, actively traded property, and short-term obligations as assets not to be taken into account by a section 958(a) U.S. shareholder for purposes of determining its aggregate foreign cash position to the extent the shareholder demonstrates to the Secretary's satisfaction that such amount is so taken into account by the shareholder with respect to another specified foreign corporation. The other assets described in section 965(c)(3)(C), including cash, are not mentioned in section 965(c)(3)(D). Second, the Treasury Department and the IRS have determined that expanding the rule in proposed § 1.965–3(b)(2) to cover all assets taken into account in determining a specified foreign corporation's cash position would require complex tracing rules to ensure that each asset was already taken into account by a section 958(a) U.S. shareholder with respect to another specified foreign corporation and have determined that such rules would entail significant administrative and compliance challenges. Accordingly, the final regulations do not expand the rule in proposed § 1.965–3(b)(2) to allow a section 958(a) U.S. shareholder to disregard assets other than those specifically enumerated in section 965(c)(3)(D).

b. Clarification of Cash Measurement Dates

Comments also recommended that the rule in proposed § 1.965–3(b)(2) be clarified so that relief from double-counting is available with respect to a specified foreign corporation when an amount is taken into account in determining the section 958(a) U.S. shareholder's pro rata share of the cash position of another specified foreign corporation on such other specified foreign corporation's corresponding cash measurement date even if the cash measurement date is not the same calendar date for both specified foreign corporations.

The Treasury Department and the IRS have concluded that section 965(c)(3)(D) allows relief from double counting whenever a section 958(a) U.S. shareholder can establish that net accounts receivable, actively traded property, or short-term obligations are ''taken into account . . . with respect to another specified foreign corporation.'' The statute does not require that an amount must have been taken into account with respect to another specified foreign corporation on the same day. Therefore, in response to the comments, the final regulations amend the rule in proposed § 1.965–3(b)(2) to clarify that double-counting relief with respect to a specified foreign corporation is available when an amount is taken into account in determining the section 958(a) U.S. shareholder's pro rata share of the cash position of another specified foreign corporation on the other specified foreign corporation's corresponding cash measurement date. Section 1.965–3(b)(2). Corresponding clarifications are made for consistency in § 1.965–3(b)(1).

3. Notional Cash Pooling Arrangements

Comments requested guidance providing that for purposes of computing a section 958(a) U.S. shareholder's aggregate foreign cash position, notional cash pooling arrangements are treated as creating intercompany receivables. The facts and circumstances of each notional cash pool, including the underlying contractual rights and obligations of the parties to the arrangement and the role of the unrelated cash pool provider in the arrangement, are varied. Whether a notional cash pooling arrangement is treated as in substance creating a loan between and among participants, rather than between the participant and the unrelated cash pool provider, depends on the application of federal income tax principles to the particular facts and circumstances of the arrangement. Accordingly, the Treasury Department and the IRS do not adopt these comments.

B. Disregard of Portion of Cash Position of Noncorporate Entities Treated as Specified Foreign Corporations

Section 965(c)(3)(E) provides that an entity (other than a corporation) is treated as a specified foreign corporation of a United States shareholder for purposes of determining the United States shareholder's aggregate foreign cash position if any interest in the entity is held by a specified foreign corporation of the United States shareholder (determined after application of the rule in this sentence) and the entity, if it were a foreign corporation, would be a specified foreign corporation of the United States shareholder. A comment requested confirmation that application of section 965(c)(3)(E) to treat a noncorporate entity as a specified foreign corporation could depend on ownership by other owners of the noncorporate entity and on the definition of United States shareholder applicable for the year in which the status of a foreign corporation as a specified foreign corporation is being determined. The Treasury Department and the IRS have determined that this point is clear from the definition of specified foreign corporation. The comment also suggested that the Treasury Department and the IRS consider limitations on attribution for purposes of determining whether a noncorporate entity would be a specified foreign corporation if it were a foreign corporation. The Treasury Department and the IRS have determined that the special attribution rule described in Part II.K of this Summary of Comments and Explanation of Revisions, as modified to a ten-percent threshold in the final regulations, would apply for purposes of the noncorporate entity rule and that no additional limitations are warranted. The Treasury Department and the IRS have also determined that it is clear under the statute that section 951(b) as in effect for years of foreign corporations beginning before January 1, 2018, applies for purposes of determining whether a noncorporate entity would be a specified foreign corporation if it were a foreign corporation for purposes of section 965(c)(3)(E), given that the relevant year for application of the rule is the last taxable year of a foreign corporation beginning before January 1, 2018.

A comment also requested guidance clarifying the application of section 965(c)(3)(E) to noncorporate entities only partially owned by a specified foreign corporation. The legislative history to section 965(c)(3)(E) indicates that it was intended that ''the cash position of a U.S. shareholder . . . not generally include the cash attributable to a direct ownership interest in a partnership,'' and that the Treasury Department and the IRS ''provide guidance for taking into account only the specified foreign corporation's share of the partnership's cash position, and not [an] interest directly owned by the U.S. shareholder.'' H.R. Rep. No. 115–446, at 621 (2017). Accordingly, the final regulations include a rule in § 1.965–3(b)(3) providing that if section 965(c)(3)(E) applies to an entity, the section 958(a) U.S. shareholder's pro rata share of the cash position of the entity is reduced by the amount attributable to deemed stock of the entity not owned (within the meaning of section 958(a)) by a specified foreign corporation of the section 958(a) U.S. shareholder. This rule is illustrated in the example in § 1.965–3(b)(4)(v).

C. Increase of Income by Section 965(c) Deduction of Expatriated Entity

Under proposed § 1.965–3(d)(1), if a person is allowed a section 965(c) deduction and becomes an expatriated entity, in certain circumstances, the person must pay tax equal to 35 percent of the person's section 965(c) deductions. *See also* section 965(l)(1). A comment recommended clarifying and limiting the definition of expatriated entity to exclude United States individuals on the theory that the reference to ''entity'' in section 965(l)(2) was intended to so provide. Section 965(l)(2) defines expatriated entity by cross-reference to the definition provided in section 7874(a)(2), which includes not only entities but certain persons (which could be individuals) related to the entity at issue; therefore, the Treasury Department and the IRS have determined that section 965(l)(2) does not apply only to an entity but potentially to any person that is an expatriated entity, and the final regulations are clarified accordingly. *See* § 1.965–3(d)(2).

D. Treatment of Section 965(c) Deductions

Under the proposed regulations, a United States person that must pay tax under section 4940 or 1411 on a section 965(a) inclusion cannot take into account a section 965(c) deduction for purposes of determining the amount of such tax. *See* proposed § 1.965–3(f)(3) and (4). A comment recommended that the section 965(c) deduction be allowed for purposes of computing the amount

of tax due under section 1411. It suggested that the rule in proposed § 1.965–3(f)(3) was inconsistent with the rule in § 1.1411–4(f)(3)(ii), which takes into account in determining net investment income itemized deductions that are investment expenses (as defined in section 163(d)(4)(C)). However, § 1.1411–4(f)(3)(ii) is inapplicable because § 1.965–3(f)(1) provides that a section 965(c) deduction is not an itemized deduction. The Treasury Department and the IRS have determined that the section 965(c) deduction was only intended to reduce the rate of tax attributable to income taxes contained in chapter 1 of the Code. *See* H.R. Rep. No. 115–466, at 620 (2017). Accordingly, the final regulations continue to provide that for purposes of section 1411 and § 1.1411–4(f)(6), a section 965(c) deduction is not treated as a deduction properly allocable to a corresponding section 965(a) inclusion. Section 1.965–3(f)(3).

Another comment suggested that the final regulations clarify whether a section 965(c) deduction is taken into account for purposes of the tax imposed under section 4968. Because section 4968(c) provides that net investment income subject to the tax is determined under rules similar to the rules of section 4940(c), and § 1.965–3(f)(4) provides that for purposes of section 4940(c)(3)(A), a section 965(c) deduction is not treated as an ordinary and necessary expense paid or incurred for the production or collection of gross investment income, the Treasury Department and the IRS have determined that it is clear that a section 965(c) deduction is not taken into account for purposes of section 4968, and no clarification is necessary. The comment also requested rules addressing the basis of the stock of a DFIC for purposes of section 4968; however, such rules would be outside of the scope of this rulemaking, and the request for such guidance is declined.

The comment also recommended that the final regulations clarify that a section 965(c) deduction is a deduction taken into account under section 62(a) in determining an individual's adjusted gross income. The Treasury Department and the IRS have determined that such treatment is appropriate and the final regulations are modified to so provide. *See* § 1.965–3(f)(1).

V. Comments and Changes to Proposed § 1.965–4—Disregard of Certain Transactions

Proposed § 1.965–4 sets forth rules that disregard certain transactions for purposes of applying section 965. Specifically, proposed § 1.965–4 provides rules that disregard (i) transactions undertaken with a principal purpose of changing a section 965 element of a United States shareholder, (ii) certain changes in method of accounting and entity classification elections, and (iii) certain transactions occurring between E&P measurement dates. The comments and modifications with respect to these rules are discussed in this Part V.

A. Scope and Consequences of Anti-Abuse Rules Generally

The rules under proposed § 1.965–4(b) through (e) (''anti-abuse rules'') relate to transactions undertaken with a principal purpose of changing a section 965 element of a United States shareholder and certain changes in method of accounting and entity classification elections. They provide that transactions subject to those rules are ''disregarded for purposes of determining the amounts of all section 965 elements'' of a United States shareholder. Comments questioned the consequences of disregarding a transaction under these rules, including with respect to certain E&P and foreign tax credit calculations. The final regulations retain the approach in the proposed regulations, which do not describe the consequences of disregarding a transaction other than the consequences with respect to the section 965 elements of a United States shareholder. A discussion of, or rules regarding, the consequences of these transactions for other purposes is outside the scope of the final regulations. However, the Treasury Department and the IRS have determined that it is appropriate to mitigate double taxation that could result from the application of the anti-abuse rules to a liquidation. Accordingly, § 1.965–4(e)(4) provides that in the case of a liquidation of a specified foreign corporation that is disregarded for purposes of determining the section 965 elements of a United States shareholder pursuant to § 1.965–4(b) or (c)(2), for purposes of determining the amounts of the section 965 elements of the United States shareholder, the date of the liquidation generally is treated as the last day of the taxable year of the specified foreign corporation. Special rules apply with respect to liquidations resulting from entity classification elections, including a rule that may defer the date of liquidation for this purpose to the date on which the entity classification election is filed. For example, if a domestic corporation (USP) wholly owns a foreign subsidiary (FS) that has a taxable year ending on November 30, and an entity classification election is filed on November 15, 2017, to treat FS as an entity that is disregarded as an entity separate from its owner for U.S. federal income tax purposes (''disregarded entity'') effective on October 1, 2017, then any transactions undertaken by FS through and including November 30, 2017, would be taken into account for purposes of determining the post-1986 earnings and profits and accumulated post-1986 deferred foreign income of FS, and any transactions involving FS after November 30, 2017, would not be taken into account for such purposes. Furthermore, any section 965(a) previously taxed earnings and profits and section 965(b) previously taxed earnings and profits of FS would be taken into account in determining the all earnings and profits amount under § 1.367(b)–3(b) with respect to FS.

Comments also requested various exceptions from the anti-abuse rules for transactions that do not reduce the overall U.S. federal income tax liability of United States persons resulting from the application of section 965. In response to these comments, the final regulations provide an exception from the anti-abuse rules for certain incorporation transactions. Under the exception, the anti-abuse rules do not apply to disregard a transfer of stock of a specified foreign corporation by a United States shareholder to a domestic corporation (for this purpose, including an S corporation), provided that the section 965(a) inclusion amount with respect to the transferred stock of the specified foreign corporation is not reduced and that the aggregate foreign cash position of both the transferor and the transferee is determined as if each had held the transferred stock of the specified foreign corporation owned by the other on each of the cash measurement dates. *See* § 1.965–4(e)(3).

B. Transactions With a Principal Purpose of Changing a Section 965 Element

1. General Rules

Comments suggested that the anti-abuse rules be eliminated and that, if retained, the anti-abuse rules in proposed § 1.965–4(b) not contain rebuttable presumptions or per se rules. The Treasury Department and the IRS have determined that the rebuttable presumptions and per se rules are appropriate for tax administration reasons. They identify situations in which tax avoidance is highly likely or unlikely in order to minimize the number of circumstances in which more

detailed facts and circumstances analyses are required.

A comment also suggested that ordinary course exceptions be provided for all of the anti-abuse rules, so that the rules can never apply to ordinary course transactions. The Treasury Department and the IRS have determined that excluding ordinary course transactions from the presumptions in the anti-abuse rules, rather than the overall application of the rules, while still applying those rules to transactions that were actually undertaken with a principal purpose of changing a section 965 element, strikes the appropriate balance between administrability and taxpayer certainty, and therefore do not adopt the comment.

A comment also suggested that the final regulations omit the requirement in proposed § 1.965–4(b)(2) that a taxpayer file a statement indicating that it takes the position that a presumption in proposed § 1.965–4(b) is rebutted. The Treasury Department and the IRS have determined that it is important for fair and effective tax administration that the IRS be aware of transactions for which there is a presumption of a principal purpose of changing a section 965 element and do not adopt the suggestion.

2. Cash Reduction Transactions and Specified Distributions

The proposed regulations provide that a cash reduction transaction is presumed to be undertaken with a principal purpose of changing a section 965 element of a United States shareholder unless the cash reduction transaction occurs in the ordinary course of business. Proposed § 1.965–4(b)(2)(iii)(A). A cash reduction transaction includes a transfer of cash, accounts receivable, or cash-equivalent assets by a specified foreign corporation to a United States shareholder of the specified foreign corporation or a person related to a United States shareholder of the specified foreign corporation if the transfer or assumption reduces the aggregate foreign cash position of the United States shareholder. *Id.* The presumption may be rebutted only if the facts and circumstances clearly establish that the transaction was not undertaken with a principal purpose of changing the amount of a section 965 element of a United States shareholder, and a taxpayer taking the position that the presumption is rebutted must attach a statement to its tax return disclosing that it has rebutted the presumption. Section 1.965–4(b)(2)(i).

The proposed regulations also set forth a ''per se'' rule providing that a cash reduction transaction will be treated per se as being undertaken with a principal purpose of changing the amount of a section 965 element of a United States shareholder if it is a specified distribution. Proposed § 1.965–4(b)(2)(iii)(B). The proposed regulations provide, in part, that a cash reduction transaction that is a distribution by a specified foreign corporation of a United States shareholder will be considered a specified distribution if and to the extent that, at the time of the distribution, there was a plan or intention for the distributee to transfer cash, accounts receivable, or cash-equivalent assets to any specified foreign corporation of the United States shareholder. *Id.* Under the proposed regulations, a cash reduction transaction that is a distribution by a specified foreign corporation to a United States shareholder of the specified foreign corporation, other than a specified distribution, is treated per se as not being undertaken with a principal purpose of changing the amount of a section 965 element of a United States shareholder. *Id.*

The Treasury Department and the IRS received requests that the final regulations exempt certain transactions from the definition of cash reduction transaction and specified distribution. A comment requested that a cash reduction transaction not be treated as a specified distribution if, and to the extent that, the distributee does not, within 24 months following the distribution, transfer cash, accounts receivable, or cash equivalents to a specified foreign corporation of the United States shareholder. Although the Treasury Department and the IRS have determined that the amount of time between a distribution and a transfer of cash may be relevant in determining whether there was a plan or intent for the distributee to transfer the cash, the Treasury Department and the IRS have determined that a per se rule disregarding transfers outside of a certain window is not warranted, as long-term plans for a transfer could exist, and providing such a rule would facilitate tax avoidance. A comment also suggested that it be clarified that any transferred amount disregarded be limited to the amount of the subsequent transfer. Because a specified distribution is defined as a cash reduction transaction ''to the extent that'' there is a plan or intent to re-transfer cash, the Treasury Department and the IRS have determined that it is already clear that the amount of a specified distribution is limited to the amount re-transferred, and accordingly no additional clarification is required.

Another comment requested that the per se rule not apply to cash reduction transactions planned before November 2, 2017. The final regulations do not adopt this requested change, as the Treasury Department and the IRS have determined that a rule exempting cash reduction transactions in planning stages before November 2, 2017, from the application of the per se rule would necessarily have to account for the possibility of subsequent plan modification or amendment and would require an inquiry regarding a taxpayer's subjective intent, resulting in a standard that is difficult to administer.

Comments also suggested that a cash reduction transaction should not be considered a specified distribution to a United States shareholder by reason of a transfer of cash to a specified foreign corporation of the United States shareholder in the ordinary course of business. The Treasury Department and the IRS agree that payments pursuant to a legal obligation entered into before the Act's introduction in Congress should not be considered to give rise to a plan or intention for the distributee in a cash reduction transaction to transfer cash, accounts receivable, or cash-equivalent assets to a specified foreign corporation of the distributee. Accordingly, the final regulations provide that in the case of a cash reduction transaction that is a distribution by a specified foreign corporation of a United States shareholder, there is not considered to be a plan or intention for the distributee to transfer cash, accounts receivable, or cash-equivalent assets to any specified foreign corporation of the United States shareholder if the transfer is made by the distributee pursuant to a legal obligation entered into before November 2, 2017. Section 1.965–4(b)(2)(iii)(B). If the taxpayer relies on this rule in determining that a cash reduction transaction is not a specified distribution, it must attach a statement to its return indicating that position. *Id.*

3. Pro Rata Share Transactions

The proposed regulations provide that a pro rata share transaction is presumed to be undertaken with a principal purpose of changing the amount of a section 965 element of a United States shareholder and treat certain internal group transactions as per se being undertaken with a principal purpose of changing the amount of a section 965 element of a United States shareholder. Proposed § 1.965–4(b)(2)(v). A comment requested that internal group transactions not be treated as per se having a principal purpose of changing

a section 965 element. The Treasury Department and the IRS have determined that the definition of internal group transactions is sufficiently narrowly tailored to apply the per se rule to tax-motivated transactions of the type that Congress intended the Treasury Department and the IRS to address and do not adopt the comment.

4. E&P Reduction Transactions

A comment noted that dividends paid by one specified foreign corporation to another between E&P measurement dates could potentially be subject to the rules in both proposed § 1.965–4(f) (disregarding specified payments in order to mitigate double-counting) and proposed § 1.965–4(b)(2)(iv) (which can result in disregarding certain transactions that reduce accumulated post-1986 deferred foreign income or post-1986 earnings and profits) and argued that the overlapping rules create a burden on taxpayers that should be ameliorated by exempting dividends between E&P measurement dates from the rules in § 1.965–4(b)(2)(iv). The Treasury Department and the IRS have determined that if such a dividend is disregarded pursuant to § 1.965–4(f), then it is clear that it is irrelevant whether it would also be disregarded under § 1.965–4(b), applying the presumption in § 1.965–4(b)(2)(iv), such that there would be no need for a taxpayer to bear the burden of rebutting the presumption. If, however, the dividend is not disregarded pursuant to § 1.965–4(f), and the taxpayer takes the position that it is also not disregarded under § 1.965–4(b), because it can rebut a presumption that applies under § 1.965–4(b)(2)(iv), then it is appropriate that the taxpayer be required to document that rebuttal for the reasons discussed in Part V.B.1 of this Summary of Comments and Explanation of Revisions. Accordingly, the comment is not adopted.

C. Changes of Accounting Method and Entity Classification Elections

A comment noted that a positive section 481 adjustment resulting from a change of accounting method could increase the section 965(a) inclusion amount and the amount of foreign income taxes deemed paid by a United States shareholder and thus be disregarded for purposes of determining the United States shareholder's section 965(a) inclusion amount, allowing some or all of the adjustment to escape taxation under section 965, even though the increase in foreign income taxes deemed paid was minimal. The Treasury Department and the IRS have determined that this would be inappropriate and modify the rule in proposed § 1.965–4(c)(1) to apply only if there is a reduction in a section 965(a) inclusion amount or an aggregate foreign cash position, or an increase in section 960 deemed paid taxes other than by reason of an increase in a section 965(a) inclusion amount. *See* § 1.965–4(c)(1)(i).

Comments suggested that the rule in proposed § 1.965–4(c)(1), which applies to changes in methods of accounting, not apply to changes from impermissible methods of accounting to permissible methods of accounting, and that the rule be conditioned on a principal purpose of changing a section 965 element. However, a principal purpose-based rule would be difficult to administer and unwarranted, given that changes after November 2, 2017, relating to specified foreign corporations likely would be tax-motivated. Moreover, the Treasury Department and the IRS have determined that allowing changes from impermissible methods of accounting to permissible methods of accounting to be taken into account will allow similarly situated taxpayers to take different positions in a way that is detrimental to the government, as taxpayers will choose to make currently those changes that result in reductions of tax due under section 965 while deferring such changes that would result in increases of tax due under section 965 until later years. Accordingly, the comments are not adopted.

Another comment requested that the final regulations permit the taxable year of a specified foreign corporation to be changed to a calendar year taxable year. Because neither the proposed regulations nor the final regulations affect the possibility of changing the accounting period of a specified foreign corporation, the final regulations do not adopt this comment. *But see* Rev. Proc. 2018–17, 2018–9 I.R.B. 384 (limiting certain changes in accounting periods of a specified foreign corporation).

In addition, comments raised questions regarding the scope of the rule in proposed § 1.965–4(c)(2), which applies to any entity classification election under § 301.7701–3 that is filed on or after November 2, 2017, and whether it is appropriate for that rule to be a per se rule that applies to all entity classification elections filed on or after that date. A comment suggested that the rule would inappropriately apply to a transaction that would have no impact on section 965 elements. Another comment suggested that certain transactions effectuated by entity classification elections, such as conversion of a United States shareholder from a domestic pass-through entity to a C corporation, or vice versa, should be excepted from the application of the rule. However, because an entity classification election is an election made specifically for tax purposes that could be made retroactively in order to be effective before November 2, 2017, and because the rule would only disregard such an election if it had the effect of changing a section 965 element, the final regulations do not change the rule from the proposed regulations. *But see* § 1.965–4(e)(3) (discussed in Part V.A of this Summary of Comments and Explanation of Revisions).

D. Application of Specified Payment Rule

The proposed regulations provide that certain amounts paid or incurred between related specified foreign corporations of a section 958(a) U.S. shareholder between E&P measurement dates that would otherwise reduce the post-1986 earnings and profits as of December 31, 2017, of the specified foreign corporation that paid or incurred such amounts are disregarded for purposes of determining the post-1986 earnings and profits of both of the specified foreign corporations as of the E&P measurement date on December 31, 2017. *See* proposed § 1.965–4(f)(1). Comments indicated that the requirement that the two specified foreign corporations have different tentative measurement dates in order for specified payments to be disregarded resulted in complexity and inappropriate results when there were multiple payments among specified foreign corporations during the period, such as in a series of dividends up a multi-level chain of specified foreign corporations. They also indicated that it was unclear how the tentative measurement date was to be determined in the case of a specified foreign corporation that was neither an E&P deficit foreign corporation nor a DFIC. Moreover, comments indicated that disregarding specified payments that were deductible payments only for purposes of section 965, but not other purposes, could create unintended foreign tax credit results, which results would not be remedied by the changes to the ordering rule in § 1.965–2(b) discussed in Part III.A of this Summary of Comments and Explanation of Revisions. One comment suggested that the specified payment rule should be refined to have an anti-abuse function.

The Treasury Department and the IRS have determined that detailed rules to address the fact patterns raised in the comments, such as rules to determine

the extent of double-counting, to except ordinary course payments, or to add ordering rules to determine whether a payment is a specified payment, would introduce more complexity than warranted and would be difficult to administer. However, in response to the comments, the final regulations eliminate the requirement that the specified foreign corporations between which a payment is made have different tentative measurement dates in order for the payment to be a specified payment disregarded under the rule and provide that a section 958(a) U.S. shareholder may choose not to apply the rule in § 1.965–4(f)(1), provided that it and all related section 958(a) U.S. shareholders do so with respect to all of their specified foreign corporations. Section 1.965–4(f)(1), (2), and (3).

VI. Comments and Changes to Proposed § 1.965–5 and § 1.965–6—Foreign Tax Credits

Proposed § 1.965–5 and § 1.965–6 provide rules with respect to foreign tax credits. The proposed regulations include, in addition to the foreign tax credit-specific rules of section 965, rules coordinating the provisions of section 965 with the foreign tax credit provisions as in effect before their repeal or amendment by the Act. The comments and modifications with respect to these rules are discussed in this Part VI.

A. Application and Determination of the Disallowance of the Applicable Percentage of Foreign Income Taxes

1. Disallowance of the Applicable Percentage of Foreign Income Taxes Attributable to Distributions of Previously Taxed Earnings and Profits

Under the proposed regulations, no deduction (including under section 164) or credit under section 901 is allowed for the applicable percentage (as defined in proposed § 1.965–5(d)) of any foreign income taxes ''paid or accrued'' with respect to any amount for which a section 965(c) deduction is allowed for a section 958(a) U.S. shareholder inclusion year. Proposed § 1.965–5(b). This includes foreign income taxes directly paid or accrued by a taxpayer attributable to a distribution of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits. A similar rule applies to deny the applicable percentage of any foreign income taxes ''treated as paid or accrued'' with respect to any amount for which a section 965(c) deduction is allowed for a section 958(a) U.S. shareholder inclusion year. Proposed § 1.965–5(c). For these purposes, foreign income taxes ''treated as paid or accrued'' include foreign income taxes deemed paid by the taxpayer under section 960 with respect to distributions of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits.

Comments recommended that the proposed regulations be modified to allow a credit for the applicable percentage of foreign income taxes directly paid or accrued under section 901 or treated as paid or accrued under section 960 on a distribution of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits. In general, these comments asserted that the disallowance of taxes attributable to a distribution of previously taxed E&P discourages the distribution of the previously taxed E&P, which the comments assert is inconsistent with the purpose of section 965. Comments also argued that the rule created administrative complexity and asked for guidance on how to track previously taxed E&P for purposes of applying this rule. Other comments acknowledged that providing a reduction for the foreign tax credits attributable to a distribution of previously taxed E&P based on the applicable percentage was appropriate.

The final regulations do not adopt the recommended changes. As an initial matter, guidance on tracking previously taxed E&P is outside the scope of this rulemaking. In addition, the Treasury Department and the IRS have determined that the rules under § 1.965–5(b) are consistent with the statutory purpose of sections 960 and 965 and do not discourage the repatriation of previously taxed E&P. In any event, the purpose of the foreign tax credit is not to encourage repatriation of E&P to the United States but to relieve double taxation. To the extent the income is subject to a lower effective rate of U.S. tax, it is consistent with the purpose of section 965(g) to reduce the credits allowed as part of relieving double taxation on such income.

Moreover, the statutory language of section 965(g) contemplates that the disallowance for the applicable percentage will apply to distributions of previously taxed E&P. Section 965(g)(1) provides, ''[n]o credit shall be allowed under section 901 for the applicable percentage of any foreign income taxes paid or accrued (or treated as paid or accrued). . . .'' In addition, section 965(g)(3) provides that no deduction is allowed for any tax for which credit is not allowable under section 901 by reason of section 965(g)(1). A deduction is allowed only for taxes directly paid or accrued by the taxpayer, not taxes deemed paid by the taxpayer. Because a U.S. taxpayer would ordinarily be subject to foreign tax only on a distribution from a foreign corporation, not on an income inclusion under U.S. tax law, ''taxes paid or accrued'' can only be understood to refer to foreign income taxes directly paid or accrued under section 901 with respect to a distribution to the taxpayer of previously taxed E&P. Allowing a full credit for all such foreign income taxes would render section 965(g)(3) meaningless. Accordingly, in order to give effect to the language of section 965(g)(3), foreign taxes paid or accrued on distributions of section 965(a) previously taxed earnings and profits and section 965(b) previously taxed earnings and profits are subject to the credit disallowance rules of section 965(g)(1).

Furthermore, there is no policy reason to differentiate between foreign income taxes attributable to a distribution of previously taxed E&P that are paid or accrued directly by the United States shareholder and are creditable under section 901 and those foreign income taxes that are paid or accrued by other CFCs as part of the distribution of the earnings to the United States shareholder and are creditable under section 960(a)(3). Thus, because section 965(g)(3) contemplates the disallowance of foreign tax credits attributable to distributions of previously taxed E&P when the foreign income taxes are directly paid or accrued by the United States shareholder, the final regulations continue to provide that the foreign tax credit is disallowed with respect to the applicable percentage of foreign income taxes deemed paid under section 960(a)(3) with respect to a distribution of previously taxed E&P in the same manner as credits are disallowed for foreign taxes deemed paid under section 960(a)(1) with respect to a section 965(a) inclusion.

Additionally, some comments raised specific objections about the application of these rules to foreign income taxes paid and deemed paid with respect to distributions of section 965(b) previously taxed earnings and profits, asserting that the disallowance is inappropriate because these earnings do not represent an amount for which a section 965(c) deduction is allowed. One comment also asserted that it was inappropriate to disallow the applicable percentage of foreign income taxes paid and deemed paid with respect to distributions of section 965(b) previously taxed earnings and profits because a distribution of section 965(b)

previously taxed earnings and profits results in a dollar-for-dollar reduction to basis (to the extent thereof), followed by gain recognition, because there is no automatic basis increase in the amount of such earnings under section 961. Additionally, the comment pointed out that the proposed regulations could create inequities between taxpayers because the proposed regulations could be read to imply that a taxpayer that had no section 965(a) inclusion amount because of the operation of section 965(b) had no applicable percentage, and thus no reduction in creditable foreign income taxes paid or deemed paid on distributions of the section 965(b) previously taxed earnings and profits.

As discussed in Part VI.B.1 of this Summary of Comments and Explanation of Revisions, the Treasury Department and the IRS have determined that section 965(b) previously taxed earnings and profits are treated as included in income under section 951(a) for purposes of section 960, and thus are treated similarly to section 965(a) previously taxed earnings and profits for purposes of applying section 965(g). Additionally, with respect to the reduction in basis associated with a distribution of section 965(b) previously taxed earnings and profits, the final regulations provide that a section 958(a) U.S. shareholder may elect to make certain basis adjustments to increase the basis of DFICs with section 965(b) previously taxed earnings and profits. *See* § 1.965–2(f)(2). Finally, comments concerning the applicable percentage for distributions of section 965(b) previously taxed earnings and profits are addressed in Part VI.A.4 of this Summary of Comments and Explanation of Revisions.

2. Compatibility of Applicable Percentage Credit Disallowance With U.S. Bilateral Income Tax Treaties

A comment stated that proposed § 1.965–5 is incompatible with the provisions of U.S. bilateral income tax treaties that provide for relief from double taxation. However, the credit against U.S. income tax provided for in these treaties is generally allowed ''[i]n accordance with the provisions and subject to the limitations of the law of the United States (as it may be amended from time to time without changing the general principle hereof).'' See, for example, paragraph 1 of Article 24 (Elimination of Double Taxation) of the income tax convention between the United States and Canada, as amended by the protocol signed June 14, 1983. This language provides that foreign tax credits allowed under the treaty are subject to the terms of the U.S. statutory credit, including ''provisions such as Code sections 901(c), 904, 905, 907, 908, and 911,'' but the applicable limitations of U.S. law are not limited to the illustrative listed provisions. See, for example, the U.S. Treasury Department Technical Explanation to the income tax convention between the United States and Canada, concerning Article 24, as amended by the protocol signed June 14, 1983.

The disallowance of the applicable percentage of foreign income taxes under section 965(g)(1) and § 1.965–5 is similar to the application of section 904 and other provisions in the Code that limit the allowable foreign tax credit. The disallowance takes into account the section 965(c) deduction and reflects the fact that, because of the section 965(c) deduction, the income included under section 965 is subject to an effective rate of U.S. tax that is significantly lower than the U.S. tax rates ordinarily imposed on corporations or individuals. Absent this disallowance, foreign income tax incurred with respect to the income included under section 965 could inappropriately be used to offset U.S. tax on unrelated foreign source income, rather than to mitigate double taxation incurred with respect to the taxable amount of the section 965(a) inclusion. Accordingly, the application of section 965(g)(1) and § 1.965–5 is consistent with the provisions of U.S. bilateral income tax treaties that provide for relief from double taxation.

3. Applicable Percentage With Respect to Foreign Income Taxes That Are Not Net Basis Taxes

The proposed regulations provide that no deduction or credit is allowed for the applicable percentage of net basis taxes imposed on a United States citizen by the citizen's jurisdiction of residence upon receipt of a distribution of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits. Proposed § 1.965–5(b). A comment recommended that the final regulations define ''net basis taxes'' and clarify that proposed § 1.965–5(b) does not apply to creditable gross basis income taxes.

Section 965(g) and proposed § 1.965–5(b) apply to all creditable foreign income taxes. The reference to ''net basis taxes'' was included in the proposed regulations for illustrative purposes only, and the taxes listed in proposed § 1.965–5(b) are not an exhaustive list of the taxes subject to proposed § 1.965–5(b). The final regulations clarify this accordingly. *See* § 1.965–5(b).

4. Applicable Percentage With Respect to Distributions of Section 965(b) Previously Taxed Earnings and Profits

The definition of applicable percentage in section 965(g) and proposed § 1.965–5(d) is computed based on a taxpayer's section 965(a) inclusion for a section 958(a) U.S. shareholder inclusion year. Comments noted that it was not clear under the proposed regulations how the applicable percentage with respect to section 965(b) previously taxed earnings and profits should be determined when a DFIC has section 965(b) previously taxed earnings and profits but the section 958(a) U.S. shareholder does not have an aggregate section 965(a) inclusion amount, because its pro rata shares of accumulated post-1986 deferred foreign income are entirely offset by its pro rata shares of specified E&P deficits. The final regulations provide that if there is no aggregate section 965(a) inclusion amount, the applicable percentage is 55.7 percent (that is, the applicable percentage that would apply if the section 965(b) previously taxed earnings and profits had been included in income and were an amount to which section 965(c)(1)(B) applied). *See* § 1.965–5(d)(2).

The final regulations also clarify how the applicable percentage applies with respect to domestic pass-through owners and with respect to distributions of previously taxed E&P. With respect to domestic pass-through owners, the final regulations provide that the applicable percentage determined under § 1.965–5(d)(1) or (2) with respect to a domestic pass-through entity applies with respect to taxes deemed paid by a domestic pass-through owner even if the domestic pass-through entity does not have a section 965(a) inclusion amount. Section 1.965–5(d)(3). With respect to foreign income taxes imposed on distributions of previously taxed E&P, the final regulations provide that the applicable percentage that is applied is the applicable percentage with respect to the section 958(a) U.S. shareholder and the section 958(a) U.S. inclusion year in which the section 958(a) U.S. shareholder had the section 965(a) inclusion as a result of which the section 965(a) previously taxed earnings and profits or the section 965(b) previously taxed earnings and profits first arose. Section 1.965–5(d)(4).

5. Applicable Percentage With Respect to Tax on Gain From Sale of Stock

The proposed regulations provide that the disallowance of foreign tax credits under section 965(g)(1) applies with respect to the applicable percentage of

foreign income taxes attributable to distributions of section 965(a) previously taxed earnings and profits and section 965(b) previously taxed earnings and profits. Proposed § 1.965–5(b). A comment requested guidance on whether the applicable percentage also applies to foreign income taxes imposed on an amount of a shareholder's gain from the sale of the specified foreign corporation's stock taken into account for foreign, but not U.S., income tax purposes, equal to its tax basis increase under section 961(a) or § 1.965–2(f)(2) by reason of section 965. The Treasury Department and the IRS have determined that under § 1.904–6, foreign tax imposed on a disposition of stock is associated with the gain (or other income) that is (or would be) recognized for U.S. tax purposes upon a taxable disposition, without regard to whether the taxpayer's basis in the stock (and, accordingly, the amount of gain recognized) is a different amount for U.S. and foreign tax purposes. Because no portion of a foreign tax imposed on the sale of a specified foreign corporation's stock is considered imposed with respect to its previously taxed E&P, the final regulations do not expand the scope of the rule in the proposed regulations.

B. Operation of Section 960(a)(3)

1. Disallowance of Credits for Foreign Taxes Treated as Deemed Paid Under Section 960(a)(1) With Respect to Section 965(b) Previously Taxed Earnings and Profits

The proposed regulations provide that no credit is allowed under section 960(a)(3) or any other section for foreign income taxes that would have been deemed paid under section 960(a)(1) with respect to the section 965(a) earnings amount that is reduced under proposed § 1.965–1(b)(2) or proposed § 1.965–8(b). Proposed § 1.965–5(c)(1)(ii). The Treasury Department and the IRS have received comments asserting that this rule should not be included in the final regulations. The final regulations maintain the rule from the proposed regulations.

Comments stated that allowing a deemed paid credit under section 960(a)(3) is necessary to avoid double taxation; however, there is no double taxation associated with section 965(b) previously taxed earnings and profits. The section 965(a) earnings amount offset by an aggregate foreign E&P deficit is excluded from U.S. taxable income and thereby effectively exempted from U.S. tax under section 965(b)(4)(A) and proposed § 1.965–1(b)(2) or proposed § 1.965–8(b). As a policy matter, this exclusion eliminates the need for a foreign tax credit. The purpose of the foreign tax credit is to mitigate double taxation by allowing foreign income taxes to reduce the U.S. tax that would otherwise be imposed on foreign source income. Allowing foreign income taxes imposed on income that is not subject to U.S. tax by reason of section 965(b) to be credited against U.S. tax on unrelated income would confer a windfall double benefit for taxpayers with section 965(b) previously taxed earnings and profits.

As a technical matter, section 965(b)(4)(A) treats section 965(a) earnings amounts offset by an aggregate foreign E&P deficit as previously included in income under section 951(a) ''for purposes of applying section 959.'' Accordingly, section 965(b) previously taxed earnings and profits are treated as previously taxed E&P resulting from a section 951(a) inclusion, despite never actually having been included in U.S. taxable income. Under section 960(a)(1), a domestic corporate shareholder that includes an amount in income under section 951(a) is deemed to have paid a ratable portion of the foreign corporation's foreign income taxes at the time of the income inclusion. Amounts treated as previously taxed E&P resulting from an income inclusion under section 951(a) should similarly be treated as having resulted in foreign taxes deemed paid under section 960(a)(1).

Section 960(a)(3) allows a credit for foreign income taxes paid by CFCs upon a subsequent distribution of the section 965(b) previously taxed earnings and profits through a chain of CFCs to the domestic corporate shareholder, but does not allow a credit for foreign income taxes that were previously deemed paid (or treated as deemed paid) under section 960(a)(1) when the amounts were included (or treated as included) in income under section 951(a). Because foreign income taxes attributable to a section 965(a) earnings amount that were offset by an aggregate foreign E&P deficit were treated as deemed paid under section 960(a)(1) when those earnings were treated as included in income under section 951(a), those taxes are not available to be deemed paid again under section 960(a)(3) upon a subsequent distribution of the section 965(b) previously taxed earnings and profits. Consistent with that treatment and with section 960(a)(2), the regulations under section 902 remove from the foreign corporation's pool of post-1986 foreign income taxes the foreign income taxes that are attributable to earnings included in income under section 951(a) or otherwise removed from its post-1986 undistributed earnings. *See* § 1.902–1(a)(8)(i).

Comments argue that the plain language of section 965(b)(4)(A) means that section 965(a) earnings amounts offset by an aggregate foreign E&P deficit are treated as income previously included under section 951(a) solely for purposes of applying section 959, and not for purposes of applying section 960(a). However, the application of section 959 is a precondition to the application of section 960(a)(3). The Treasury Department and the IRS have determined that section 960(a)(3) cannot be applied independently of section 959 and that the Act did not change the relationship between these sections. Indeed, the comments recognize the interaction between sections 959 and 960(a)(3) by recommending that a credit be allowed under section 960(a)(3) upon a distribution of section 965(b) previously taxed earnings and profits, which requires treating such amounts as previously taxed E&P for purposes of section 960(a)(3) as well as for purposes of section 959. If the section 965(b) previously taxed earnings and profits are treated as previously taxed E&P excluded from gross income on distribution under section 959(a) in applying section 960(a)(3), it necessarily follows that in applying that same section those amounts are treated as having been included in income under section 951(a) and resulted in foreign taxes deemed paid under section 960(a)(1) as well.

Some comments raised the concern that U.S. companies would face a higher U.S. tax burden by not being able to claim foreign tax credits under section 960(a)(3) for foreign income tax imposed on E&P that is not subject to tax in the United States by reason of section 965(b). The comments argued that this would reduce the competitive advantage Congress sought to confer through the enactment of the foreign tax credit regime and discourage repatriation of previously taxed E&P. However, the purpose of the foreign tax credit regime is to relieve double taxation of foreign source income by reducing U.S. tax on that income, not to guarantee that U.S. taxpayers will be able to use all foreign income taxes paid to reduce their U.S. tax burden. *See* section 904. The foreign tax credit regime was never intended to subsidize foreign income taxes that are paid in excess of the U.S. tax burden on the foreign source income. Because these earnings are not subject to U.S. tax, any foreign tax credits related to these earnings would only be used to offset other unrelated foreign source income.

One comment explained that allowing a deemed paid credit under section 960(a)(3) with respect to section 965(b) previously taxed earnings and profits is equivalent to allowing a deemed paid credit for foreign income tax paid in a year in which losses recognized for U.S. (but not foreign) tax purposes reduced post-1986 undistributed earnings. Pre-Act law, however, associated foreign income taxes paid by a foreign corporation in post-1986 years with its post-1986 undistributed earnings, but did not treat earnings offset by losses as giving rise to previously taxed E&P. Therefore, the statutory scheme allowed a credit for those taxes in connection with dividends or inclusions of those earnings, and not in connection with distributions of previously taxed E&P.

Relatedly, comments also suggested that the premise of section 965(b) is to treat an E&P deficit foreign corporation and a DFIC as a single corporation to the extent that a DFIC's accumulated post-1986 deferred foreign income is offset by an aggregate foreign E&P deficit. However, Congress did not adopt the single corporation approach, as evidenced by the allocation of the aggregate foreign E&P deficit to the DFICs under section 965(b). Section 965 as enacted requires a foreign corporation-by-foreign corporation determination, which method extends to the computation of the foreign tax credit. Congress did not change the computation of the deemed-paid credit to apply other than on a foreign corporation-by-foreign corporation basis.

After consideration of the comments, the Treasury Department and the IRS maintain the rule in the final regulations based upon both the technical analysis of the relevant sections of the Code and the underlying policy. As a result, no credit is allowed under section 960(a)(3) or any other provision of the Code for taxes attributable to section 965(a) earnings amounts offset by an aggregate foreign E&P deficit that would have been deemed paid under section 960(a)(1) had the amounts actually been included in income under section 951(a).

2. Definition of Upper-Tier Foreign Corporation

The proposed regulations provide that the credit allowed under section 960(a)(3) is only with respect to foreign income taxes imposed on an upper-tier foreign corporation on distributions of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits from a lower-tier foreign corporation. Proposed § 1.965–5(c)(1)(ii). A comment requested that the final regulations clarify that references to ''upper-tier foreign corporation'' includes a disregarded entity or partnership that is legally an owner of the specified foreign corporation in question, and that references to distributions similarly refer to legal distributions not to U.S. tax characterizations.

The final regulations do not broaden the definition of ''upper-tier foreign corporation'' as requested by the comment. To the extent that there is a distribution of previously taxed E&P from a foreign corporation to a disregarded entity or partnership that is owned by a foreign corporation, the foreign corporate owner would be considered an ''upper-tier foreign corporation.'' *See, e.g.,* section 702(a). Therefore, a credit would be allowed under section 960(a)(3), upon ultimate distribution of the previously taxed E&P to an eligible United States shareholder, for creditable foreign income taxes imposed on the disregarded entity or partnership that are considered paid by the foreign corporate owner for U.S. tax purposes with respect to the distribution of previously taxed E&P from the lower-tier foreign corporation. To the extent that there is a distribution of previously taxed E&P from a foreign corporation to a disregarded entity or partnership that is owned by a domestic corporation, the domestic corporate owner should be entitled to a credit under section 901 for the creditable foreign income taxes imposed on the disregarded entity or partnership that are considered paid by the domestic corporation for U.S. tax purposes. Therefore, there is no need to broaden the definition of ''upper-tier foreign corporation'' to include disregarded entities and partnerships.

Similar comments requested that the final regulations clarify that a tax imposed on a disregarded payment from a disregarded entity to an upper-tier foreign corporation that owns the disregarded entity is related to a distribution of previously taxed E&P. Another comment stated that the limitation of the credit allowed under section 960(a)(3) to foreign income taxes imposed on an upper-tier foreign corporation impedes the avoidance of double taxation with respect to foreign income taxes imposed on a lower-tier CFC upon distribution of its previously taxed E&P to an upper-tier CFC or foreign income taxes imposed on a first-tier CFC upon distribution of its previously taxed E&P to its United States shareholder. The Treasury Department and the IRS do not address these comments in the final regulations because the characterization of taxes incurred with respect to disregarded payments for purposes of section 960(a)(3) is outside of the scope of this rulemaking.

Finally, clarification was requested on whether the requirement that the previously taxed E&P be distributed by a lower-tier foreign corporation in order for taxes to be deemed paid with respect to the previously taxed E&P under section 960(a)(3) applies to both section 965(a) previously taxed earnings and profits and section 965(b) previously taxed earnings and profits, or just to the latter. The Treasury Department and the IRS have determined that regulations are clear that the requirement applies to both section 965(a) previously taxed earnings and profits and section 965(b) previously taxed earnings and profits. *See* § 1.965–5(c)(1)(ii).

C. Deemed Paid Credit Computation

1. Treatment of Adjustment Under Section 965(b)(4)(B)

The proposed regulations provide that, for purposes of section 902(c)(1), the post-1986 undistributed earnings of an E&P deficit foreign corporation are increased under section 965(b)(4)(B) and § 1.965–2(d)(2)(i)(A) as of the first day of the foreign corporation's first taxable year following the E&P deficit foreign corporation's last taxable year that begins before January 1, 2018. Proposed § 1.965–6(c)(3). Comments recommended that the final regulations conform to the language of section 965(b)(4)(B) to provide that these adjustments happen in the last taxable year that begins before January 1, 2018.

Section 965(b)(4)(B) provides that, for purposes of the Code, a United States shareholder's pro rata share of the E&P of any E&P deficit foreign corporation is increased by the amount of the specified E&P deficit of such corporation taken into account by the shareholder by reason of allocation of the deficit to a DFIC. Under section 902(c)(1), post-1986 undistributed earnings are based on the E&P of the foreign corporation, computed in accordance with sections 964(a) and 986, without diminution for dividends distributed during the taxable year. Pursuant to section 902(c)(8), Treasury regulations modify the computation of E&P included in post-1986 undistributed earnings as necessary to carry out the provisions of section 902. For example, under § 1.902–1(a)(9)(i), previously taxed earnings and profits arising in prior post-1986 taxable years are not included in post-1986 undistributed earnings. Section 965(o) also provides that the Treasury Department and IRS may issue regulations necessary to prevent the

avoidance of the purposes of section 965.

Given this background, the Treasury Department and the IRS have determined that post-1986 undistributed earnings should not be increased during the last taxable year of an E&P deficit foreign corporation beginning before January 1, 2018, as a result of section 965(b)(4)(B). An immediate increase could allow shareholders to claim deemed paid credits with respect to amounts earned after November 2, 2017, by E&P deficit foreign corporations even though such earnings were not in excess of accumulated deficits. That would result in a windfall to section 958(a) U.S. shareholders of DFICs and E&P deficit foreign corporations because such shareholders are not taxable on accumulated post-1986 deferred foreign income of a DFIC to the extent of the DFIC's allocable share of an aggregate foreign E&P deficit and, with respect to the E&P deficit corporation, they would be entitled to deemed paid taxes that they would not otherwise be eligible to claim because of the accumulated deficit, a result inconsistent with general operation of section 902. *See, e.g.,* § 1.902–1(b)(4). Additionally, the deemed paid taxes would not be subject to the disallowance for the applicable percentage provided for in section 965(g), even though the foreign income taxes were able to be deemed paid only as a result of the operation of section 965. Accordingly, the Treasury Department and the IRS do not amend this rule in the final regulations. *See* § 1.965–6(b)(3).

2. Deemed Paid Credits for E&P Deficit Foreign Corporations

The proposed regulations clarify that when the denominator of the section 902 fraction is zero or less than zero, the section 902 fraction is zero, and no foreign taxes are deemed paid. Proposed § 1.965–6(c)(2). A comment requested that the foreign taxes of an E&P deficit foreign corporation could be deemed paid with respect to a section 965(a) inclusion, for example, by allocation of such taxes pro rata to DFICs.

The Treasury Department and the IRS do not adopt the suggestion to treat the post-1986 foreign income taxes of an E&P deficit foreign corporation as taxes paid or accrued by a DFIC because there is no basis in the statute for modifying the computation of deemed paid credits in this manner. In addition, neither section 902 nor 960 nor the regulations issued under those sections provide for the allocation of taxes from one foreign corporation to another as suggested by the comment.

3. Application of Section 902 as if Section 965(a) Inclusion Were a Dividend

The proposed regulations provide, in relevant part, that for purposes of determining foreign taxes deemed paid under section 960(a)(1) with respect to a section 965(a) inclusion with respect to a DFIC, section 902 applies as if the section 965(a) inclusion were a dividend paid by the DFIC. Proposed § 1.965–6(b). Questions have arisen as to the effect of treating a section 965(a) inclusion as a dividend for this purpose. This language merely incorporates the language of section 960(a)(1) into the regulations, as section 960(a)(1) also provides in relevant part that ''section 902 shall be applied as if the amount so included were a dividend paid by such foreign corporation.'' The language in proposed § 1.965–6(b) does not mean that any of the requirements of sections 902 and 960 should be considered inapplicable for purposes of determining deemed paid taxes with respect to section 965(a) inclusions.

Further, the language in proposed § 1.965–6(b) does not mean that section 965(a) inclusions should be treated as dividends for purposes of the ordering rule under § 1.960–1(i)(2). The final regulations clarify that the ordering rules of § 1.960–1(i)(2) continue to apply, subject to the modification described in Part III.A of this Summary of Comments and Explanation of Revisions. *See* § 1.965–2(b).

4. Section 902 Fraction

The proposed regulations provide that the term ''section 902 fraction'' means, with respect to either a DFIC or an E&P deficit foreign corporation, the fraction that is (i) the dividend paid by, or the inclusion under section 951(a)(1) (including a section 965(a) inclusion) with respect to, the foreign corporation, as applicable, divided by (ii) the foreign corporation's post-1986 undistributed earnings. Proposed § 1.965–6(c). A question was raised as to whether dividends and inclusions under section 951(a)(1) are combined for purposes of the section 902 fraction. Another comment concerned whether the definition of ''section 902 fraction'' implied that the ordering rule in § 1.960–1(i)(2) was no longer effective.

The final regulations continue to include a defined term, ''section 902 fraction,'' that is consistent with section 902(a), while tying it to the computation of deemed paid taxes in section 902(a). *See* § 1.965–6(b)(2) and (4). As noted in Part VI.C.3 of this Summary of Comments and Explanation of Revisions, the final regulations also confirm that the ordering rule in § 1.960–1(i)(2), as modified by § 1.965–2(b), applies in years in which a taxpayer may have a section 965(a) inclusion; accordingly, the section 902 fraction must be computed separately with respect to dividends and inclusions under section 951(a)(1). As noted in Part III.A.3 of this Summary of Comments and Explanation of Revisions, the examples in § 1.965–2(j)(1) and (4) illustrate the determination of deemed paid taxes (including the computation of section 902 fractions) under sections 902 and 960 in fact patterns involving section 965(a) inclusions.

5. Ownership Requirements for Deemed Paid Taxes

The proposed regulations provide that the rule treating members of a consolidated group as a single corporation does not apply for purposes of computing the foreign taxes deemed paid with respect to a section 965(a) inclusion, and that the foreign taxes deemed paid must be computed on a separate member basis. *See* proposed § 1.965–8(e)(2). A comment requested that the final regulations treat all the members of a consolidated group as a single taxpayer for all purposes of section 965, such that members owning less than ten percent of a DFIC would be able to claim deemed paid credits with respect to the DFIC.

Another comment requested relief in the case in which a domestic corporation satisfied the ownership requirements under section 902 with respect to a DFIC when it received a distribution from the DFIC, but did not satisfy the ownership requirements under section 960 on the date of the section 965(a) inclusion.

The final regulations continue to follow the statute under section 960 regarding the ownership requirements for eligibility for a foreign tax credit and, therefore, do not adopt either of these comments. *See* § 1.965–8(e)(2).

6. Hovering Deficits

In response to comments, the preamble to the proposed regulations stated that the regulations would not provide a rule that, to the extent that a hovering deficit is treated as reducing the post-1986 earnings and profits of a DFIC, related taxes would be added to the DFIC's post-1986 foreign income taxes in the inclusion year with respect to the DFIC. After the issuance of the proposed regulations, the Treasury Department and the IRS received additional comments requesting reconsideration of this issue. Comments

highlighted the following language in the legislative history to section 965:

> [T]he conferees expect the Secretary may issue guidance to provide that, solely for purposes of calculating the amount of foreign income taxes deemed paid by the U.S. shareholder with respect to an inclusion under section 965, a hovering deficit may be absorbed by current year earnings and profits and the foreign income taxes related to the hovering deficit may be added to the specified foreign corporation's post-1986 foreign income taxes in that separate category on a pro rata basis in the year of inclusion.

H.R. Rep. No. 115–466, at 619 (2017).

To effectuate the legislative history, the final regulations provide that to the extent the hovering deficit would have been absorbed by E&P accrued during the taxable year but for a section 965(a) inclusion, taxes that relate to the hovering deficit are taken into account for purposes of determining post-1986 foreign income taxes. Therefore, § 1.965–6(d) provides that in the last taxable year that begins before January 1, 2018, of a DFIC that is also a foreign surviving corporation, for purposes of determining the related taxes that are included in post-1986 foreign income taxes, the post-transaction earnings that can be offset by a hovering deficit include any current year earnings which were included under section 965 by a section 958(a) U.S. shareholder; and the hovering deficit offset is treated as occurring as of the last day of the DFIC's inclusion year.

VII. Comments and Changes to Proposed § 1.965–7—Elections and Payment Rules

Proposed § 1.965–7 provides rules regarding the timing and manner of certain elections that may be available to taxpayers under section 965, and payments to be made pursuant to those elections. The comments and modifications with respect to these rules are discussed in this Part VII.

A. Election Statements

The proposed regulations provide that, in order to make elections with respect to section 965, the person making the election must attach an election statement, signed under penalties of perjury, to its return for the relevant taxable year. Proposed §§ 1.965–2(f)(2)(iii)(B)(*2*), 1.965–7(b)(2)(iii), 1.965–7(c)(2)(iii), 1.965–7(d)(3)(iii), 1.965–7(e)(2)(iii), and 1.965–7(f)(5)(iii). The proposed regulations do not address whether the election statement attached to or included with the return must be signed or whether the person making the election can attach an unsigned statement and retain the signed copy in its records. The final regulations provide that the signature requirement is satisfied if the unsigned copy is attached to a timely-filed return of the person making the election, provided that the person retains the signed original in the manner specified in § 1.6001–1(e). *See* §§ 1.965–2(f)(2)(iii)(B)(*2*), 1.965–7(b)(2)(iii), 1.965–7(c)(2)(iii), 1.965–7(d)(3)(iii), 1.965–7(e)(2)(iii), and 1.965–7(f)(5)(iii). In addition, comments requested clarification regarding whether the election statement could be signed by a return preparer and who must sign the statement in the case of a married filing jointly income tax return. The final regulations do not specifically address who must sign a statement but indicate that general rules concerning who is authorized to sign tax returns apply. *Id.*

B. Acceleration Events and Triggering Events

Section 965(h)(3) provides that an acceleration event occurs when there is an addition to tax for failure to timely pay an installment required under section 965(h), a liquidation or sale of substantially all of the assets of the person who made the section 965(h) election (including in a title 11 or similar case), a cessation of business by the person who made the section 965(h) election, or any similar circumstance. Proposed § 1.965–7(b)(3)(ii) clarifies what events are acceleration events and what is considered a similar circumstance. Proposed § 1.965–7(b)(3)(ii)(B) provides that a liquidation, sale, exchange, or other disposition of substantially all of the assets of the person making the election (including in a title 11 or similar case or, in the case of an individual, death) is an acceleration event.

Similarly, section 965(i)(2) lists triggering events that end the payment deferral for purposes of the section 965(i) election, including a liquidation or sale of substantially all of the assets of the S corporation (including in a title 11 or similar case), a cessation of business by the S corporation, the S corporation ceasing to exist, or any similar circumstance. Proposed § 1.965–7(c)(3)(ii) clarifies the similar circumstances treated as triggering events. Specifically, proposed § 1.965–7(c)(3)(ii)(B) provides that a liquidation, sale, exchange, or other disposition of substantially all of the assets of the S corporation (including in a title 11 or similar case) is a triggering event.

In addition, section 965(m)(2)(B)(ii) provides that, with respect to a real estate investment trust (''REIT'') that made a section 965(m) election, a liquidation or sale of substantially all of the assets of the REIT (including in a title 11 or similar case), a cessation of business by the REIT, or any similar circumstance will cause any amount not yet included in gross income (due to the section 965(m) election) to be included in gross income as of the day before the date of the event. Proposed § 1.965–7(d)(5) clarifies what a similar circumstance is by providing that a liquidation, sale, exchange, or other disposition of substantially all of the assets of the REIT will cause the acceleration of the remaining inclusion.

1. Disposition or Exchange of Substantially All of the Assets

Comments questioned whether a disposition of substantially all of the assets resulting from a downstream tax-free reorganization or an exchange described in section 351 or 721 should constitute an acceleration event or triggering event, particularly when the assets remain under the control of the taxpayer, and whether a reorganization described in section 368(a)(1)(F) should be treated as an acceleration event or triggering event. One comment, relating only to triggering events under section 965(i), proposed multiple alternatives, including removing the ''exchange or other disposition'' language from proposed § 1.965–7(c)(3)(ii)(B) and providing that any nonrecognition transaction is not an exchange.

The Treasury Department and the IRS have determined that any disposition of substantially all of the assets of the person making the section 965(h) election, the S corporation, or the REIT, including in a tax-free reorganization or an exchange described in section 351 or 721, poses a risk to the IRS's ability to collect the full amount of the section 965(h) net tax liability, section 965(i) net tax liability, or total net tax liability under section 965, as the case may be. The Treasury Department and the IRS have determined that it is essential for tax administration purposes for the IRS to be apprised of these dispositions. Providing an exclusion to the general rule that an exchange or other disposition of substantially all of the assets of the person making the section 965(h) election, the S corporation with respect to which a section 965(i) election is in effect, or the REIT with a section 965(m) election in effect for nonrecognition transactions could hamper the IRS's ability to collect the outstanding tax liabilities and could enable certain taxpayers to inappropriately dilute their interests in their assets or change their businesses in a way that is inconsistent with the purposes behind the elections and related triggering and acceleration events. The final regulations also do not

include a special exception for reorganizations under section 368(a)(1)(F) because requiring a transfer agreement, if applicable, in those situations is necessary for tax administration purposes.

A comment also requested clarification of the meaning of ''substantially all'' for purposes of the acceleration event and triggering event rules. The phrase ''substantially all'' is used in various Code provisions and in regulations, and often is determined based on all of the facts and circumstances. Consistent with this general approach, the Treasury Department and the IRS decline to provide a bright-line definition of ''substantially all'' in the final regulations.

2. Death of Transferor

Proposed § 1.965–7(b)(3)(ii)(B) provides that for a person who made a section 965(h) election, the liquidation, sale, exchange, or other disposition of substantially all of the assets of the person, including, for an individual, by reason of death, is an acceleration event. Proposed § 1.965–7(b)(3)(iii)(A)(*1*)(*ii*) specifically excludes death of an individual from the covered acceleration events that allow for a transfer agreement. A comment requested that, because death is specifically mentioned as a triggering event in section 965(i)(2)(A)(iii) but not section 965(h)(3), death not be treated as an acceleration event for purposes of the section 965(h) election. In addition, the comment requested that, if death is treated as an acceleration event for purposes of the section 965(h) election, it be treated as a covered acceleration event (as described in proposed § 1.965–7(b)(3)(iii)(A)(*1*)) and thus be eligible for a transfer agreement. Under section 965(h)(3), an acceleration event includes a liquidation or sale of substantially all of the assets of the taxpayer or any similar circumstance, and proposed § 1.965–7(b)(3)(ii)(B) provides that an exchange or other disposition of substantially all of the assets of the taxpayer (outside of the context of the death of an individual) is an acceleration event. The death of an individual taxpayer is similar to any transfer or other disposition of substantially all of the assets of a taxpayer, and, accordingly, is a similar circumstance that should be an acceleration event. The Treasury Department and the IRS have determined that there are administrative difficulties with transferring liabilities and executing transfer agreements in the event of death. Moreover, in many cases, there would be multiple beneficiaries in the case of death, and multiple transferees are not permitted for purposes of section 965(h). For those reasons, and because the section 965(i) rules more clearly contemplate allowing transfers on death (and allowing transfers to multiple transferees or beneficiaries), the Treasury Department and the IRS have determined that it is appropriate not to treat the death of an individual shareholder as a covered acceleration event for purposes of section 965(h), and the comment is not adopted.

C. Transfer Agreements

1. Inclusion of Form 965–A or 965–B

The proposed regulations provide that transfer agreements for purposes of section 965(h) and section 965(i) are required to include the eligible section 965(h) transferor's or eligible section 965(i) transferor's most recent Form 965–A or 965–B, as applicable, among other information. Proposed § 1.965–7(b)(3)(iii)(B)(*4*)(*v*) and (c)(3)(iv)(B)(*4*)(*v*). In some cases, no Form 965–A or 965–B will have been required to be filed before the transfer agreement. Accordingly, the final regulations clarify that the Form 965–A or 965–B is only required to be filed with a transfer agreement if the eligible section 965(h) transferor or eligible section 965(i) transferor was required to file the form. Section 1.965–7(b)(3)(iii)(B)(*4*)(*v*) and (c)(3)(iv)(B)(*4*)(*v*).

2. Due Date for Transfer Agreements

Proposed § 1.965–7(b)(3)(iii)(B)(*2*)(*ii*) and § 1.965–7(c)(3)(iv)(B)(*2*)(*ii*) provide that, if an acceleration event or a triggering event occurs before September 10, 2018, a transfer agreement must be filed by October 9, 2018, in order to be considered timely filed. In addition, proposed § 1.965–7(b)(3)(iii)(B)(*2*)(*i*) and § 1.965–7(c)(3)(iv)(B)(*2*)(*i*) provide that, if an acceleration event or a triggering event occurs on or after September 10, 2018, a transfer agreement must be filed within thirty days of the acceleration or triggering event in order to be considered timely filed. Proposed § 1.965–7(b)(3)(iii)(B)(*2*)(*i*) and § 1.965–7(c)(3)(iv)(B)(*2*)(*i*) provide that transfer agreements must be filed in accordance with the rules provided in publications, forms, instructions, or other guidance. Because additional guidance, including where to file the agreements, was not issued before certain transfer agreements would have been due, the transition rules in § 1.965–7(b)(3)(iii)(B)(*2*)(*ii*) and § 1.965–7(c)(3)(iv)(B)(*2*)(*ii*) have been updated to provide that if a triggering event or acceleration event occurs on or before February 5, 2019, the transfer agreement must be filed by March 7, 2019, in order to be considered timely filed. *See also* § 1.965–7(c)(3)(v)(D)(*2*)(*ii*) (similarly extending the deadline for filing agreements to make a section 965(h) election after a triggering event).

3. Multiple Transferees

With respect to a section 965(h) acceleration event, proposed § 1.965–7(b)(3)(iii)(B)(*1*) defines an eligible section 965(h) transferee as a ''single United States person that is not a domestic pass-through entity'' that meets additional requirements. With respect to a section 965(i) triggering event, proposed § 1.965–7(c)(3)(iv)(B)(*1*) defines an eligible section 965(i) transferee as a ''single United States person that is not a domestic pass-through entity.'' A comment requested that multiple transferees be allowed to be eligible transferees for purposes of both section 965(h) and section 965(i). Section 965(h) and proposed § 1.965–7(b) do not allow for a partial transfer of the section 965(h) net tax liability. Allowing multiple transferees would be similar to allowing for partial transfers. Furthermore, the existence of multiple transferees poses significant administrative challenges for the IRS. Accordingly, the Treasury Department and the IRS do not adopt the recommendation. However, section 965(i)(2)(B) specifically contemplates partial transfers of the section 965(i) net tax liability. As a result, the final regulations clarify in § 1.965–7(c)(3)(iv)(B)(*1*) that if a transfer (including as a result of the death of an eligible section 965(i) transferor) consists of multiple partial transfers (as described in § 1.965–7(c)(3)(iii)), then the eligible section 965(i) transferor can enter into multiple transfer agreements, one for each partial transfer, with different eligible section 965(i) transferees.

4. Consolidated Groups

Proposed § 1.965–7(b)(3)(ii)(F) provides that an acceleration event includes, in the case of a consolidated group, the consolidated group ceasing to exist. Proposed § 1.965–7(b)(3)(iii)(A)(*1*)(*iv*) provides that, for purposes of the eligible section 965(h) transferee exception (as defined in proposed § 1.965–7(b)(3)(iii)), a covered acceleration event includes, with respect to an acceleration event under proposed § 1.965–7(b)(3)(ii)(F), an event resulting from the acquisition of a consolidated group within the meaning of § 1.1502–13(j)(6) if the acquired consolidated group members join a

different consolidated group as of the day following the acquisition. The proposed regulations do not provide for covered acceleration events related to other fact patterns in which a consolidated group ceases to exist. Comments requested that there be an additional covered acceleration event to account for a situation in which the consolidated group ceases to exist by reason of one or more members of the consolidated group transferring all of their assets to other members, with only one member remaining (for example, a consolidated group consisting only of a parent and a subsidiary ceasing to exist by reason of the subsidiary liquidating into the parent). The Treasury Department and the IRS have determined that it is appropriate to permit the remaining member to enter into a transfer agreement in these circumstances. Accordingly, § 1.965–7(b)(3)(iii)(A)(*1*)(*v*) includes this scenario as a covered acceleration event. In addition, § 1.965–7(b)(3)(iii)(B)(*1*)(*v*) provides that, with respect to the acceleration event in § 1.965–7(b)(3)(iii)(A)(*1*)(*v*), the remaining member of the consolidated group to which all of the other members' assets are transferred is an eligible section 965(h) transferee (provided that it meets the remaining requirements of § 1.965–7(b)(3)(iii)(B)(*1*)).

Another comment requested that there be an additional covered acceleration event to account for a situation in which a consolidated group is wholly owned by a corporation that is not an includible corporation (within the meaning of section 1504(b)) when a section 965(h) election was made but subsequently becomes an includible corporation even though the situation does not involve the acquisition of stock of the common parent. For example, this situation could arise when the corporation that owns the consolidated group is an S corporation and subsequently revokes its S corporation election. The Treasury Department and the IRS have determined that it is appropriate to permit transfer agreements in these circumstances. Accordingly, § 1.965–7(b)(3)(iii)(A)(*1*)(*vi*) provides that a covered acceleration event occurs when the group ceases to exist as a result of the termination of the subchapter S election pursuant to section 1362(d) of a shareholder of the common parent of the consolidated group and, for the shareholder's taxable year immediately following the termination, the shareholder joins in the filing a consolidated return as of a consolidated group that includes all of the former members of the former consolidated group. In addition, § 1.965–7(b)(3)(iii)(B)(*1*)(*vi*) provides that, with respect to the acceleration event in § 1.965–7(b)(3)(iii)(A)(*1*)(*vi*), the agent (within the meaning of § 1.1502–77) of the new consolidated group that includes the shareholder whose subchapter S election was terminated and all of the former members of the former consolidated group is an eligible section 965(h) transferee (provided that it meets the remaining requirements of § 1.965–7(b)(3)(iii)(B)(*1*)).

5. Joint and Several Liability

Proposed § 1.965–7(b)(3)(iii)(D)(*2*) provides that an eligible section 965(h) transferor remains jointly and severally liable for any unpaid installments assumed by the eligible section 965(h) transferee, as well as any penalties, additions to tax, or other additional amounts attributable to the section 965(h) net tax liability that was transferred. A representation to this effect is required in the transfer agreement if the section 965(h) transferor remains in existence after the transfer. Proposed § 1.965–7(b)(3)(iii)(B)(*4*)(*viii*). A comment questioned whether the joint and several liability requirement was necessary, given that the eligible section 965(h) transferee has agreed to assume the liability and has the assets from which the liability would be satisfied, and whether there should be differing treatment between eligible section 965(h) transferors that liquidate immediately after the transfer and those that do not. The comment also noted that in many cases, the section 965(h) net tax liability would be taken into account in the purchase price of a sale of substantially all of the assets of the eligible section 965(h) transferor. The final regulations do not adopt this comment. Requiring the eligible section 965(h) transferor to be jointly and severally liability for the unpaid section 965(h) net tax liability, as well as any penalties, additions to tax, or other additional amounts attributable to the section 965(h) net tax liability, protects the IRS's ability to collect the full amount of the section 965(h) net tax liability and helps guard against abusive transactions. In addition, as the comment noted, taxpayers are able to account for the joint and several liability in their transactions.

6. Death of an S Corporation Shareholder

Under section 965(i)(2)(A)(iii) and (i)(2)(C) and proposed § 1.965–7(c)(3)(ii)(C) and (c)(3)(iv)(A)(*1*), the death of an S corporation shareholder who made a section 965(i) election is a triggering event, and the deferred liability can be transferred if a transfer agreement is entered into with an eligible section 965(i) transferee (as defined in proposed § 1.965–7(c)(3)(iv)(B)(*1*)). Proposed § 1.965–7(c)(3)(iv)(B)(*2*)(*i*) requires that any transfer agreement with respect to a section 965(i) election be filed within 30 days of the date that the transfer occurred. The Treasury Department and the IRS have determined that when the triggering event is the death of the eligible section 965(i) transferor, filing a transfer agreement within 30 days may be impractical. Accordingly, the final regulations provide, in § 1.965–7(c)(3)(iv)(B)(*2*)(*iii*), that in the case of the death of an eligible section 965(i) transferor, the transfer agreement is required to be filed by the later of the unextended due date for the eligible section 965(i) transferor's final income tax return and March 7, 2019.

In addition, the final regulations clarify in § 1.965–7(c)(3)(iv)(B)(*5*) what transfer agreements are required following the death of an eligible section 965(i) transferor. In order to make the transfer agreements more administrable for both taxpayers and the IRS, the final regulations provide that, except in the case of transfers to trusts, in the event of the death of an eligible section 965(i) transferor, if the beneficiary or beneficiaries are known and determined as of the due date for the transfer agreement (that is, generally, the unextended due date for the eligible section 965(i) transferor's final income tax return), then the transfer will be treated as a transfer directly between the eligible section 965(i) transferor and the eligible section 965(i) transferee beneficiary or beneficiaries, and only one transfer agreement for each eligible section 965(i) transferee is required. If, however, the beneficiary or beneficiaries are not known and determined by the due date for the transfer agreement, then the transfer will be treated as two transfers: First, the transfer on death between the eligible section 965(i) transferor and his or her estate, and, second, a transfer (not on death) between the estate and the eligible section 965(i) transferee beneficiary or beneficiaries, and separate transfer agreements are required for each transfer. The general rule concerning transfers to trusts will continue to apply as discussed in Part VII.E.1 of this Summary of Comments and Explanation of Revisions.

7. Terms of Transfer Agreements

a. Transfer Agreements After Acceleration Events

The proposed regulations provide specific information and representations that a transfer agreement must contain, including a statement that the transferee agrees to assume the transferor's liability for any unpaid installment payments. The final regulations include modifications to certain requirements for the terms of a transfer agreement. First, the final regulations clarify that an eligible section 965(h) transferee must consent to an assessment with respect to the liability that it assumes. Specifically, when an eligible section 965(h) transferor and an eligible section 965(h) transferee enter into a transfer agreement, the amount of the section 965(h) net tax liability will already be assessed against the transferor. For the transfer agreements to be administrable, the final regulations add the requirement that an eligible section 965(h) transferee waive the right to a notice of liability and consent to the immediate assessment of the portion of the eligible section 965(h) transferor's section 965(h) net tax liability remaining unpaid as a term of the transfer agreement. Section 1.965–7(b)(3)(iii)(B)(*4*)(*ix*).

Second, the final regulations retain the proposed regulations' requirement that an eligible section 965(h) transferee represent that it is able to make the remaining payments with respect to the section 965(h) net tax liability being assumed. Because the transfer of substantially all of the assets of the eligible section 965(h) transferor presents a risk to the IRS's ability to collect the outstanding section 965(h) net tax liability, the final regulations require a transfer agreement to include a statement as to whether the leverage ratio of the eligible section 965(h) transferee exceeds three to one, subject to modification by future guidance. *See* § 1.965–7(b)(3)(iii)(B)(*4*)(*ix*) and (b)(3)(iii)(B)(*6*).

A taxpayer with a leverage ratio in excess of three to one may be an eligible section 965(h) transferee and may file a valid transfer agreement, provided the requirements of § 1.965–7(b)(3)(iii)(B) are met. The IRS may, however, use the information provided regarding an eligible section 965(h) transferee's leverage ratio in connection with a subsequent evaluation of the accuracy of an eligible section 965(h) transferee's representation that it has the ability to pay the outstanding section 965(h) net tax liability. The ability of an eligible section 965(h) transferee to pay the outstanding section 965(h) net tax liability depends on all of the relevant facts and circumstances, including its leverage ratio and also including the eligible section 965(h) transferee's revenue, the value of its assets, its access to capital, the volatility of its business, the size of the section 965(h) net tax liability assumed, and other factors. The IRS may request further information when evaluating a transfer agreement in order to assess these aspects of the transferee. Section 1.965–7(b)(3)(iii)(C)(*1*) and (c)(3)(iv)(C)(*1*).

If the Commissioner determines that this representation (or any of the other information contained in the transfer agreement) is incorrect, then the transfer agreement may be rejected as of the date of the acceleration event or the Commissioner may determine that an acceleration event has occurred with respect to the eligible section 965(h) transferee as of the date of the determination. *See* § 1.965–7(b)(3)(iii)(C)(*2*).

Third, § 1.965–7(b)(3)(iii)(B)(4)(*xi*) clarifies, consistent with the requirement in proposed § 1.965–7(b)(3)(iii)(B)(*2*)(*i*) that a transfer agreement be filed consistent with other guidance, that additional terms for transfer agreements may be prescribed pursuant to publications, forms, instructions, or other guidance.

b. Transfer Agreements and Consent Agreements After Triggering Eevents

The final regulations also include changes to the terms of the transfer agreements to be entered into by eligible section 965(i) transferees and the consent agreements to be entered into by certain shareholders after certain triggering events consistent with the changes to the terms of the transfer agreements to be entered into in connection with acceleration events discussed in Part VI.C.7.a of this Summary of Comments and Explanation of Revisions. The final regulations require a transfer agreement or consent agreement to include a statement as to whether the leverage ratio of the eligible section 965(i) transferee or the taxpayer making the section 965(h) election after a triggering events exceeds three to one. *See* § 1.965–7(c)(3)(iv)(B)(*4*)(*ix*), (c)(3)(iv)(B)(*6*), (c)(3)(v)(D)(*4*)(*v*), and (c)(3)(v)(D)(*6*). The final regulations also clarify that additional terms for transfer agreements and consent agreements in connection with triggering events may be prescribed pursuant to publications, forms, instructions, or other guidance. Section 1.965–7(c)(3)(iv)(B)(*4*)(*x*) and (c)(3)(v)(D)(*4*)(*vi*).

D. Section 965(h) Elections

1. Deficiencies or Additional Liabilities

Section 965(h)(4) provides that if a deficiency is assessed with respect to a person's section 965(h) net tax liability, other than in cases of negligence, intentional disregard of rules and regulations, or fraud with intent to evade tax, the amount of the deficiency will be prorated among the installments, and for any installment the due date of which has already passed, the part of the deficiency prorated to that installment will be due on notice and demand. Proposed § 1.965–7(b)(1)(ii) extends this rule to apply in the case of a person that increases the amount of its section 965(h) net tax liability when it files a return after payment of the first installment or files an amended return. Requiring notice and demand before payment of the additional amount when it is not due to a deficiency that has been assessed is administratively difficult and inconsistent with the rule provided in proposed § 1.965–7(b)(1)(ii)(C), applicable in the case of negligence, intentional disregard of rules and regulations, or fraud with intent to evade tax. Therefore, the final regulations have been modified to provide that in the case of an additional liability reported on a return or amended return, any amount that is prorated to an installment, the due date of which has already passed, will be due with the return reporting the additional amount. Section 1.965–7(b)(1)(ii)(B). The rule with respect to deficiencies remains the same, and payment for a deficiency prorated to an installment, the due date of which has already passed, is due on notice and demand. *Id.*

2. Elections in Multiple Years

A comment requested clarification regarding whether a person who has section 965(h) net tax liabilities in multiple taxable years due to ownership of DFICs with different inclusion years can make the section 965(h) election for each year individually. Because the section 965(h) election is made with respect to the section 965(h) net tax liability for a taxable year and is made with the person's tax return, it must be made separately for each year that the person has a section 965(h) net tax liability. The Treasury Department and the IRS have determined that no additional clarification is necessary. Section 1.965–7(b)(2) and (g)(4).

E. Section 965(i) Elections

1. Trusts and Estates

Comments requested clarification of the application of the rules regarding elections in the case of trusts and estates. These comments can largely be divided into two categories: (a) Requests for guidance concerning which persons are treated as S corporation shareholders for purposes of the section 965(i) election and entering into transfer agreements after a triggering event, and (b) requests for guidance concerning what events constitute triggering events.

a. Persons Eligible To Make Section 965(i) Elections and Eligible Section 965(i) Transferees

The comments requested that the final regulations clarify the definition of ''pass-through entity'' in proposed § 1.965–1(f)(28) to provide more certainty on the status of grantor trusts and qualified subchapter S trusts (''QSSTs''). Comments further noted that it may be unclear whether grantor trust owners and beneficiaries of QSSTs are eligible to make a section 965(i) election and enter into transfer agreements as eligible section 965(i) transferees because it is not clear whether such persons are treated as shareholders of an S corporation for purposes of section 965. They also requested that the final regulations provide that a person with a section 965(i) net tax liability be permitted to make a section 965(i) election and that a person that would be subject to tax on a section 965(i) net tax liability be permitted to enter into a transfer agreement after a triggering event. Similarly, they requested that when an S corporation is owned by a domestic pass-through entity, the domestic pass-through owners be able to make the section 965(i) election. The comments also requested guidance on who is an eligible section 965(i) transferee when there is a death and a grantor trust becomes a non-grantor trust, given that an eligible section 965(i) transferee does not include a pass-through entity, as defined in proposed § 1.965–1(f)(28).

The Treasury Department and the IRS have determined that the proposed regulations are clear that both grantor trusts and QSSTs constitute pass-through entities for purposes of proposed § 1.965–1(f)(28). The entire portion of the income attributable to the S corporation stock is taxed to the beneficiary of a QSST. *See* § 1.1361–1(j)(1)(i). The same is true for grantor trusts. *See* section 671 and § 1.1361–1(h)(1)(i). The Treasury Department and the IRS have determined that, because the beneficiary of a QSST or the grantor (or beneficiary) of a grantor trust is treated as an S corporation shareholder for subchapter S purposes, it is appropriate that the beneficiary or grantor makes the section 965(i) election and signs a transfer agreement as the eligible section 965(i) transferee. While the beneficiaries of an electing small business trust (''ESBT'') are treated as S corporation shareholders for section 1361 purposes, they are not treated as such for purposes of consenting to an S corporation election or taking into account shares of an S corporation's items of income, loss, or deduction. *See* §§ 1.1361–1(h)(3) and 1.1362–6(b)(2). Thus, the trustee of the S corporation portion of an ESBT should make a section 965(i) election and be the eligible section 965(i) transferee.

In the case of death, in which a grantor trust becomes a non-grantor trust, who can enter the transfer agreement should depend on whether, for example, an election is made to treat the trust as a QSST or an ESBT, whether the trust is treated as a testamentary trust, or whether a section 645 election is made to treat the trust as part of the estate. Generally, the QSST beneficiary, the trustee of an ESBT, or the executor of an estate should be permitted to enter into the transfer agreement. Accordingly, in response to these comments, the rules in § 1.965–7(c)(1) and (c)(3)(iv)(B)(*1*) are revised to clarify that persons required to consent with respect to a trust or estate for purposes of section 1362 are eligible to make a section 965(i) election and be an eligible section 965(i) transferee.

The comments also requested clarification concerning whether an ESBT or QSST that is treated as bifurcated under trust rules is also treated as bifurcated for purposes of section 965, including elections, acceleration events, and triggering events. The comments noted that certain trusts, in particular ESBTs, are divided into different portions when they hold stock of an S corporation. *See* § 1.641(c)–1(a). Accordingly, separate section 965(h) elections and section 965(i) elections must be made. The final regulations do not, however, address the application of the trust bifurcation rules, which are outside of the scope of this rulemaking.

b. Triggering Events

Comments requested that certain transactions that occur frequently with respect to S corporation trusts not be treated as triggering events and that guidance be provided concerning how to enter into a transfer agreement if such a transaction is a triggering event. For example, family settlement agreements, disclaimers, and certain decanting transactions result in a legal transfer but are not considered a transfer for either U.S. federal transfer tax or income tax purposes. The comments also noted that certain trust transactions may result in a change in taxpayer for U.S. federal income tax reporting purposes although no legal transfer occurred. These transactions may include a conversion of a grantor trust to a non-grantor trust, a trust making a QSST or ESBT election, a merger of two or more trusts, or a severance of trusts into separate shares. A comment also recommended that a material modification of a trust, such as through an amendment, decanting, or judicial reformation, or a material modification in a trust's beneficiaries, not constitute a triggering event where there is no change in ownership for U.S. federal income tax purposes.

In response to the comments, the final regulations clarify that a transfer of S corporation stock can only be a triggering event if it is a transfer that results in a change in ownership for U.S. federal income tax purposes. Thus, for example, a transfer of S corporation stock between a person and a grantor trust of which the person is an owner, which is disregarded for U.S. federal income tax purposes, is not a transfer that can constitute a triggering event because it does not result in an ownership change for U.S. federal income tax purposes. *Cf.* Rev. Rul. 85–13, 1985–1 C.B. 184 (providing that no sale occurred upon the transfer of trust assets from a grantor trust to the grantor). Specific guidance concerning what transactions are treated as transfers that result in a change in ownership for U.S. federal income tax purposes is outside the scope of these regulations.

Comments also requested guidance on whether a trust's conversion from grantor status to non-grantor status due to the death of a grantor, regardless of whether the trust is treated as part of the decedent's estate under section 645, is a triggering event. Section 965(i)(2)(iii) and § 1.965–7(c)(3)(ii)(C) are clear that a transfer includes a transfer by reason of death, so a trust's conversion to non-grantor status due to a death is a triggering event. Accordingly, no further guidance is warranted.

2. Section 962 Elections

A comment requested guidance concerning the interaction of a section 962 election and a section 965(i) election. The Treasury Department and the IRS have determined that it is clear that an eligible taxpayer may make a section 962 election that applies with respect to a section 965(a) inclusion that results in a section 965(i) net tax

liability that the taxpayer defers payment of pursuant to a section 965(i) election, because there are no limitations in the section 962 regulations or the section 965 regulations that would preclude the elections. Accordingly, no change is made to the final regulations in this regard.

The comment also requested guidance concerning whether making both the section 962 election and the section 965(i) election would result in the treatment of distributions from a DFIC owned by the S corporation to which the section 965(i) election relates occurring before a triggering event as dividends not excluded from gross income. The Treasury Department and the IRS have determined that it is clear that amounts attributable to a section 965(a) inclusion with respect to which a section 962 election applies that would otherwise be excluded from gross income under section 959 are prevented from being excluded before a triggering event due to the application of section 962(d), because no tax will have been paid with respect to the section 965(a) inclusion. See Part III.D.6 of this Summary of Comments and Explanation of Revisions for a discussion of the application of section 962(d) to section 965(h) elections, the concepts of which apply equally for section 965(i) elections. However, as discussed in Part III.D.6 of this Summary of Comments and Explanation of Revisions with regard to the basis adjustments to be made in the similar case of a domestic pass-through owner that has made a section 962 election applicable to its distributive share of a domestic pass-through entity's section 965(a) inclusion amount, the issue raised by the comment is a longstanding issue of general applicability within subpart F that is outside of the scope of regulations concerning section 965. Accordingly, the Treasury Department and the IRS decline to adopt the comment.

F. Section 965(m) Elections

Section 965(m) allows a real estate investment trust (REIT) to make an election to include its section 965(a) inclusions (and correspondingly deduct its section 965(c) deductions) over an eight-year period, rather than all in one taxable year. The schedule for inclusions over the eight-year period is similar to the schedule for payments for the section 965(h) election. *See* sections 965(h)(1) and 965(m)(1)(B). A comment requested that REITs making section 965(m) elections be treated the same as taxpayers making section 965(h) elections and be allowed to make adjustments to previously taxed E&P and basis under sections 959 and 961 as if the REIT had included the full section 965(a) inclusion (and deducted the full section 965(c) deduction) in the taxable year or years in which its DFICs had subpart F income as a result of section 965(a). Notwithstanding the similarities in the eight-year schedules for section 965(h) elections and section 965(m) elections, the statute is clear that the section 965(h) election defers payments while the section 965(m) election defers inclusions (and deductions). Thus, allowing REITs making section 965(m) elections to make adjustments under sections 959 and 961 as if they had not made the section 965(m) election would be inconsistent with the statute; therefore, the final regulations do not adopt the comment.

Another comment requested that if adjustments under sections 959 and 961 were not permitted until the corresponding amounts were included in income, the final regulations provide guidance concerning the consequences if the REIT disposed of DFIC stock before all section 965(a) inclusions with respect to the stock had been included in income, and thus before all corresponding adjustments under sections 959 and 961 had been made. The comment recommended that the section 959 and 961 adjustments be treated as made immediately before the disposition. For the reasons discussed in the preceding paragraph, the Treasury Department and the IRS have determined that such treatment would not be appropriate and do not adopt the comment.

G. Section 965(n) Elections

Proposed § 1.965–7(e) provides that if a taxpayer makes a section 965(n) election for a taxable year, certain section 965-related amounts are not taken into account in determining the taxpayer's net operating loss under section 172 for the year or in determining the taxpayer's taxable income for such taxable year (computed without regard to the deduction allowable under section 172) that may be reduced by net operating loss carryovers or carrybacks to such taxable year under section 172. A comment requested clarification that the section 965(n) election applies for purposes of the alternative minimum tax (''AMT'') and section 1411. The Treasury Department and the IRS have determined that because the section 965(n) election affects the net operating loss deduction and taxable income, which are starting points for determining alternative minimum tax net operating loss deduction and alternative minimum taxable income under sections 56(d) and 55(b)(2), respectively, it is clear that the section 965(n) election applies for purposes of the AMT. Similarly, it is clear that the section 965(n) election affects the computations under § 1.1411–4(h) if an election under § 1.1411–10(g) has been made, and no clarification is needed.

A comment also requested clarification that a section 965(n) election can be made for every year in which a REIT has a section 965(a) inclusion by reason of a section 965(m) election. Given that § 1.965–7(e), like proposed § 1.965–7(e), provides that a section 965(n) election can be made for a taxable year in which a person has a section 965(a) inclusion, the Treasury Department and the IRS have determined that no additional clarification is necessary.

H. Election To Use Alternative Method of Calculating Post-1986 Earnings and Profits

Proposed § 1.965–7(f)(5)(i) provides for an election to use an alternative method for calculating post-1986 earnings and profits and provides that the election is made for each specified foreign corporation by its controlling domestic shareholder (as defined in § 1.964–1(c)(5)) pursuant to the rules of § 1.964–1(c)(3). A comment requested modifications regarding multiple aspects of this election.

First, the comment requested that references to the rules in § 1.964–1(c)(3) be deleted because the requirements, particularly with respect to the statement required by § 1.964–1(c)(3)(ii) and the notice to minority shareholders required by § 1.964–1(c)(3)(iii), are too onerous for this purpose. Second, the comment requested that United States shareholders be allowed to make a blanket election for all of their specified foreign corporations or be allowed to make a single election and specifically provide a schedule of those specified foreign corporations for which they do not want to make the election. Third, the comment requested that the penalties of perjury statement requirement be eliminated.

The Treasury Department and the IRS have determined that requiring a controlling domestic shareholder to file the statement required by § 1.964–1(c)(ii) in order to make the election described in proposed § 1.965–7(f) is duplicative in light of the requirement to provide an election statement described in proposed § 1.965–7(f)(5)(iii). However, the requirement to give notice to minority shareholders is not a duplicative requirement, and it helps ensure that all taxpayers are using

the same amounts for post-1986 earnings and profits to calculate their section 965(a) inclusions. Accordingly, § 1.965–7(f)(5)(i) retains the reference to § 1.964–1(c)(3) but provides that the statement described in § 1.964–1(c)(3)(ii) is not required. In addition, proposed § 1.965–7(f) provides that the election is made on a specified foreign corporation by specified foreign corporation basis, in part because the ability to use the November 2, 2017, measurement date might differ among specified foreign corporations. While it is important for the IRS to know what method is being used for each specified foreign corporation in order to properly determine the amount of post-1986 earnings and profits, it is not necessary for a separate statement to be filed with respect to each specified foreign corporation. Therefore, the final regulations permit a single election statement to be filed that provides the necessary information with respect to each specified foreign corporation. Finally, the election statement required by proposed § 1.965–7(f)(5)(iii) contains additional information beyond the making of the election, including the name and taxpayer identification number (if any) of both the person making the election and the specified foreign corporation, so the request that the penalties of perjury statement be eliminated is not adopted. See Part VII.A of this Summary of Comments and Explanation of Revisions for more discussion of the election statements.

I. Total Net Tax Liability Under Section 965

Section 965(h) elections and section 965(i) elections allow the deferral of payment of amounts based on a taxpayer's total net tax liability under section 965. *See* § 1.965–7(b)(1), (c)(1), (g)(4), and (g)(6). Total net tax liability is calculated on the basis of a taxpayer's net income tax ''with'' and ''without'' the application of section 965, which is intended to isolate the portion of a taxpayer's net income tax attributable to section 965.

1. ''Without'' Prong

The second prong of the definition of total net tax liability under section 965 (the ''without'' prong) in the proposed regulations calculates the taxpayer's net income tax without regard to section 965 but also disregards dividends received directly or through a chain of ownership described in section 958(a). Proposed § 1.965–7(g)(10)(i)(B)(*2*). Dividends are disregarded because, absent section 965, they would generally be taxed in the hands of the taxpayer, but such dividends may instead be distributions of previously taxed E&P if section 965 applies, and thus not subject to additional tax if section 965 applies. Therefore, absent this rule, the tax imposed on dividends would be included in the ''without'' prong but not in the ''with'' prong, distorting the ''with'' and ''without'' calculation so that it no longer isolates the net income tax attributable to section 965. However, this rule does not disregard investments in United States property that would give rise to inclusions under sections 951(a)(1)(B) and 956, even though these inclusions, like dividends, could result in income inclusions that would be taxable in the ''without'' prong absent section 965, but may instead be sheltered by previously taxed E&P if section 965 does apply. Comments recommended that the final regulations disregard inclusions under sections 951(a)(1)(B) and 956 for purposes of the ''without'' computation in order to ensure that the total net tax liability under section 965 reflects an accurate measure of a taxpayer's tax due to section 965. The final regulations adopt this recommendation. *See* § 1.965–7(g)(10)(i)(B)(*2*).

A comment also suggested that the final regulations clarify whether the ''without'' prong disregards dividends received by a United States shareholder from a DFIC before the DFIC's inclusion year. The Treasury Department and the IRS have determined that disregarding such dividends would distort the measurement of the taxpayer's tax due to section 965, as those dividends would not become distributions of previously taxed E&P solely as a result of disregarding section 965 in a year for which there was no section 965(a) inclusion with respect to a DFIC. Accordingly, consistent with the change discussed in the preceding paragraph and in response to the comment, the final regulations clarify that the dividends disregarded are limited to those paid by a DFIC during the DFIC's inclusion year. *See id.*

A comment also noted that the ''without'' prong of the definition of total net tax liability under section 965 under the proposed regulations disregards credits, as well as income or deductions properly attributable to dividends from a DFIC, even though section 965(h)(6)(A)(ii)(II) only specifically disregards income or deductions. The comment suggested that because credits were specifically included in the House version of the rule, but not the Senate version, Congress specifically intended to take into account credits in the ''without'' prong. However, there is no legislative history explaining the change. A similar comment recommended that the ''without'' prong of the definition of total net tax liability under section 965 take into account foreign income taxes that the taxpayer would have been able to use as credits in subsequent years had section 965 not been enacted.

The term ''net income tax'' is defined to mean the regular tax liability reduced by the credits allowed under subparts A, B, and D of part IV of subchapter A of the Code and is not defined as such solely with respect to the ''with'' prong in section 965(h)(6)(A)(i), but also the ''without'' prong in section 965(h)(6)(A)(ii). *See* section 965(h)(6)(B). Subpart B includes section 27, which allows for a foreign tax credit. The disregard of credits clearly follows from the statutory definition of the ''without'' prong, as there could be no credits attributable to a dividend if income attributable to the dividend were disregarded. Accordingly, the Treasury Department and the IRS have determined that the approach of the proposed regulations is appropriate, and do not adopt the recommendations.

2. Effect on Total Tax Liability

A comment suggested that the rules for determining a total net tax liability under section 965 can result in the total tax liability of a United States person who makes a section 965(i) election being higher than it would have been had a section 965(i) election not been made. However, the Treasury Department and the IRS have determined that because such rules apply only for purposes of the definition of total net tax liability under section 965, and thus for purposes of determining how much can be deferred pursuant to a section 965(h) election or a section 965(i) election, they have no impact on a person's actual total tax liability. Accordingly, no changes are made in response to the comment.

VIII. Comments and Changes to Proposed § 1.965–8—Affiliated Groups (Including Consolidated Groups)

Proposed § 1.965–8 sets forth rules governing the application of section 965 and the section 965 regulations to members of an affiliated group (as defined in section 1504(a)), including members of a consolidated group (as defined in § 1.1502–1(h)). The comments and modifications with respect to these rules are discussed in this Part VIII.

A. Treatment of Consolidated Groups

1. Treatment for Purposes of Determining Aggregate Foreign Cash Position

The proposed regulations provide rules allowing a section 958(a) U.S. shareholder to disregard certain assets for purposes of determining its aggregate foreign cash position. *See* proposed § 1.965–3(b). The proposed regulations further provide that all members of a consolidated group that are section 958(a) U.S. shareholders of a specified foreign corporation are treated as a single section 958(a) U.S. shareholder for certain enumerated purposes that do not include proposed § 1.965–3(b). Proposed § 1.965–8(e). Section 3 of Notice 2018–78 explained that, to prevent the overstatement of the aggregate foreign cash position, the final regulations would provide that all members of a consolidated group that are section 958(a) U.S. shareholders of a specified foreign corporation would also be treated as a single section 958(a) U.S. shareholder for purposes of § 1.965–3(b).

However, comments have noted that treating all members of a consolidated group that are section 958(a) U.S. shareholders of a specified foreign corporation as a single section 958(a) U.S. shareholder for purposes of § 1.965–3(b) but not for all purposes of determining the aggregate foreign cash position could still result in overstatement of the aggregate foreign cash position, if, for example, stock of a specified foreign corporation was transferred between such shareholders between cash measurement dates. Accordingly, the final regulations provide that the consolidated group aggregate foreign cash position is determined as if all members of a consolidated group that are section 958(a) U.S. shareholders of a specified foreign corporation were a single section 958(a) U.S. shareholder. *See* § 1.965–8(e)(1), (e)(3), and (f)(4).

2. Treatment for Other Purposes

Comments also requested that the final regulations treat all members of a consolidated group as a single United States shareholder for all purposes of section 965. One comment highlighted a fact pattern in which it argues that the anti-abuse rule in § 1.965–4(b) applies and causes double taxation if the members are treated as separate but would not apply if the members were treated as a single United States shareholder. However, the Treasury Department and the IRS have determined that treatment of members of a consolidated group as a single United States shareholder would not alter the application of the anti-abuse rule in the fact pattern raised. Even if it did, however, broadly changing the consequences of well-established principles concerning the determination of inclusions under section 951 in a consolidated group would not be justified by the application of an anti-abuse rule to a transaction that falls within its parameters. See Part VI.C.5 of this Summary of Comments and Explanation of Revisions for a discussion of why the final regulations do not adopt recommendations to treat all members of a consolidated group that are section 958(a) U.S. shareholders of a specified foreign corporation as a single section 958(a) U.S. shareholder for purposes of determining foreign income taxes deemed paid with respect to section 965(a) inclusions.

B. Treatment of Affiliated Groups Other Than Consolidated Groups

A comment also suggested that section 958(a) U.S. shareholders that are members of an affiliated group that do not file a consolidated U.S. federal income tax return also be treated as a single United States shareholder for purposes of determining the aggregate foreign cash position of each member. It suggested that the statute evidences Congressional intent for such treatment. The Treasury Department and the IRS have determined that the rules in section 965(b)(5) concerning the allocation of an affiliated group member's aggregate unused E&P deficit to certain members of its affiliated group do not evidence an intent to treat all members of an affiliated, but not consolidated, group as a single United States shareholder and decline to adopt the recommendation.

IX. Other Comments

A. Application to Individuals

Numerous comments recommended that guidance exempt individuals from the application of section 965. A comment also recommended that section 965(c)(3)(E), which provides that the cash position of certain noncorporate entities must be taken into account in determining a United States shareholder's aggregate foreign cash position, not apply with respect to individuals but did not supply any reasoning for the recommendation. The statute applies to increase the subpart F income of all DFICs, with no exception to the extent that a DFIC has one or more United States shareholders that are individuals. *See* section 965(a). Further, the legislative history expressly provides that all United States shareholders, including individuals, are subject to section 965. *See* H.R. Rep. No. 115–446, at 606 (2017) (''In contrast to the participation exemption deduction [in section 245A] available only to domestic corporations that are U.S. shareholders under subpart F, the transition rule applies to all U.S. shareholders.''). Accordingly, the final regulations do not adopt these recommendations. The final regulations also do not adopt a related recommendation to permit retroactive entity classification elections to treat DFICs as disregarded for U.S. federal income tax purposes, which would be out of scope and contrary to the legislative history indicating that the Treasury Department and the IRS were expected to prevent the avoidance of section 965. *See* H.R. Rep. No. 115–466, at 619 (2017).

Another comment disputed the description of the clear application of section 965(c) and the proposed regulations thereunder in Part XI.C.2 of the Explanation of Provisions in the proposed regulations but did not suggest any changes to the rules in the proposed regulations. The Treasury Department and the IRS have determined that the proposed regulations are consistent with the statute and that Part XI.C.2 of the Explanation of Provisions in the proposed regulations accurately describes the rules, and thus that no changes are needed in response to the comment.

B. Section 962 Elections

A comment requested that the Treasury Department and the IRS consider providing relief for individuals who make a section 962 election and subsequently receive a distribution of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits from a DFIC to provide parity with corporations. However, as the comment acknowledges, section 962(d) limits the application of section 959 in the case of an individual that has made a section 962 election, and, as discussed in Part III.D.6 of this Summary of Comments and Explanation of Revisions, section 961 similarly limits the availability of basis for a distribution of previously taxed E&P in the case of a section 962 election. Accordingly, the Treasury Department and the IRS have determined that no relief is appropriate.

Another comment requested guidance concerning the interaction of a section 962 election and a § 1.1411–10(g) election; specifically, whether tax is imposed under section 1411 on a distribution of previously taxed E&P that are not excluded from an

individual's income as a result of the application of section 959(d) and what the effects are on the section 1411 tax basis in DFIC stock. Because this is an issue of general applicability with respect to previously taxed E&P and not specific to the application of section 965, the final regulations do not address this issue.

C. RICs

A comment requested that guidance affirm that section 965(a) inclusions do not affect regulated investment company (''RIC'') qualification. The application of the RIC qualification rules is outside of the scope of the final regulations.

D. Extension of Limitation on Assessment

A comment suggested that the final regulations clarify whether the extension of the limitation on the time period for assessment under section 965(k) applies to domestic pass-through owners. The comment also suggested that the final regulations clarify that the extension does not apply for purposes of the alternative minimum tax, the tax under section 1411, the tax under section 4968, or the tax under section 4940. In addition, the comment recommended clarifying the interaction of the extension of the limitation on the time period for collection in section 965(i)(6) with the extension in section 965(k) and the interaction of section 965(k) with partnership audit rules enacted by the Bipartisan Budget Act of 2015, Public Law 114–74, 129 Stat. 587 (''BBA''). The Treasury Department and the IRS have determined that, because section 965(k) applies to the net tax liability under section 965 (as defined in section 965(h)(6)), and § 1.965–7(g)(10) defines total net tax liability under section 965 consistently with the definition under section 965(h)(6), it is clear that section 965(k) applies to any total net tax liability under section 965, including that of a domestic pass-through owner. Moreover, the definitions of net tax liability under section 965 in section 965(h)(6) and total net tax liability under section 965 in § 1.965–7(g)(10) are clear that they do not include the taxes mentioned by the comment. The Treasury Department and the IRS have also determined that it is clear that section 965(k) does not limit section 965(i)(6). Accordingly, the comment is not adopted. The final regulations do not address the interaction of section 965(k) with the BBA rules, as those are outside of the scope of this rulemaking.

E. Late Election Relief

Section 965 includes statutory due dates for making section 965(h) elections, section 965(i) elections, section 965(m) elections, and section 965(n) elections. In addition to furnishing guidance with respect to statutory elections, the proposed regulations provide taxpayers with two additional elections in proposed §§ 1.965–2(f)(2) and 1.965–7(f) and prescribe due dates for making these regulatory elections. The proposed regulations indicate that relief under § 301.9100–2 or § 301.9100–3 is not available with respect to any election under section 965. A comment recommended that the Treasury Department and the IRS reverse its position in the proposed regulations and grant section 9100 relief for the statutory and regulatory elections with respect to section 965. The IRS does not have the discretion to provide section 9100 relief with respect to an election whose due date is prescribed by statute. Furthermore, in addition to providing additional time for the basis election, as discussed in Part III.D.1 of this Summary of Comments and Explanation of Revisions, Notice 2018–78 provided a postponement for taxpayers affected by Hurricane Florence to make and revoke all elections with respect to section 965. The Treasury Department and the IRS have determined that providing additional election relief would create administrative difficulties and is therefore inappropriate. Accordingly, the recommendation is not adopted.

X. Applicability Dates

No comments were received with respect to the applicability dates of the proposed regulations. The final regulations retain the applicability dates that were in the proposed regulations and, consistent with the applicability date of section 965, generally apply beginning the last taxable year of a foreign corporation that begins before January 1, 2018, and with respect to a United States person, beginning the taxable year in which or with which such taxable year of the foreign corporation ends. *See* section 7805(b)(2).

Effect on Other Documents

Notice 2018–07 (2018–4 I.R.B. 317) is obsolete as of February 5, 2019.

Sections 1 through 4 and 6 of Notice 2018–13 (2018–6 I.R.B. 341) are obsolete as of February 5, 2019.

Sections 1 through 5 and 7 of Notice 2018–26 (2018–16 I.R.B. 480) are obsolete as of February 5, 2019.

Sections 1 through 3 and 5 of Notice 2018–78 (2018–42 I.R.B. 604) are obsolete as of February 5, 2019.

Statement of Availability of IRS Documents

IRS Revenue Procedures, Revenue Rulings, notices, and other guidance cited in this document are published in the Internal Revenue Bulletin or Cumulative Bulletin and are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by visiting the IRS website at *http://www.irs.gov.*

Special Analyses

I. Regulatory Planning and Review

Executive Orders 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. OIRA has designated this rule as an economically significant regulatory action under section 3(f) of Executive Order 12866 and the Memorandum of Agreement (MOA), *Review of Tax Regulations under Executive Order 12866* (April 11, 2018). Accordingly, the rule has been reviewed by the Office of Management and Budget.

A. Need for the Final Regulations

These final regulations implement section 965 of the Code as amended by the Act. The final regulations provide rules for determining the section 965(a) inclusion amount of a United States shareholder of a foreign corporation with accumulated post-1986 deferred foreign income. The final regulations directly implement the statutory requirements. The Senate Committee on Finance stated with respect to section 965:

> To ensure that all distributions from foreign subsidiaries are treated in the same manner under the participation exemption system, the Committee believes that it is appropriate to tax such earnings as if they had been repatriated under present law, but at a reduced rate. The Committee believes the tax on accumulated foreign earnings should apply without requiring an actual distribution of earnings, and further believes that the tax rate should take into account the liquidity of the accumulated earnings.

Senate Committee on Finance, Explanation of the Bill, at 358 (November 22, 2017).

B. Background

The international tax system prior to the Act created strong incentives for U.S. companies to keep their earnings and profits overseas, an action known as deferral, in order to avoid paying a sizeable residual U.S. tax. The Act ended deferral and the resulting ''lockout effect.'' It introduced a one-time tax on the stock of any deferred E&P not previously taxed by the United States, regardless of whether those earnings are repatriated. Cash or cash-equivalent assets held by a foreign corporation result in a higher rate of repatriation tax than non-cash assets, such as plant, property, and equipment. The tax applies to the accumulated stock of deferred E&P as of the last taxable year of a foreign corporation beginning before January 1, 2018, and with respect to United States shareholders, for taxable years in which or with which the taxable year of the foreign corporation ends; these details are important for understanding the economic impacts of the final regulations.

The final regulations address open questions regarding the application of section 965 and comments received on the proposed regulations. They provide rules related to section 965 described in the four notices issued since December 22, 2017, with certain modifications, as well as additional guidance related to section 965. Specifically, the guidance provides general rules and definitions, as well as rules related to the determination and treatment of section 965(c) deductions, rules that disregard certain transactions in connection with section 965, rules related to foreign tax credits, rules regarding elections and payments, rules regarding the application of the section 965 regulations to affiliated groups, including consolidated groups, rules on dates of applicability, rules relating to section 962 elections, and rules regarding the application of section 986(c) in connection with section 965. These final regulations are designed to provide clarity and reduce unnecessary burdens on taxpayers, including by providing guidance on how to apply particular mechanical rules.

C. Baseline

The baseline constitutes a world in which no regulations pertaining to section 965 had been promulgated. The following qualitative analysis describes the anticipated impacts of the regulations relative to the baseline.

D. Consideration of Alternatives

For a discussion of the alternatives considered in the promulgation of the proposed regulations, see Parts II through IX of the Summary of Comments and Explanation of Revisions. For example, see Part II of the Summary of Comments and Explanation of Revisions for a discussion of the alternatives considered with respect to the determination of, among other things, post-1986 earnings and profits, cash measurement dates, and short-term obligations, and Part III.D of the Summary of Comments and Explanation of Revisions for a discussion of the alternatives considered to the rule permitting elective basis adjustments to the stock of certain DFICs and E&P deficit foreign corporations. For a discussion of additional alternatives considered in the promulgation of the final regulations, see Part G of this Special Analyses.

E. Economic Analysis of Provisions Substantially Unchanged From the Proposed Regulations

The final regulations enhance the performance of the U.S. economy by reducing uncertainty and ambiguity over interpretation of the section 965 requirements. Absent these final regulations, different parties would likely interpret the statute in different ways. Such disparate interpretations could lead similarly situated taxpayers to calculate their tax liability differently and therefore possibly to make organizational or investment decisions under different signals of economic value, an economically inefficient outcome. The final regulations, following the proposed regulations with primarily only technical modifications, reduce uncertainty and ambiguity by: (1) Providing that all members of a consolidated group that are United States shareholders of a specified foreign corporation are treated as a single United States shareholder for certain purposes; (2) introducing definitions of terminology used; (3) coordinating foreign tax credit rules; (4) providing explicit mechanical rules for applying section 965 in a variety of complex scenarios; (5) making explicit the process for making elections and paying the tax; and (6) providing dates of applicability.

In consultation with taxpayers, the Treasury Department and the IRS also determined that there are multiple instances throughout the statute where the transition tax may be artificially inflated because of double counting of cash and E&P due to multiple testing dates and chains of ownership. Double counting, as well as non-counting, is inequitable because similarly situated taxpayers may differ in terms of the amounts of income that fall into the specific categories that may be subject to double counting or non-counting. As a result of this analysis, the final regulations, following the proposed regulations with only technical modifications, reduce double counting and non-counting and produce more equitable tax outcomes across otherwise similarly situated taxpayers by: (1) Preventing double counting in computing the aggregate foreign cash position, for example, by disregarding receivables and payables between related specified foreign corporations with a common U.S. shareholder; and (2) preventing double-counting and non-counting in the computation of deferred earnings arising from amounts paid or incurred between related parties between measurement dates.

F. Responses to Comments

The Treasury Department and the IRS received comments from the public in response to the proposed regulations. This section discusses significant issues brought up in the comments for which economic reasoning is insightful. For a full discussion of comments received, see the Summary of Comments and Explanation of Revisions section of this preamble.

1. Basis Election Rules

To understand the basis election, it is useful to understand that when a United States shareholder includes an amount in income related to the subpart F income of its CFC, the CFC's earnings that are associated with the income inclusion are considered as previously taxed. Thus, when those previously taxed E&P are distributed to the United States shareholder, the United States shareholder generally does not include them in income. Additionally, in general, the subpart F inclusion also causes an upward basis adjustment in the stock of the CFC equal to the amount of the income inclusion. This also prevents double taxation through capital gain recognized in the event that the CFC is sold. Because this increase in basis is only needed to avoid double taxation until the previously taxed E&P are distributed, once the earnings are distributed, there is a corresponding downward adjustment in basis of the CFC. If there is insufficient basis in the stock to account for the decrease, then the United States shareholder must recognize gain equal to the difference between the amount of the basis and the reduction.

When applying the framework laid out above in the context of section 965, there are several places where additional rules were needed. Under section 965(b)(4)(A), earnings of DFICs are treated as previously taxed E&P (''section 965(b) previously taxed earnings and profits'') if a deficit is used to offset those earnings for purposes of determining the United States shareholder's inclusion under section 965(a). However, the statute does not provide for a basis increase to the stock of the DFIC, even though other provisions of the Code still require a basis decrease when the section 965(b) previously taxed earnings and profits are distributed. Thus, under the statute, there could be a disincentive to distribute section 965(b) previously taxed earnings and profits because the United States shareholder has to reduce its basis in its CFC, and in some instances, recognize gain, because the initial offsetting basis increase did not occur.

Under section 965(b)(4)(B), the deficit in E&P in an E&P deficit foreign corporation is generally eliminated to the extent that it is used to offset earnings of a DFIC. The increase in E&P without a corresponding decrease in the basis of the E&P deficit foreign corporation introduces a distortion into the system because it preserves a loss in the stock of the entity even though the loss in earnings and profits has been utilized and eliminated.

Consistent with the legislative history, under the proposed regulations, a taxpayer could elect to make certain basis adjustments related to the taxpayer's section 965(b) previously taxed earnings and profits. This election was allowed in order to eliminate the distortions in the basis of the stock of the DFIC and E&P deficit foreign corporations. The proposed regulations allowed the taxpayer to elect to increase the basis of certain stock of its DFICs pro rata by the amount of its section 965(b) previously taxed earnings and profits. However, for consistency, the taxpayer was then also required to reduce the basis of certain stock of its E&P deficit foreign corporations by an equivalent amount, and recognize gain to the extent the reduction exceeded the amount of basis the taxpayer had in the stock. The proposed regulations therefore reduced the disincentive to repatriate section 965(b) previously taxed earnings and profits. However, the forced gain recognition could have discouraged some taxpayers from making the election, which would continue the disincentive to repatriate section 965(b) previously taxed earnings and profits, retaining the distortion in the basis of their E&P deficit foreign corporations and thereby distorting taxpayers' investment and planning decisions.

The final regulations therefore revise this rule slightly to provide an even more flexible election. The final regulations permit a taxpayer to increase its basis in the stock of its DFICs by the lesser of its section 965(b) previously taxed earnings and profits or the amount it can reduce the stock basis of its E&P deficit foreign corporations without recognizing gain. Additionally, subject to certain limitations, the taxpayer is allowed to designate which stock of a DFIC is increased and by how much. This new election further incentivizes taxpayers to make an election to reduce some of the distortions created by the statute, by providing some basis in the DFICs with section 965(b) previously taxed earnings and profits that can be used to repatriate those earnings, and by reducing some of the basis in the E&P deficit foreign corporations to account for the utilization and elimination of the deficit. Additionally, allowing taxpayers the flexibility to assign basis increases to stock in a way which benefits them the most, rather than merely allocating the increases pro rata among the taxpayers' DFICs, further neutralizes any negative impact of the statute on the incentive to repatriate section 965(b) previously taxed earnings and profits.

In developing the final regulations, the Treasury Department and the IRS considered a number of options related to the basis election, including retaining the rule in the proposed regulations, requiring that the taxpayer increase the basis in the stock of its DFICs on a pro rata basis rather than by designation, and a more complex rule that would have permitted additional basis adjustments where an E&P deficit foreign corporation had basis in excess of its deficit. The rules in the final regulation balance administrative and compliance concerns, while still allowing the maximum amount of flexibility for taxpayers in their investment and repatriation planning. This increased flexibility and clarity provided by the final regulations helps to ensure that taxpayers face more uniform incentives regarding section 965(b) previously taxed earnings and profits, and minimizes distortions to taxpayer behavior resulting from the adjustments provided for by the statute. See Part III.D of the Summary of Comments and Explanation of Revisions for additional discussion of the considerations taken into account with respect to this issue.

2. Cash Position Calculation

In the case of a domestic corporate United States shareholder, section 965 generally taxes foreign earnings at a 15.5% rate if held in cash, but only at 8% otherwise. The cash definition in the statute and the proposed regulations includes both cash and cash equivalents. A number of comments were received requesting that certain assets be excluded from the list of assets counted as cash equivalents, including commodities held as inventories or supplies and stock of publicly traded companies. The final regulations provide a narrow exception from the definition of ''cash position'' for certain commodities held by a specified foreign corporation in the ordinary course of its trade or business as well as for certain privately negotiated contracts to buy or sell such assets.

The Treasury Department and the IRS have determined that assets that would otherwise constitute cash equivalents should not be treated as such for purposes of section 965 if they constitute inventory or supplies under longstanding tax principles. These types of assets have been defined by statute and decades of case law as property used in the ordinary course of a taxpayer's business, typically for sale to customers or further use via processes such as manufacturing and refinement. In general, these types of assets are not held for investment with the goal of recognizing appreciation over a substantial period of time, but are rather turned over (or used to make property that is turned over) routinely in the ordinary conduct of business.

These well-settled delineations of what constitute inventory or supplies are consistent with the statutory definition of and legislative history explaining cash-equivalent assets in section 965(c)(3)(B)(iii). Moreover, the contours of this category have been carefully defined through common law and are generally well-understood by taxpayers. As a result, an exception from cash-equivalent assets for this type of property is well-defined and understood, consistent with statutory intent, and appropriately narrow. By contrast, other potential exceptions would have required the creation of new terms and concepts, led to potential over- or under-inclusiveness, and created uncertainty. For these reasons, the Treasury Department and the IRS determined that the general approach in the proposed regulations was most consistent with the statute and legislative history, subject to the narrow exception added to the final regulations for the reasons discussed above.

Further, providing broad exceptions could create complexity and increased administrative and compliance burdens. See Part II.D of the Summary of Comments and Explanation of Revisions for a more complete discussion of the considerations taken into account with respect to this issue.

3. Total Net Tax Liability Under Section 965

Section 965(h) elections and section 965(i) elections allow a taxpayer to defer payment of its total net tax liability under section 965. (For section 965(h), the election provides deferral over 8 years, whereas for section 965(i) the election provides indefinite deferral until the occurrence of certain triggering events.) Total net tax liability under section 965, which defines the portion of a taxpayer's income tax eligible for deferral, is equal to the difference between a taxpayer's net income tax ''with'' and ''without'' the application of section 965; this is intended to isolate the portion of a taxpayer's net income tax attributable solely to section 965. Under the statute, the ''without'' prong calculates a taxpayer's net income tax without regard to section 965, but also disregards dividends received from a foreign subsidiary. Dividends are disregarded because, absent section 965, the dividends generally would be taxed in the hands of the taxpayer, but such dividends would be distributions of previously taxed E&P if section 965 applies, and thus not subject to additional tax.

Absent the provision in the statute that disregards dividends received from a foreign subsidiary in the ''without'' prong, the tax imposed on dividends would be included in the ''without'' prong but not in the ''with'' prong, distorting the ''with'' and ''without'' calculation so that it no longer isolates the net income tax attributable to section 965, and under-counting income eligible for deferral.

In response to comments, the final regulations also disregard effective repatriations taxed in a manner similar to dividends under section 951(a)(1)(B) resulting from a foreign subsidiary's investments in United States property under section 956 for purposes of calculating the ''without'' prong. In the year that section 965 applied, taxpayers may have chosen to borrow funds from their CFCs instead of receiving a regular dividend distribution, because such loans would not be subject to tax as effective repatriations of previously taxed E&P and their annual cash distribution policies could not be easily adjusted following passage of the Act. Without the final regulations, taxpayers that received these loans from their CFCs would be required to include the loan amount in the ''without'' calculation, leading to a distortion in the ''with'' and ''without'' calculation so that it no longer isolates the net income tax attributable to section 965, resulting in a reduced net income tax attributable to section 965, and a loss of some of the deferral benefit of section 965(h) and (i).

While the Treasury Department and the IRS considered retaining the proposed rule, the final regulations do not do so because the amounts of inbound loans, like dividends, will generally be non-taxable investments of previously taxed E&P ''with'' section 965, but taxable as effective repatriations ''without'' section 965, and thus, as stated previously, including these amounts in the ''without'' calculation would inappropriately decrease the amount of the taxpayer's net tax liability eligible for the deferral elections and fail to isolate the portion of the taxpayer's net tax liability attributable solely to section 965. See Part VII.I.1 of the Summary of Comments and Explanation of Revisions for a more complete discussion of the considerations taken into account with respect to this issue.

II. Paperwork Reduction Act

A. Collection of Information Imposed by the Regulations

The collection of information imposed directly by these regulations is contained in §§ 1.965–2(d)(2)(ii)(B), 1.965–2(f)(2)(iii)(B), 1.965–3(b)(2), 1.965–3(c)(3), 1.965–4(b)(2)(i), 1.965–4(b)(2)(iii)(B), 1.965–7(b)(2), 1.965–7(b)(3)(iii)(B), 1.965–7(c)(2), 1.965–7(c)(3)(iv)(B), 1.965–7(c)(3)(v)(D), 1.965–7(c)(6)(i), 1.965–7(d)(3), 1.965–7(e)(2), 1.965–7(f)(5), and 1.965–8(c). The collection of information provided by these regulations has been reviewed and approved by the Office of Management and Budget under control number 1545–2280. The information is required in order for the IRS to be aware if a taxpayer makes an election, transfers a section 965(h) net tax liability or section 965(i) net tax liability pursuant to a transfer agreement, or takes a position that the anti-abuse rules (described in Part V of the Summary of Comments and Explanation of Revisions section of this preamble) do not apply.

The estimates for the collection of information provided by these final regulations are that 100,000 respondents will require 5 hours per response for a total reporting burden of 500,000 hours. A valuation of the burden hours at $95/hour ($2017) leads to a PRA-based estimate of the reporting costs to taxpayers of $47,500,000. This is a one-time paperwork burden. The Treasury Department and the IRS anticipate substantially all paperwork burdens related to the final regulations to be incurred only with respect to the inclusion year. Any subsequent reporting (such as in connection with a transfer of a section 965(h) net tax liability or section 965(i) net tax liability) would be negligible burdens that implement elections made and payments calculated in the inclusion year. These burden estimates capture only those burdens imposed by the final regulations and do not include burden estimates for forms associated with the statute.

Comments suggested that the burden reported in connection with the collection of information requirements under the proposed regulations did not appropriately take into account the time necessary for determining net tax liability under section 965 and performing other computations related to the determination of such net tax liability. However, the collections of information under the proposed regulations do not relate to such computations; they relate solely to the making of elections, filing of transfer agreements, and reporting of positions concerning the application of anti-abuse rules. Limited information is required to make such elections, file such transfer agreements, or do such reporting, and accordingly, five hours is an appropriate estimate of the burden imposed by the collections of information in the final regulations.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. The IRS has posted information for taxpayers on their recordkeeping requirements at *https://www.irs.gov/taxtopics/tc305.* Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

B. Forms Created or Modified To Collect Information

In addition to the collection of information requirements in the final regulations, the enactment of section 965 necessitated the creation and modification of certain forms, which are needed to capture changes solely made by the Act and do not reflect a burden imposed by the final regulations. The Treasury Department and the IRS intend

that the collections of information relating to the reporting and payment of tax under section 965 will be conducted by way of the forms and instructions identified thus far in the following table. As a result, for purposes of the Paperwork Reduction Act (44 U.S.C. 3507(d)), the reporting burden associated with the collection of information in those forms will be reflected in the Form 14029, Paperwork Reduction Act Submission, associated with those forms.

RELATED NEW OR REVISED TAX FORMS

	New forms	Revision of existing form	Number of respondents (estimated)
Form 965	X		50,000—100,000
Form 965–A	X		35,000–70,000
Form 965–B	X		15,000–30,000
Form 990–PF		X	<1,000
Form 990–T		X	<1,000
Form 1040		X	27,000–57,000
Form 1041		X	<1,000
Form 1065		X	8,000–10,000
Form 1120		X	12,000–20,000
Form 1120–C		X	<1,000
Form 1120–L		X	<1,000
Form 1120–PC		X	<1,000
Form 1120–REIT		X	<1,000
Form 1120–RIC		X	<1,000
Form 1120–S		X	3,000–5,000

The current status of the Paperwork Reduction Act submissions related to the tax forms that will be created or revised as a result of section 965 is provided in the following table. The burdens associated with the information collections in the forms are included in aggregated burden estimates for the OMB control numbers listed in the following table which, in the case of 1545–0123, represents a total estimated burden time, including all other related forms and schedules for corporations, of 3.157 billion hours and total estimated monetized costs of $58.148 billion ($2017) and, in the case of 1545–0074, a total estimated burden time, including all other related forms and schedules for individuals, of 1.784 billion hours and total estimated monetized costs of $31.764 billion ($2017). The burden estimates provided in the OMB control numbers in the following table are aggregate amounts that relate to the entire package of forms associated with the OMB control number, and will in the future include but not isolate the estimated burden of only those information collections associated with section 965. These numbers are therefore unrelated to the future calculations needed to assess the burden imposed by these regulations. To guard against over-counting the burden that international tax provisions imposed prior to the Act, the Treasury Department and the IRS urge readers to recognize that these burden estimates have also been cited by regulations (such as the foreign tax credit regulations, 83 FR 63200) that rely on the applicable OMB control numbers in order to collect information from the applicable types of filers. With respect to the final regulations, the only relevant burden estimates are those associated with OMB control number 1545–2280. Future estimates would capture both changes made by the Act and those that arise out of discretionary authority exercised in the regulations. In addition, when available, drafts of IRS forms are posted for comment at *https://apps.irs.gov/app/picklist/list/draftTaxForms.htm.*

Form	Type of filer	OMB No.(s)	Status
Form 965 (including Schedules A–H).	Business (NEW Model).	1545–0123	Published in the FRN on 10/11/18. Public Comment period closed on 12/10/18.
	Link: *https://www.federalregister.gov/documents/2018/10/09/2018-21846/proposed-collection-comment-request-for-forms-1065-1065-b-1066-1120-1120-c-1120-f-1120-h-1120-nd.*		
Form 965–B	Business (NEW Model).	1545–0123	Published in the FRN on 10/11/18. Public Comment period closed on 12/10/18.
	Link: *https://www.federalregister.gov/documents/2018/10/09/2018-21846/proposed-collection-comment-request-for-forms-1065-1065-b-1066-1120-1120-c-1120-f-1120-h-1120-nd.*		
Form 965–A	Individual (NEW Model).	1545–0074	Limited Scope submission (1040 only) approved on 12/7/18. Full ICR submission for all forms in 3/2019. 60 Day FRN not published yet for full collection.
	Link: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201808-1545-031.*		

Form	Type of filer	OMB No.(s)	Status
Forms 990–PF, 990–T	Tax exempt entities (NEW Model).	1545–0047	Published 60-day FRN on 8/22/18.
	Link: *https://www.federalregister.gov/documents/2018/08/22/2018-18135/proposed-collection-comment-request-for-forms-990-990-ez-sch-b-br-br-990-ez-sch-l-lp-990-ez-990-pf.*		
Form 1040	Individual (NEW Model).	1545–0074	Limited Scope submission (1040 only) approved on 12/7/18. Full ICR submission for all forms in 3/2019. 60 Day FRN not published yet for full collection.
	Link: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201808-1545-031.*		
Form 1041	Trusts and estates.	1545–0092	Submitted to OIRA for review on 9/27/18.
	Link: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201806-1545-014.*		
Form 1065	Business (NEW Model).	1545–0123	Published in the FRN on 10/11/18. Public Comment period closed on 12/10/18.
	Link: *https://www.federalregister.gov/documents/2018/10/09/2018-21846/proposed-collection-comment-request-for-forms-1065-1065-b-1066-1120-1120-c-1120-f-1120-h-1120-nd.*		
Forms 1120, 1120–C, 1120–L, 1120–PC, 1120–REIT, 1120–RIC, 1120–S.	Business (NEW Model).	1545–0123	Published in the FRN on 10/11/18. Public Comment period closed on 12/10/18.
	Link: *https://www.federalregister.gov/documents/2018/10/09/2018-21846/proposed-collection-comment-request-for-forms-1065-1065-b-1066-1120-1120-c-1120-f-1120-h-1120-nd.*		

III. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that the final regulations will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act (''small entities'').

Section 965 and the final regulations generally affect U.S. taxpayers who are at least 10-percent shareholders of a foreign corporation. As an initial matter, foreign corporations are not considered small entities. Nor are U.S. taxpayers considered small entities to the extent the taxpayers are natural persons or entities other than small entities. Although the Treasury Department and the IRS received a number of comments asserting that a substantial number of small entities would be affected by the proposed regulations, those comments were principally concerned with U.S. citizens living abroad that owned foreign corporations directly or indirectly through other foreign entities. No small entity is affected in this scenario. Thus, the final regulations generally only affect small entities if a U.S. taxpayer that is a 10-percent shareholder of a foreign corporation is a small entity.

While comprehensive counts of all types of small businesses affected by section 965 and these regulations are not readily available, in-house estimates of section 965 suggest that very roughly 20,000 multinational domestic corporations are potentially subject to section 965, and that about half of these corporations have less than $25 million in gross receipts. Therefore, very roughly 10,000 small multinational corporations (defined as corporations with less than $25 million in gross receipts) are potentially subject to section 965. The in-house estimates further suggest that about 25% of these small multinational corporations would not owe any tax under section 965, because they do not have any accumulated E&P to which the tax would be applied.

Regardless of the number of small entities potentially affected by section 965 or the final regulations, the Treasury Department and the IRS have concluded that there is no significant economic impact on such entities as a result of the final regulations. Based on published information from the Conference Report accompanying the Act, H.R. Rep. No. 115–446, at 688 (2017), and Bureau of Economic Analysis aggregate data, which were adjusted to reflect the tax burden and total sales of small businesses, the projected net tax proceeds from section 965 are estimated to be only a small fraction of the total sales of small U.S. parented multinational enterprises projected to 2027.[1] See the table in this Part III. The tax amounts to less than 3 to 5 percent of receipts (as defined in 13 CFR 121.04), an economic impact that is not regarded as significant under the Regulatory Flexibility Act. Moreover, while most affected small entities are likely to pay the tax in (unequal) installments over 8 years, the percentage in any particular year does not exceed 2.2 percent.

[1] In-house estimates of section 965 tax liability and total receipts of small businesses are used to scale the published aggregate figures. In this case, a small business is defined as a multinational corporation with less than $25 million in gross receipts. Data on total sales of all U.S. parented companies are drawn from the Bureau of Economic Analysis Interactive Data accessed at this web address in December, 2018: *https://apps.bea.gov/iTable/iTable.cfm?ReqID=2&step=1.*

NET SECTION 965 TAX REVENUE AS A FRACTION OF TOTAL SALES FOR SMALL MULTINATIONAL BUSINESSES [1]

Fiscal years	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027
Net Tax Collected ($ billions)	1.2	0.8	0.2	0.2	0.2	0.4	0.7	1.0	0.5	−0.1
Total Sales ($ billions)	54.0	56.7	59.6	62.6	65.7	69.0	72.4	76.0	79.8	83.8
Percent	2.20	1.32	0.42	0.38	0.36	0.60	0.99	1.28	0.63	−0.17

[1] Small Multinational Businesses are not necessarily small entities as defined by the Regulatory Flexibility Act.

Thus, even if the economic impact of the final regulations is interpreted broadly to include the tax liability due under section 965, which small entities would be required to pay even if the final regulations were not issued, the economic impact should not be regarded as significant under the Regulatory Flexibility Act.

Additionally, the economic impact of the final regulations when considered alone should be minimal. Any economic impact of the final regulations stems from the collection of information requirements imposed by §§ 1.965–2(d)(2)(ii)(B), 1.965–2(f)(2)(iii)(B), 1.965–3(b)(2), 1.965–3(c)(3), 1.965–4(b)(2)(i), 1.965–4(b)(2)(iii)(B), 1.965–7(b)(2), 1.965–7(b)(3)(iii)(B), 1.965–7(c)(2), 1.965–7(c)(3)(iv)(B), 1.965–7(c)(3)(v)(D), 1.965–7(c)(6)(i), 1.965–7(d)(3), 1.965–7(e)(2), 1.965–7(f)(5), and 1.965–8(c). The Treasury Department and the IRS have determined that the average burden associated with these collection of information requirements is 5 hours, which is minimal, particularly in comparison with other regulatory requirements related to owning stock in a specified foreign corporation. Furthermore, these requirements apply only if a taxpayer chooses to make an election or rely on a favorable rule. The comments received regarding the economic impact of the proposed regulations principally focus on burdens imposed by the statute (*i.e.,* the tax due as a result of section 965) rather than any additional burdens resulting from the proposed regulations.

For the reasons explained above, the Treasury Department and the IRS have determined that the final regulations will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis under the Regulatory Flexibility Act is not required. Pursuant to section 7805(f), the notice of proposed rulemaking preceding these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business. No comments were received.

IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. In 2018, that threshold is approximately $150 million. This rule does not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

V. Executive Order 13132: Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Drafting Information

The principal authors of the final regulations are Leni C. Perkins, Natalie Punchak, and Karen J. Cate of the Office of Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in the development of the final regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding new entries in numerical order to read as follows:

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

* * * * *

Section 1.962–1 also issued under 26 U.S.C. 965(o).

* * * * *

Section 1.965–1 also issued under 26 U.S.C. 965(c)(3)(B)(iii)(V), 965(d)(2), 965(o), 989(c), and 7701(a).

Section 1.965–2 also issued under 26 U.S.C. 965(b)(3)(A)(ii), 965(o), and 961(a) and (b).

Section 1.965–3 also issued under 26 U.S.C. 965(c)(3)(D) and 965(o).

Section 1.965–4 also issued under 26 U.S.C. 965(c)(3)(F) and 965(o).

Sections 1.965–5 through 1.965–6 also issued under 26 U.S.C. 965(o) and 26 U.S.C. 902(c)(8) (as in effect on December 21, 2017).

Section 1.965–7 also issued under 26 U.S.C. 965(h)(3), 965(h)(5), 965(i)(2), 965(i)(8)(B), 965(m)(2)(A), 965(n)(3), and 965(o).

Section 1.965–8 also issued under 26 U.S.C. 965(o).

Section 1.965–9 also issued under 26 U.S.C. 965(o).

* * * * *

Section 1.986(c)–1 also issued under 26 U.S.C. 965(o) and 26 U.S.C. 989(c).

* * * * *

■ **Par. 2.** Section 1.962–1 is amended by:

■ 1. Revising paragraph (b)(1)(i).

■ 2. Redesignating paragraphs (b)(2)(iv)(*a*) and (*b*) as paragraph (b)(2)(iv)(A) and (B), respectively.

■ 3. Adding paragraph (d).

The revision and addition read as follows:

§ 1.962–1 Limitation of tax for individuals on amounts included in gross income under section 951(a).

* * * * *

(b) * * *

(1) * * *

(i) *Determination of taxable income.* The term *taxable income* means the excess of—

(A) The sum of—

(*1*) All amounts required to be included in his gross income under section 951(a) for the taxable year with respect to a foreign corporation of which he is a United States shareholder, including—

(*i*) His section 965(a) inclusion amounts (as defined in § 1.965–1(f)(38)); and

(*ii*) His domestic pass-through owner shares (as defined in § 1.965–1(f)(21)) of section 965(a) inclusion amounts with respect to deferred foreign income corporations (as defined in § 1.965–

1(f)(17)) of which he is a United States shareholder; plus

(*2*) [Reserved]

(*3*) All amounts which would be required to be included in his gross income under section 78 for the taxable year with respect to the amounts referred to in paragraph (b)(1)(i)(A)(*1*) and (*2*) of this section if the shareholder were a domestic corporation; over

(B) The sum of the following deductions, but no other deductions or amounts—

(*1*) His section 965(c) deduction amount (as defined in § 1.965–1(f)(42)) for the taxable year;

(*2*) His domestic pass-through owner shares of section 965(c) deduction amounts corresponding to the amounts referred to in paragraph (b)(1)(i)(A)(*1*)(*ii*) of this section; and

(*3*) [Reserved]

* * * * *

(d) *Applicability dates.* Paragraph (b)(1)(i) of this section applies beginning the last taxable year of a foreign corporation that begins before January 1, 2018, and with respect to a United States person, for the taxable year in which or with which such taxable year of the foreign corporation ends.

■ **Par. 3.** Section 1.962–2 is amended by revising paragraph (a) and adding paragraph (d) to read as follows:

§ 1.962–2 Election of limitation of tax for individuals.

(a) *Who may elect.* The election under section 962 may be made only by an individual (including a trust or estate) who is a United States shareholder (including an individual who is a United States shareholder because, by reason of section 958(b), he is considered to own stock of a foreign corporation owned (within the meaning of section 958(a)) by a domestic pass-through entity (as defined in § 1.965–1(f)(19))).

* * * * *

(d) *Applicability dates.* Paragraph (a) of this section applies beginning the last taxable year of a foreign corporation that begins before January 1, 2018, and with respect to a United States person, for the taxable year in which or with which such taxable year of the foreign corporation ends.

■ **Par. 4.** Sections 1.965–0 through 1.965–9 are added to read as follows:

* * * * *

1.965–0 Outline of section 965 regulations.
1.965–1 Overview, general rules, and definitions.
1.965–2 Adjustments to earnings and profits and basis.
1.965–3 Section 965(c) deductions.
1.965–4 Disregard of certain transactions.
1.965–5 Allowance of credit or deduction for foreign income taxes.
1.965–6 Computation of foreign income taxes deemed paid and allocation and apportionment of deductions.
1.965–7 Elections, payment, and other special rules.
1.965–8 Affiliated groups (including consolidated groups).
1.965–9 Applicability dates.

* * * * *

§ 1.965–0 Outline of section 965 regulations.

This section lists the headings for §§ 1.965–1 through 1.965–9.

§ 1.965–1 Overview, general rules, and definitions.

(a) Overview.
(1) In general.
(2) Scope.
(b) Section 965(a) inclusion amounts.
(1) Inclusion of the pro rata share of the section 965(a) earnings amount.
(2) Reduction by the allocable share of the aggregate foreign E&P deficit.
(c) Section 965(c) deduction amounts.
(d) Treatment of specified foreign corporation as a controlled foreign corporation.
(e) Special rule for certain controlled domestic partnerships.
(1) In general.
(2) Definition of a controlled domestic partnership.
(f) Definitions.
(1) 8 percent rate amount.
(2) 8 percent rate equivalent percentage.
(3) 15.5 percent rate amount.
(4) 15.5 percent rate equivalent percentage.
(5) Accounts payable.
(6) Accounts receivable.
(7) Accumulated post-1986 deferred foreign income.
(8) Aggregate foreign cash position.
(9) Aggregate foreign E&P deficit.
(10) Aggregate section 965(a) inclusion amount.
(11) Allocable share.
(12) Bona fide hedging transaction.
(13) Cash-equivalent asset.
(i) In general.
(ii) Specified commodity.
(14) Cash-equivalent asset hedging transaction.
(i) In general.
(ii) Aggregate hedging transactions.
(15) Cash measurement dates.
(16) Cash position.
(i) General rule.
(ii) Fair market value of cash-equivalent assets.
(iii) Measurement of derivative financial instruments.
(iv) Translation of cash position amounts.
(17) Deferred foreign income corporation.
(i) In general.
(ii) Priority rule.
(18) Derivative financial instrument.
(19) Domestic pass-through entity.
(20) Domestic pass-through owner.
(21) Domestic pass-through owner share.
(22) E&P deficit foreign corporation.
(i) In general.
(ii) Determination of deficit in post-1986 earnings and profits.
(23) E&P measurement dates.
(24) Final cash measurement date.
(25) First cash measurement date.
(26) Inclusion year.
(27) Net accounts receivable.
(28) Pass-through entity.
(29) Post-1986 earnings and profits.
(i) General rule.
(ii) Foreign income taxes.
(iii) Deficits in earnings and profits.
(30) Pro rata share.
(31) Second cash measurement date.
(32) Section 958(a) stock.
(33) Section 958(a) U.S. shareholder.
(34) Section 958(a) U.S. shareholder inclusion year.
(35) Section 965 regulations.
(36) Section 965(a) earnings amount.
(37) Section 965(a) inclusion.
(38) Section 965(a) inclusion amount.
(39) Section 965(a) previously taxed earnings and profits.
(40) Section 965(b) previously taxed earnings and profits.
(41) Section 965(c) deduction.
(42) Section 965(c) deduction amount.
(43) Short-term obligation.
(44) Specified E&P deficit.
(45) Specified foreign corporation.
(i) General rule.
(ii) Special attribution rule.
(A) In general.
(B) Attribution for purposes of the ten percent standard.
(iii) Passive foreign investment companies.
(46) Spot rate.
(47) United States shareholder.
(g) Examples.
(1) Example 1.
(i) Facts.
(ii) Analysis.
(2) Example 2.
(i) Facts.
(ii) Analysis.
(3) Example 3.
(i) Facts.
(ii) Analysis.
(4) Example 4.
(i) Facts.
(ii) Analysis.
(5) Example 5.
(i) Facts.
(ii) Analysis.
(A) Determination of status as a deferred foreign income corporation.
(B) Determination of status as an E&P deficit foreign corporation.
(6) Example 6.
(i) Facts.
(ii) Analysis.
(7) Example 7.
(i) Facts.
(ii) Analysis.
(8) Example 8.
(i) Facts.
(ii) Analysis.

§ 1.965–2 Adjustments to earnings and profits and basis.

(a) Scope.
(b) Determination of and adjustments to earnings and profits of a specified foreign corporation for purposes of applying sections 902, 959, 960, and 965.
(c) Adjustments to earnings and profits by reason of section 965(a).
(d) Adjustments to earnings and profits by reason of section 965(b).

(1) Adjustments to earnings and profits described in section 959(c)(2) and (c)(3) of deferred foreign income corporations.
(2) Adjustments to earnings and profits described in section 959(c)(3) of E&P deficit foreign corporations.
(i) Increase in earnings and profits by an amount equal to the portion of the section 958(a) U.S. shareholder's pro rata share of the specified E&P deficit.
(A) In general.
(B) Reduction of a qualified deficit.
(ii) Determination of portion of a section 958(a) U.S. shareholder's pro rata share of a specified E&P deficit taken into account.
(A) In general.
(B) Designation of portion of a section 958(a) U.S. shareholder's pro rata share of a specified E&P deficit taken into account.
(e) Adjustments to basis by reason of section 965(a).
(1) General rule.
(2) Section 962 election.
(f) Adjustments to basis by reason of section 965(b).
(1) In general.
(2) Election to make adjustments to basis to account for the application of section 965(b).
(i) In general.
(ii) Basis adjustments.
(A) Increase in basis with respect to a deferred foreign income corporation.
(*1*) In general.
(*2*) Limited basis adjustment.
(B) Reduction in basis with respect to an E&P deficit foreign corporation.
(*1*) In general.
(*2*) Limited basis adjustment.
(C) Section 962 election.
(iii) Rules regarding the election.
(A) Consistency requirement.
(B) Manner of making election.
(*1*) Timing.
(*i*) In general.
(*ii*) Transition rule.
(*2*) Election statement.
(g) Gain reduction rule.
(1) Reduction in gain recognized under section 961(b)(2) by reason of distributions attributable to section 965 previously taxed earnings and profits in the inclusion year.
(i) In general.
(ii) Definition of section 965 previously taxed earnings and profits.
(2) Reduction in basis by an amount equal to the gain reduction amount.
(h) Rules of application for specified basis adjustments.
(1) Timing of basis adjustments.
(2) Netting of basis adjustments.
(3) Gain recognition for reduction in excess of basis.
(4) Adjustments with respect to each share.
(i) Section 958(a) stock.
(ii) Applicable property.
(5) Stock or property for which adjustments are made.
(i) In general.
(ii) Special rule for an interest in a foreign pass-through entity.
(i) Definitions.
(1) Applicable property.
(2) Foreign pass-through entity.
(3) Property.
(j) Examples.
(1) Example 1.
(i) Facts.
(ii) Analysis.
(A) Adjustments to section 959(c) classification of earnings and profits for inclusion under section 951(a)(1)(A) without regard to section 965.
(B) Distributions between specified foreign corporations before January 1, 2018.
(C) Section 965(a) inclusion amount.
(*1*) CFC1 section 965(a) earnings amount.
(*2*) CFC2 section 965(a) earnings amount.
(*3*) Effect on earnings and profits described in section 959(c)(2) and (3).
(D) Distribution to United States shareholder.
(E) Section 902 and section 960 consequences.
(*1*) Distribution by and inclusions with respect to CFC2.
(*2*) Inclusions with respect to CFC1.
(2) Example 2.
(i) Facts.
(ii) Analysis.
(A) Adjustments to section 959(c) classification of earnings and profits for inclusion under section 951(a)(1)(A) without regard to section 965.
(B) Distributions between specified foreign corporations before January 1, 2018.
(C) Section 965(a) inclusion amount.
(*1*) CFC1 section 965(a) earnings amount.
(*2*) CFC2 section 965(a) earnings amount.
(*3*) Effect on earnings and profits described in section 959(c)(2) and (3).
(D) Distribution to United States shareholder.
(3) Example 3.
(i) Facts.
(ii) Analysis.
(A) Adjustments to section 959(c) classification of earnings and profits for inclusion under section 951(a)(1)(A) without regard to section 965.
(B) Distributions between specified foreign corporations before January 1, 2018.
(C) Section 965(a) inclusion amount.
(*1*) CFC1 section 965(a) earnings amount.
(*2*) CFC2 section 965(a) earnings amount.
(*3*) Effect on earnings and profits described in section 959(c)(2) and (3).
(D) Distribution to United States shareholder.
(4) Example 4.
(i) Facts.
(ii) Analysis.
(A) Adjustments to section 959(c) classification of earnings and profits for inclusion under section 951(a)(1)(A) without regard to section 965.
(B) Distributions between specified foreign corporations before January 1, 2018.
(C) Section 965(a) inclusion amount.
(*1*) CFC1 section 965(a) earnings amount.
(*2*) CFC2 section 965(a) earnings amount.
(*3*) Effect on earnings and profits described in section 959(c)(2) and (3).
(D) Distribution to United States shareholder.
(*1*) Distribution that is a specified payment.
(*2*) Distribution to United States shareholder.
(E) Section 902 and section 960 consequences.
(5) Example 5.
(A) Section 965(a) inclusion amount.
(*1*) CFC section 965(a) earnings amount.
(*2*) Effect on earnings and profits described in section 959(c)(2) and (3).
(6) Example 6.
(i) Facts.
(ii) Analysis.
(A) Adjustments to section 959(c) classification of earnings and profits for section 1248 inclusion.
(B) Section 965(a) inclusion amount.
(C) Distributions to United States shareholders.
(7) Example 7.
(i) Facts.
(ii) Analysis.
(8) Example 8.
(i) Facts.
(ii) Analysis.
(A) Application of the gain reduction rule.
(B) Adjustments to the basis of CFC1.
(9) Example 9.
(i) Facts.
(ii) Analysis.
(A) Application of the gain reduction rule.
(B) Adjustments to the basis of CFC1 and CFC2.

§ 1.965–3 Section 965(c) deductions.

(a) Scope.
(b) Rules for disregarding certain assets for determining aggregate foreign cash position.
(1) Disregard of certain obligations between related specified foreign corporations.
(2) Disregard of other assets upon demonstration of double-counting.
(3) Disregard of portion of cash position of noncorporate entities treated as specified foreign corporations.
(4) Examples.
(i) Example 1.
(A) Facts.
(B) Analysis.
(*1*) Loan from CFC1 to CFC2.
(*2*) Account receivable of CFC1 held by CFC2.
(*3*) Loan from CFC1 to CFC3.
(ii) Example 2.
(A) Facts.
(B) Analysis.
(iii) Example 3.
(A) Facts.
(B) Analysis.
(iv) Example 4.
(A) Facts.
(B) Analysis.
(v) Example 5.
(A) Facts.
(B) Analysis.
(*1*) Treatment of PS1.
(*2*) Treatment of PS2.
(c) Determination of aggregate foreign cash position for a section 958(a) U.S. shareholder inclusion year.
(1) Single section 958(a) U.S. shareholder inclusion year.
(2) Multiple section 958(a) U.S. shareholder inclusion years.
(i) Allocation to first section 958(a) U.S. shareholder inclusion year.
(ii) Allocation to succeeding section 958(a) U.S. shareholder inclusion years.
(3) Estimation of aggregate foreign cash position.
(4) Examples.
(i) Example 1.
(A) Facts.
(B) Analysis.

(ii) Example 2.
(A) Facts.
(B) Analysis.
(d) Increase of income by section 965(c) deduction of an expatriated entity.
(1) In general.
(2) Definition of expatriated entity.
(3) Definition of surrogate foreign corporation.
(e) Section 962 election.
(1) In general.
(2) Example.
(i) Facts.
(ii) Analysis.
(f) Treatment of section 965(c) deduction under certain provisions of the Internal Revenue Code.
(1) Section 63(d).
(2) Sections 705, 1367, and 1368.
(i) Adjustments to basis.
(ii) S corporation accumulated adjustments account.
(iii) Example.
(A) Facts.
(B) Analysis.
(3) Section 1411.
(4) Section 4940.
(g) Domestic pass-through entities.

§ 1.965–4 Disregard of certain transactions.

(a) Scope.
(b) Transactions undertaken with a principal purpose of changing the amount of a section 965 element.
(1) General rule.
(2) Presumptions and exceptions for the application of the general rule.
(ii) Definitions.
(A) Relatedness.
(B) Transfer.
(*1*) In general.
(*2*) Indirect transfer.
(iii) Cash reduction transactions.
(A) General rule.
(B) Per se rules for certain distributions.
(iv) E&P reduction transactions.
(A) General rule.
(*1*) Definition of pro rata share reduction transaction.
(*2*) Definition of E&P deficit transaction.
(B) Per se rule for internal group transactions.
(C) Example.
(*1*) Facts.
(*2*) Analysis.
(c) Disregard of certain changes in method of accounting and entity classification elections.
(1) Changes in method of accounting.
(2) Entity classification elections.
(d) Definition of a section 965 element.
(e) Rules for applying paragraphs (b) and (c) of this section.
(1) Determination of whether there is a change in the amount of a section 965 element.
(2) Treatment of domestic pass-through owners as United States shareholders.
(3) Exception for certain incorporation transactions.
(i) In general.
(ii) Aggregate foreign cash position.
(4) Consequences of liquidation.
(i) In general.
(ii) Specified liquidation date.
(f) Disregard of certain transactions occurring between E&P measurement dates.
(1) Disregard of specified payments.
(2) Definition of specified payment.
(3) Non-application of disregard rule.
(4) Examples.
(i) Example 1.
(A) Facts.
(B) Analysis.
(ii) Example 2.
(A) Facts.
(B) Analysis.
(iii) Example 3.
(A) Facts.
(B) Analysis.
(iv) Example 4.
(A) Facts.
(B) Analysis.
(v) Example 5.
(A) Facts.
(B) Analysis.
(vi) Example 6.
(A) Facts.
(B) Analysis.

§ 1.965–5 Allowance of credit or deduction for foreign income taxes.

(a) Scope.
(b) Rules for foreign income taxes paid or accrued.
(c) Rules for foreign income taxes treated as paid or accrued.
(1) Disallowed credit.
(i) In general.
(ii) Foreign income taxes deemed paid under section 960(a)(3) (as in effect on December 21, 2017).
(iii) [Reserved]
(2) Disallowed deduction.
(3) Coordination with section 78.
(i) In general.
(ii) Domestic corporation that is a domestic pass-through owner.
(d) Applicable percentage.
(1) In general.
(2) No section 965(a) inclusion amount.
(3) Applicable percentage for domestic pass-through owners.
(4) Applicable percentage with respect to certain distributions of previously taxed earnings and profits.

§ 1.965–6 Computation of foreign income taxes deemed paid and allocation and apportionment of deductions.

(a) Scope.
(b) Computation of foreign income taxes deemed paid.
(1) In general.
(2) Dividend or inclusion in excess of post-1986 undistributed earnings.
(3) Treatment of adjustment under section 965(b)(4)(B).
(4) Section 902 fraction.
(c) Allocation and apportionment of deductions.
(d) Hovering deficits.

§ 1.965–7 Elections, payment, and other special rules.

(a) Scope.
(b) Section 965(h) election.
(1) In general.
(i) Amount of installments.
(ii) Increased installments due to a deficiency or a timely filed or amended return.
(A) In general.
(B) Timing.
(C) Exception for negligence, intentional disregard, or fraud.
(iii) Due date of installments.
(A) In general.
(B) Extension for specified individuals.
(2) Manner of making election.
(i) Eligibility.
(ii) Timing.
(iii) Election statement.
(3) Acceleration of payment.
(i) Acceleration.
(ii) Acceleration events.
(iii) Eligible section 965(h) transferee exception.
(A) In general.
(*1*) Requirement to have a covered acceleration event.
(*2*) Requirement to enter into a transfer agreement.
(B) Transfer agreement.
(*1*) Eligibility.
(*2*) Filing requirements.
(*i*) In general.
(*ii*) Transition rule.
(*3*) Signature requirement.
(*4*) Terms of agreement.
(*5*) Consolidated groups.
(*6*) Leverage ratio.
(C) Consent of Commissioner.
(*1*) In general.
(*2*) Material misrepresentations and omissions.
(D) Effect of assumption.
(*1*) In general.
(*2*) Eligible section 965(h) transferor liability.
(E) Qualifying consolidated group member transaction.
(*1*) Definition of qualifying consolidated group member transaction.
(*2*) Definition of qualified successor.
(*3*) Departure of multiple members of a consolidated group.
(c) Section 965(i) election.
(1) In general.
(2) Manner of making election.
(i) Eligibility.
(ii) Timing.
(iii) Election statement.
(3) Triggering events.
(i) In general.
(ii) Triggering events.
(iii) Partial transfers.
(iv) Eligible section 965(i) transferee exception.
(A) In general.
(*1*) Requirement to have a covered triggering event.
(*2*) Requirement to enter into a transfer agreement.
(B) Transfer agreement.
(*1*) Eligibility.
(*2*) Filing requirements.
(*i*) In general.
(*ii*) Transition rule.
(*iii*) Death of eligible section 965(i) transferor.
(*3*) Signature requirement.
(*4*) Terms of agreement.
(*5*) Special rule in the case of death of eligible section 965(i) transferor.
(*6*) Leverage ratio.
(C) Consent of Commissioner.
(*1*) In general.
(*2*) Material misrepresentations and omissions.
(D) Effect of assumption.
(*1*) In general.

(*2*) Eligible section 965(i) transferor liability.
(v) Coordination with section 965(h) election.
(A) In general.
(B) Timing for election.
(C) Due date for installment.
(D) Limitation.
(*1*) In general.
(*2*) Manner of obtaining consent.
(*i*) In general.
(*ii*) Transition rule.
(*3*) Signature requirement.
(*4*) Terms of agreement.
(*5*) Consent of Commissioner.
(*i*) In general.
(*ii*) Material misrepresentations and omissions.
(*6*) Leverage ratio.
(4) Joint and several liability.
(5) Extension of limitation on collection.
(6) Annual reporting requirement.
(i) In general.
(ii) Failure to report.
(d) Section 965(m) election and special rule for real estate investment trusts.
(1) In general.
(2) Inclusion schedule for section 965(m) election.
(3) Manner of making election.
(i) Eligibility.
(ii) Timing.
(iii) Election statement.
(4) Coordination with section 965(h).
(5) Acceleration of inclusion.
(6) Treatment of section 965(a) inclusions of a real estate investment trust.
(e) Section 965(n) election.
(1) In general.
(i) General rule.
(ii) Applicable amount for section 965(n) election.
(iii) Scope of section 965(n) election.
(iv) [Reserved]
(2) Manner of making election.
(i) Eligibility.
(ii) Timing.
(iii) Election statement.
(f) Election to use alternative method for calculating post-1986 earnings and profits.
(1) Effect of election for specified foreign corporations that do not have a 52–53-week taxable year.
(2) Effect of election for specified foreign corporations that have a 52–53-week taxable year.
(3) Computation of post-1986 earnings and profits using alternative method.
(4) Definitions.
(i) 52–53-week taxable year.
(ii) Annualized earnings and profits amount.
(iii) Daily earnings amount.
(iv) Notional measurement date.
(5) Manner of making election.
(i) Eligibility.
(ii) Timing.
(iii) Election statement.
(6) Examples.
(i) Example 1.
(A) Facts.
(B) Analysis.
(ii) Example 2.
(A) Facts.
(B) Analysis.
(g) Definitions.
(1) Deferred net tax liability.
(2) REIT section 965 amounts.
(3) Section 965(h) election.
(4) Section 965(h) net tax liability.
(5) Section 965(i) election.
(6) Section 965(i) net tax liability.
(7) Section 965(m) election.
(8) Section 965(n) election.
(9) Specified individual.
(10) Total net tax liability under section 965.
(i) General rule.
(ii) Net income tax.
(iii) Foreign tax credits.
§ 1.965–8 Affiliated groups (including consolidated groups).
(a) Scope.
(b) Reduction of E&P net surplus shareholder's pro rata share of the section 965(a) earnings amount of a deferred foreign income corporation by the allocable share of the applicable share of the aggregate unused E&P deficit.
(1) In general.
(2) Consolidated group as part of an affiliated group.
(c) Designation of portion of excess aggregate foreign E&P deficit taken into account.
(1) In general.
(2) Consolidated group as part of an affiliated group.
(d) [Reserved]
(1) [Reserved]
(2) Consolidated groups.
(e) Treatment of a consolidated group as a single section 958(a) U.S. shareholder or a single person.
(1) In general.
(2) Limitation.
(3) Determination of section 965(c) deduction amount.
(f) Definitions.
(1) Aggregate unused E&P deficit.
(i) In general.
(ii) Reduction with respect to E&P net deficit shareholders that are not wholly owned by the affiliated group.
(2) Allocable share.
(3) Applicable share.
(4) Consolidated group aggregate foreign cash position.
(5) E&P net deficit shareholder.
(6) E&P net surplus shareholder.
(7) Excess aggregate foreign E&P deficit.
(8) Group cash ratio.
(9) Group ownership percentage.
(g) Examples.
(1) Example 1.
(i) Facts.
(A) In general.
(B) Facts relating to section 965.
(ii) Analysis.
(A) Section 965(a) inclusion amounts before application of section 965(b)(5).
(B) Application of section 965(b)(5).
(*1*) Determination of E&P net surplus shareholders and E&P net deficit shareholders.
(*2*) Determining section 965(a) inclusion amounts under section 965(b)(5).
(C) Aggregate foreign cash position.
(D) Section 965(c) deduction amount.
(2) Example 2.
(i) Facts.
(ii) Analysis.
(A) Section 965(a) inclusion amount.
(*1*) Single section 958(a) U.S. shareholder treatment.
(*2*) Determination of inclusion amount.
(B) Consolidated group aggregate foreign cash position.
(C) Section 965(a) deduction amount.
§ 1.965–9 Applicability dates.
(a) In general.
(b) Applicability dates for rules disregarding certain transactions.

§ 1.965–1 Overview, general rules, and definitions.

(a) *Overview*—(1) *In general.* This section provides general rules and definitions under section 965. Section 1.965–2 provides rules relating to adjustments to earnings and profits and basis to determine and account for the application of section 965 and a rule that limits the amount of gain recognized under section 961(b)(2) by reason of distributions attributable to section 965 previously taxed earnings and profits (as defined in § 1.965–2(g)(1)(ii)) in the inclusion year. Section 1.965–3 provides rules regarding the determination of section 965(c) deductions. Section 1.965–4 sets forth rules that disregard certain transactions for purposes of section 965. Sections 1.965–5 and 1.965–6 provide rules with respect to foreign tax credits. Section 1.965–7 provides rules regarding elections and payments. Section 1.965–8 provides rules regarding affiliated groups, including consolidated groups. Section 1.965–9 provides dates of applicability. *See also* §§ 1.962–1 and 1.962–2 (providing rules regarding the application of section 962) and 1.986(c)–1 (providing rules regarding the application of section 986(c)).

(2) *Scope.* Paragraph (b) of this section provides the general rules concerning section 965(a) inclusion amounts. Paragraph (c) of this section provides the general rule concerning section 965(c) deduction amounts. Paragraph (d) of this section provides a rule for specified foreign corporations that are not controlled foreign corporations. Paragraph (e) of this section treats certain controlled domestic partnerships as foreign partnerships for purposes of section 965. Paragraph (f) of this section provides definitions applicable for the section 965 regulations and §§ 1.962–1, 1.962–2, and 1.986(c)–1. Paragraph (g) of this section contains examples illustrating the general rules and definitions set forth in this section.

(b) *Section 965(a) inclusion amounts*—(1) *Inclusion of the pro rata share of the section 965(a) earnings amount.* For an inclusion year of a deferred foreign income corporation, the subpart F income of the deferred foreign income corporation (as otherwise

determined for the inclusion year under section 952 and § 1.952–1) is increased by the section 965(a) earnings amount of the deferred foreign income corporation. *See* section 965(a). Accordingly, a section 958(a) U.S. shareholder with respect to a deferred foreign income corporation generally includes in gross income under section 951(a)(1) for the section 958(a) U.S. shareholder inclusion year its pro rata share of the section 965(a) earnings amount of the deferred foreign income corporation, translated (if necessary) into U.S. dollars using the spot rate on December 31, 2017, and subject to reduction under section 965(b), paragraph (b)(2) of this section, and § 1.965–8(b). The amount of the section 958(a) U.S. shareholder's inclusion with respect to a deferred foreign income corporation as a result of section 965(a) and this paragraph (b)(1), as reduced under section 965(b), paragraph (b)(2) of this section, and § 1.965–8(b), as applicable, is referred to as the *section 965(a) inclusion amount.* Neither the section 965(a) earnings amount nor the section 965(a) inclusion amount is subject to the rules or limitations in section 952 or limited by the accumulated earnings and profits of the deferred foreign income corporation on the date of the inclusion.

(2) *Reduction by the allocable share of the aggregate foreign E&P deficit.* For purposes of determining a section 958(a) U.S. shareholder's section 965(a) inclusion amount with respect to a deferred foreign income corporation, the U.S. dollar amount of the section 958(a) U.S. shareholder's pro rata share of the section 965(a) earnings amount of the deferred foreign income corporation, translated (if necessary) into U.S. dollars using the spot rate on December 31, 2017, is reduced by the deferred foreign income corporation's allocable share of the section 958(a) U.S. shareholder's aggregate foreign E&P deficit. *See* section 965(b). If the section 958(a) U.S. shareholder is a member of a consolidated group, under § 1.965–8(e), all section 958(a) U.S. shareholders that are members of the consolidated group are treated as a single section 958(a) U.S. shareholder for purposes of this paragraph (b)(2).

(c) *Section 965(c) deduction amounts.* For a section 958(a) U.S. shareholder inclusion year, a section 958(a) U.S. shareholder is generally allowed a deduction in an amount equal to the section 965(c) deduction amount.

(d) *Treatment of specified foreign corporation as a controlled foreign corporation.* A specified foreign corporation described in section 965(e)(1)(B) and paragraph (f)(45)(i)(B) of this section that is not otherwise a controlled foreign corporation is treated as a controlled foreign corporation solely for purposes of paragraph (b) of this section and sections 951, 961, and § 1.1411–10. *See* 965(e)(2).

(e) *Special rule for certain controlled domestic partnerships*—(1) *In general.* For purposes of the section 965 regulations, a controlled domestic partnership is treated as a foreign partnership for purposes of determining the section 958(a) U.S. shareholder of a specified foreign corporation and the section 958(a) stock of the specified foreign corporation owned by the section 958(a) U.S. shareholder if the following conditions are satisfied—

(i) Without regard to this paragraph (e), the controlled domestic partnership is a section 958(a) U.S. shareholder of the specified foreign corporation and thus owns section 958(a) stock of the specified foreign corporation (*tested section 958(a) stock*);

(ii) If the controlled domestic partnership (and all other controlled domestic partnerships in the chain of ownership of the specified foreign corporation) were treated as foreign—

(A) The specified foreign corporation would continue to be a specified foreign corporation; and

(B) At least one United States shareholder of the specified foreign corporation—

(*1*) Would be treated as a section 958(a) U.S. shareholder of the specified foreign corporation; and

(*2*) Would be treated as owning (within the meaning of section 958(a)) tested section 958(a) stock of the specified foreign corporation through another foreign corporation that is a direct or indirect partner in the controlled domestic partnership.

(2) *Definition of a controlled domestic partnership.* For purposes of paragraph (e)(1) of this section, the term *controlled domestic partnership* means a domestic partnership that is controlled by a United States shareholder described in paragraph (e)(1)(ii)(B) of this section and persons related to the United States shareholder. For purposes of this paragraph (e)(2), control is determined based on all the facts and circumstances, except that a partnership will be deemed to be controlled by a United States shareholder and related persons if those persons, in the aggregate, own (directly or indirectly through one or more partnerships) more than 50 percent of the interests in the partnership capital or profits. For purposes of this paragraph (e)(2), a related person is, with respect to a United States shareholder, a person that is related (within the meaning of section 267(b) or 707(b)(1)) to the United States shareholder.

(f) *Definitions.* This paragraph (f) provides definitions that apply for purposes of the section 965 regulations and §§ 1.962–1, 1.962–2, and 1.986(c)–1. Unless otherwise indicated, all amounts are expressed as positive numbers.

(1) *8 percent rate amount.* The term *8 percent rate amount* means, with respect to a section 958(a) U.S. shareholder and a section 958(a) U.S. shareholder inclusion year, the excess, if any, of the section 958(a) U.S. shareholder's aggregate section 965(a) inclusion amount for the section 958(a) U.S. shareholder inclusion year over the amount of the section 958(a) U.S. shareholder's aggregate foreign cash position for the section 958(a) U.S. shareholder inclusion year as determined under § 1.965–3(c).

(2) *8 percent rate equivalent percentage.* The term *8 percent rate equivalent percentage* means, with respect to a section 958(a) U.S. shareholder and a section 958(a) U.S. shareholder inclusion year, the percentage that would result in the 8 percent rate amount being subject to an 8 percent rate of tax determined by only taking into account a deduction equal to such percentage of such amount and the highest rate of tax specified in section 11 for the section 958(a) U.S. shareholder inclusion year. In the case of a section 958(a) U.S. shareholder inclusion year of a section 958(a) U.S. shareholder to which section 15 applies, the highest rate of tax under section 11 before the effective date of the change in rates and the highest rate of tax under section 11 after the effective date of such change will each be taken into account under the preceding sentence in the same proportions as the portion of the section 958(a) U.S. shareholder inclusion year that is before and after such effective date, respectively.

(3) *15.5 percent rate amount.* The term *15.5 percent rate amount* means, with respect to a section 958(a) U.S. shareholder and a section 958(a) U.S. shareholder inclusion year, the amount of the section 958(a) U.S. shareholder's aggregate foreign cash position for the section 958(a) U.S. shareholder inclusion year as determined under § 1.965–3(c) to the extent it does not exceed the section 958(a) U.S. shareholder's aggregate section 965(a) inclusion amount for the section 958(a) U.S. shareholder inclusion year.

(4) *15.5 percent rate equivalent percentage.* The term *15.5 percent rate equivalent percentage,* with respect to a section 958(a) U.S. shareholder and a section 958(a) U.S. shareholder

inclusion year, has the meaning provided for the term ''8 percent rate equivalent percentage'' applied by substituting ''15.5 percent rate amount'' for ''8 percent rate amount'' and ''15.5 percent rate of tax'' for ''8 percent rate of tax.''

(5) *Accounts payable.* The term *accounts payable* means payables arising from the purchase of property described in section 1221(a)(1) or section 1221(a)(8) or the receipt of services from vendors or suppliers, provided the payables have a term upon issuance of less than one year.

(6) *Accounts receivable.* The term *accounts receivable* means receivables described in section 1221(a)(4) that have a term upon issuance of less than one year.

(7) *Accumulated post-1986 deferred foreign income*—(i) *In general.* The term *accumulated post-1986 deferred foreign income* means, with respect to a specified foreign corporation, the post-1986 earnings and profits of the specified foreign corporation except to the extent such earnings and profits—

(A) Are attributable to income of the specified foreign corporation that is effectively connected with the conduct of a trade or business within the United States and subject to tax under chapter 1;

(B) If distributed, would, in the case of a controlled foreign corporation, be excluded from the gross income of a United States shareholder under section 959; or

(C) If distributed, would, in the case of a controlled foreign corporation that has shareholders that are not United States shareholders on an E&P measurement date, be excluded from the gross income of such shareholders under section 959 if such shareholders were United States shareholders, determined by applying the principles of Revenue Ruling 82–16, 1982–1 C.B. 106.

(ii) *Earnings and profits attributable to subpart F income in the same taxable year as an E&P measurement date.* For purposes of determining the accumulated post-1986 deferred foreign income of a specified foreign corporation as of an E&P measurement date, earnings and profits of the specified foreign corporation that are or would be, applying the principles of Revenue Ruling 82–16, 1982–1 C.B. 106, described in section 959(c)(2) by reason of subpart F income (as defined in section 952 without regard to section 965(a)) are described in section 965(d)(2)(B) and paragraph (f)(7)(i)(B) or (f)(7)(i)(C) of this section only to the extent that such income has been accrued by the specified foreign corporation as of the E&P measurement date. For rules regarding the interaction of sections 951, 956, 959, and 965 generally, see § 1.965–2(b).

(8) *Aggregate foreign cash position*—(i) *In general.* The term *aggregate foreign cash position* means, with respect to a section 958(a) U.S. shareholder that is not a member of a consolidated group, the greater of—

(A) The aggregate of the section 958(a) U.S. shareholder's pro rata share of the cash position of each specified foreign corporation determined as of the final cash measurement date of the specified foreign corporation; or

(B) One half of the sum of—

(*1*) The aggregate described in paragraph (f)(8)(i)(A) of this section determined as of the second cash measurement date of each specified foreign corporation, plus

(*2*) The aggregate described in paragraph (f)(8)(i)(A) of this section determined as of the first cash measurement date of each specified foreign corporation.

(ii) *Other rules.* For rules for determining the aggregate foreign cash position for a section 958(a) U.S. shareholder inclusion year of the section 958(a) U.S. shareholder, see § 1.965–3(c). For the rule for determining the aggregate foreign cash position of a section 958(a) U.S. shareholder that is a member of a consolidated group, see § 1.965–8(e)(3). For rules disregarding certain assets for purposes of determining the aggregate foreign cash position of a section 958(a) U.S. shareholder, see § 1.965–3(b).

(9) *Aggregate foreign E&P deficit.* The term *aggregate foreign E&P deficit* means, with respect to a section 958(a) U.S. shareholder, the lesser of—

(i) The aggregate of the section 958(a) U.S. shareholder's pro rata share of the specified E&P deficit of each E&P deficit foreign corporation, translated (if necessary) into U.S. dollars using the spot rate on December 31, 2017, or

(ii) The aggregate of the section 958(a) U.S. shareholder's pro rata share of the section 965(a) earnings amount of each deferred foreign income corporation, translated (if necessary) into U.S. dollars using the spot rate on December 31, 2017.

(10) *Aggregate section 965(a) inclusion amount.* The term *aggregate section 965(a) inclusion amount* means, with respect to a section 958(a) U.S. shareholder, the sum of all of the section 958(a) U.S. shareholder's section 965(a) inclusion amounts.

(11) *Allocable share.* The term *allocable share* means, with respect to a deferred foreign income corporation and an aggregate foreign E&P deficit of a section 958(a) U.S. shareholder, the product of the aggregate foreign E&P deficit and the ratio determined by dividing—

(i) The section 958(a) U.S. shareholder's pro rata share of the section 965(a) earnings amount of the deferred foreign income corporation, translated (if necessary) into U.S. dollars using the spot rate on December 31, 2017, by

(ii) The amount described in paragraph (f)(9)(ii) of this section with respect to the section 958(a) U.S. shareholder.

(12) *Bona fide hedging transaction.* The term *bona fide hedging transaction* means a hedging transaction that meets (or that would meet if the specified foreign corporation were a controlled foreign corporation) the requirements of a bona fide hedging transaction described in § 1.954–2(a)(4)(ii), except that in the case of a specified foreign corporation that is not a controlled foreign corporation, the identification requirements of § 1.954–2(a)(4)(ii)(B) do not apply.

(13) *Cash-equivalent asset*—(i) *In general.* The term *cash-equivalent asset* means any of the following assets—

(A) Personal property which is of a type that is actively traded and for which there is an established financial market, other than a specified commodity;

(B) Commercial paper, certificates of deposit, the securities of the Federal government and of any State or foreign government;

(C) Any foreign currency;

(D) A short-term obligation; or

(E) Derivative financial instruments, other than bona fide hedging transactions.

(ii) *Specified commodity.* The term *specified commodity* means a commodity held by a specified foreign corporation that, in the hands of the specified foreign corporation, is property described in section 1221(a)(1) or 1221(a)(8). This paragraph (f)(13)(ii) does not apply with respect to a specified foreign corporation that is a dealer or trader in commodities.

(14) *Cash-equivalent asset hedging transaction*—(i) *In general.* The term *cash-equivalent asset hedging transaction* means a bona fide hedging transaction identified on a specified foreign corporation's books and records as hedging a cash-equivalent asset.

(ii) *Aggregate hedging transactions.* For purposes of paragraph (f)(14)(i) of this section, the amount of a bona fide hedging transaction described in § 1.1221–2(c)(3) (an *aggregate hedging transaction*) that is treated as a cash-equivalent asset hedging transaction is

the amount that bears the same proportion to the fair market value of the aggregate hedging transaction as the value of the cash-equivalent assets being hedged by the aggregate hedging transaction bears to the value of all assets being hedged by the aggregate hedging transaction.

(15) *Cash measurement dates.* The term *cash measurement dates* means, with respect to a specified foreign corporation, the first cash measurement date, the second cash measurement date, and the final cash measurement date, collectively, and each a *cash measurement date.*

(16) *Cash position*—(i) *General rule.* The term *cash position* means, with respect to a specified foreign corporation, the sum of—

(A) Cash held by the corporation;

(B) The net accounts receivable of the corporation; and

(C) The fair market value of the cash-equivalent assets held by the corporation.

(ii) *Fair market value of cash-equivalent assets.* For purposes of determining the fair market value of a cash-equivalent asset of a specified foreign corporation, the value of the cash-equivalent asset must be adjusted by the fair market value of any cash-equivalent asset hedging transaction with respect to the cash-equivalent asset, but only to the extent that the cash-equivalent asset hedging transaction does not reduce the fair market value of the cash-equivalent asset below zero.

(iii) *Measurement of derivative financial instruments.* The amount of derivative financial instruments taken into account in determining the cash position of a specified foreign corporation is the aggregate fair market value of its derivative financial instruments that constitute cash-equivalent assets, provided such amount is not less than zero.

(iv) *Translation of cash position amounts.* The cash position of a specified foreign corporation with respect to a cash measurement date must be expressed in U.S. dollars. For this purpose, the amounts described in paragraph (f)(16)(i) of this section must be translated (if necessary) into U.S. dollars using the spot rate on the relevant cash measurement date.

(17) *Deferred foreign income corporation*—(i) *In general.* The term *deferred foreign income corporation* means a specified foreign corporation that has accumulated post-1986 deferred foreign income greater than zero as of an E&P measurement date.

(ii) *Priority rule.* If a specified foreign corporation satisfies the definition of a deferred foreign income corporation under section 965(d)(1) and paragraph (f)(17)(i) of this section, it is classified solely as a deferred foreign income corporation and not also as an E&P deficit foreign corporation even if it otherwise satisfies the requirements of section 965(b)(3)(B) and paragraph (f)(22) of this section.

(18) *Derivative financial instrument.* The term *derivative financial instrument* includes a financial instrument that is one of the following—

(i) A notional principal contract,

(ii) An option contract,

(iii) A forward contract, other than a forward contract with respect to a specified commodity (as defined in paragraph (f)(13)(ii) of this section), but solely to the extent that the specified foreign corporation identified, or could have identified, the forward contract as a hedging transaction (within the meaning of § 1.1221–2(b)) with respect to one or more specified commodities held by the specified foreign corporation,

(iv) A futures contract,

(v) A short position in securities or commodities, other than a forward contract with respect to a specified commodity, but solely to the extent that the specified foreign corporation identified, or could have identified, the forward contract as a hedging transaction (within the meaning of § 1.1221–2(b)) with respect to one or more specified commodities held by the specified foreign corporation, or

(vi) Any financial instrument similar to one described in paragraphs (f)(18)(i) through (v) of this section.

(19) *Domestic pass-through entity.* The term *domestic pass-through entity* means a pass-through entity that is a United States person (as defined in section 7701(a)(30)).

(20) *Domestic pass-through owner.* The term *domestic pass-through owner* means, with respect to a domestic pass-through entity, a United States person (as defined in section 7701(a)(30)) that is a partner, shareholder, beneficiary, grantor, or owner, as the case may be, in the domestic pass-through entity. Notwithstanding the preceding sentence, the term does not include a partner, shareholder, beneficiary, grantor, or owner of the domestic pass-through entity that is itself a domestic pass-through entity but does include any other United States person that is an indirect partner, shareholder, beneficiary, grantor, or owner of the domestic pass-through entity through one or more other pass-through entities.

(21) *Domestic pass-through owner share.* The term *domestic pass-through owner share* means, with respect to a domestic pass-through owner and a domestic pass-through entity, the domestic pass-through owner's share of the aggregate section 965(a) inclusion amount and the section 965(c) deduction amount, as applicable, of the domestic pass-through entity, including the domestic pass-through owner's share of the aggregate section 965(a) inclusion amount and section 965(c) deduction amount, as applicable, of a domestic pass-through entity owned indirectly by the domestic pass-through owner through one or more other pass-through entities.

(22) *E&P deficit foreign corporation*—(i) *In general.* The term *E&P deficit foreign corporation* means, with respect to a section 958(a) U.S. shareholder, a specified foreign corporation, other than a deferred foreign income corporation, if, as of November 2, 2017—

(A) The specified foreign corporation had a deficit in post-1986 earnings and profits,

(B) The corporation was a specified foreign corporation, and

(C) The shareholder was a United States shareholder of the corporation.

(ii) *Determination of deficit in post-1986 earnings and profits.* In the case of a specified foreign corporation that has post-1986 earnings and profits that include earnings and profits described in section 959(c)(1) or 959(c)(2) (or both) and a deficit in earnings and profits (including hovering deficits, as defined in § 1.367(b)–7(d)(2)(i)), the specified foreign corporation has a deficit in post-1986 earnings and profits described in paragraph (f)(22)(i)(A) of this section only to the extent the deficit in post-1986 earnings and profits exceeds the aggregate of its post-1986 earnings and profits described in section 959(c)(1) and 959(c)(2).

(23) *E&P measurement dates.* The term *E&P measurement dates* means November 2, 2017, and December 31, 2017, collectively, and each an *E&P measurement date.*

(24) *Final cash measurement date.* The term *final cash measurement date* means, with respect to a specified foreign corporation, the close of the last taxable year of the specified foreign corporation that begins before January 1, 2018, and ends on or after November 2, 2017, if any.

(25) *First cash measurement date.* The term *first cash measurement date* means, with respect to a specified foreign corporation, the close of the last taxable year of the specified foreign corporation that ends after November 1, 2015, and before November 2, 2016, if any.

(26) *Inclusion year.* The term *inclusion year* means, with respect to a

deferred foreign income corporation, the last taxable year of the deferred foreign income corporation that begins before January 1, 2018.

(27) *Net accounts receivable.* The term *net accounts receivable* means, with respect to a specified foreign corporation, the excess (if any) of—

(i) The corporation's accounts receivable, over

(ii) The corporation's accounts payable (determined consistent with the rules of section 461).

(28) *Pass-through entity.* The term *pass-through entity* means a partnership, S corporation, or any other person (whether domestic or foreign) other than a corporation to the extent that the income or deductions of the person are included in the income of one or more direct or indirect owners or beneficiaries of the person. For example, if a domestic trust is subject to federal income tax on a portion of its section 965(a) inclusion amount and its domestic pass-through owners are subject to tax on the remaining portion, the domestic trust is treated as a domestic pass-through entity with respect to such remaining portion.

(29) *Post-1986 earnings and profits*—(i) *General rule.* The term *post-1986 earnings and profits* means, with respect to a specified foreign corporation and an E&P measurement date, the earnings and profits (including earnings and profits described in section 959(c)(1) and 959(c)(2)) of the specified foreign corporation (computed in accordance with sections 964(a) and 986, subject to § 1.965–4(f), and by taking into account only periods when the foreign corporation was a specified foreign corporation) accumulated in taxable years beginning after December 31, 1986, and determined—

(A) As of the E&P measurement date, except as provided in paragraph (f)(29)(ii) of this section, and

(B) Without diminution by reason of dividends distributed during the last taxable year of the foreign corporation that begins before January 1, 2018, other than dividends distributed to another specified foreign corporation to the extent the dividends increase the post-1986 earnings and profits of the distributee specified foreign corporation.

(ii) *Foreign income taxes.* For purposes of determining a specified foreign corporation's post-1986 earnings and profits as of the E&P measurement date on November 2, 2017, in the case in which foreign income taxes (as defined in section 901(m)(5)) of the specified foreign corporation accrue after November 2, 2017, but on or before December 31, 2017, and during the specified foreign corporation's U.S. taxable year that includes November 2, 2017, the specified foreign corporation's post-1986 earnings and profits as of November 2, 2017, are reduced by the applicable portion of such foreign income taxes. For purposes of the preceding sentence, the applicable portion of the foreign income taxes is the amount of the taxes that are attributable to the portion of the taxable income (as determined under foreign law) that accrues on or before November 2, 2017.

(iii) *Deficits in earnings and profits.* Any deficit related to post-1986 earnings and profits, including a hovering deficit (as defined in § 1.367(b)–7(d)(2)(i)), of a specified foreign corporation is taken into account for purposes of determining the post-1986 earnings and profits (including a deficit) of the specified foreign corporation.

(30) *Pro rata share.* The term *pro rata share* means, with respect to a section 958(a) U.S. shareholder of a specified foreign corporation, a deferred foreign income corporation, or an E&P deficit foreign corporation, as applicable—

(i) With respect to the section 965(a) earnings amount of a deferred foreign income corporation, the portion of the section 965(a) earnings amount that would be treated as distributed to the section 958(a) U.S. shareholder under § 1.951–1(e), determined as of the last day of the inclusion year of the deferred foreign income corporation on which it is a specified foreign corporation;

(ii) With respect to the specified E&P deficit of an E&P deficit foreign corporation, the portion of the specified E&P deficit allocated to the section 958(a) U.S. shareholder, determined by allocating the specified E&P deficit among the shareholders of the corporation's common stock in proportion to the liquidation value of the common stock held by the shareholders, determined as of the last day of the last taxable year of the E&P deficit foreign corporation that begins before January 1, 2018, provided that—

(A) If the corporation's common stock has a liquidation value of zero and there is at least one other class of equity with a liquidation preference relative to the common stock, then the specified E&P deficit is allocated as if it were distributed in a hypothetical distribution described in § 1.951–1(e)(1)(i) with respect to the most junior class of equity with a positive liquidation value to the extent of such liquidation value, and then to the next most junior class of equity to the extent of its liquidation value, and so on, applying § 1.951–1(e) by substituting ''specified E&P deficit'' for ''subpart F income'' each place it appears and treating the amount of current earnings and profits of the corporation for the year as being equal to the specified E&P deficit of the corporation for the year; and

(B) If the corporation's common stock has a liquidation value of zero and there is no other class of equity with a liquidation preference relative to the common stock, the specified E&P deficit is allocated among the common stock using any reasonable method consistently applied; and

(iii) With respect to the cash position of a specified foreign corporation on a cash measurement date, the portion of the cash position that would be treated as distributed to the section 958(a) U.S. shareholder under § 1.951–1(e) if the cash position were subpart F income, determined as of the close of the cash measurement date and without regard to whether the section 958(a) U.S. shareholder is a section 958(a) U.S. shareholder of the specified foreign corporation as of any other cash measurement date of the specified foreign corporation, including the final cash measurement date of the specified foreign corporation.

(31) *Second cash measurement date.* The term *second cash measurement date* means, with respect to a specified foreign corporation, the close of the last taxable year of the specified foreign corporation that ends after November 1, 2016, and before November 2, 2017, if any.

(32) *Section 958(a) stock.* The term *section 958(a) stock* means, with respect to a specified foreign corporation, a deferred foreign income corporation, or an E&P deficit foreign corporation, as applicable, stock of the corporation owned (directly or indirectly) by a United States shareholder within the meaning of section 958(a).

(33) *Section 958(a) U.S. shareholder.* The term *section 958(a) U.S. shareholder* means, with respect to a specified foreign corporation, a deferred foreign income corporation, or an E&P deficit foreign corporation, as applicable, a United States shareholder of such corporation that owns section 958(a) stock of the corporation.

(34) *Section 958(a) U.S. shareholder inclusion year.* The term *section 958(a) U.S. shareholder inclusion year* means the taxable year of a section 958(a) U.S. shareholder in which or with which the last day of the inclusion year of a deferred foreign income corporation on which it is a specified foreign corporation occurs.

(35) *Section 965 regulations.* The term *section 965 regulations* means the

regulations under §§ 1.965–1 through 1.965–9, collectively.

(36) *Section 965(a) earnings amount.* The term *section 965(a) earnings amount* means, with respect to a deferred foreign income corporation, the greater of the accumulated post-1986 deferred foreign income of the deferred foreign income corporation as of the E&P measurement date on November 2, 2017, or the accumulated post-1986 deferred foreign income of the deferred foreign income corporation as of the E&P measurement date on December 31, 2017, determined in each case in the functional currency of the specified foreign corporation. If the functional currency of a specified foreign corporation changes between the two E&P measurement dates, the comparison must be made in the functional currency of the specified foreign corporation as of December 31, 2017, by translating the specified foreign corporation's accumulated post-1986 deferred foreign income as of November 2, 2017, into the new functional currency using the spot rate on November 2, 2017.

(37) *Section 965(a) inclusion.* The term *section 965(a) inclusion* means, with respect to a person and a deferred foreign income corporation, an amount included in income by the person by reason of section 965 with respect to the deferred foreign income corporation, whether because the person is a section 958(a) U.S. shareholder of the deferred foreign income corporation with a section 965(a) inclusion amount with respect to the deferred foreign income corporation or because the person is a domestic pass-through owner with respect to a domestic pass-through entity that is a section 958(a) U.S. shareholder of the deferred foreign income corporation and the person includes in income its domestic pass-through owner share of the section 965(a) inclusion amount of the domestic pass-through entity with respect to the deferred foreign income corporation.

(38) *Section 965(a) inclusion amount.* The term *section 965(a) inclusion amount* has the meaning provided in paragraph (b)(1) of this section.

(39) *Section 965(a) previously taxed earnings and profits.* The term *section 965(a) previously taxed earnings and profits* has the meaning provided in § 1.965–2(c).

(40) *Section 965(b) previously taxed earnings and profits.* The term *section 965(b) previously taxed earnings and profits* has the meaning provided in § 1.965–2(d).

(41) *Section 965(c) deduction.* The term *section 965(c) deduction* means, with respect to a person, an amount allowed as a deduction to the person by reason of section 965(c), whether because the person is a section 958(a) U.S. shareholder with a section 965(c) deduction amount or because the person is a domestic pass-through owner with respect to a domestic pass-through entity that is a section 958(a) U.S. shareholder and the person takes into account its domestic pass-through owner share of the section 965(c) deduction amount of the domestic pass-through entity.

(42) *Section 965(c) deduction amount.* The term *section 965(c) deduction amount* means an amount equal to the sum of—

(i) A section 958(a) U.S. shareholder's 8 percent rate equivalent percentage of the section 958(a) U.S. shareholder's 8 percent rate amount for the section 958(a) U.S. shareholder inclusion year, plus

(ii) The section 958(a) U.S. shareholder's 15.5 percent rate equivalent percentage of the section 958(a) U.S. shareholder's 15.5 percent rate amount for the section 958(a) U.S. shareholder inclusion year.

(43) *Short-term obligation.* The term *short-term obligation* means any obligation with a term upon issuance that is less than one year and any loan that must be repaid at the demand of the lender (or that must be repaid within one year of such demand), but does not include any accounts receivable.

(44) *Specified E&P deficit.* The term *specified E&P deficit* means, with respect to an E&P deficit foreign corporation, the amount of the deficit described in paragraph (f)(22)(i)(A) of this section.

(45) *Specified foreign corporation*—(i) *General rule.* Except as provided in paragraph (f)(45)(iii) of this section, the term *specified foreign corporation* means—

(A) A controlled foreign corporation, or

(B) A foreign corporation of which one or more domestic corporations is a United States shareholder.

(ii) *Special attribution rule*—(A) *In general.* Solely for purposes of determining whether a foreign corporation is a specified foreign corporation within the meaning of section 965(e)(1)(B) and paragraph (f)(45)(i)(B) of this section, stock owned, directly or indirectly, by or for—

(*1*) A partner (*tested partner*) will not be considered as being owned by a partnership under sections 958(b) and 318(a)(3)(A) and § 1.958–2(d)(1)(i) if the tested partner owns less than ten percent of the interests in the partnership's capital and profits; and

(*2*) A beneficiary (*tested beneficiary*) will not be considered as being owned by a trust under sections 958(b) and 318(a)(3)(B) and § 1.958–2(d)(1)(ii) if the value of the interest of the tested beneficiary, computed actuarially, whether vested or contingent, current or remainder, is less than ten percent of the value of the trust property, assuming the maximum exercise of discretion in favor of the beneficiary.

(B) *Attribution for purposes of the ten percent standard.* For purposes of paragraph (f)(45)(ii)(A) of this section, an interest in a partnership or trust owned by a partner or beneficiary other than the tested partner or tested beneficiary will be considered as being owned by the tested partner or tested beneficiary under the principles of sections 958(b) and 318, as modified by this paragraph (f)(45)(ii), as if interests in a partnership or trust were stock.

(iii) *Passive foreign investment companies.* A foreign corporation that is a passive foreign investment company (as defined in section 1297) with respect to a United States shareholder and that is not a controlled foreign corporation is not a specified foreign corporation of the United States shareholder.

(46) *Spot rate.* The term *spot rate* has the meaning provided in § 1.988–1(d).

(47) *United States shareholder.* The term *United States shareholder* has the meaning provided in section 951(b).

(g) *Examples.* The following examples illustrate the definitions and general rules set forth in this section.

(1) *Example 1. Definition of specified foreign corporation.* (i) *Facts.* A, an individual, owns 1% of the interests in a partnership, PS, and 10% by vote and value of the stock of a foreign corporation, FC. PS owns 100% of the stock of a domestic corporation, DC. A United States citizen, USI, owns an additional 10% by vote and value of the stock of FC. The remaining 80% by vote and value of the stock of FC is owned by non-United States persons that are unrelated to A, USI, DC, and PS.

(ii) *Analysis.* (A) Absent the application of sections 958(b), 318(a)(3)(A), and 318(a)(3)(C), and § 1.958–2(d)(1)(i) and (iii), FC would not be a specified foreign corporation because FC is not a controlled foreign corporation and there would be no domestic corporation that is a United States shareholder of FC. However, under sections 958(b) and 318(a)(3)(A) and § 1.958–2(d)(1)(i), absent the special attribution rule in paragraph (f)(45)(ii) of this section, PS would be treated as owning 10% of the stock of FC. As a result, under sections 958(b), 318(a)(5)(A), and 318(a)(3)(C), and § 1.958–2(f)(1)(i) and (d)(1)(iii), DC would be treated as owning the stock of FC treated as owned by PS, and thus DC would be a United States shareholder with respect to FC, causing FC to be a specified foreign corporation within the meaning of section 965(e)(1)(B) and paragraph (f)(45)(i)(B) of this section. The results would be the same whether A or PS or both are domestic or foreign persons.

(B) Under the special attribution rule in paragraph (f)(45)(ii) of this section, solely for purposes of determining whether a foreign corporation is a specified foreign corporation within the meaning of section 965(e)(1)(B) and paragraph (f)(45)(i)(B) of this section, the stock of FC owned by A is not considered as being owned by PS under sections 958(b) and 318(a)(3)(A) and § 1.958–2(d)(1)(i) because A owns less than 10% of the interests in PS's capital and profits. Accordingly, FC is not a specified foreign corporation within the meaning of section 965(e)(1)(B) and paragraph (f)(45)(i)(B) of this section.

(2) *Example 2. Definition of specified foreign corporation.* (i) *Facts.* The facts are the same as in paragraph(g)(1)(i) of this section (the facts in *Example 1*), except that A is a foreign corporation wholly owned by B, a foreign corporation, and B directly owns 9% of the interests in PS.

(ii) *Analysis.* Applying the principles of sections 958(b) and 318, as modified by paragraph (f)(45)(ii) of this section, as if the interest in PS were stock, A is treated as owning the interests in PS owned by B (in addition to the 1% interest in PS that A owns directly), and thus A is not treated as owning less than 10% of the interests in PS's capital and profits. Accordingly, the special attribution rule in paragraph (f)(45)(ii) of this section does not apply, and PS is treated as owning A's stock of FC for purposes of determining whether FC is a specified foreign corporation within the meaning of section 965(e)(1)(B) and paragraph (f)(45)(i)(B) of this section. Accordingly, under the analysis described in paragraph (ii)(A) of *Example 1* of paragraph (g)(1) of this section, FC is a specified foreign corporation within the meaning of section 965(e)(1)(B) and paragraph (f)(45)(i)(B) of this section.

(3) *Example 3. Determination of accumulated post-1986 deferred foreign income.* (i) *Facts.* USP, a domestic corporation, and FP, a foreign corporation unrelated to USP, have owned 70% and 30% respectively, by vote and value, of the only class of stock of FS, a foreign corporation, from January 1, 2016, until December 31, 2017. USP and FS both have a calendar year taxable year. FS had no income until its taxable year ending December 31, 2016, in which it had 100u of income, all of which constituted subpart F income, and USP included 70u in income with respect to FS under section 951(a)(1) for such year. FS earned no income in 2017. Therefore, FS's post-1986 earnings and profits are 100u as of both E&P measurement dates.

(ii) *Analysis.* Because USP included 70u in income with respect to FS under section 951(a)(1), 70u of such post-1986 earnings and profits would, if distributed, be excluded from the gross income of USP under section 959. Thus, FS's accumulated post-1986 deferred foreign income would be reduced by 70u pursuant to section 965(d)(2)(B) and paragraph (f)(7)(i)(B) of this section. Furthermore, under paragraph (f)(7)(i)(C) of this section, the accumulated post-1986 deferred foreign income of FS is reduced by amounts that would be excluded from the gross income of FP if FP were a United States shareholder, consistent with the principles of Revenue Ruling 82–16. Accordingly, FS's accumulated post-1986 deferred foreign income is reduced by the remaining 30u of the 100u of post-1986 earnings and profits to which USP's 70u of section 951(a)(1) income inclusions were attributable. As a result, FS's accumulated post-1986 deferred foreign income is 0u (100u minus 70u minus 30u).

(4) *Example 4. Determination of status as a deferred foreign income corporation or an E&P deficit foreign corporation; specified foreign corporation is solely a deferred foreign income corporation.* (i) *Facts.* USP, a domestic corporation, owns all of the stock of FS, a foreign corporation. As of November 2, 2017, FS has a deficit in post-1986 earnings and profits of 150u. As of December 31, 2017, FS has 200u of post-1986 earnings and profits. FS does not have earnings and profits that are attributable to income of the specified foreign corporation that is effectively connected with the conduct of a trade or business within the United States and subject to tax under chapter 1, or that, if distributed, would be excluded from the gross income of a United States shareholder under section 959 or from the gross income of another shareholder if such shareholder were a United States shareholder.

(ii) *Analysis.* FS's accumulated post-1986 deferred foreign income is equal to its post-1986 earnings and profits because no adjustment to post-1986 earnings and profits is made under section 965(d)(2) or § 1.965–1(f)(7). Under paragraph (f)(17)(i) of this section, FS is a deferred foreign income corporation because FS has accumulated post-1986 deferred foreign income greater than zero as of the E&P measurement date on December 31, 2017. In addition, under paragraph (f)(17)(ii) of this section, because FS is a deferred foreign income corporation, FS is not also an E&P deficit foreign corporation, notwithstanding that FS has a deficit in post-1986 earnings and profits as of the E&P measurement date on November 2, 2017.

(5) *Example 5. Determination of status as a deferred foreign income corporation or an E&P deficit foreign corporation; specified foreign corporation is neither a deferred foreign income corporation nor an E&P deficit foreign corporation.* (i) *Facts.* USP, a domestic corporation, owns all of the stock of FS, a foreign corporation. As of both November 2, 2017, and December 31, 2017, FS has 100u of earnings and profits described in section 959(c)(2) and a deficit of 90u in earnings and profits described in section 959(c)(3), all of which were accumulated in taxable years beginning after December 31, 1986, while FS was a specified foreign corporation. Accordingly, as of both November 2, 2017, and December 31, 2017, FS has 10u of post-1986 earnings and profits.

(ii) *Analysis.* (A) *Determination of status as a deferred foreign income corporation.* Under paragraph (f)(17) of this section, for purposes of determining whether FS is a deferred foreign income corporation, a determination must be made whether FS has accumulated post-1986 deferred foreign income greater than zero as of either the E&P measurement date on November 2, 2017, or the E&P measurement date on December 31, 2017. Under section 965(d)(2) and paragraph (f)(7) of this section, FS's accumulated post-1986 deferred foreign income is its post-1986 earnings and profits, except to the extent such earnings and profits are attributable to income of the specified foreign corporation that is effectively connected with the conduct of a trade or business within the United States and subject to tax under chapter 1, or that, if distributed, would be excluded from the gross income of a United States shareholder under section 959 or from the gross income of another shareholder if such shareholder were a United States shareholder. Disregarding FS's 100u of post-1986 earnings and profits described in paragraph (f)(7)(i)(B) of this section, FS has a 90u deficit in accumulated post-1986 deferred foreign income as of both E&P measurement dates. Accordingly, FS does not have accumulated post-1986 deferred foreign income greater than zero as of either E&P measurement date, and, therefore, FS is not a deferred foreign income corporation.

(B) *Determination of status as an E&P deficit foreign corporation.* Under paragraph (f)(22)(i) of this section, for purposes of determining whether FS is an E&P deficit foreign corporation, a determination must be made whether FS has a deficit in post-1986 earnings and profits as of the E&P measurement date on November 2, 2017. Under paragraph (f)(22)(ii) of this section, because the deficit in the earnings and profits of FS described in section 959(c)(3) of 90u does not exceed the earnings and profits of FS described in section 959(c)(2) of 100u, FS does not have a deficit in post-1986 earnings and profits as of the E&P measurement date on November 2, 2017, and, therefore, FS is not an E&P deficit foreign corporation. Accordingly, FS is neither a deferred foreign income corporation nor an E&P deficit foreign corporation.

(6) *Example 6. Application of currency translation rules.* (i) *Facts.* As of November 2, 2017, and December 31, 2017, USP, a domestic corporation, owns all of the stock of CFC1, an E&P deficit foreign corporation with the ''u'' as its functional currency; CFC2, an E&P deficit foreign corporation with the ''v'' as its functional currency; CFC3, a deferred foreign income corporation with the ''y'' as its functional currency; and CFC4, a deferred foreign income corporation with the ''z'' as its functional currency. USP, CFC1, CFC2, CFC3, and CFC4 each have a calendar year taxable year. As of December 31, 2017, 1u=$1, .75v=$1, .50y=$1, and .25z=$1. CFC1 has a specified E&P deficit of 100u, CFC2 has a specified E&P deficit of 120v, CFC3 has a section 965(a) earnings amount of 50y, and CFC4 has a section 965(a) earnings amount of 75z.

(ii) *Analysis.* (A) Under paragraph (f)(38) of this section, for purposes of determining USP's section 965(a) inclusion amounts with respect to CFC3 and CFC4, the section 965(a) earnings amount of each of CFC3 and CFC4 is translated into U.S. dollars at the spot rate on December 31, 2017, which equals $100 (50y at .50y=$1) and $300 (75z at .25z=$1), respectively. Furthermore, USP's pro rata share of the section 965(a) earnings amounts, as translated, is $100 and $300, respectively, or 100% of each section 965(a) earnings amount.

(B) Under paragraph (f)(9) of this section, for purposes of determining USP's aggregate

foreign E&P deficit, the specified E&P deficit of each of CFC1 and CFC2 is translated into U.S. dollars at the spot rate on December 31, 2017, which equals $100 (100u at 1u=$1) and $160 (120v at .75v=$1), respectively. Furthermore USP's pro rata share of each specified E&P deficit, as translated, is $100 and $160, respectively, or 100% of each specified E&P deficit. Therefore, USP's aggregate foreign E&P deficit is $260.

(C) Under section 965(b)(1) and paragraph (b)(2) of this section, for purposes of determining USP's section 965(a) inclusion amount with respect to each of CFC3 and CFC4, the U.S. dollar amount of USP's pro rata share of the section 965(a) earnings amount of each of CFC3 and CFC4 is reduced by each of CFC3 and CFC4's allocable share of USP's aggregate foreign E&P deficit. Under section 965(b)(2) and paragraph (f)(11) of this section, CFC3's allocable share of USP's aggregate foreign E&P deficit of $260 is $65 ($260 × ($100/$400)) and CFC4's allocable share of USP's aggregate foreign E&P deficit is $195 ($260 × ($300/400)). After reduction under section 965(b)(1) and paragraph (b)(2) of this section, the section 965(a) inclusion amount of USP with respect to CFC3 is $35 ($100 − $65) and the section 965(a) inclusion amount of USP with respect to CFC4 is $105 ($300 − $195). Under § 1.965–2(c), the section 965(a) previously taxed earnings and profits of each of CFC3 and CFC4, translated into the respective functional currencies of CFC3 and CFC4 at the spot rate on December 31, 2017, are 17.5y ($35 at .50y=$1) and 26.25z ($105 at .25z=$1), respectively. Under § 1.965–6(b)(1), for purposes of applying section 960(a)(1), the amounts treated as a dividend paid by each of CFC3 and CFC4, translated into the respective functional currencies of CFC3 and CFC4 at the spot rate on December 31, 2017, are 17.5y ($35 at .50y=$1) and 26.25z ($105 at .25z=$1).

(D) For purposes of determining the section 965(b) previously taxed earnings and profits of each of CFC3 and CFC4 under section 965(b)(4)(A) and § 1.965–2(d)(1) as a result of the reduction to USP's section 965(a) inclusion amounts with respect to CFC3 and CFC4, the amount of the aggregate foreign E&P deficit of USP allocated to each of CFC3 and CFC4 under section 965(b)(2) and paragraph (f)(11) of this section, translated into the respective functional currencies of CFC3 and CFC4 at the spot rate on December 31, 2017, is 32.5y ($65 at .50y=$1) and 48.75z ($195 at .25z=$1), respectively.

(7) *Example 7. Determination of cash measurement dates and pro rata shares of cash positions.* (i) *Facts.* Except as otherwise provided, for all relevant periods, USP, a domestic corporation, has owned directly at least 10% of the stock of CFC1, CFC2, CFC3, and CFC4, each a foreign corporation. CFC1 and CFC2 have calendar year taxable years. CFC3 and CFC4 have taxable years that end on November 30. No entity has a short taxable year, except as a result of the transactions described below.

(A) USP transferred all of its stock of CFC2 to an unrelated person on June 30, 2016, at which point USP ceased to be a United States shareholder with respect to CFC2.

(B) CFC4 dissolved on December 30, 2010, and, as a result, its final taxable year ended on December 30, 2010.

(ii) *Analysis.* Each of CFC1, CFC2, CFC3, and CFC4 is a specified foreign corporation of USP, subject to the sale of CFC2 on June 30, 2016, and the dissolution of CFC4 on December 30, 2010. Under the definition of aggregate foreign cash position in paragraph (f)(8)(i) of this section, the definition of pro rata share of a cash position in paragraph (f)(30)(iii) of this section, and the definitions of the final cash measurement date, second cash measurement date, and first cash measurement date in paragraphs (f)(24), (25), and (31) of this section, the cash measurement dates of the specified foreign corporations to be taken into account by USP in determining its aggregate foreign cash position are summarized in the following table:

CASH MEASUREMENT DATES

	Final	Second	First
CFC1	December 31, 2017	December 31, 2016	December 31, 2015.
CFC2	N/A	N/A	December 31, 2015.
CFC3	November 30, 2018	November 30, 2016	November 30, 2015.
CFC4	N/A	N/A	N/A.

(8) *Example 8. Determination of section 958(a) U.S. shareholder in case of a controlled domestic partnership.* (i) *Facts.* USP, a domestic corporation, owns all of the stock of CFC1 and CFC2. CFC1 and CFC2 own 60% and 40%, respectively, of the interests in the capital and profits of DPS, a domestic partnership. DPS owns all of the stock of CFC3 and CFC4. This ownership structure has existed since the date of formation of CFC1, CFC2, CFC3, and CFC4. CFC1, CFC2, CFC3, and CFC4 are each a foreign corporation. USP, DPS, CFC1, CFC2, CFC3, and CFC4 have calendar year taxable years. On both E&P measurement dates, CFC3 has 50u of accumulated post-1986 deferred foreign income. On both E&P measurement dates, CFC4 has a deficit in post-1986 earnings and profits of 30u. On all cash measurement dates, CFC1, CFC2, and CFC3 each have a cash position of 0u, and CFC4 has a cash position of 200u.

(ii) *Analysis.* DPS is a controlled domestic partnership with respect to USP within the meaning of paragraph (e)(2) of this section because more than 50% of the interests in its capital and profits are owned by persons related to USP within the meaning of section 267(b), CFC1 and CFC2, and thus DPS is controlled by USP and related persons. Without regard to paragraph (e) of this section, DPS is a section 958(a) U.S. shareholder of CFC3 and CFC4, each of which is a controlled foreign corporation. If DPS were treated as foreign, CFC3 and CFC4 would each continue to be a controlled foreign corporation, and USP would be treated as a section 958(a) U.S. shareholder of each of CFC3 and CFC4, and would be treated as owning (within the meaning of section 958(a)) tested section 958(a) stock of each of CFC3 and CFC4 through CFC1 and CFC2, which are both partners in DPS. Thus, under paragraph (e)(1) of this section, DPS is treated as a foreign partnership for purposes of determining the section 958(a) U.S. shareholder of both CFC3 and CFC4 and the section 958(a) stock of both CFC3 and CFC4 owned by the section 958(a) U.S. shareholder. Thus, USP's pro rata share of CFC3's section 965(a) earnings amount is 50u, and its pro rata share of CFC4's specified E&P deficit is 30u. USP's aggregate foreign cash position is 200u. DPS is not a section 958(a) U.S. shareholder with respect to either CFC3 or CFC4.

§ 1.965–2 Adjustments to earnings and profits and basis.

(a) *Scope.* This section provides rules relating to adjustments to earnings and profits and basis to determine and account for the application of section 965(a) and (b) and § 1.965–1(b) and a rule that limits the amount of gain recognized under section 961(b)(2) by reason of distributions attributable to section 965 previously taxed earnings and profits (as defined in paragraph (g)(1)(ii) of this section) in the inclusion year. Paragraph (b) of this section provides rules relating to adjustments to earnings and profits of a specified foreign corporation for purposes of applying sections 902, 959, 960, and 965. Paragraph (c) of this section provides rules regarding adjustments to earnings and profits by reason of section 965(a). Paragraph (d) of this section provides rules regarding adjustments to earnings and profits by reason of section 965(b). Paragraph (e) provides rules regarding adjustments to basis by reason of section 965(a). Paragraph (f) of this section provides an election to make certain adjustments to basis corresponding to adjustments to earnings and profits by reason of section 965(b). Paragraph (g) of this section provides rules that limit the amount of gain recognized in connection with the application of section 961(b)(2) and that require related reductions in basis. Paragraph (h) of this section provides

rules regarding basis adjustments. Paragraph (i) of this section provides definitions that apply for purposes of this section. Paragraph (j) of this section provides examples illustrating the application of this section.

(b) *Determination of and adjustments to earnings and profits of a specified foreign corporation for purposes of applying sections 902, 959, 960, and 965.* For the taxable year of a specified foreign corporation in which an E&P measurement date occurs, and the last taxable year of a specified foreign corporation that begins before January 1, 2018, and the taxable year of a section 958(a) U.S. shareholder in which or with which any such year ends, the adjustments to earnings and profits described in paragraphs (b)(1) through (b)(5) of this section apply in sequence. For purposes of determining the consequences under sections 902 and 960 of a distribution or an inclusion under section 951(a)(1), after the application of those paragraphs, the ordering rule in § 1.960–1(i)(2) applies except that section 902 is applied with respect to any distributions from the specified foreign corporation described in paragraph (b)(2) of this section that are not disregarded under § 1.965–4 before section 960 is applied with respect to an inclusion or distribution described in paragraph (b)(3), (b)(4), or (b)(5) of this section.

(1) Each of the subpart F income of the specified foreign corporation and the amount required to be included in income under section 1248, if any, are determined without regard to section 965(a), but taking into account any relevant distributions, and earnings and profits of the specified foreign corporation that are described in section 959(c)(2) with respect to the section 958(a) U.S. shareholder are increased to the extent of the section 958(a) U.S. shareholder's inclusion under section 951(a)(1)(A) without regard to section 965(a) (including to the extent provided in section 959(e)).

(2) The treatment of a distribution by the specified foreign corporation to another specified foreign corporation that is made before January 1, 2018, is determined under section 959.

(3) Each of the post-1986 earnings and profits (including a deficit) of the specified foreign corporation, the accumulated post-1986 deferred foreign income of the specified foreign corporation, the section 965(a) earnings amount of the specified foreign corporation, and the section 965(a) inclusion amount with respect to the specified foreign corporation, if any, is determined, taking into account the rules of § 1.965–4, and the earnings and profits (including a deficit) of the specified foreign corporation are adjusted as provided in paragraphs (c) and (d) of this section. For a rule disregarding subpart F income earned after an E&P measurement date for purposes of calculating accumulated post-1986 deferred foreign income as of the E&P measurement date, see § 1.965–1(f)(7)(ii).

(4) The treatment of distributions described in paragraph (b)(2) of this section that are disregarded under § 1.965–4 is redetermined and the treatment of all distributions from the specified foreign corporation other than those described in paragraph (b)(2) of this section is determined under section 959.

(5) An amount is determined under section 956 with respect to the specified foreign corporation and the section 958(a) U.S. shareholder; earnings and profits of the specified foreign corporation described in section 959(c)(2) with respect to the section 958(a) U.S. shareholder are reclassified as earnings and profits described in section 959(c)(1) with respect to the section 958(a) U.S. shareholder to the extent the amount determined under section 956 would, but for section 959(a)(2), be included by the section 958(a) U.S. shareholder under section 951(a)(1)(B); and earnings and profits described in section 959(c)(1) with respect to the section 958(a) U.S. shareholder are further increased to the extent of the section 958(a) U.S. shareholder's inclusion under section 951(a)(1)(B).

(c) *Adjustments to earnings and profits by reason of section 965(a).* The earnings and profits of a deferred foreign income corporation described in section 959(c)(2) with respect to a section 958(a) U.S. shareholder are increased by an amount equal to the section 965(a) inclusion amount of the section 958(a) U.S. shareholder with respect to the deferred foreign income corporation, if any, translated (if necessary) into the functional currency of the deferred foreign income corporation using the spot rate on December 31, 2017, provided the section 965(a) inclusion amount is included in income by the section 958(a) U.S. shareholder. For purposes of the section 965 regulations, the earnings and profits described in section 959(c)(2) by reason of this paragraph (c) and the earnings and profits initially described in section 959(c)(2) by reason of this paragraph (c) but subsequently reclassified as earnings and profits described in section 959(c)(1), if any, are referred to as *section 965(a) previously taxed earnings and profits.* Furthermore, the earnings and profits (including a deficit) of the deferred foreign income corporation that are described in section 959(c)(3) (or that would be described in section 959(c)(3) but for the application of section 965(a) and the section 965 regulations) are reduced (or, in the case of a deficit, increased) by an amount equal to the section 965(a) previously taxed earnings and profits.

(d) *Adjustments to earnings and profits by reason of section 965(b)*—(1) *Adjustments to earnings and profits described in section 959(c)(2) and (c)(3) of deferred foreign income corporations.* The earnings and profits of a deferred foreign income corporation described in section 959(c)(2) with respect to a section 958(a) U.S. shareholder are increased by an amount equal to the reduction to the section 958(a) U.S. shareholder's pro rata share of the section 965(a) earnings amount of the deferred foreign income corporation under section 965(b), § 1.965–1(b)(2), and § 1.965–8(b), as applicable, translated (if necessary) into the functional currency of the deferred foreign income corporation using the spot rate on December 31, 2017, provided the section 958(a) U.S. shareholder includes the section 965(a) inclusion amount (if any) with respect to the deferred foreign income corporation in income. For purposes of the section 965 regulations, the earnings and profits described in section 959(c)(2) by reason of this paragraph (d) and the earnings and profits initially described in section 959(c)(2) by reason of this paragraph (d) but subsequently reclassified as earnings and profits described in section 959(c)(1) are referred to as *section 965(b) previously taxed earnings and profits,* and are treated as having been previously included in the gross income of the section 958(a) U.S. shareholder under section 951 for purposes of section 1248(d)(1). Furthermore, the earnings and profits (including a deficit) described in section 959(c)(3) of the deferred foreign income corporation (or that would be described in section 959(c)(3) but for the application of section 965(b) and the section 965 regulations) are reduced (or, in the case of a deficit, increased) by an amount equal to the section 965(b) previously taxed earnings and profits.

(2) *Adjustments to earnings and profits described in section 959(c)(3) of E&P deficit foreign corporations*—(i) *Increase in earnings and profits by an amount equal to the portion of the section 958(a) U.S. shareholder's pro rata share of the specified E&P deficit taken into account*—(A) *In general.* For an E&P deficit foreign corporation's last

taxable year that begins before January 1, 2018, the earnings and profits of the E&P deficit foreign corporation described in section 959(c)(3) are increased by an amount equal to the portion of a section 958(a) U.S. shareholder's pro rata share of the specified E&P deficit of the E&P deficit foreign corporation taken into account under section 965(b), § 1.965–1(b)(2), and § 1.965–8(b), as determined under paragraph (d)(2)(ii) of this section, translated (if necessary) into the functional currency of the E&P deficit foreign corporation using the spot rate on December 31, 2017. For purposes of section 316, the earnings and profits of the E&P deficit foreign corporation attributable to the increase described in the preceding sentence are not treated as earnings and profits of the taxable year described in section 316(a)(2). See also § 1.965–6(b)(3) for the timing of this adjustment for purposes of determining foreign taxes deemed paid under sections 902 and 960.

(B) *Reduction of a qualified deficit.* For purposes of section 952, a section 958(a) U.S. shareholder's pro rata share of the earnings and profits of an E&P deficit foreign corporation is increased by an amount equal to the portion of the section 958(a) U.S. shareholder's pro rata share of the specified E&P deficit of the E&P deficit foreign corporation taken into account under section 965(b), § 1.965–1(b)(2), or § 1.965–8(b), as applicable, as determined under paragraph (d)(2)(ii) of this section, translated (if necessary) into the functional currency of the E&P deficit foreign corporation using the spot rate on December 31, 2017, and such increase is attributable to the same activity to which the deficit so taken into account was attributable.

(ii) *Determination of portion of a section 958(a) U.S. shareholder's pro rata share of a specified E&P deficit taken into account*—(A) *In general.* The portion of a section 958(a) U.S. shareholder's pro rata share of a specified E&P deficit of an E&P deficit foreign corporation taken into account under section 965(b), § 1.965–1(b)(2), or § 1.965–8(b), as applicable, is 100 percent of the section 958(a) U.S. shareholder's pro rata share of the specified E&P deficit if either of the following conditions is satisfied:

(*1*) The section 958(a) U.S. shareholder (including a consolidated group of which the section 958(a) U.S. shareholder is a member) does not have an excess aggregate foreign E&P deficit (as defined in § 1.965–8(f)(7)(i)), or

(*2*) If the section 958(a) U.S. shareholder is a member of an affiliated group in which not all members are members of the same consolidated group, the amount described in § 1.965–8(f)(1)(i)(B) with respect to the affiliated group is equal to or greater than the amount described § 1.965–8(f)(1)(i)(A).

(B) *Designation of portion of a section 958(a) U.S. shareholder's pro rata share of a specified E&P deficit taken into account.* If neither the condition in paragraph (d)(2)(ii)(A)(*1*) nor the condition in paragraph (d)(2)(ii)(A)(*2*) is satisfied with respect to a section 958(a) U.S. shareholder, then the section 958(a) U.S. shareholder must designate the portion taken into account by reporting to each E&P deficit foreign corporation of the section 958(a) U.S. shareholder, and maintaining, in its books and records, a statement setting forth the following information—

(*1*) The portion of the section 958(a) U.S. shareholder's pro rata share of the specified E&P deficit of the E&P deficit foreign corporation taken into account under section 965(b), § 1.965–1(b)(2), or § 1.965–8(b), as designated under § 1.965–8(c), as applicable, and

(*2*) In the case of an E&P deficit foreign corporation that has a qualified deficit (as determined under section 952 and § 1.952–1), the portion (if any) of the section 958(a) shareholder's pro rata share of the specified E&P deficit of the E&P deficit foreign corporation taken into account under paragraph (d)(2)(ii)(B)(*1*) of this section that is attributable to a qualified deficit, including the qualified activities to which such portion is attributable.

(e) *Adjustments to basis by reason of section 965(a)*—(1) *General rule.* Except as provided in paragraph (e)(2) of this section, a section 958(a) U.S. shareholder's basis in section 958(a) stock of a deferred foreign income corporation, or a section 958(a) U.S. shareholder's basis in applicable property with respect to a deferred foreign income corporation, is increased by the section 958(a) U.S. shareholder's section 965(a) inclusion amount with respect to the deferred foreign income corporation included in income by the section 958(a) U.S. shareholder. *See* section 961(a).

(2) *Section 962 election.* In the case of a section 958(a) U.S. shareholder who has made an election under section 962 for a section 958(a) U.S. shareholder's inclusion year, the increase in basis in the section 958(a) U.S. shareholder's section 958(a) stock of, or applicable property with respect to, a deferred foreign income corporation cannot exceed an amount equal to the amount of tax paid under chapter 1 of the Code with respect to the section 958(a) U.S. shareholder's section 965(a) inclusion amount with respect to the deferred foreign income corporation, taking into account any section 965(h) election made by the section 958(a) U.S. shareholder.

(f) *Adjustments to basis by reason of section 965(b)*—(1) *In general.* Except as provided in paragraph (f)(2) of this section, no adjustments to basis of stock or property are made under section 961 (or any other provision of the Code) to take into account the reduction to a section 958(a) U.S. shareholder's pro rata share of the section 965(a) earnings amount of a deferred foreign income corporation under section 965(b), § 1.965–1(b)(2), or § 1.965–8(b), as applicable.

(2) *Election to make adjustments to basis to account for the application of section 965(b)*—(i) *In general.* If a section 958(a) U.S. shareholder makes the election as provided in this paragraph (f)(2), the adjustments to basis described in paragraph (f)(2)(ii) of this section are made with respect to each deferred foreign income corporation and each E&P deficit foreign corporation in which the section 958(a) U.S. shareholder owns section 958(a) stock.

(ii) *Basis adjustments*—(A) *Increase in basis with respect to a deferred foreign income corporation*—(*1*) *In general.* Except as provided in paragraphs (f)(2)(ii)(A)(*2*) and (C) of this section, a section 958(a) U.S. shareholder's basis in section 958(a) stock of a deferred foreign income corporation, or a section 958(a) U.S. shareholder's basis in applicable property with respect to a deferred foreign income corporation, is increased by an amount equal to the section 965(b) previously taxed earnings and profits of the deferred foreign income corporation with respect to the section 958(a) U.S. shareholder, translated (if necessary) into U.S. dollars using the spot rate on December 31, 2017.

(*2*) *Limited basis adjustment.* A section 958(a) U.S. shareholder may, in lieu of applying paragraph (f)(2)(ii)(A)(*1*) of this section, designate the amount by which it increases its basis in section 958(a) stock of, or applicable property with respect to, a deferred foreign income corporation, provided that—

(*i*) The increase does not exceed the section 965(b) previously taxed earnings and profits of the deferred foreign income corporation with respect to the section 958(a) U.S. shareholder, translated (if necessary) into U.S. dollars using the spot rate on December 31, 2017; and

(*ii*) The aggregate amount of a section 958(a) U.S. shareholder's increases in basis with respect to stock or applicable property pursuant to paragraph (f)(2)(ii)(A)(*2*) of this section does not

exceed the aggregate amount of the section 958(a) U.S. shareholder's reductions in basis pursuant to paragraph (f)(2)(ii)(B) of this section subject to the limitation under paragraph (f)(2)(ii)(B)(*2*) of this section.

(B) *Reduction in basis with respect to an E&P deficit foreign corporation*—(*1*) *In general.* Except as provided in paragraphs (f)(2)(ii)(B)(*2*) and (f)(2)(ii)(C) of this section, a section 958(a) U.S. shareholder's basis in section 958(a) stock of an E&P deficit foreign corporation, or a section 958(a) U.S. shareholder's basis in applicable property with respect to an E&P deficit foreign corporation, is reduced by an amount equal to the portion of the section 958(a) U.S. shareholder's pro rata share of the specified E&P deficit of the E&P deficit foreign corporation taken into account under section 965(b), § 1.965–1(b)(2), and § 1.965–8(b), as applicable, as determined under paragraph (d)(2)(ii) of this section, translated (if necessary) into U.S. dollars using the spot rate on December 31, 2017. For rules requiring gain recognition, see paragraph (h)(3) of this section.

(*2*) *Limited basis adjustment.* If a section 958(a) U.S. shareholder adjusts its basis in section 958(a) stock of, or applicable property with respect to, one or more deferred foreign income corporations under paragraph (f)(2)(ii)(A)(*2*) of this section, the section 958(a) U.S. shareholder's aggregate reductions in basis in section 958(a) stock of, or applicable property with respect to, an E&P deficit foreign corporation pursuant to paragraph (f)(2)(ii)(B)(*1*) of this section on a day may not exceed the amount of the section 958(a) U.S. shareholder's basis in the section 958(a) stock of, or applicable property with respect to, such E&P deficit foreign corporation, determined without taking into account specified basis adjustments to the section 958(a) stock of, or applicable property with respect to, such E&P deficit foreign corporation.

(C) *Section 962 election.* In the case of a section 958(a) U.S. shareholder who has made an election under section 962 for a section 958(a) U.S. shareholder's inclusion year, the adjustments provided in paragraphs (f)(2)(ii)(A) and (B) of this section do not apply.

(iii) *Rules regarding the election*—(A) *Consistency requirement.* In order for the election described in this paragraph (f)(2) to be effective, a section 958(a) U.S. shareholder and each section 958(a) U.S. shareholder of an E&P deficit foreign corporation or of a deferred foreign income corporation with respect to which the second section 958(a) U.S. shareholder's pro rata share of the section 965(a) earnings amount is reduced under section 965(b), § 1.965–1(b)(2), or § 1.965–8(b) that is related to the first section 958(a) U.S. shareholder must make the election described in this paragraph (f)(2). For purposes of this paragraph (f)(2)(iii)(A), a person is treated as related to a section 958(a) U.S. shareholder if the person bears a relationship to the section 958(a) U.S. shareholder described in section 267(b) or 707(b).

(B) *Manner of making election*—(*1*) *Timing*—(*i*) *In general.* Except as provided in paragraph (f)(2)(iii)(B)(*1*)(*ii*) of this section, the election provided in this paragraph (f)(2) must be made no later than the due date (taking into account extensions, if any) for the section 958(a) U.S. shareholder's return for the first taxable year that includes the last day of the last taxable year of a deferred foreign income corporation or E&P deficit foreign corporation of the shareholder that begins before January 1, 2018. Relief is not available under § 301.9100–2 or 301.9100–3 to file a late election. Except as provided in paragraph (f)(2)(iii)(B)(*1*)(*ii*) of this section, the election provided in this paragraph (f)(2) is irrevocable.

(*ii*) *Transition rule.* If the due date referred to in paragraph (f)(2)(iii)(B)(*1*)(*i*) of this section occurs before May 6, 2019, the election must be made by May 6, 2019. In the case of an election made before February 5, 2019, the election may be revoked by attaching a statement, signed under penalties of perjury, to an amended return filed by May 6, 2019. The statement must contain the section 958(a) U.S. shareholder's name and taxpayer identification number and a statement that the section 958(a) U.S. shareholder and all related persons, as defined in paragraph (f)(2)(iii)(A) of this section, that are section 958(a) U.S. shareholders of E&P deficit foreign corporations or of deferred foreign income corporations with respect to which the section 958(a) U.S. shareholder's pro rata share of the section 965(a) earnings amount is reduced under section 965(b), § 1.965–1(b)(2), or § 1.965–8(b) revoke the election provided in this paragraph (f)(2).

(*2*) *Election statement.* Except as otherwise provided in publications, forms, instructions, or other guidance, to make the election provided in this paragraph (f)(2), a section 958(a) U.S. shareholder must attach a statement, signed under penalties of perjury consistent with the rules for signatures applicable to the section 958(a) U.S. shareholders return, to its return for the first taxable year that includes the last day of the last taxable year of a deferred foreign income corporation or E&P deficit foreign corporation of the shareholder that begins before January 1, 2018. The statement must include the section 958(a) U.S. shareholder's name, taxpayer identification number, and a statement that the section 958(a) U.S. shareholder and all related persons, as defined in paragraph (f)(2)(iii)(A) of this section, that are section 958(a) U.S. shareholders of E&P deficit foreign corporations or of deferred foreign income corporations with respect to which the section 958(a) U.S. shareholder's pro rata share of the section 965(a) earnings amount is reduced under section 965(b), § 1.965–1(b)(2), or § 1.965–8(b) make the election provided in this paragraph (f)(2). If the section 958(a) U.S. shareholder increases its basis in stock or applicable property under paragraph (f)(2)(ii)(A)(*2*) of this section and decreases its basis in stock or applicable property pursuant to paragraph (f)(2)(ii)(B) of this section subject to the limitation under paragraph (f)(2)(ii)(B)(*2*) of this section, the election statement must so indicate. The attachment of an unsigned copy of the election statement to the timely-filed return for the relevant taxable year satisfies the signature requirement of this paragraph (f)(2)(iii)(B)(*2*) if the section 958(a) U.S. shareholder retains the original signed election statement in the manner specified by § 1.6001–1(e).

(g) *Gain reduction rule*—(1) *Reduction in gain recognized under section 961(b)(2) by reason of distributions attributable to section 965 previously taxed earnings and profits in the inclusion year*—(i) *In general.* If a section 958(a) U.S. shareholder receives a distribution from a deferred foreign income corporation (including through a chain of ownership described under section 958(a)) during the inclusion year of the deferred foreign income corporation that is attributable to section 965 previously taxed earnings and profits of the deferred foreign income corporation, then the amount of gain that otherwise would be recognized under section 961(b)(2) by the section 958(a) U.S. shareholder with respect to the section 958(a) U.S. shareholder's section 958(a) stock of the deferred foreign income corporation or interest in applicable property with respect to the deferred foreign income corporation is reduced (but not below zero) by an amount equal to the section 965 previously taxed earnings and profits of the deferred foreign income corporation with respect to the section 958(a) U.S. shareholder, translated (if necessary)

into U.S. dollars at the spot rate on December 31, 2017.

(ii) *Definition of section 965 previously taxed earnings and profits.* For purposes of paragraph (g)(1)(i) of this section, the term *section 965 previously taxed earnings and profits* means, with respect to a deferred foreign income corporation and a section 958(a) U.S. shareholder, the sum of the section 965(a) previously taxed earnings and profits of the deferred foreign income corporation with respect to the section 958(a) U.S. shareholder, and, if the section 958(a) U.S. shareholder has made the election described in paragraph (f)(2) of this section, the section 965(b) previously taxed earnings and profits of the deferred foreign income corporation with respect to the section 958(a) U.S. shareholder.

(2) *Reduction in basis by an amount equal to the gain reduction amount.* If a section 958(a) U.S. shareholder does not recognize gain under section 961(b)(2) by reason of paragraph (g)(1) of this section with respect to a distribution from a deferred foreign income corporation (including through a chain of ownership described under section 958(a)), the section 958(a) U.S. shareholder's basis in the section 958(a) stock of the deferred foreign income corporation, or the section 958(a) U.S. shareholder's basis in the applicable property with respect to the deferred foreign income corporation, is reduced by the amount of gain that would otherwise be recognized by the section 958(a) U.S. shareholder without regard to paragraph (g)(1) of this section.

(h) *Rules of application for specified basis adjustments.* This paragraph (h) applies for purposes of making any adjustment to the basis of section 958(a) stock or applicable property with respect to a specified foreign corporation described in paragraph (e), (f)(2), or (g)(2) of this section (collectively, *specified basis adjustments,* and each a *specified basis adjustment*).

(1) *Timing of basis adjustments.* Except as provided in paragraph (e)(2) of this section, a specified basis adjustment to section 958(a) stock or applicable property with respect to a specified foreign corporation is made as of the last day of the last taxable year of the specified foreign corporation that begins before January 1, 2018, on which it is a specified foreign corporation.

(2) *Netting of basis adjustments.* If one or more specified basis adjustments occur on the same day with respect to the same section 958(a) stock or applicable property, a single basis adjustment is made as of the close of such day with respect to such stock or applicable property in an amount equal to the net amount, if any, of the increase or reduction, as applicable.

(3) *Gain recognition for reduction in excess of basis.* The excess (if any) of a net reduction in basis with respect to section 958(a) stock or applicable property of a section 958(a) U.S. shareholder by reason of one or more specified basis adjustments over the section 958(a) U.S. shareholder's basis in such stock or applicable property without regard to the specified basis adjustments is treated as gain from the sale or exchange of property.

(4) *Adjustments with respect to each share*—(i) *Section 958(a) stock.* If a specified basis adjustment is made with respect to section 958(a) stock, the specified basis adjustment is made with respect to each share of the section 958(a) stock in a manner consistent with the section 958(a) U.S. shareholder's pro rata share of the section 965(a) earnings amount or specified E&P deficit, as applicable, by reason of such share.

(ii) *Applicable property.* If a specified basis adjustment is made with respect to applicable property, the adjustment is made with respect to the applicable property in a manner consistent with the application of paragraph (h)(4)(i) of this section.

(5) *Stock or property for which adjustments are made*—(i) *In general.* Except as provided in paragraph (h)(5)(ii) of this section, a specified basis adjustment is made solely with respect to section 958(a) stock owned by the section 958(a) U.S. shareholder within the meaning of section 958(a)(1)(A) or applicable property owned directly by the section 958(a) U.S. shareholder.

(ii) *Special rule for an interest in a foreign pass-through entity.* If the applicable property of the section 958(a) U.S. shareholder described in paragraph (h)(5)(i) of this section is an interest in a foreign pass-through entity, then, for purposes of determining the foreign pass-through entity's basis in section 958(a) stock or applicable property, as applicable, with respect to the section 958(a) U.S. shareholder, a specified basis adjustment is made with respect to section 958(a) stock or applicable property of the section 958(a) U.S. shareholder owned through the foreign pass-through entity in the same manner as if the section 958(a) stock or applicable property were owned directly by the section 958(a) U.S. shareholder. In the case of tiered foreign pass-through entities, this paragraph (h)(5)(ii) applies with respect to each foreign pass-through entity.

(i) *Definitions.* This paragraph (i) provides definitions that apply for purposes of this section.

(1) *Applicable property.* The term *applicable property* means, with respect to a section 958(a) U.S. shareholder and a specified foreign corporation, property owned by the section 958(a) U.S. shareholder (including through one or more foreign pass-through entities) by reason of which the section 958(a) U.S. shareholder is considered under section 958(a)(2) as owning section 958(a) stock of the specified foreign corporation.

(2) *Foreign pass-through entity.* The term *foreign pass-through entity* means a foreign partnership or a foreign estate or trust (as defined in section 7701(a)(31)) (including a controlled domestic partnership treated as a foreign partnership pursuant to § 1.965–1(e)).

(3) *Property.* The term *property* has the meaning provided in § 1.961–1(b)(1).

(j) *Examples.* The following examples illustrate the application of this section.

(1) *Example 1. Determination of accumulated post-1986 deferred foreign income with subpart F income earned before E&P measurement date on November 2, 2017.* (i) *Facts.* USP, a domestic corporation, owns all of the stock of CFC1, a foreign corporation, which owns all of the stock of CFC2, also a foreign corporation. USP, CFC1, and CFC2 all have taxable years ending December 31, 2017. As of January 1, 2017, CFC1 has no earnings and profits, and CFC2 has 100u of earnings and profits described in section 959(c)(3) that were accumulated in taxable years beginning after December 31, 1986, while CFC2 was a specified foreign corporation, and $21x of post-1986 foreign income taxes. None of CFC2's earnings and profits are attributable to income treated as effectively connected with the conduct of a trade or business within the United States. On March 1, 2017, CFC1 earns 30u of subpart F income (as defined in section 952), and CFC2 earns 20u of subpart F income. No foreign income tax is imposed on CFC1's or CFC2's subpart F income. For purposes of section 904, the post-1986 undistributed earnings, subpart F income, and post-1986 foreign income taxes are in the general category. On July 1, 2017, CFC2 distributes 40u to CFC1. On November 1, 2017, CFC1 distributes 60u to USP. USP does not have an aggregate foreign E&P deficit. USP includes in gross income all amounts that it is required to include under section 951. No foreign income tax is imposed or withheld on the distribution by CFC2 to CFC1 or the distribution by CFC1 to USP.

(ii) *Analysis.* (A) *Adjustments to section 959(c) classification of earnings and profits for inclusion under section 951(a)(1)(A) without regard to section 965.* The distribution from CFC2 to CFC1 does not give rise to subpart F income to CFC1 due to the application of section 954(c)(6). Accordingly, USP's inclusion under section 951(a)(1)(A) without regard to section 965(a) is 30u with respect to CFC1 and 20u with respect to

CFC2 for their taxable years ending December 31, 2017. As a result of the inclusions under section 951(a)(1)(A), CFC1 and CFC2 increase their earnings and profits described in section 959(c)(2) by 30u and 20u, respectively.

(B) *Distributions between specified foreign corporations before January 1, 2018.* The distribution of 40u from CFC2 to CFC1 is treated as a distribution of 20u out of earnings and profits described in section 959(c)(2) (attributable to inclusions under section 951(a)(1)(A) without regard to section 965(a)) and 20u out of earnings and profits described in section 959(c)(3).

(C) *Section 965(a) inclusion amount.* USP determines whether CFC1 and CFC2 are deferred foreign income corporations and, if so, determines its section 965(a) inclusion amounts with respect to CFC1 and CFC2. CFC1 and CFC2 are specified foreign corporations, and CFC1 and CFC2 each have accumulated post-1986 deferred foreign income greater than zero as of an E&P measurement date. Accordingly, CFC1 and CFC2 are deferred foreign income corporations. USP's section 965(a) inclusion amount with respect to each of CFC1 and CFC2, respectively, equals the section 965(a) earnings amount of CFC1 and CFC2, respectively.

(*1*) *CFC1 section 965(a) earnings amount.* The section 965(a) earnings amount with respect to CFC1 is 20u, the amount of its accumulated post-1986 deferred foreign income as of both November 2, 2017, and December 31, 2017, which is equal to 70u of post-1986 earnings and profits (30u earned and 40u attributable to the CFC2 distribution) reduced by 50u of such post-1986 earnings and profits described in section 959(c)(2) (30u earned and 20u attributable to the CFC2 distribution) under section 965(d)(2)(B) and § 1.965–1(f)(7)(i)(B). Under section 965(d)(3)(B) and § 1.965–1(f)(29)(i)(B), the post-1986 earnings and profits of CFC1 are not reduced by the 60u distribution to USP.

(*2*) *CFC2 section 965(a) earnings amount.* The section 965(a) earnings amount with respect to CFC2 is 80u, the amount of its accumulated post-1986 deferred foreign income as of both November 2, 2017, and December 31, 2017, which is equal to the amount of CFC2's post-1986 earnings and profits of 80u. CFC2's accumulated post-1986 deferred foreign income is equal to its post-1986 earnings and profits because CFC2 does not have earnings and profits that are attributable to income of the specified foreign corporation that is effectively connected with the conduct of a trade or business within the United States and subject to tax under chapter 1, or that, if distributed, would be excluded from the gross income of a United States shareholder under section 959 or from the gross income of another shareholder if such shareholder were a United States shareholder, and, therefore, no adjustment is made under section 965(d)(2) or § 1.965–1(f)(7). CFC2's 80u of post-1986 earnings and profits consists of 120u of earnings and profits that it earned, reduced by the 40u distribution to CFC1 under section 965(d)(3)(B) and § 1.965–1(f)(29)(i)(B). The amount of the reduction to the post-1986 earnings and profits of CFC2 for the 40u distribution is not limited by § 1.965–1(f)(29)(i)(B) because CFC1's post-1986 earnings and profits are increased by 40u as a result of the distribution. Furthermore, because the 40u distribution was made on July 1, 2017, which is before the E&P measurement date on November 2, 2017, § 1.965–4(f) is not relevant.

(*3*) *Effect on earnings and profits described in section 959(c)(2) and (3).* CFC1 and CFC2 increase their earnings and profits described in section 959(c)(2) by USP's section 965(a) inclusion amounts with respect to CFC1 and CFC2, 20u and 80u, respectively, and reduce their earnings and profits described in section 959(c)(3) by an equivalent amount.

(D) *Distribution to United States shareholder.* The distribution from CFC1 to USP is treated as a distribution of 60u out of the earnings and profits of CFC1 described in section 959(c)(2), which include earnings and profits attributable to the section 965(a) inclusion amount taken into account by USP.

(E) *Section 902 and section 960 consequences.* (*1*) *Distribution by and inclusions with respect to CFC2.* Under section 960, USP is deemed to pay $3.50x ($21x × (20u/120u)) of CFC2's post-1986 foreign income taxes as a result of its inclusion under section 951(a)(1)(A) without regard to section 965(a) with respect to CFC2. As a result of the distribution from CFC2 to CFC1, CFC2's post-1986 foreign income taxes are reduced, and CFC1's post-1986 foreign income taxes are increased, by the foreign income taxes deemed paid by CFC1 under section 902 of $3.50x (($21x − $3.50x) × (20u/120u − 20u)). Under section 960, USP is deemed to pay $14x (($21x − $3.50x − $3.50x) × 80u/(120u − 40u)) of CFC2's post-1986 foreign income taxes as a result of its section 965(a) inclusion with respect to CFC2. The taxes deemed paid by USP as a result of its section 965(a) inclusion with respect to CFC2 are subject to the applicable percentage disallowance under section 965(g).

(*2*) *Inclusions with respect to CFC1.* As determined in paragraph (j)(1)(ii)(E)(*1*) of this *section (paragraph (E)(1) in the analysis in this Example 1),* as a result of the distribution from CFC2 to CFC1, CFC1 is deemed under section 902 to pay $3.50x of CFC2's post-1986 foreign income taxes. Under section 960, USP is deemed to pay $2.10x ($3.50x × (30u/(30u + 20u))) of CFC1's post-1986 foreign income taxes as a result of its inclusion under section 951(a)(1)(A) without regard to section 965(a) with respect to CFC1. Under section 960, USP is deemed to pay $1.40x (($3.50x − $2.10x) × 20u/(30u + 20u − 30u)) of CFC1's post-1986 foreign income taxes as a result of its section 965(a) inclusion with respect to CFC1. The taxes deemed paid by USP as a result of its section 965(a) inclusion with respect to CFC1 are subject to the applicable percentage disallowance under section 965(g).

(2) *Example 2. Determination of accumulated post-1986 deferred foreign income with subpart F income earned after E&P measurement date on November 2, 2017.* (i) *Facts.* The facts are the same as in paragraph (j)(1)(i) of this section (the facts in *Example 1*), except that on December 1, 2017, CFC1 earns an additional 50u of subpart F income (as defined in section 952), and neither CFC1 nor CFC2 has any post-1986 foreign income taxes.

(ii) *Analysis.* (A) *Adjustments to section 959(c) classification of earnings and profits for inclusion under section 951(a)(1)(A) without regard to section 965.* USP determines its inclusion under section 951(a)(1)(A) without regard to section 965(a), which is 80u with respect to CFC1 and 20u with respect to CFC2 for their taxable years ending December 31, 2017. As a result of the inclusions under section 951(a)(1)(A), CFC1 and CFC2 increase their earnings and profits described in section 959(c)(2) by 80u and 20u, respectively.

(B) *Distributions between specified foreign corporations before January 1, 2018.* The analysis is the same as in paragraph (j)(1)(ii)(B) of this section (paragraph (B) in the analysis in *Example 1*).

(C) *Section 965(a) inclusion amount.* USP determines whether CFC1 and CFC2 are deferred foreign income corporations and, if so, determines its section 965(a) inclusion amounts with respect to CFC1 and CFC2. CFC1 and CFC2 are specified foreign corporations, and CFC1 and CFC2 each have accumulated post-1986 deferred foreign income greater than zero as of an E&P measurement date. Accordingly, CFC1 and CFC2 are deferred foreign income corporations. USP's section 965(a) inclusion amount with respect to each of CFC1 and CFC2, respectively, equals the section 965(a) earnings amount of CFC1 and CFC2, respectively.

(*1*) *CFC1 section 965(a) earnings amount.* The section 965(a) earnings amount with respect to CFC1 is 20u, the greater of—

(*i*) The amount of its accumulated post-1986 deferred foreign income as of November 2, 2017, 20u, which is equal to 70u of post-1986 earnings and profits (30u earned and 40u attributable to the CFC2 distribution) reduced by 50u of such post-1986 earnings and profits described in section 959(c)(2) without regard to the subpart F income earned after November 2, 2017 (30u earned and 20u attributable to the CFC2 distribution) under section 965(d)(2)(B) and § 1.965–1(f)(7)(i)(B) and (ii), and

(*ii*) The amount of its accumulated post-1986 deferred foreign income as of December 31, 2017, 20u, which is equal to 120u of post-1986 earnings and profits (80u earned and 40u attributable to the CFC2 distribution) reduced by 100u of such post-1986 earnings and profits described in section 959(c)(2) with regard to the subpart F income earned on or before December 31, 2017 (80u earned and 20u attributable to the CFC2 distribution) under section 965(d)(2)(B) and § 1.965–1(f)(7)(i)(B) and (ii).

(*2*) *CFC2 section 965(a) earnings amount.* The analysis is the same as in paragraph (j)(1)(ii)(C)(*2*) of this section (paragraph (C)(*2*) in the analysis in *Example 1*)).

(*3*) *Effect on earnings and profits described in section 959(c)(2) and (3).* The analysis is the same as in paragraph (j)(1)(ii)(C)(*3*) of this section (paragraph (C)(*3*) in the analysis in *Example 1*).

(D) *Distribution to United States shareholder.* The analysis is the same as in paragraph (j)(1)(ii)(D) of this section (paragraph (D) in the analysis in *Example 1*).

(3) *Example 3. Determination of accumulated post-1986 deferred foreign income with subpart F income earned after E&P measurement date on November 2, 2017, but previously taxed earnings and profits attributable to the subpart F income distributed before E&P measurement date on November 2, 2017.* (i) *Facts.* The facts are the same as in paragraph (j)(1)(i) of this section (the facts in *Example 1*), except that on December 1, 2017, CFC2 earns an additional 50u of subpart F income (as defined in section 952), and neither CFC1 nor CFC2 has any post-1986 foreign income taxes.

(ii) *Analysis.* (A) *Adjustments to section 959(c) classification of earnings and profits for inclusion under section 951(a)(1)(A) without regard to section 965.* USP determines its inclusion under section 951(a)(1)(A) without regard to section 965(a), which is 30u with respect to CFC1 and 70u with respect to CFC2 for their taxable years ending December 31, 2017. As a result of the inclusions under section 951(a)(1)(A), CFC1 and CFC2 increase their earnings and profits described in section 959(c)(2) by 30u and 70u, respectively.

(B) *Distributions between specified foreign corporations before January 1, 2018.* The distribution of 40u from CFC2 to CFC1 is treated as a distribution of 40u out of earnings and profits described in section 959(c)(2) (attributable to inclusions under section 951(a)(1)(A) without regard to section 965(a)).

(C) *Section 965(a) inclusion amount.* USP determines whether CFC1 and CFC2 are deferred foreign income corporations, and, if so, determines its section 965(a) inclusion amounts with respect to CFC1 and CFC2. Because USP wholly owns CFC1 and CFC2 under section 958(a) and USP does not have an aggregate foreign E&P deficit, USP's section 965(a) inclusion amount with respect to each of CFC1 and CFC2, respectively, equals the section 965(a) earnings amount, if any, of CFC1 and CFC2, respectively.

(*1*) *CFC1 section 965(a) earnings amount.* CFC1 is not a deferred foreign income corporation and does not have a section 965(a) earnings amount because the amount of its accumulated post-1986 deferred foreign income as of both November 2, 2017, and December 31, 2017, is 0u, which is equal to 70u of post-1986 earnings and profits (30u earned and 40u attributable to the CFC2 distribution) reduced by 70u of such post-1986 earnings and profits described in section 959(c)(2) (30u earned and 40u attributable to the CFC2 distribution) under section 965(d)(2)(B) and § 1.965–1(f)(7)(i)(B).

(*2*) *CFC2 section 965(a) earnings amount.* The section 965(a) earnings amount with respect to CFC2 is 100u, the greater of the amounts in paragraph (j)(3)(ii)(C)(2)(*i*) and (*ii*) of this section (paragraph (C)(2)(*i*) and (*ii*) in the analysis in this *Example 3*)—

(*i*) The amount of its accumulated post-1986 deferred foreign income as of November 2, 2017, 80u. CFC2's 80u of accumulated post-1986 deferred foreign income as of November 2, 2017, is equal to its 80u of post-1986 earnings and profits because no adjustment is made under section 965(d)(2) or § 1.965–1(f)(7), as CFC2 does not have earnings and profits that are attributable to income of the specified foreign corporation that is effectively connected with the conduct of a trade or business within the United States and subject to tax under chapter 1, or that, if distributed, would be excluded from the gross income of a United States shareholder under section 959 or from the gross income of another shareholder if such shareholder were a United States shareholder, without regard to the subpart F income earned after November 2, 2017. CFC2's 80u of post-1986 earnings and profits consists of 120u of earnings and profits that it earned, reduced by the 40u distribution to CFC1 under section 965(d)(3)(B) and § 1.965–1(f)(29)(i)(B). The amount of the reduction to the post-1986 earnings and profits of CFC2 for the 40u distribution is not limited by § 1.965–1(f)(29)(i)(B) because CFC1's post-1986 earnings and profits are increased by 40u as a result of the distribution. Furthermore, because the 40u distribution was made on July 1, 2017, which is before any E&P measurement date, § 1.965–4(f) is not relevant.

(*ii*) The amount of its accumulated post-1986 deferred foreign income as of December 31, 2017, 100u, which is equal to 130u of post-1986 earnings and profits reduced by 30u of such post-1986 earnings and profits described in section 959(c)(2) with regard to the subpart F income earned before December 31, 2017, under section 965(d)(2)(B) and § 1.965–1(f)(7)(i)(B) and (ii). CFC2's 130u of post-1986 earnings and profits consists of 170u of earnings and profits that it earned, reduced by the 40u distribution to CFC1 under section 965(d)(3)(B) and § 1.965–1(f)(29)(i)(B).

(*3*) *Effect on earnings and profits described in section 959(c)(2) and (3).* CFC2 increases its earnings and profits described in section 959(c)(2) by USP's section 965(a) inclusion amount with respect to CFC2, 100u, and reduces its earnings and profits described in section 959(c)(3) by an equivalent amount.

(D) *Distribution to United States shareholder.* The analysis is the same as in paragraph (j)(1)(ii)(D) of this section (paragraph (D) in the analysis in *Example 1*).

(4) *Example 4. Determination of accumulated post-1986 deferred foreign income with distribution made after E&P measurement date on November 2, 2017.* (i) *Facts.* USP, a domestic corporation, owns all of the stock of CFC1, a foreign corporation, which owns all of the stock of CFC2, also a foreign corporation. USP, CFC1, and CFC2 all have taxable years ending December 31, 2017. As of January 1, 2017, CFC1 has 10u of earnings and profits described in section 959(c)(3) that were accumulated in taxable years beginning after December 31, 1986, while CFC1 was a specified foreign corporation, and $2x of post-1986 foreign income taxes; and CFC2 has 100u of earnings and profits described in section 959(c)(3) that were accumulated in taxable years beginning after December 31, 1986, while CFC2 was a specified foreign corporation and $10x of post-1986 foreign income taxes. For purposes of section 904, the post-1986 undistributed earnings and post-1986 foreign income taxes are in the general category. None of CFC1's or CFC2's earnings and profits are attributable to income treated as effectively connected with the conduct of a trade or business within the United States. On December 1, 2017, CFC2 distributes 100u to CFC1, and CFC1 distributes 10u to USP. USP does not have an aggregate foreign E&P deficit. USP includes in gross income all amounts that it is required to include under section 951. No foreign income tax is imposed or withheld on the distribution by CFC2 to CFC1 or the distribution by CFC1 to USP. USP does not apply § 1.965–4(f)(3) to determine the post-1986 earnings and profits of CFC1 and CFC2.

(ii) *Analysis.* (A) *Adjustments to section 959(c) classification of earnings and profits for inclusion under section 951(a)(1)(A) without regard to section 965.* The distribution from CFC2 to CFC1 does not give rise to subpart F income to CFC1 due to the application of section 954(c)(6). Accordingly, USP does not have an inclusion under section 951(a)(1)(A) without regard to section 965(a) with respect to CFC1 or CFC2 for their taxable years ending December 31, 2017. As a result, neither CFC1 nor CFC2 has earnings and profits described in section 959(c)(2).

(B) *Distributions between specified foreign corporations before January 1, 2018.* The distribution of 100u from CFC2 to CFC1 is initially treated as a distribution out of earnings and profits described in section 959(c)(3).

(C) *Section 965(a) inclusion amount.* USP determines whether CFC1 and CFC2 are deferred foreign income corporations, and, if so, determines its section 965(a) inclusion amounts with respect to CFC1 and CFC2. CFC1 and CFC2 are specified foreign corporations, and CFC1 and CFC2 each have accumulated post-1986 deferred foreign income greater than zero as of an E&P measurement date. Accordingly, CFC1 and CFC2 are deferred foreign income corporations. USP's section 965(a) inclusion amount with respect to each of CFC1 and CFC2, respectively, equals the section 965(a) earnings amount of CFC1 and CFC2, respectively.

(*1*) *CFC1 section 965(a) earnings amount.* The section 965(a) earnings amount with respect to CFC1 is 10u, the amount of its accumulated post-1986 deferred foreign income as of both November 2, 2017, and December 31, 2017, which is equal to the amount of CFC1's post-1986 earnings and profits of 10u. CFC1's accumulated post-1986 deferred foreign income is equal to its post-1986 earnings and profits because CFC1 does not have earnings and profits that are attributable to income of the specified foreign corporation that is effectively connected with the conduct of a trade or business within the United States and subject to tax under chapter 1, or that, if distributed, would be excluded from the gross income of a United States shareholder under section 959 or from the gross income of another shareholder if such shareholder were a United States shareholder, and therefore no adjustment is made under section 965(d)(2) or § 1.965–1(f)(7). But for § 1.965–4(f), CFC1's post-1986 earnings and profits as of December 31, 2017, would be 110u, but because the distribution from CFC2 is a specified payment, it is disregarded in determining CFC1's post-1986 earnings and profits as of December 31, 2017,

under § 1.965–4(f). Under section 965(d)(3)(B) and § 1.965–1(f)(29)(i)(B), the post-1986 earnings and profits of CFC1 are not reduced by the 10u distribution to USP.

(*2*) *CFC2 section 965(a) earnings amount.* The section 965(a) earnings amount with respect to CFC2 is 100u, the amount of its accumulated post-1986 deferred foreign income as of both November 2, 2017, and December 31, 2017, which is equal to the amount of CFC2's post-1986 earnings and profits of 100u. CFC2's accumulated post-1986 deferred foreign income is equal to its post-1986 earnings and profits because CFC2 does not have earnings and profits that are attributable to income of the specified foreign corporation that is effectively connected with the conduct of a trade or business within the United States and subject to tax under chapter 1, or that, if distributed, would be excluded from the gross income of a United States shareholder under section 959 or from the gross income of another shareholder if such shareholder were a United States shareholder, and therefore no adjustment is made under section 965(d)(2) or § 1.965–1(f)(7). But for § 1.965–4(f), CFC2's post-1986 earnings and profits as of December 31, 2017, would be 0u, but because the distribution to CFC1 is a specified payment, it is disregarded in determining CFC2's post-1986 earnings and profits as of December 31, 2017, under § 1.965–4(f).

(*3*) *Effect on earnings and profits described in section 959(c)(2) and (3).* CFC1 and CFC2 increase their earnings and profits described in section 959(c)(2) by USP's section 965(a) inclusion amounts with respect to CFC1 and CFC2, 10u and 100u, respectively, and reduce their earnings and profits described in section 959(c)(3) by an equivalent amount.

(D) *Distributions*—(*1*) *Distribution that is a specified payment.* The distribution from CFC2 to CFC1 is recharacterized as a distribution of 100u out of the earnings and profits of CFC2 described in section 959(c)(2), which include earnings and profits attributable to the section 965(a) inclusion amount taken into account by USP.

(*2*) *Distribution to United States shareholder.* The distribution from CFC1 to USP is treated as a distribution of 10u out of the earnings and profits of CFC1 described in section 959(c)(2), which include earnings and profits attributable to the section 965(a) inclusion amount taken into account by USP.

(E) *Section 902 and section 960 consequences.* Under section 960, USP is deemed to pay $10x ($10x × (100u/100u)) of CFC2's post-1986 foreign income taxes as a result of its section 965(a) inclusion with respect to CFC2 and $2x ($2x × (10u/10u) of CFC1's post-1986 foreign income taxes as a result of its section 965(a) inclusion with respect to CFC1. Such taxes are subject to the applicable percentage disallowance under section 965(g).

(5) *Example 5. Determination of accumulated post-1986 deferred foreign income with section 951(a)(1)(B) inclusion after E&P measurement date on November 2, 2017.* (i) *Facts.* USP, a domestic corporation, owns all of the stock of CFC, a foreign corporation. USP has a taxable year ending December 31, 2017, and CFC has a taxable year ending November 30, 2017. As of December 1, 2016, CFC has 110u of earnings and profits described in section 959(c)(3) that were accumulated in taxable years beginning after December 31, 1986, while CFC was a specified foreign corporation. CFC holds 150u of United States property throughout its taxable year ending November 30, 2017, but disposes of it on December 1, 2017, recognizing no gain or loss on the property. Between December 1, 2017, and December 31, 2017, CFC earns an additional 10u of income that does not constitute subpart F income or income treated as effectively connected with the conduct of a trade or business within the United States that gives rise to 10u of earnings and profits. USP includes in income all amounts that it is required to include under section 951.

(ii) *Analysis.* (A) *Section 965(a) inclusion amount.* USP determines whether CFC is a deferred foreign income corporation, and, if so, determines its section 965(a) inclusion amount with respect to CFC. CFC is a specified foreign corporation, and CFC has accumulated post-1986 deferred foreign income greater than zero as of an E&P measurement date. Accordingly, CFC is a deferred foreign income corporation. USP's section 965(a) inclusion amount with respect to CFC equals the section 965(a) earnings amount of CFC.

(*1*) *CFC section 965(a) earnings amount.* The section 965(a) earnings amount with respect to CFC is 110u, the greater of the amount of its accumulated post-1986 deferred foreign income as of November 2, 2017, which is 110u, and the amount of its accumulated post-1986 deferred foreign income as of December 31, 2017, which is 10u. CFC's accumulated post-1986 deferred foreign income as of November 2, 2017, is equal to its 110u of post-1986 earnings and profits, which are not reduced by the 110u of earnings and profits described in section 959(c)(1) as a result of USP's section 951(a)(1)(B) inclusion with respect to CFC as of December 31, 2017, because such amounts would not be excluded from the gross income of a United States shareholder under section 959 under section 965(d)(2) or § 1.965–1(f)(7) if distributed on November 2, 2017. CFC's accumulated post-1986 deferred foreign income as of December 31, 2017, is equal to its 120u of post-1986 earnings and profits reduced by the 110u of earnings and profits described in section 959(c)(1) as a result of USP's section 951(a)(1)(B) inclusion with respect to CFC as of December 31, 2017, which would be excluded from the gross income of a United States shareholder under section 959 under section 965(d)(2) or § 1.965–1(f)(7) if distributed on December 31, 2017.

(*2*) *Effect on earnings and profits described in section 959(c)(2) and (3).* In USP's taxable year ending December 31, 2018, CFC increases its earnings and profits described in section 959(c)(2) by USP's section 965(a) inclusion amount with respect to CFC, 110u, and reduces its earnings and profits described in section 959(c)(3) by an equivalent amount.

(B) *Section 956 inclusion.* In USP's taxable year ending December 31, 2017, USP increases its earnings and profits described in section 959(c)(1) by USP's amount included under sections 951(a)(1)(B) and 956 with respect to CFC, 110u, and reduces its earnings and profits described in section 959(c)(3) by an equivalent amount.

(6) *Example 6. Section 1248 inclusion.* (i) *Facts.* USP1, a domestic corporation, owns all of the stock of CFC, a foreign corporation, until it sells all of such stock to USP2, a domestic corporation, on December 1, 2017, in a sale on which USP1 recognizes $100x of gain. Throughout 2017, 1u=$1x. USP1, USP2, and CFC all have taxable years ending December 31, 2017. As of January 1, 2017, CFC has 100u of earnings and profits described in section 959(c)(3) that were accumulated in taxable years beginning after December 31, 1986, while CFC was wholly owned by USP1. On March 1, 2017, CFC distributes 20u to USP1. None of CFC's earnings and profits are attributable to income treated as effectively connected with the conduct of a trade or business within the United States. USP2 does not have an aggregate foreign E&P deficit. USP1 and USP2 include in income all amounts that they are required to include under sections 951 and 1248.

(ii) *Analysis.* (A) *Adjustments to section 959(c) classification of earnings and profits for section 1248 inclusion.* USP1's inclusion under section 1248 with respect to CFC is $80x ($100x − $20x). As a result of the inclusion under section 1248, under section 959(e), CFC increases its earnings and profits described in section 959(c)(2) by 80u.

(B) *Section 965(a) inclusion amount.* USP2 determines whether CFC is a deferred foreign income corporation and, if so, determines its section 965(a) inclusion amount with respect to CFC. CFC is a specified foreign corporation, and CFC has accumulated post-1986 deferred foreign income greater than zero as of an E&P measurement date. Accordingly, CFC is a deferred foreign income corporation. USP2's section 965(a) inclusion amount with respect to CFC equals the section 965(a) earnings amount of CFC. The section 965(a) earnings amount with respect to CFC is 20u, the amount of its accumulated post-1986 deferred foreign income as of both November 2, 2017, and December 31, 2017, which is equal to 100u of post-1986 earnings and profits reduced by 80u of such post-1986 earnings and profits described in section 959(c)(2) under section 965(d)(2)(B) and § 1.965–1(f)(7)(i)(B). CFC increases its earnings and profits described in section 959(c)(2) by USP2's section 965(a) inclusion amount with respect to CFC, 20u, and reduces its earnings and profits that would be described in section 959(c)(3) but for the application of section 965(a) by an equivalent amount.

(C) *Distributions to United States shareholders.* The distributions from CFC to USP1 (including the deemed dividend under section 1248) are treated as distributions out of the earnings and profits of CFC described in section 959(c)(3).

(7) *Example 7. Distribution attributable to section 965(a) previously taxed earnings and profits.* (i) *Facts.* USP, a domestic corporation, owns all of the stock of CFC1, a specified foreign corporation that has no post-1986 earnings and profits (or deficit in post-1986 earnings and profits), and CFC1

owns all the stock of CFC2, a deferred foreign income corporation. USP is a calendar year taxpayer. CFC1's last taxable year beginning before January 1, 2018, ends on November 30, 2018; CFC2 has an inclusion year that ends on November 30, 2018. The functional currency of CFC1 and CFC2 is the U.S. dollar. USP's adjusted basis in the stock of CFC1 is zero. On January 1, 2018, CFC2 distributes $100x to CFC1, and CFC1 distributes $100x to USP. USP has a section 965(a) inclusion amount of $100x with respect to CFC2 that is taken into account for USP's taxable year ending December 31, 2018. CFC2 has no earnings and profits described in section 959(c)(1) or (2) other than section 965(a) previously taxed earnings and profits.

(ii) *Analysis.* Under paragraph (c) of this section, CFC2 has $100x of section 965(a) previously taxed earnings and profits with respect to USP. USP receives a distribution from CFC2 through a chain of ownership described in section 958(a) during the inclusion year of CFC2 that is attributable to the $100x of section 965(a) previously taxed earnings and profits of CFC2. Under paragraph (g)(1) of this section, the amount of gain that USP otherwise would recognize with respect to the stock of CFC1 under section 961(b)(2) is reduced (but not below zero) by $100x, the amount of CFC2's section 965(a) previously taxed earnings and profits with respect to USP. As of the close of November 30, 2018, USP's basis in CFC1 is increased under paragraph (e) of this section by USP's section 965(a) inclusion amount with respect to CFC2 ($100x), and is reduced under paragraph (g)(2) of this section by the amount of gain that would have been recognized by USP under section 961(b)(2) but for the application of paragraph (g)(1) of this section ($100x).

(8) *Example 8. Distribution attributable to section 965(b) previously taxed earnings and profits; parent-subsidiary.* (i) *Facts.* The facts are the same as in paragraph (j)(7)(i) of this section (the facts in *Example 7*), except that CFC1 has a specified E&P deficit of $100x. Because of the specified E&P deficit of CFC1, USP's section 965(a) inclusion amount with respect to CFC2 is reduced to zero pursuant to section 965(b)(1) and § 1.965–1(b)(2). USP makes the election described in paragraph (f)(2) of this section.

(ii) *Analysis.* (A) *Application of the gain reduction rule.* Under paragraph (d)(1) of this section, CFC2 has $100x of section 965(b) previously taxed earnings and profits with respect to USP, and, under paragraph (d)(2) of this section, CFC1's earnings and profits described in section 959(c)(3) are increased by $100x to $0. USP receives a distribution from CFC2 through a chain of ownership described in section 958(a) during the inclusion year of CFC2 that is attributable to the $100x of section 965(b) previously taxed earnings and profits of CFC2. Under paragraph (g)(1) of this section, the amount of gain that USP otherwise would recognize with respect to the stock of CFC1 under section 961(b)(2) is reduced (but not below zero) by $100x, the amount of CFC2's section 965(b) previously taxed earnings and profits with respect to USP under paragraph (d)(1) of this section.

(B) *Adjustments to the basis of CFC1.* Because USP makes the election described in paragraph (f)(2) of this section, as of the close of November 30, 2018, USP's basis in CFC1 is increased under paragraph (f)(2)(ii)(A) of this section by an amount equal to CFC2's section 965(b) previously taxed earnings and profits with respect to USP under paragraph (d)(1) of this section ($100x), reduced under paragraph (f)(2)(ii)(B) of this section by an amount equal to the portion of the specified E&P deficit of CFC1 taken into account in determining USP's section 965(a) inclusion amount with respect to CFC2 ($100x), and reduced under paragraph (g)(2) of this section by the amount of gain that would have been recognized by USP with respect to the stock of CFC1 under section 961(b)(2) but for the application of paragraph (g)(1) of this section ($100x). Under paragraph (h)(2) and (3) of this section, the excess of the net reduction from the adjustments under paragraphs (f) and (g) of this section over USP's basis in the stock of CFC1 (in this case, $100x) is treated as gain recognized by USP from the sale or exchange of property.

(9) *Example 9. Distribution attributable to section 965(b) previously taxed earnings and profits; brother-sister.* (i) *Facts.* The facts are the same as in paragraph (j)(8)(i) of this section (the facts in *Example 8*), except that USP owns all the stock of CFC2, USP's adjusted basis in the stock of CFC2 is zero, CFC1 made no distributions, and on January 1, 2018, CFC2 distributes $100x to USP.

(ii) *Analysis.* (A) *Application of the gain reduction rule.* Under paragraph (d)(1) of this section, CFC2 has $100x of section 965(b) previously taxed earnings and profits with respect to USP, and, under paragraph (d)(2) of this section, CFC1's earnings and profits described in section 959(c)(3) (deficit of $100x) are increased by $100x to $0. USP receives a distribution from CFC2 during the inclusion year of CFC2 that is attributable to the $100x of section 965(b) previously taxed earnings and profits of CFC2. Under paragraph (g)(1) of this section, the amount of gain that USP otherwise would recognize with respect to the stock of CFC2 under section 961(b)(2) is reduced (but not below zero) by $100x, the amount of CFC2's section 965(b) previously taxed earnings and profits with respect to USP under paragraph (d)(1) of this section.

(B) *Adjustments to the basis of CFC1 and CFC2.* Because USP makes the election described in paragraph (f)(2) of this section, as of the close of November 30, 2018, USP's basis in the stock of CFC2 is increased under paragraph (f)(2)(ii)(A) of this section by the amount of CFC2's section 965(b) previously taxed earnings and profits with respect to USP under paragraph (d)(1) of this section ($100x) and reduced under paragraph (g)(2) of this section by the amount of gain that would have been recognized by USP with respect to the stock of CFC2 under section 961(b)(2) but for the application of paragraph (g)(1) of this section ($100x). As of the close of November 30, 2018, USP's basis in CFC1 is reduced under paragraph (f)(2)(ii)(B) of this section by an amount equal to the portion of USP's pro rata share of the specified E&P deficit of CFC1 taken into account in determining USP's section 965(a) inclusion amount with respect to CFC2 ($100x). Under paragraph (h)(3) of this section, the excess of the reduction under paragraph (f) of this section over USP's basis in the stock of CFC1 (in this case, $100x) is treated as gain recognized by USP from the sale or exchange of property.

§ 1.965–3 Section 965(c) deductions.

(a) *Scope.* This section provides rules regarding section 965(c) deductions and section 965(c) deduction amounts. Paragraph (b) of this section provides rules for disregarding certain assets for purposes of determining the aggregate foreign cash position of a section 958(a) U.S. shareholder. Paragraph (c) of this section provides rules for determining the aggregate foreign cash position for a section 958(a) U.S. shareholder inclusion year. Paragraph (d) of this section provides a rule regarding certain expatriated entities. Paragraph (e) of this section provides a rule for the treatment of section 965(c) deductions in connection with an election under section 962. Paragraph (f) of this section provides rules regarding the treatment of a section 965(c) deduction under certain provisions of the Internal Revenue Code. Paragraph (g) of this section provides a rule for domestic pass-through entities.

(b) *Rules for disregarding certain assets for determining aggregate foreign cash position*—(1) *Disregard of certain obligations between related specified foreign corporations.* In determining the aggregate foreign cash position of a section 958(a) U.S. shareholder, any account receivable, account payable, short-term obligation, or derivative financial instrument between a specified foreign corporation with respect to which the section 958(a) U.S. shareholder owns section 958(a) stock and a related specified foreign corporation on corresponding cash measurement dates is disregarded to the extent of the smallest of the product of the amount of the item on such corresponding cash measurement dates of each specified foreign corporation and the section 958(a) U.S. shareholder's ownership percentage of section 958(a) stock of the specified foreign corporation owned by the section 958(a) U.S. shareholder on such dates. For purposes of this paragraph (b)(1)(i), a specified foreign corporation is treated as a related specified foreign corporation with respect to another specified foreign corporation if, as of the cash measurement date referred to in the preceding sentence of each specified foreign corporation, the specified foreign corporations are related persons within the meaning of section 954(d)(3), substituting the term ''specified foreign

corporation'' for ''controlled foreign corporation'' in each place that it appears.

(2) *Disregard of other assets upon demonstration of double-counting.* For purposes of determining the aggregate foreign cash position of a section 958(a) U.S. shareholder, the section 958(a) U.S. shareholder's pro rata share of the cash position of a specified foreign corporation on a cash measurement date is reduced by amounts of net accounts receivable, actively traded property, and short-term obligations to the extent such amounts are attributable to amounts taken into account in determining the section 958(a) U.S. shareholder's pro rata share of the cash position of another specified foreign corporation on the corresponding cash measurement date of such other specified corporation and to the extent not disregarded pursuant to paragraph (b)(1) of this section. However, the preceding sentence applies only if the section 958(a) U.S. shareholder attaches a statement containing the information outlined in paragraphs (b)(2)(i) through (v) of this section to its timely filed return (taking into account extensions, if any) for the section 958(a) U.S. shareholder inclusion year, or, if the section 958(a) U.S. shareholder has multiple section 958(a) U.S. shareholder inclusion years, the later of such years. Relief is not available under § 301.9100–2 or 301.9100–3 to allow late filing of the statement. The statement must contain the following information with respect to each specified foreign corporation for which the cash position is reduced under this paragraph (b)(2)—

(i) A description of the asset that would be taken into account with respect to both specified foreign corporations,

(ii) A statement of the amount by which its pro rata share of the cash position of one specified foreign corporation is reduced,

(iii) A detailed explanation of why there would otherwise be double-counting, including the computation of the amount taken into account with respect to the other specified foreign corporation, and

(iv) An explanation of why paragraph (b)(1) of this section does not apply to disregard such amount.

(3) *Disregard of portion of cash position of noncorporate entities treated as specified foreign corporations.* If an entity is treated as a specified foreign corporation of a section 958(a) U.S. shareholder pursuant to section 965(c)(3)(E), for purposes of determining the aggregate foreign cash position of the section 958(a) U.S. shareholder, the section 958(a) U.S. shareholder's pro rata share of the cash position of the entity (determined taking into account paragraphs (b)(1) and (b)(2) of this section) is reduced by the amount of the pro rata share attributable to deemed stock of the entity not owned (within the meaning of section 958(a), applied by treating domestic pass-through entities as foreign) by a specified foreign corporation of the section 958(a) U.S. shareholder (determined without taking into account section 965(c)(3)(E)).

(4) *Examples.* The following examples illustrate the application of this paragraph (b).

(i) *Example 1.* (A) *Facts.* USP, a domestic corporation, owns all of the stock of CFC1, a foreign corporation. CFC1 owns 95% of the only class of stock of CFC2, also a foreign corporation, and 40% of the only class of stock of CFC3, also a foreign corporation. The remaining 5% of the only class of stock of CFC2 is owned by a person unrelated to USP, CFC1, and CFC2; and the remaining 60% of the only class of stock of CFC3 is owned by a person unrelated to USP and CFC1. USP, CFC1, and CFC3 have calendar year taxable years. CFC2 has a taxable year ending on November 30. On November 15, 2015, CFC1 makes a loan of $100x to CFC2, which is required to be and is, in fact, repaid on January 1, 2016. On November 15, 2016, CFC2 sells inventory to CFC1 in exchange for an account receivable of $200x, which is required to be and is, in fact, repaid on December 15, 2016. On August 1, 2017, CFC1 makes a loan of $300x to CFC3, which is required to be and is, in fact, repaid on January 31, 2018.

(B) *Analysis*—(*1*) *Loan from CFC1 to CFC2.* For purposes of determining the aggregate foreign cash position of USP, a section 958(a) U.S. shareholder of CFC1, under paragraph (b)(1) of this section, because CFC1 and CFC2 are related within the meaning of paragraph (b)(1) of this section, the short-term obligation of CFC2 held by CFC1 outstanding on the first cash measurement date of each specified foreign corporation, November 30, 2015, and December 31, 2015, respectively, is disregarded to the extent of 95%, the smallest ownership percentage of section 958(a) stock of CFC1 and CFC2 owned by USP on such first cash measurement dates. Accordingly, USP only takes into account $5 ($100 − 95% of $100) of the short-term obligation in determining CFC1's cash position for purposes of determining its aggregate foreign cash position.

(*2*) *Account receivable of CFC1 held by CFC2.* Because the account receivable of CFC1 held by CFC2 on its second cash measurement date, November 30, 2016, is not outstanding on CFC1's second cash measurement date, December 31, 2016, paragraph (b)(1) of this section does not apply to disregard any portion of such account receivable.

(*3*) *Loan from CFC1 to CFC3.* Because CFC3 is not related to CFC1 within the meaning of paragraph (b)(1) of this section, paragraph (b)(1) of this section does not apply to disregard any portion of such short-term obligation.

(ii) *Example 2.* (A) *Facts.* The facts are the same as in paragraph (b)(4)(i)(A) of this section (the facts in *Example 1*), except that on December 1, 2015, CFC1 sells 5% of the stock of CFC2 to an unrelated person.

(B) *Analysis.* The analysis is the same as in paragraph (b)(4)(i)(B) of this section (the analysis in *Example 1*), except that the short-term obligation of CFC2 held by CFC1 outstanding on both of their first cash measurement dates, November 30, 2015, and December 31, 2015, respectively, is disregarded under paragraph (b)(1) of this section to the extent of 90%, the smallest ownership percentage of section 958(a) stock of CFC1 and CFC2 by USP on such first cash measurement dates. Accordingly, USP takes into account $10 ($100 − 90% of $100) of the short-term obligation in determining CFC1's cash position for purposes of determining its aggregate foreign cash position.

(iii) *Example 3.* (A) *Facts.* USP, a domestic corporation, owns all of the stock of CFC1, a foreign corporation, which owns 45% of the only class of stock of CFC2, also a foreign corporation. The remainder of the CFC2 stock is actively traded on an established financial market but is not owned by any person related to USP or CFC1. USP, CFC1, and CFC2 have calendar year taxable years. The value of the CFC2 stock owned by CFC1 is $500x on each of the cash measurement dates. Also on each of the cash measurement dates, CFC2 has $300x of assets described in section 965(c)(3)(B) and § 1.965–1(f)(16) that are taken into account in determining its cash position.

(B) *Analysis.* For purposes of determining USP's aggregate foreign cash position, USP's pro rata share of the cash position of CFC1 on each cash measurement date may be reduced by the amount of the stock of CFC2 to the extent attributable to amounts taken into account in determining USP's pro rata share of the cash position of CFC2 on such cash measurement date (that is, to the extent of the $135x taken into account with respect to CFC2), provided USP attaches a statement to its timely filed return (taking into account extensions, if any) containing the following: A description of the CFC2 stock and the assets of CFC2 taken into account in determining its cash position; a statement that USP's pro rata share of the cash position of CFC1 is being reduced by $135x; the computation of the $135x taken into account with respect to CFC2; and an explanation of why paragraph (b)(1) of this section does not apply to disregard such amount.

(iv) *Example 4.* (A) *Facts.* USP, a domestic corporation, owns all of the stock of CFC1 and CFC2, each a foreign corporation. USP, CFC1, and CFC2 have calendar year taxable years. CFC1 buys goods on credit from a third party for $100x and thus has an account payable of $100x. CFC1 modifies the goods and sells to CFC2 for $105x in exchange for an account receivable of $105x. CFC2 modifies the goods and sells to another third party for $110x in exchange for an account receivable of $110x. All of the accounts payable and accounts receivable are outstanding on the final cash measurement date.

(B) *Analysis.* For purposes of determining USP's aggregate foreign cash position, on the

final cash measurement date, CFC1 has net accounts receivable of $0 because, pursuant to paragraph (b)(1) of this section, CFC1's account receivable from CFC2 is disregarded, and CFC2 has net accounts receivable of $110x because, pursuant to paragraph (b)(1) of this section, CFC2's account payable to CFC1 is disregarded. USP cannot rely on the rule in paragraph (b)(2) of this section because no amounts attributable to CFC2's net accounts receivable are taken into account with respect to another specified foreign corporation.

(v) *Example 5.* (A) *Facts.* USP, a domestic corporation, owns all of the stock of CFC1 and CFC2, each a foreign corporation. USP and CFC1 own 60% and 40%, respectively, of the interests in the capital and profits of PS1, a partnership. PS1 and CFC2 own 70% and 30%, respectively, of the interests in the capital and profits of PS2, a partnership. On each cash measurement date, PS1's cash position of $100x consists entirely of cash, and PS2's cash position of $200x includes a $50x short-term obligation of CFC2.

(B) *Analysis.* (*1*) *Treatment of PS1.* Because an interest in PS1 is held by CFC1, a specified foreign corporation of USP, and PS1 would be a specified foreign corporation of USP if it were a foreign corporation, PS1 is treated as a specified foreign corporation of USP for purposes of determining USP's aggregate foreign cash position. Without regard to paragraph (b)(3) of this section, USP must take into account $100x, its pro rata share of PS1's cash position, for purposes of determining its aggregate foreign cash position. However, 60% of that amount is attributable to deemed stock of PS1 that is not owned (within the meaning of section 958(a)) by a specified foreign corporation of USP. Accordingly, pursuant to paragraph (b)(3) of this section, the amount of PS1's cash position that USP must take into account for purposes of determining its aggregate foreign cash position is reduced by $60x (60% of $100x) to $40x ($100x − $60x).

(*2*) *Treatment of PS2.* Because an interest in PS2 is held by CFC2, a specified foreign corporation of USP, and PS2 would be a specified foreign corporation of USP if it were a foreign corporation, PS2 is treated as a specified foreign corporation of USP for purposes of determining USP's aggregate foreign cash position. USP, CFC1, CFC2, PS1, and PS2 all have calendar year taxable years. For purposes of determining the aggregate foreign cash position of USP, a section 958(a) U.S. shareholder of PS2, under paragraph (b)(1) of this section, the short-term obligation of CFC2 held by PS2 outstanding on each cash measurement date of each specified foreign corporation is disregarded on such cash measurement dates. Accordingly, without regard to paragraph (b)(3) of this section, USP must take into account $150x ($200x − $50x) of PS2's cash position for purposes of determining its aggregate foreign cash position. However, 42% (60% × 70%) of that amount is attributable to deemed stock of PS2 that is not owned (within the meaning of section 958(a), applied by treating PS1 as foreign if it is a domestic pass-through entity) by a specified foreign corporation of USP (determined without taking into account section 965(c)(3)(E)). Accordingly, pursuant to paragraph (b)(3) of this section, the amount of PS2's cash position that USP must take into account for purposes of determining its aggregate foreign cash position is reduced by $63x (42% of $150x) to $87x ($150x − $63x).

(c) *Determination of aggregate foreign cash position for a section 958(a) U.S. shareholder inclusion year*—(1) *Single section 958(a) U.S. shareholder inclusion year.* If a section 958(a) U.S. shareholder has a single section 958(a) U.S. shareholder inclusion year, then the section 958(a) U.S. shareholder's aggregate foreign cash position for the section 958(a) U.S. shareholder inclusion year is equal to the aggregate foreign cash position of the section 958(a) U.S. shareholder.

(2) *Multiple section 958(a) U.S. shareholder inclusion years.* If a section 958(a) U.S. shareholder has multiple section 958(a) U.S. shareholder inclusion years, then the section 958(a) U.S. shareholder's aggregate foreign cash position for each section 958(a) U.S. shareholder inclusion year is determined by allocating the aggregate foreign cash position to a section 958(a) U.S. shareholder inclusion year under paragraphs (c)(2)(i) and (c)(2)(ii) of this section.

(i) *Allocation to first section 958(a) U.S. shareholder inclusion year.* A portion of the aggregate foreign cash position of the section 958(a) U.S. shareholder is allocated to the first section 958(a) U.S. shareholder inclusion year in an amount equal to the lesser of the section 958(a) U.S. shareholder's aggregate foreign cash position or the section 958(a) U.S. shareholder's aggregate section 965(a) inclusion amount for the section 958(a) U.S. shareholder inclusion year.

(ii) *Allocation to succeeding section 958(a) U.S. shareholder inclusion years.* The amount of the section 958(a) U.S. shareholder's aggregate foreign cash position allocated to any succeeding section 958(a) U.S. shareholder inclusion year equals the lesser of the excess, if any, of the section 958(a) U.S. shareholder's aggregate foreign cash position over the aggregate amount of its aggregate foreign cash position allocated to preceding section 958(a) U.S. shareholder inclusion years under paragraph (c)(2)(i) of this section and this paragraph (c)(2)(ii) or the section 958(a) U.S. shareholder's aggregate section 965(a) inclusion amount for such succeeding section 958(a) U.S. shareholder inclusion year.

(3) *Estimation of aggregate foreign cash position.* For purposes of determining the aggregate foreign cash position of a section 958(a) U.S. shareholder, the section 958(a) U.S. shareholder may assume that its pro rata share of the cash position of any specified foreign corporation whose last taxable year beginning before January 1, 2018, ends after the date the return for such section 958(a) U.S. shareholder inclusion year (the *estimated section 958(a) U.S. shareholder inclusion year*) is timely filed (taking into account extensions, if any) is zero as of the cash measurement date with which the taxable year of such specified foreign corporation ends. If a section 958(a) U.S. shareholder's pro rata share of the cash position of a specified foreign corporation is treated as zero pursuant to the preceding sentence, the amount described in § 1.965–1(f)(8)(i)(A) with respect to such section 958(a) U.S. shareholder in fact exceeds the amount described in § 1.965–1(f)(8)(i)(B) with respect to such section 958(a) U.S. shareholder, and the aggregate section 965(a) inclusion amount for the estimated section 958(a) U.S. shareholder inclusion year exceeds the amount described in § 1.965–1(f)(8)(i)(B) with respect to such section 958(a) U.S. shareholder, interest and penalties will not be imposed if such section 958(a) U.S. shareholder amends the return for the estimated section 958(a) U.S. shareholder inclusion year to account for the correct aggregate foreign cash position for the year. The amended return must be filed by the due date (taking into account extensions, if any) for the return for the year after the estimated section 958(a) U.S. shareholder inclusion year.

(4) *Examples.* The following examples illustrate the application of this paragraph (c).

(i) *Example 1. Estimation of aggregate foreign cash position for a section 958(a) U.S. shareholder inclusion year*—(A) *Facts.* USP, a domestic corporation, owns all of the stock of CFC1, a foreign corporation, which owns all of the stock of CFC2, also a foreign corporation. USP is a calendar year taxpayer. CFC1 has a taxable year ending on December 31, and CFC2 has a taxable year ending on November 30. The cash position of CFC1 on each of December 31, 2015, December 31, 2016, and December 31, 2017, is $100x. The cash position of CFC2 on each of November 30, 2015, and November 30, 2016, is $200x. USP has a section 965(a) inclusion amount of $300x with respect to CFC1.

(B) *Analysis.* In determining its aggregate foreign cash position for its 2017 taxable year, USP may assume that its pro rata share of the cash position of CFC2 will be zero as of November 30, 2018, for purposes of filing its return due on April 18, 2018 (or due on October 15, 2018, with extension). Therefore, USP's aggregate foreign cash position is treated as $300x, which is the greater of (a) $300x, 50% of the sum of USP's pro rata shares of the cash position of CFC1 as of December 31, 2015, and December 31, 2016,

and of the cash position of CFC2 as of November 30, 2015, and November 30, 2016, and (b) $100x, USP's pro rata share of the cash position of CFC1 as of December 31, 2017. If USP's pro rata share of the cash position of CFC2 as of November 30, 2018, in fact exceeds $200x, USP must amend its return for its 2017 taxable year to reflect the correct aggregate foreign cash position by the due date for its return for its 2018 taxable year, April 15, 2019 (or October 15, 2019, with extension).

(ii) *Example 2. Allocation of aggregate foreign cash position among section 958(a) U.S. shareholder inclusion years*—(A) *Facts.* The facts are the same as in paragraph (c)(4)(i)(A) of this section (the facts in *Example 1*), except that the cash position of each of CFC1 and CFC2 on all relevant cash measurement dates is $200x, with the result that USP has an aggregate foreign cash position determined under § 1.965–1(f)(8)(i) of $400x. For its 2017 taxable year, USP has a section 965(a) inclusion amount with respect to CFC1 of $300x, and for its 2018 taxable year, USP has a section 965(a) inclusion amount with respect to CFC2 of $300x.

(B) *Analysis.* Under paragraph (c)(2)(i) of this section, USP's aggregate foreign cash position for 2017 is $300x, which is the lesser of USP's aggregate foreign cash position determined under § 1.965–1(f)(8)(i) ($400x) or the section 965(a) inclusion amount ($300x) that USP takes into account in 2017. Under paragraph (c)(2)(ii) of this section, the amount of USP's aggregate foreign cash position for 2018 is $100x, USP's aggregate foreign cash position determined under § 1.965–1(f)(8)(i) ($400x) reduced by the amount of its aggregate foreign cash position for 2017 ($300x) under paragraph (c)(2)(i) of this section.

(d) *Increase of income by section 965(c) deduction of an expatriated entity*—(1) *In general.* If a person is allowed a section 965(c) deduction and the person (or a successor) first becomes an expatriated entity, with respect to a surrogate foreign corporation, at any time during the 10-year period beginning on December 22, 2017, then the tax imposed by chapter 1 of the Internal Revenue Code is increased for the first taxable year in which such person becomes an expatriated entity by an amount equal to 35 percent of the person's section 965(c) deductions, and no credits are allowed against such increase in tax. The preceding sentence applies only if the surrogate foreign corporation first becomes a surrogate foreign corporation on or after December 22, 2017.

(2) *Definition of expatriated entity.* For purposes of paragraph (d)(1) of this section, the term *expatriated entity* has the same meaning given such term under section 7874(a)(2), except that such term does not include an expatriated entity if the surrogate foreign corporation with respect to the expatriated entity is treated as a domestic corporation under section 7874(b).

(3) *Definition of surrogate foreign corporation.* For purposes of paragraph (d)(1) of this section, the term *surrogate foreign corporation* has the meaning given such term in section 7874(a)(2)(B).

(e) *Section 962 election*—(1) *In general.* In the case of an individual (including a trust or estate) that makes an election under section 962, any section 965(c) deduction taken into account under § 1.962–1(b)(1)(i)(B) in determining taxable income as used in section 11 is not taken into account for purposes of determining the individual's taxable income under section 1.

(2) *Example.*The following example illustrates the application of the rule in this paragraph (e).

(i) *Facts.* USI, a United States citizen, owns 10% of the capital and profits of USPRS, a domestic partnership that has a calendar year taxable year, the remainder of which is owned by foreign persons unrelated to USI or USPRS. USPRS owns all of the stock of FS, a foreign corporation that is a controlled foreign corporation with a calendar year taxable year. USPRS has a section 965(a) inclusion amount with respect to FS of $1,000x and has a section 965(c) deduction amount of $700x. FS has no post-1986 foreign income taxes. USI makes a valid election under section 962 for 2017.

(ii) *Analysis.* USI's ''taxable income'' described in § 1.962–1(b)(1)(i) equals $100x (USI's domestic pass-through owner share of USPRS's section 965(a) inclusion amount) minus $70x (USI's domestic pass-through owner share of USPRS's section 965(c) deduction amount), or $30x. No other deductions are allowed in determining this amount. USI's tax on the $30x section 965(a) inclusion will be equal to the tax that would be imposed on such amount under section 11 if USI were a domestic corporation. Under paragraph (e)(1) of this section, USI cannot deduct $70x for purposes of determining USI's taxable income that is subject to tax under section 1.

(f) *Treatment of section 965(c) deduction under certain provisions of the Internal Revenue Code*—(1) *Sections 62(a) and 63(d).* A section 965(c) deduction is treated as a deduction described in section 62(a) and is not treated as an itemized deduction for any purpose of the Internal Revenue Code.

(2) *Sections 705, 1367, and 1368*—(i) *Adjustments to basis.* In the case of a domestic partnership or S corporation—

(A) The aggregate amount of its section 965(a) inclusions net of the aggregate amount of its section 965(c) deductions is treated as a separately stated item of net income solely for purposes of calculating basis under section 705(a) and § 1.705–1(a) and section 1367(a)(1) and § 1.1367–1(f), and

(B) The aggregate amount of its section 965(a) inclusions equal to the aggregate amount of its section 965(c) deductions is treated as income exempt from tax solely for purposes of calculating basis under sections 705(a)(1)(B), 1367(a)(1)(A), and § 1.1367–1(f).

(ii) *S corporation accumulated adjustments account.* In the case of an S corporation, the aggregate amount of its section 965(a) inclusions equal to the aggregate amount of its section 965(c) deductions is treated as income not exempt from tax solely for purposes of determining whether an adjustment is made to an accumulated adjustments account under section 1368(e)(1)(A) and § 1.1368–2(a)(2).

(iii) *Example.* The following example illustrates the application of this paragraph (f)(2).

(A) *Facts.* USI, a United States citizen, owns all of the stock of S Corp, an S corporation, which owns all of the stock of FS, a foreign corporation. S Corp has a section 965(a) inclusion of $1,000x with respect to FS and has a $700x section 965(c) deduction.

(B) *Analysis.* As a result of the application of paragraph (f)(2)(i)(A) of this section, solely for purposes of calculating basis under section 1367(a)(1) and § 1.1367–1(f), USI treats as a separately stated item of net income $300x (its pro rata share of the net of S Corp's $1,000x aggregate section 965(a) inclusion and S Corp's $700x aggregate section 965(c) deduction). Accordingly, USI's basis in S Corp is increased under section 1367(a)(1) by $300x. As a result of the application of paragraph (f)(2)(i)(B) of this section, an amount of S Corp's aggregate section 965(a) inclusion equal to its aggregate section 965(c) deduction, $700x, is treated as tax exempt income solely for purposes of calculating basis under section 1367(a)(1)(A) and § 1.1367–1(f), and accordingly, USI's basis in S Corp is further increased by its pro rata share of such amount, $700x. S Corp's accumulated adjustments account (''AAA'') is increased under section 1368(e)(1)(A) by the $1,000x section 965(a) inclusion taken into account and reduced by the $700x section 965(c) deduction taken into account. In addition, as a result of the application of paragraph (f)(2)(ii) of this section, S Corp's AAA is further increased by an amount of S Corp's aggregate section 965(a) inclusion equal to its aggregate section 965(c) deduction, $700x, which is not treated as tax-exempt income for purposes of § 1.1368–2(a)(2).

(3) *Section 1411.* For purposes of section 1411 and § 1.1411–4(f)(6), a section 965(c) deduction is not treated as being properly allocable to any section 965(a) inclusion.

(4) *Section 4940.* For purposes of section 4940(c)(3)(A), a section 965(c) deduction is not treated as an ordinary and necessary expense paid or incurred for the production or collection of gross investment income.

(g) *Domestic pass-through entities.* For purposes of determining a domestic

pass-through owner share, a section 965(c) deduction amount of a domestic pass-through entity must be allocated to a domestic pass-through owner in the same proportion as an aggregate section 965(a) inclusion amount of the domestic pass-through entity for a section 958(a) U.S. shareholder inclusion year is allocated to the domestic pass-through owner.

§ 1.965–4 Disregard of certain transactions.

(a) *Scope.* This section provides rules that disregard certain transactions for purposes of applying section 965 to a United States shareholder. Paragraph (b) of this section provides rules that disregard transactions undertaken with a principal purpose of changing the amount of a section 965 element of a United States shareholder. Paragraph (c) of this section provides rules that disregard certain changes in method of accounting and entity classification elections that would otherwise change the amount of a section 965 element. Paragraph (d) of this section defines the term section 965 element. Paragraph (e) of this section provides rules of application concerning paragraphs (b) and (c) of this section. Paragraph (f) of this section provides rules that disregard certain transactions occurring between E&P measurement dates. Paragraph (g) of this section provides examples illustrating the application of this section.

(b) *Transactions undertaken with a principal purpose of changing the amount of a section 965 element*—(1) *General rule.* Except as otherwise provided in paragraph (e)(3) of this section, a transaction is disregarded for purposes of determining the amounts of all section 965 elements of a United States shareholder if each of the following conditions is satisfied with respect to any section 965 element of the United States shareholder—

(i) The transaction occurs, in whole or in part, on or after November 2, 2017 (the *specified date*);

(ii) The transaction is undertaken with a principal purpose of changing the amount of a section 965 element of the United States shareholder; and

(iii) The transaction would, without regard to this paragraph (b)(1), change the amount of the section 965 element of the United States shareholder.

(2) *Presumptions and exceptions for the application of the general rule*—(i) *Overview.* Under paragraphs (b)(2)(iii) through (v) of this section, certain transactions are presumed to be undertaken with a principal purpose of changing the amount of a section 965 element of a United States shareholder for purposes of paragraph (b)(1) of this section. The presumptions described in paragraphs (b)(2)(iii) through (v) of this section may be rebutted only if facts and circumstances clearly establish that the transaction was not undertaken with a principal purpose of changing the amount of a section 965 element of a United States shareholder. A taxpayer that takes the position that the presumption is rebutted must attach a statement to its return for its taxable year in which or with which the relevant taxable year of the relevant specified foreign corporation ends disclosing that it has rebutted the presumption. In the case of a transaction described in paragraph (b)(2)(iii) or (iv) of this section, if the presumption does not apply because the transaction occurs in the ordinary course of business, whether the transaction was undertaken with a principal purpose of changing the amount of a section 965 element of a United States shareholder must be determined under all the facts and circumstances. Under paragraphs (b)(2)(iii) through (v) of this section, certain transactions are treated per se as being undertaken with a principal purpose of changing the amount of a section 965 element of a United States shareholder, and, therefore, such transactions are disregarded under paragraph (b)(1) of this section if the conditions of paragraphs (b)(1)(i) and (iii) of this section are satisfied. Further, under paragraph (b)(2)(iii) of this section, certain distributions are treated per se as not being undertaken with a principal purpose of changing the amount of a section 965 element of a United States shareholder and therefore are not disregarded under paragraph (b)(1) of this section.

(ii) *Definitions*—(A) *Relatedness.* For purposes of paragraphs (b)(2)(iii) through (v) of this section, a person is treated as related to a United States shareholder if, either immediately before or immediately after the transaction (or series of related transactions), the person bears a relationship to the United States shareholder described in section 267(b) or section 707(b).

(B) *Transfer*—(*1*) *In general.* For purposes of paragraphs (b)(2)(iii) and (v) of this section, the term *transfer* includes any disposition of stock or property, including a sale or exchange, contribution, distribution, issuance, redemption, recapitalization, or loan of stock or property, and includes an indirect transfer of stock or property.

(*2*) *Indirect transfer.* For purposes of paragraph (b)(2)(ii)(B)(*1*) of this section, the term *indirect transfer* includes a transfer of property or stock owned by an entity through a transfer of an interest in such entity (or an interest in an entity that has a direct or indirect interest in such entity), and a transfer of property or stock to a person through a transfer of property or stock to a pass-through entity of which such person is a direct or indirect owner.

(iii) *Cash reduction transactions*—(A) *General rule.* For purposes of paragraph (b)(1) of this section, a cash reduction transaction is presumed to be undertaken with a principal purpose of changing the amount of a section 965 element of a United States shareholder. For this purpose, the term *cash reduction transaction* means a transfer of cash, accounts receivable, or cash-equivalent assets by a specified foreign corporation to a United States shareholder of the specified foreign corporation or a person related to a United States shareholder of the specified foreign corporation, or an assumption by a specified foreign corporation of an account payable of a United States shareholder of the specified foreign corporation or a person related to a United States shareholder of the specified foreign corporation, if such transfer or assumption would, without regard to paragraph (b)(1) of this section, reduce the aggregate foreign cash position of the United States shareholder. The presumption described in this paragraph (b)(2)(iii) does not apply to a cash reduction transaction that occurs in the ordinary course of business.

(B) *Per se rules for certain distributions.* Notwithstanding the presumption described in paragraph (b)(2)(iii)(A) of this section, except in the case of a specified distribution, a cash reduction transaction that is a distribution by a specified foreign corporation to a United States shareholder of the specified foreign corporation is treated per se as not being undertaken with a principal purpose of changing the amount of a section 965 element of the United States shareholder for purposes of paragraph (b)(1) of this section. A specified distribution is treated per se as being undertaken with a principal purpose of changing the amount of a section 965 element of a United States shareholder for purposes of paragraph (b)(1) of this section. For purposes of this paragraph (b)(2)(iii)(B), the term *specified distribution* means a cash reduction transaction that is a distribution by a specified foreign corporation of a United States shareholder if and to the extent that, at the time of the distribution, there was a plan or intention for the distributee to transfer cash, accounts receivable, or cash-equivalent assets to

any specified foreign corporation of the United States shareholder or a distribution that is a non pro rata distribution to a foreign person that is related to the United States shareholder. For purposes of the preceding sentence, there is no plan or intention for the distributee to transfer cash, accounts receivable, or cash-equivalent assets to any specified foreign corporation of the United States shareholder if the transfer is pursuant to a legal obligation entered into before November 2, 2017. A taxpayer that takes the position that a cash reduction transaction is not a specified distribution because a transfer of cash, accounts receivable, or cash-equivalent asset is pursuant to a legal obligation entered into before November 2, 2017, must attach a statement to its return for its taxable year in which or with which the relevant taxable year of the relevant specified foreign corporation ends disclosing the position.

(iv) *E&P reduction transactions*—(A) *General rule.* For purposes of paragraph (b)(1) of this section, an E&P reduction transaction is presumed to be undertaken with a principal purpose of changing the amount of a section 965 element of a United States shareholder. For purposes of this paragraph (b)(2)(iv), the term *E&P reduction transaction* means a transaction between a specified foreign corporation and any of a United States shareholder of the specified foreign corporation, another specified foreign corporation of a United States shareholder of the specified foreign corporation, or any person related to a United States shareholder of the specified foreign corporation, if the transaction would, without regard to paragraph (b)(1) of this section, reduce either the accumulated post-1986 deferred foreign income or the post-1986 undistributed earnings (as defined in section 902(c)(1)) of the specified foreign corporation or another specified foreign corporation of any United States shareholder of such specified foreign corporation. The presumption described in this paragraph (b)(2)(iv)(A) does not apply to an E&P reduction transaction that occurs in the ordinary course of business.

(B) *Per se rule for specified transactions.* A specified transaction is treated per se as being undertaken with a principal purpose of changing the amount of a section 965 element of a United States shareholder for purposes of paragraph (b)(1) of this section. For purposes of the preceding sentence, the term *specified transaction* means an E&P reduction transaction that involves one or more of the following: A complete liquidation of a specified foreign corporation to which section 331 applies; a sale or other disposition of stock by a specified foreign corporation; or a distribution by a specified foreign corporation that reduces the earnings and profits of the specified foreign corporation pursuant to section 312(a)(3).

(v) *Pro rata share transactions*—(A) *General rule.* For purposes of paragraph (b)(1) of this section, a pro rata share transaction is presumed to be undertaken with a principal purpose of changing the amount of a section 965 element of a United States shareholder. For this purpose, the term *pro rata share transaction* means either a pro rata share reduction transaction or an E&P deficit transaction.

(*1*) *Definition of pro rata share reduction transaction.* For purposes of this paragraph (b)(2)(v)(A), the term *pro rata share reduction transaction* means a transfer of the stock of a specified foreign corporation by either a United States shareholder of the specified foreign corporation or a person related to a United States shareholder of the specified foreign corporation (including by the specified foreign corporation itself) to a person related to the United States shareholder if the transfer would, without regard to paragraph (b)(1) of this section, reduce the United States shareholder's pro rata share of the section 965(a) earnings amount of the specified foreign corporation, reduce the United States shareholder's pro rata share of the cash position of the specified foreign corporation, or both.

(*2*) *Definition of E&P deficit transaction.* For purposes of this paragraph (b)(2)(v)(A), the term *E&P deficit transaction* means a transfer to either a United States shareholder or a person related to the United States shareholder of the stock of an E&P deficit foreign corporation by a person related to the United States shareholder (including by the E&P deficit foreign corporation itself) if the transfer would, without regard to paragraph (b)(1) of this section, increase the United States shareholder's pro rata share of the specified E&P deficit of the E&P deficit foreign corporation.

(B) *Per se rule for internal group transactions.* An internal group transaction is treated per se as being undertaken with a principal purpose of changing the amount of a section 965 element of a United States shareholder for purposes of paragraph (b)(1) of this section. For purposes of the preceding sentence, the term *internal group transaction* means a pro rata share transaction if, immediately before or after the transfer, the transferor of the stock of the specified foreign corporation and the transferee of such stock are members of an affiliated group in which the United States shareholder is a member. For this purpose, the term *affiliated group* has the meaning set forth in section 1504(a), determined without regard to paragraphs (1) through (8) of section 1504(b), and the term *members of an affiliated group* means entities included in the same affiliated group. For purposes of identifying an affiliated group and the members of such group, each partner in a partnership, as determined without regard to this sentence, is treated as holding its proportionate share of the stock held by the partnership, as determined under the rules and principles of sections 701 through 777, and if one or more members of an affiliated group own, in the aggregate, at least 80 percent of the interests in a partnership's capital or profits, the partnership will be treated as a corporation that is a member of the affiliated group.

(C) *Example.* The following example illustrates the application of the rules in this paragraph (b)(2)(v).

(*1*) *Facts.* FP, a foreign corporation, owns all of the stock of USP, a domestic corporation. USP owns all of the stock of FS, a foreign corporation. USP has a calendar year taxable year; FS's taxable year ends November 30. On January 2, 2018, USP transfers all of the stock of FS to FP in exchange for cash. On January 3, 2018, FS makes a distribution with respect to the stock transferred to FP. USP treats the transaction as a taxable sale of the FS stock and claims a dividends received deduction under section 245A with respect to its deemed dividend under section 1248(j) as a result of the sale. FS has post-1986 earnings and profits as of December 31, 2017, and no post-1986 earnings and profits that are attributable to income effectively connected with the conduct of a trade or business within the United States and subject to tax under chapter 1 or that, if distributed, would be excluded from the gross income of a United States shareholder under section 959.

(*2*) *Analysis.* The transfer of the stock of FS is a pro rata share reduction transaction and thus a pro rata share transaction because such transfer is by USP, a United States shareholder, to FP, a person related to USP, and the transfer would, without regard to the rule in paragraph (b)(1) of this section, reduce USP's pro rata share of the section 965(a) earnings amount of FS. Because USP and FP are also members of an affiliated group within the meaning of paragraph (b)(2)(v)(B) of this section, the transfer of the stock of FS is also an internal group transaction and is treated per se as being undertaken with a principal purpose of changing the amount of a section 965 element of USP. Accordingly, because the transfer occurs after the specified date and reduces USP's section 965(a) inclusion amount with respect to FS, the transfer is disregarded for purposes of determining any

section 965 element of USP with the result that, among other things, USP's pro rata share of FS's section 965(a) earnings amount is determined as if USP owned (within the meaning of section 958(a)) 100% of the stock of FS on the last day of FS's inclusion year and no other person received a distribution with respect to such stock during such year. *See* section 951(a)(2)(A) and (B).

(c) *Disregard of certain changes in method of accounting and entity classification elections*—(1) *Changes in method of accounting.* Any change in method of accounting made for a taxable year of a specified foreign corporation that ends in 2017 or 2018 is disregarded for purposes of determining the amounts of all section 965 elements with respect to a United States shareholder if the change in method of accounting would, without regard to this paragraph (c)(1), change the amount of any section 965 element described in paragraph (d)(1) or (2) of this section with respect to the United States shareholder, or change the amount of the section 965 element described in paragraph (d)(3) of this section other than by reason of an increase in a section 965(a) inclusion amount with respect to the specified foreign corporation, regardless of whether the change in method of accounting is made with a principal purpose of changing the amount of a section 965 element with respect to the United States shareholder. The rule described in the preceding sentence applies regardless of whether the change in method of accounting was made in accordance with the procedures described in Rev. Proc. 2015–13, 2015–5 I.R.B. 419 (or successor), and regardless of whether the change in method of accounting was properly made, but it does not apply to a change in method of accounting for which the original and/or duplicate copy of any Form 3115, ''Application for Change in Accounting Method,'' requesting the change was filed before the specified date (as defined in paragraph (b)(1) of this section).

(2) *Entity classification elections.* Except as otherwise provided in paragraph (e)(3) of this section, an election under § 301.7701–3 to change the classification of an entity that is filed on or after the specified date (as defined in paragraph (b)(1) of this section) is disregarded for purposes of determining the amounts of all section 965 elements of a United States shareholder if the election would, without regard to this paragraph (c)(2), change the amount of any section 965 element of the United States shareholder, regardless of whether the election is made with a principal purpose of changing the amount of a section 965 element of the United States shareholder. An election filed on or after the specified date is subject to the preceding sentence even if the election was filed with an effective date that is before the specified date.

(d) *Definition of a section 965 element.* For purposes of paragraphs (b) and (c) of this section, the term *section 965 element* means, with respect to a United States shareholder, any of the following amounts (collectively, *section 965 elements*)—

(1) The United States shareholder's section 965(a) inclusion amount with respect to a specified foreign corporation;

(2) The aggregate foreign cash position of the United States shareholder; or

(3) The amount of foreign income taxes of a specified foreign corporation deemed paid by the United States shareholder under section 960 as a result of a section 965(a) inclusion.

(e) *Rules for applying paragraphs (b) and (c) of this section*—(1) *Determination of whether there is a change in the amount of a section 965 element.* For purposes of paragraphs (b) and (c) of this section, there is a change in the amount of a section 965 element of a United States shareholder as a result of a transaction, change in accounting method, or election to change an entity's classification, if, without regard to paragraph (b)(1), (c)(1), or (c)(2) of this section, the transaction, change in accounting method, or change in entity classification would—

(i) Reduce the amount described in paragraph (d)(1) of this section,

(ii) Reduce the amount described in paragraph (d)(2) of this section, but only if such amount is less than the United States shareholder's aggregate section 965(a) inclusion amount, or

(iii) Increase the amount described in paragraph (d)(3) of this section.

(2) *Treatment of domestic pass-through owners as United States shareholders.* For purposes of paragraphs (b) and (c) of this section, if a domestic pass-through entity is a United States shareholder, then a domestic pass-through owner with respect to the domestic pass-through entity that is not otherwise a United States shareholder is treated as a United States shareholder.

(3) *Exception for certain incorporation transactions*—(i) *In general.* Paragraphs (b) and (c)(2) of this section do not apply to disregard a transfer of stock of a specified foreign corporation by a United States shareholder to a domestic corporation (for this purpose, including an S corporation), provided that—

(A) The transferee's section 965(a) inclusion amount with respect to the transferred stock of the specified foreign corporation is no lower than the transferor's section 965(a) inclusion amount with respect to the transferred stock of the specified foreign corporation, determined without regard to the transfer; and

(B) The transferee and the transferor determine their aggregate foreign cash position under paragraph (e)(3)(ii) of this section.

(ii) *Aggregate foreign cash position.* In the case of a transfer described in paragraph (e)(3)(i) of this section, in order to rely on the exception in paragraph (e)(3)(i) of this section—

(A) The transferee must treat its pro rata share of the cash position of a specified foreign corporation as of a cash measurement date as of which it did not own the transferred stock of the specified foreign corporation as including the transferor's pro rata share of the cash position of the specified foreign corporation with respect to the transferred stock of the specified foreign corporation as of such cash measurement date for purposes of determining its aggregate foreign cash position; and

(B) The transferor must treat its pro rata share of the cash position of a specified foreign corporation as of a cash measurement date as of which it did not own the transferred stock of the specified foreign corporation as including the transferee's pro rata share of the cash position of the specified foreign corporation with respect to the transferred stock of the specified foreign corporation as of such cash measurement date for purposes of determining its aggregate foreign cash position.

(4) *Consequences of liquidation*—(i) *In general.* In the case of a liquidation of a specified foreign corporation that is disregarded for purposes of determining the section 965 elements of a United States shareholder pursuant to paragraph (b) or (c)(2) of this section, for purposes of determining the amounts of the section 965 elements of the United States shareholder, the date that is treated as the last day of the taxable year of the specified foreign corporation is the later of—

(A) The date of the liquidation; and

(B) The specified liquidation date, if any.

(ii) *Specified liquidation date.* The term *specified liquidation date* means, in the case of a liquidation of a specified foreign corporation pursuant to an entity classification election that is disregarded for purposes of determining

the section 965 elements of a United States shareholder—

(A) November 30, 2017, with respect to a United States shareholder that must include in income under § 1.367(b)–3 as a deemed dividend the all earnings and profits amount with respect to the United States shareholder's stock of the liquidating specified foreign corporation; or

(B) The date of filing of the entity classification election, with respect to all other United States shareholders.

(f) *Disregard of certain transactions occurring between E&P measurement dates*—(1) *Disregard of specified payments.* Except as provided in paragraph (f)(3) of this section, a specified payment made by a specified foreign corporation (*payor specified foreign corporation*) to another specified foreign corporation (*payee specified foreign corporation*) is disregarded for purposes of determining the post-1986 earnings and profits of each of the payor specified foreign corporation and the payee specified foreign corporation as of the E&P measurement date on December 31, 2017.

(2) *Definition of specified payment.* For purposes of paragraph (f)(1) of this section, the term *specified payment* means any amount paid or accrued by the payor specified foreign corporation, including a distribution by the payor specified foreign corporation with respect to its stock, if each of the following conditions are satisfied:

(i) Immediately before or immediately after the payment or accrual of the amount, the payor specified foreign corporation and the payee specified foreign corporation are related within the meaning of section 954(d)(3), substituting the term ''specified foreign corporation'' for ''controlled foreign corporation'' in each place that it appears;

(ii) The payment or accrual of the amount occurs after November 2, 2017, and on or before December 31, 2017; and

(iii) The payment or accrual of the amount would, without regard to the application of paragraph (f)(1) of this section, reduce the post-1986 earnings and profits of the payor specified foreign corporation as of the E&P measurement date on December 31, 2017.

(3) *Non-application of disregard rule.* A section 958(a) U.S. shareholder may determine the post-1986 earnings and profits of a specified foreign corporation without regard to paragraph (f)(1) of this section, provided that it and every section 958(a) U.S. shareholder related to the first section 958(a) U.S. shareholder determines the post-1986 earnings and profits of each of its specified foreign corporations without regard to paragraph (f)(1) of this section. For purposes of this paragraph (f)(3), a person is treated as related to a section 958(a) U.S. shareholder if the person bears a relationship to the section 958(a) U.S. shareholder described in section 267(b) or 707(b).

(4) *Examples.* The following examples illustrate the application of the rules in this paragraph (f).

(i) *Example 1. Deductible payment between wholly owned specified foreign corporations is a specified payment.* (A) *Facts.* USP, a domestic corporation, owns all of the stock of CFC1, a foreign corporation, which owns all of the stock of CFC2, also a foreign corporation. USP, CFC1, and CFC2 have calendar year taxable years. On November 2, 2017, each of CFC1 and CFC2 has post-1986 earnings and profits of 100u. Neither CFC1 nor CFC2 has post-1986 earnings and profits that are attributable to income of the specified foreign corporation that is effectively connected with the conduct of a trade or business within the United States and subject to tax under chapter 1 or that, if distributed, would be excluded from the gross income of a United States shareholder under section 959 or from the gross income of another shareholder if such shareholder were a United States shareholder; therefore, no adjustment is made under section 965(d)(2) or § 1.965–1(f)(7), and each of CFC1's and CFC2's accumulated post-1986 deferred foreign income is equal to such corporation's post-1986 earnings and profits. On November 3, 2017, CFC2 makes a deductible payment of 10u to CFC1. The payment does not constitute subpart F income. CFC1 and CFC2 have no other items of income or deduction.

(B) *Analysis.* The payment from CFC2 to CFC1 is a specified payment because (*1*) CFC1 and CFC2 are related specified foreign corporations; (*2*) the payment occurs after November 2, 2017, and on or before December 31, 2017; and (*3*) the payment would, without regard to the application of the rule in paragraph (f)(1) of this section, reduce the post-1986 earnings and profits of CFC2 as of the E&P measurement date on December 31, 2017. Under paragraph (f)(1) of this section, the payment is disregarded, and CFC1 and CFC2 each have post-1986 earnings and profits of 100u as of December 31, 2017. Accordingly, the section 965(a) earnings amount of each of CFC1 and CFC2 is 100u.

(ii) *Example 2. Distribution is a specified payment.* (A) *Facts.* The facts are the same as in paragraph (f)(4)(i)(A) of this section (the facts in *Example 1*), except instead of a deductible payment to CFC1, CFC2 makes a 10u distribution on November 3, 2017, that, without regard to paragraph (f)(1) of this section would reduce the post-1986 earnings and profits of CFC2 as of the E&P measurement date on December 31, 2017, and increase the post-1986 earnings and profits of CFC1 as of the E&P measurement date on December 31, 2017, by 10u.

(B) *Analysis.* The distribution is a specified payment because (*1*) CFC1 and CFC2 are related specified foreign corporations; (*2*) the distribution occurs after November 2, 2017, and on or before December 31, 2017; and (*3*) the distribution would, without regard to the application of the rule in paragraph (f)(1) of this section, reduce the post-1986 earnings and profits of CFC2 as of the E&P measurement date on December 31, 2017. Under paragraph (f)(1) of this section, the distribution is disregarded with the result that CFC1 and CFC2 each have post-1986 earnings and profits of 100u as of the E&P measurement date on December 31, 2017, and a section 965(a) earnings amount of 100u.

(iii) *Example 3. Deductible payment between related (but not wholly owned) specified foreign corporations is a specified payment.* (A) *Facts.* The facts are the same as in paragraph (f)(4)(i)(A) of this section (the facts in *Example 1*), except that CFC1 owns only 51% of the only class of stock of CFC2, the remainder of which is owned by USI, a United States citizen unrelated to USP, CFC1, and CFC2.

(B) *Analysis.* The analysis is the same as in paragraph (f)(4)(i)(B) of this section (the analysis in *Example 1*); thus, the payment is disregarded with the result that CFC1 and CFC2 each have post-1986 earnings and profits of 100u as of the E&P measurement date on December 31, 2017, and a section 965(a) earnings amount of 100u.

(iv) *Example 4. Deductible payment between unrelated specified foreign corporations is not a specified payment.* (A) *Facts.* The facts are the same as in paragraph (f)(4)(i)(A) of this section (the facts in *Example 1*), except that CFC1 owns only 50% of the only class of stock of CFC2, the remainder of which is owned by USI, a United States citizen unrelated to USP, CFC1, and CFC2.

(B) *Analysis.* Paragraph (f)(1) of this section does not apply because CFC1 and CFC2 are not related. Thus, the payment is taken into account with the result that CFC1 has post-1986 earnings and profits of 110u as of the E&P measurement date on December 31, 2017, and a section 965(a) earnings amount of 110u.

(v) *Example 5. Deductible payment and income accrued from unrelated persons are not specified payments.* (A) *Facts.* The facts are the same as in paragraph (f)(4)(i)(A) of this section (the facts in *Example 1*), except that CFC2 does not make a deductible payment to CFC1, and, between E&P measurement dates, CFC2 accrues gross income of 20u from a person that is not related to CFC2, and CFC1 incurs a deductible expense of 20u to a person that is not related to CFC1.

(B) *Analysis.* Paragraph (f)(1) of this section does not apply because neither the deductible expense of CFC1 nor the income accrual by CFC2 are attributable to a specified payment.

(vi) *Example 6. Deductible payment and income accrued with respect to unrelated persons are not specified payments; deductible payment between wholly specified foreign corporations is a specified payment.* (A) *Facts.* The facts are the same as in paragraph (f)(4)(v)(A) of this section (the facts in *Example 5*), except that CFC2 also makes

a deductible payment of 10u to CFC1 on November 3, 2017.

(B) *Analysis.* The deductible payment is a specified payment because (*1*) CFC1 and CFC2 are related specified foreign corporations; (*2*) the payment occurs after November 2, 2017, and on or before December 31, 2017; and (*3*) the deductible payment would, without regard to the application of the rule in paragraph (f)(1) of this section, reduce the post-1986 earnings and profits of CFC2 as of the E&P measurement date on December 31, 2017. Accordingly, under paragraph (f)(1) of this section, the deductible payment is disregarded with the result that CFC1 and CFC2 have 80u and 120u of post-1986 earnings and profits as of the E&P measurement date on December 31, 2017, respectively. Accordingly, CFC1 and CFC2 have section 965(a) earnings amounts of 100u and 120u, respectively.

§ 1.965–5 Allowance of a credit or deduction for foreign income taxes.

(a) *Scope.* This section provides rules for the allowance of a credit or deduction for foreign income taxes in connection with the application of section 965. Paragraph (b) of this section provides rules under section 965(g) for the allowance of a credit or deduction for foreign income taxes paid or accrued. Paragraph (c) of this section provides rules for the allowance of a credit or deduction for foreign income taxes treated as paid or accrued in connection with the application of section 965. Paragraph (d) of this section defines the term applicable percentage.

(b) *Rules for foreign income taxes paid or accrued.* Neither a deduction (including under section 164) nor a credit under section 901 is allowed for the applicable percentage of any foreign income taxes paid or accrued with respect to any amount for which a section 965(c) deduction is allowed for a section 958(a) U.S. shareholder inclusion year. Neither a deduction (including under section 164) nor a credit under section 901 is allowed for the applicable percentage of any foreign income taxes attributable to a distribution of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits. Accordingly, for example, no deduction or credit is allowed for the applicable percentage of any withholding taxes imposed on a United States shareholder by the jurisdiction of residence of the distributing foreign corporation with respect to a distribution of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits. Similarly, for example, no deduction or credit is allowed for the applicable percentage of foreign income taxes imposed on a United States citizen by the citizen's jurisdiction of residence upon receipt of a distribution of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits.

(c) *Rules for foreign income taxes treated as paid or accrued*—(1) *Disallowed credit*—(i) *In general.* A credit under section 901 is not allowed for the applicable percentage of any foreign income taxes treated as paid or accrued with respect to any amount for which a section 965(c) deduction is allowed for a section 958(a) U.S. shareholder inclusion year. For purposes of the preceding sentence, taxes treated as paid or accrued include foreign income taxes deemed paid under section 960(a)(1) with respect to a section 965(a) inclusion, foreign income taxes deemed paid under section 960(a)(3) (as in effect on December 21, 2017) or section 960(b) (as applicable to taxable years of controlled foreign corporations beginning after December 31, 2017) with respect to distributions of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits, foreign income taxes allocated to an entity under § 1.901–2(f)(4), and a distributive share of foreign income taxes paid or accrued by a partnership.

(ii) *Foreign income taxes deemed paid under section 960(a)(3) (as in effect on December 21, 2017).* Foreign income taxes deemed paid by a domestic corporation under section 960(a)(3) with respect to a distribution of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits include only the foreign income taxes paid or accrued by an upper-tier foreign corporation with respect to a distribution of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits from a lower-tier foreign corporation. No credit is allowed under section 960(a)(3) or any other section for foreign income taxes that would have been deemed paid under section 960(a)(1) with respect to the portion of a section 965(a) earnings amount that is reduced under § 1.965–1(b)(2) or § 1.965–8(b).

(iii) [Reserved]

(2) *Disallowed deduction.* No deduction (including under section 164) is allowed for the applicable percentage of any foreign income taxes treated as paid or accrued with respect to any amount for which a section 965(c) deduction is allowed. Such taxes include foreign income taxes allocated to an entity under § 1.901–2(f)(4) and a distributive share of foreign income taxes paid or accrued by a partnership.

(3) *Coordination with section 78*—(i) *In general.* With respect to foreign income taxes deemed paid by a domestic corporation with respect to its section 965(a) inclusion amount for a section 958(a) U.S. shareholder inclusion year, section 78 applies only to so much of such taxes as bears the same proportion to the amount of such taxes as—

(A) The excess of—

(*1*) The section 965(a) inclusion amount for a section 958(a) U.S. shareholder inclusion year, over

(*2*) The section 965(c) deduction amount allowable with respect to such section 965(a) inclusion amount, bears to

(B) Such section 965(a) inclusion amount.

(ii) *Domestic corporation that is a domestic pass-through owner.* With respect to foreign income taxes deemed paid by a domestic corporation attributable to such corporation's domestic pass-through owner share of a section 965(a) inclusion amount of a domestic pass-through entity, section 78 applies only to so much of such taxes as bears the same proportion to the amount of such taxes as the proportion determined under paragraph (c)(3)(i) of this section as applied to the domestic pass-through entity's section 965(a) inclusion amount for a section 958(a) U.S. shareholder inclusion year.

(d) *Applicable percentage*—(1) *In general.* For purposes of this section, except as provided in paragraph (d)(2) and (d)(3) of this section, the term *applicable percentage* means, with respect to a section 958(a) U.S. shareholder and a section 958(a) U.S. shareholder inclusion year, the amount (expressed as a percentage) equal to the sum of—

(i) 0.771 multiplied by the ratio of—

(A) The section 958(a) U.S. shareholder's 8 percent rate amount for the section 958(a) U.S. shareholder inclusion year, divided by

(B) The sum of the section 958(a) U.S. shareholder's 8 percent rate amount for the section 958(a) U.S. shareholder inclusion year plus the section 958(a) U.S. shareholder's 15.5 percent rate amount for the section 958(a) U.S. shareholder inclusion year; plus

(ii) 0.557 multiplied by the ratio of—

(A) The section 958(a) U.S. shareholder's 15.5 percent rate amount for the section 958(a) U.S. shareholder inclusion year, divided by

(B) The amount described in paragraph (d)(1)(i)(B) of this section.

(2) *No section 965(a) inclusion amount.* If a section 958(a) U.S. shareholder does not have an aggregate section 965(a) inclusion amount, the section 958(a) U.S. shareholder's applicable percentage is 55.7 percent.

(3) *Applicable percentage for domestic pass-through owners.* In the case of a domestic pass-through owner with respect to a domestic pass-through entity, the domestic pass-through owner's applicable percentage that is applied to foreign income taxes attributable to the domestic pass-through owner share of the section 965(a) inclusion amount or of distributions of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits is equal to the applicable percentage determined under paragraph (d)(1) or (2) of this section, as applicable, with respect to the domestic pass-through entity.

(4) *Applicable percentage with respect to certain distributions of previously taxed earnings and profits.* In the case of a distribution of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits (other than with respect to a section 958(a) U.S. shareholder described in paragraph (d)(2) of this section), the applicable percentage that is applied to foreign income taxes attributable to the distribution is the applicable percentage that applied with respect to the section 958(a) U.S. shareholder and the section 958(a) U.S. inclusion year in which, or with which, the inclusion year of the relevant deferred foreign income corporation ends. For this purpose, the relevant deferred foreign income corporation is the deferred foreign income corporation with respect to which the section 958(a) U.S. shareholder had the section 965(a) inclusion as a result of which the section 965(a) previously taxed earnings and profits first arose (as described in § 1.965–2(c)) or the section 965(b) previously taxed earnings and profits first arose (as described in § 1.965–2(d)).

§ 1.965–6 Computation of foreign income taxes deemed paid and allocation and apportionment of deductions.

(a) *Scope.* This section provides rules for the computation of foreign income taxes deemed paid and the allocation and apportionment of deductions. Paragraph (b) of this section provides the general rules for the computation of foreign income taxes deemed paid under sections 902 and 960. Paragraph (c) of this section provides rules for allocation and apportionment of expenses. Paragraph (d) of this section provides rules for foreign income taxes associated with hovering deficits.

(b) *Computation of foreign incomes taxes deemed paid*—(1) *In general.* For purposes of determining foreign income taxes deemed paid under section 960(a)(1) with respect to a section 965(a) inclusion attributable to a deferred foreign income corporation that is a member of a qualified group (as defined in section 902(b)(2)), section 902 applies as if the section 965(a) inclusion, translated (if necessary) into the functional currency of the deferred foreign income corporation using the spot rate on December 31, 2017, were a dividend paid by the deferred foreign income corporation. For purposes of computing the amount of foreign income taxes deemed paid under section 960(a)(1), §§ 1.965–2(b), 1.965–5, sections 902 and 960, the regulations under those sections, and this section apply.

(2) *Dividend or inclusion in excess of post-1986 undistributed earnings.* When the denominator of the section 902 fraction is positive but less than the numerator of such fraction, the section 902 fraction is one. When the denominator of the section 902 fraction is zero or less than zero, the section 902 fraction is zero, and no foreign taxes are deemed paid.

(3) *Treatment of adjustment under section 965(b)(4)(B).* For purposes of section 902(c)(1), the post-1986 undistributed earnings of an E&P deficit foreign corporation are increased under section 965(b)(4)(B) and § 1.965–2(d)(2)(i)(A) as of the first day of the foreign corporation's first taxable year following the E&P deficit foreign corporation's last taxable year that begins before January 1, 2018.

(4) *Section 902 fraction.* The term *section 902 fraction* means, with respect to either a deferred foreign income corporation or an E&P deficit foreign corporation, the fraction that is—

(i) The dividends paid by, or the inclusion under section 951(a)(1) (including a section 965(a) inclusion) with respect to, the foreign corporation, as applicable (the *numerator*), divided by

(ii) The foreign corporation's post-1986 undistributed earnings or pre-1987 accumulated profits, as applicable (the *denominator*).

(c) *Allocation and apportionment of deductions.* For purposes of allocating and apportioning expenses, a section 965(c) deduction does not result in any gross income, including a section 965(a) inclusion, being treated as exempt, excluded, or eliminated income within the meaning of section 864(e)(3) or § 1.861–8T(d). Similarly, a section 965(c) deduction does not result in the treatment of stock as an exempt asset within the meaning of section 864(e)(3) or § 1.861–8T(d). In addition, consistent with the general inapplicability of § 1.861–8T(d)(2) to earnings and profits described in section 959(c)(1) or 959(c)(2), neither section 965(a) previously taxed earnings and profits nor section 965(b) previously taxed earnings and profits are treated as giving rise to gross income that is exempt, excluded, or eliminated income. Similarly, the asset that gives rise to a section 965(a) inclusion, section 965(a) previously taxed earnings and profits, or section 965(b) previously taxed earnings and profits is not treated as a tax-exempt asset.

(d) *Hovering deficits.* In the last taxable year that begins before January 1, 2018, of a deferred foreign income corporation that is also a foreign surviving corporation, as defined in § 1.367(b)–7(a), solely for purposes of determining the amount of related taxes that are included in post-1986 foreign income taxes under § 1.367(b)–7(d)(2)(iii)—

(1) The post-transaction earnings described in § 1.367(b)–7(d)(2)(ii) that can be offset by a hovering deficit include any post-transaction earnings earned in that year that were not considered accumulated because they were included in income under section 965 and § 1.965–1(b)(1) by a section 958(a) U.S. shareholder; and

(2) Any offset for purposes of § 1.367(b)–7(d)(2)(ii) is treated as occurring on the last day of the foreign surviving corporation's inclusion year.

§ 1.965–7 Elections, payment, and other special rules.

(a) *Scope.* This section provides rules regarding certain elections and payments. Paragraph (b) of this section provides rules regarding the section 965(h) election. Paragraph (c) of this section provides rules regarding the section 965(i) election. Paragraph (d) of this section provides rules regarding the section 965(m) election and a special rule for real estate investment trusts. Paragraph (e) of this section provides rules regarding the section 965(n) election. Paragraph (f) of this section provides rules regarding the election to use the alternative method for calculating post-1986 earnings and profits. Paragraph (g) of this section provides definitions that apply for purposes of this section.

(b) *Section 965(h) election*—(1) *In general.* Any person with a section 965(h) net tax liability (that is, a section 958(a) U.S. shareholder or a domestic

pass-through owner with respect to a domestic pass-through entity that is a section 958(a) U.S. shareholder, but not a domestic pass-through entity itself) may elect under section 965(h) and this paragraph (b) to pay its section 965(h) net tax liability in eight installments. This election may be revoked only by paying the full amount of the remaining unpaid section 965(h) net tax liability.

(i) *Amount of installments.* Except as provided in paragraph (b)(3) of this section, if a person makes a section 965(h) election, the amounts of the installments are—

(A) Eight percent of the section 965(h) net tax liability in the case of each of the first five installments;

(B) Fifteen percent of the section 965(h) net tax liability in the case of the sixth installment;

(C) Twenty percent of the section 965(h) net tax liability in the case of the seventh installment; and

(D) Twenty-five percent of the section 965(h) net tax liability in the case of the eighth installment.

(ii) *Increased installments due to a deficiency or a timely filed or amended return*—(A) *In general.* If a person makes a section 965(h) election, except as provided in paragraph (b)(1)(ii)(C) of this section, any deficiency or additional liability will be prorated to the installments described under paragraph (b)(1)(i) of this section if any of the following occur:

(*1*) A deficiency is assessed with respect to the person's section 965(h) net tax liability;

(*2*) The person files a return by the due date of the return (taking into account extensions, if any) increasing the amount of its section 965(h) net tax liability beyond that taken into account in paying the first installment described under paragraph (b)(1)(i) of this section; or

(*3*) The person files an amended return that reflects an increase in the amount of its section 965(h) net tax liability.

(B) *Timing.* If the due date for the payment of an installment to which the deficiency is prorated has passed, the amount prorated to such installment must be paid on notice and demand by the Secretary, or, in the case of an additional liability reported on a return increasing the amount of the section 965(h) net tax liability after payment of the first installment or on an amended return, with the filing of the return. If the due date for the payment of an installment to which the deficiency or additional liability is prorated has not passed, then such amount will be due at the same time as, and as part of, the relevant installment.

(C) *Exception for negligence, intentional disregard, or fraud.* If a deficiency or additional liability is due to negligence, intentional disregard of rules and regulations, or fraud with intent to evade tax, the proration rule of this paragraph (b)(1)(ii) will not apply, and the deficiency or additional liability (as well as any applicable interest and penalties) must be paid on notice and demand by the Secretary or, in the case of an additional liability reported on a return increasing the amount of the section 965(h) net tax liability after payment of the first installment or on an amended return, with the filing of the return.

(iii) *Due date of installments*—(A) *In general.* If a person makes a section 965(h) election, the first installment payment is due on the due date (without regard to extensions) for the return for the relevant taxable year. For purposes of this paragraph (b), the term *relevant taxable year* means, in the case in which the person is a section 958(a) U.S. shareholder, the section 958(a) U.S. shareholder inclusion year, or, in the case in which the person is a domestic pass-through owner, the taxable year in which the person has the section 965(a) inclusion to which the section 965(h) net tax liability is attributable. Each succeeding installment payment is due on the due date (without regard to extensions) for the return for the taxable year following the taxable year with respect to which the previous installment payment was made.

(B) *Extension for specified individuals.* If a person is a specified individual with respect to a taxable year within which an installment payment is due pursuant to paragraph (b)(1)(iii)(A) of this section, then, for purposes of determining the due date of an installment payment under paragraph (b)(1)(iii)(A) of this section, the due date of the return (without regard to extensions) due within the taxable year will be treated as the fifteenth day of the sixth month following the close of the prior taxable year. This paragraph (b)(1)(iii)(B) is applicable regardless of whether the person is a specified individual with respect to the relevant taxable year.

(2) *Manner of making election*—(i) *Eligibility.* Any person with a section 965(h) net tax liability may make the section 965(h) election, provided that, with respect to the person, none of the acceleration events described in paragraph (b)(3)(ii) of this section has occurred before the election is made. Notwithstanding the preceding sentence, a person that would be eligible to make the section 965(h) election but for the occurrence of an event described in paragraph (b)(3)(ii) of this section may make the section 965(h) election if the exception described in paragraph (b)(3)(iii)(A) of this section applies.

(ii) *Timing.* A section 965(h) election must be made no later than the due date (taking into account extensions, if any, or any additional time that would have been granted if the person had made an extension request) for the return for the relevant taxable year. Relief is not available under § 301.9100–2 or § 301.9100–3 to file a late election.

(iii) *Election statement.* Except as otherwise provided in publications, forms, instructions, or other guidance, to make a section 965(h) election, a person must attach a statement, signed under penalties of perjury consistent with the rules for signatures applicable to the person's return, to its return for the relevant taxable year. The statement must include the person's name, taxpayer identification number, total net tax liability under section 965, section 965(h) net tax liability, section 965(i) net tax liability with respect to which a section 965(i) election is effective (if applicable), and the anticipated amounts of each installment described under paragraph (b)(1)(i) of this section. The statement must be filed in the manner prescribed in publications, forms, instructions, or other guidance. The attachment of an unsigned copy of the election statement to the timely-filed return for the relevant taxable year satisfies the signature requirement of this paragraph (b)(2)(iii) if the person making the election retains the original signed election statement in the manner specified by § 1.6001–1(e).

(3) *Acceleration of payment*—(i) *Acceleration.* Notwithstanding paragraph (b)(1)(i) of this section, if a person makes a section 965(h) election and an acceleration event described in paragraph (b)(3)(ii) of this section subsequently occurs, then, except as provided in paragraph (b)(3)(iii) of this section, the unpaid portion of the remaining installments will be due on the date of the acceleration event (or in the case of a title 11 or similar case, the day before the petition is filed).

(ii) *Acceleration events.* The following events are acceleration events for purposes of paragraph (b)(3)(i) of this section with respect to a person that has made a section 965(h) election—

(A) An addition to tax is assessed for the failure to timely pay an installment described in paragraph (b)(1)(i) of this section;

(B) A liquidation, sale, exchange, or other disposition of substantially all of the assets of the person (including in a

title 11 or similar case, or, in the case of an individual, by reason of death);

(C) In the case of a person that is not an individual, a cessation of business by the person;

(D) Any event that results in the person no longer being a United States person, including a resident alien (as defined in section 7701(b)(1)(A)) becoming a nonresident alien (as defined in section 7701(b)(1)(B));

(E) In the case of a person that was not a member of any consolidated group, the person becoming a member of a consolidated group;

(F) In the case of a consolidated group, the group ceasing to exist (including by reason of the acquisition of a consolidated group within the meaning of § 1.1502–13(j)(5)) or the group otherwise discontinuing in the filing of a consolidated return; or

(G) A determination by the Commissioner described in the second sentence of paragraph (b)(3)(iii)(C)(*2*) of this section.

(iii) *Eligible section 965(h) transferee exception*—(A) *In general.* Paragraph (b)(3)(i) of this section does not apply (such that the unpaid portion of all remaining installments will not be due as of the date of the acceleration event) to a person with respect to which an acceleration event occurs if the requirements described in paragraphs (b)(3)(iii)(A)(*1*) and (*2*) of this section are satisfied. A person with respect to which an acceleration event described in this paragraph (b)(3)(iii)(A) occurs is referred to as an *eligible section 965(h) transferor.*

(*1*) *Requirement to have a covered acceleration event.* The acceleration event satisfies the requirements of this paragraph (b)(3)(iii)(A)(*1*) if it is described in—

(*i*) Paragraph (b)(3)(ii)(B) of this section, and the acceleration event is a qualifying consolidated group member transaction within the meaning of paragraph (b)(3)(iii)(E) of this section;

(*ii*) Paragraph (b)(3)(ii)(B) of this section (other than, in the case of an individual, an acceleration event caused by reason of death) in a transaction that is not a qualifying consolidated group member transaction;

(*iii*) Paragraph (b)(3)(ii)(E) of this section;

(*iv*) Paragraph (b)(3)(ii)(F) of this section, and the acceleration event results from the acquisition of a consolidated group within the meaning of § 1.1502–13(j)(5), and the acquired consolidated group members join a different consolidated group as of the day following the acquisition;

(*v*) Paragraph (b)(3)(ii)(F) of this section, and the group ceases to exist as a result of the transfer of all of the assets of one or more members of the consolidated group to other members with only one entity remaining (the *successor entity*); or

(*vi*) Paragraph (b)(3)(ii)(F) of this section, and the group ceases to exist as a result of the termination of the subchapter S election pursuant to section 1362(d) of a shareholder of the common parent of the consolidated group and, for the shareholder's taxable year immediately following the termination, the shareholder joins in the filing of a consolidated return as a consolidated group that includes all of the former members of the former consolidated group.

(*2*) *Requirement to enter into a transfer agreement.* An eligible section 965(h) transferor and an eligible section 965(h) transferee (as defined in paragraph (b)(3)(iii)(B)(*1*) of this section) must enter into an agreement with the Commissioner that satisfies the requirements of paragraph (b)(3)(iii)(B) of this section.

(B) *Transfer agreement*—(*1*) *Eligibility.* A transfer agreement that satisfies the requirements of this paragraph (b)(3)(iii)(B) must be entered into by an eligible section 965(h) transferor and an eligible section 965(h) transferee. For this purpose, the term *eligible section 965(h) transferee* refers to a single United States person that is not a domestic pass-through entity and that—

(*i*) With respect to an acceleration event described in paragraph (b)(3)(iii)(A)(*1*)(*i*) of this section, is a departing member (as defined in paragraph (b)(3)(iii)(E)(*1*)(*i*) of this section) or its qualified successor (as defined in paragraph (b)(3)(iii)(E)(*2*) of this section);

(*ii*) With respect to an acceleration event described in paragraph (b)(3)(iii)(A)(*1*)(*ii*) of this section, acquires substantially all of the assets of an eligible section 965(h) transferor;

(*iii*) With respect to an acceleration event described in paragraph (b)(3)(iii)(A)(*1*)(*iii*) of this section, is the agent (within the meaning of § 1.1502–77) of the consolidated group that the eligible section 965(h) transferor joins;

(*iv*) With respect to an acceleration event described in paragraph (b)(3)(iii)(A)(*1*)(*iv*) of this section, is the agent (within the meaning of § 1.1502–77) of the surviving consolidated group;

(*v*) With respect to an acceleration event described in paragraph (b)(3)(iii)(A)(*1*)(*v*) of this section, is the successor entity (within the meaning of paragraph (b)(3)(iii)(A)(*1*)(*v*) of this section); or

(*vi*) With respect an acceleration event described in paragraph (b)(3)(iii)(A)(*1*)(*vi*) of this section, is the agent (within the meaning of § 1.1502–77) of the consolidated group that includes the shareholder whose subchapter S election was terminated and all of the former members of the former consolidated group.

(*2*) *Filing requirements*—(*i*) *In general.* A transfer agreement must be timely filed. Except as provided in paragraph (b)(3)(iii)(B)(*2*)(*ii*) of this section, a transfer agreement is considered timely filed only if the transfer agreement is filed within 30 days of the date that the acceleration event occurs. The transfer agreement must be filed in accordance with the rules provided in publications forms, instructions, or other guidance. In addition, a duplicate copy of the transfer agreement must be attached to the returns of both the eligible section 965(h) transferee and the eligible section 965(h) transferor for the taxable year during which the acceleration event occurs filed by the due date for such returns (taking into account extensions, if any). Relief is not available under § 301.9100–2 or 301.9100–3 to file a transfer agreement late.

(*ii*) *Transition rule.* If an acceleration event occurs on or before February 5, 2019, the transfer agreement must be filed by March 7, 2019, to be considered timely filed.

(*3*) *Signature requirement.* The transfer agreement that is filed within 30 days of the acceleration event or by the due date specified in paragraph (b)(3)(iii)(B)(*2*)(*ii*) of this section must be signed under penalties of perjury by a person who is authorized to sign a return on behalf of the eligible section 965(h) transferor and a person who is authorized to sign a return on behalf of the eligible section 965(h) transferee.

(*4*) *Terms of agreement.* A transfer agreement under this paragraph (b)(3)(iii)(B) must be entitled ''Transfer Agreement Under Section 965(h)(3)'' and must contain the following information and representations—

(*i*) A statement that the document constitutes an agreement by the eligible section 965(h) transferee to assume the liability of the eligible section 965(h) transferor for any unpaid installment payments of the eligible section 965(h) transferor under section 965(h);

(*ii*) A statement that the eligible section 965(h) transferee (and, if the eligible section 965(h) transferor continues in existence immediately after the acceleration event, the eligible section 965(h) transferor) agrees to comply with all of the conditions and requirements of section 965(h) and paragraph (b) of this section, as well as

any other applicable requirements in the section 965 regulations;

(*iii*) The name, address, and taxpayer identification number of the eligible section 965(h) transferor and the eligible section 965(h) transferee;

(*iv*) The amount of the eligible section 965(h) transferor's section 965(h) net tax liability remaining unpaid, as determined by the eligible section 965(h) transferor, which amount is subject to adjustment by the Commissioner;

(*v*) A copy of the eligible section 965(h) transferor's most recent Form 965–A or Form 965–B, as applicable, if the eligible section 965(h) transferor has been required to file a Form 965–A or Form 965–B;

(*vi*) A detailed description of the acceleration event that led to the transfer agreement;

(*vii*) A representation that the eligible section 965(h) transferee is able to make the remaining payments required under section 965(h) and paragraph (b) of this section with respect to the section 965(h) net tax liability being assumed;

(*viii*) If the eligible section 965(h) transferor continues to exist immediately after the acceleration event, an acknowledgement that the eligible section 965(h) transferor and any successor to the eligible section 965(h) transferor will remain jointly and severally liable for any unpaid installment payments of the eligible section 965(h) transferor under section 965(h), including, if applicable, under § 1.1502–6;

(*ix*) A statement as to whether the leverage ratio of the eligible section 965(h) transferee and all subsidiary members of its affiliated group immediately after the acceleration event exceeds three to one, which ratio may be modified as provided in publications, forms, instructions, or other guidance;

(*x*) A certification by the eligible section 965(h) transferee stating that the eligible section 965(h) transferee waives the right to a notice of liability and consents to the immediate assessment of the portion of the section 965(h) net tax liability remaining unpaid; and

(*xi*) Any additional information, representation, or certification required by the Commissioner in publications, forms, instructions, or other guidance.

(*5*) *Consolidated groups.* For purposes of this paragraph (b)(3)(iii)(B), in the case of a consolidated group, the terms ''eligible section 965(h) transferor'' and ''eligible section 965(h) transferee'' each refer to a consolidated group that is a party to a covered acceleration event described in paragraph (b)(3)(iii)(A)(*1*) of this section. In such a case, any transfer agreement under this paragraph (b)(3)(iii)(B) must be entered into by the agent (as defined in § 1.1502–77) of the relevant consolidated group.

(*6*) *Leverage ratio.* For purposes of paragraph (b)(3)(iii)(B)(4)(*ix*) of this section, and except as otherwise provided in publications, forms, instructions, or other guidance, the term *leverage ratio* means the ratio that the total indebtedness of the eligible section 965(h) transferee bears to the sum of its money and all other assets reduced (but not below zero) by such total indebtedness. For this purpose, the amount taken into account with respect to any asset is the adjusted basis thereof for purposes of determining gain, and the amount taken into account with respect to any indebtedness with original issue discount is its issue price plus the portion of the original issue discount previously accrued as determined under the rules of section 1272 (determined without regard to subsection (a)(7) or (b)(4) thereof).

(C) *Consent of Commissioner*—(*1*) *In general.* Except as otherwise provided in publications, forms, instructions, or other guidance, if an eligible section 965(h) transferor and an eligible section 965(h) transferee file a transfer agreement in accordance with the provisions of paragraph (b)(3)(iii)(B) of this section, the eligible section 965(h) transferor and the eligible section 965(h) transferee will be considered to have entered into an agreement described in paragraph (b)(3)(iii)(A)(*2*) of this section with the Commissioner for purposes of section 965(h)(3) and paragraph (b)(3)(iii) of this section. If the Commissioner determines that additional information is necessary (for example, additional information regarding the ability of the eligible section 965(h) transferee to fully pay the remaining section 965(h) net tax liability), the eligible section 965(h) transferee must provide such information upon request.

(*2*) *Material misrepresentations and omissions.* If the Commissioner determines that an agreement filed by an eligible section 965(h) transferor and an eligible section 965(h) transferee contains a material misrepresentation or material omission, or if the eligible section 965(h) transferee does not provide the additional information requested under paragraph (b)(3)(iii)(C)(*1*) of this section within a reasonable timeframe communicated by the Commissioner to the eligible section 965(h) transferee, then the Commissioner may reject the transfer agreement (effective as of the date of the related acceleration event). In the alternative, on the date that the Commissioner determines that the transfer agreement includes a material misrepresentation or material omission, the Commissioner may determine that an acceleration event has occurred with respect to the eligible section 965(h) transferee as of the date of the determination, such that any unpaid installment payments of the eligible section 965(h) transferor that were assumed by the eligible section 965(h) transferee become due on the date of the determination.

(D) *Effect of assumption*—(*1*) *In general.* If the exception in this paragraph (b)(3)(iii) applies with respect to an eligible section 965(h) transferor and an eligible section 965(h) transferee, the eligible section 965(h) transferee assumes all of the outstanding obligations and responsibilities of the eligible section 965(h) transferor with respect to the section 965(h) net tax liability as though the eligible section 965(h) transferee had included the section 965(a) inclusion in income. Accordingly, the eligible section 965(h) transferee is responsible for making payments and reporting with respect to any unpaid installment payments. In addition, for example, if an acceleration event described in paragraph (b)(3)(ii) of this section occurs with respect to an eligible section 965(h) transferee, any unpaid installment payments of the eligible section 965(h) transferor that were assumed by the eligible section 965(h) transferee will become due on the date of such event, subject to any applicable exception in paragraph (b)(3)(iii) of this section.

(*2*) *Eligible section 965(h) transferor liability.* An eligible section 965(h) transferor (or a successor) remains jointly and severally liable for any unpaid installment payments of the eligible section 965(h) transferor that were assumed by the eligible section 965(h) transferee, as well as any penalties, additions to tax, or other additional amounts attributable to such net tax liability.

(E) *Qualifying consolidated group member transaction*—(*1*) *Definition of qualifying consolidated group member transaction.* For purposes of this paragraph (b)(3), the term *qualifying consolidated group member transaction* means a transaction in which—

(*i*) A member of a consolidated group (the *departing member*) ceases to be a member of the consolidated group (including by reason of the distribution, sale, or exchange of the departing member's stock);

(*ii*) The transaction results in the consolidated group (which is treated as a single person for this purpose under § 1.965–8(e)(1)) being treated as transferring substantially all of its assets

for purposes of paragraph (b)(3)(ii)(B) of this section; and

(*iii*) The departing member either continues to exist immediately after the transaction or has a qualified successor.

(*2*) *Definition of qualified successor.* For purposes of this paragraph (b)(3), the term *qualified successor* means, with respect to a departing member described in this paragraph (b)(3)(iii)(E), another domestic corporation (or consolidated group) that acquires substantially all of the assets of the departing member (including in a transaction described in section 381(a)(2)).

(*3*) *Departure of multiple members of a consolidated group.* Multiple members that deconsolidate from the same consolidated group as a result of a single transaction are treated as a single departing member to the extent that, immediately after the transaction, they become members of the same (second) consolidated group, which would be treated as a single person under § 1.965–8(e)(1).

(c) *Section 965(i) election*—(1) *In general.* Each shareholder of an S corporation (including a person listed in § 1.1362–6(b)(2) with respect to a trust or estate, but not a domestic pass-through entity itself) that is a United States shareholder of a deferred foreign income corporation may elect under section 965(i) and this paragraph (c) to defer the payment of the shareholder's section 965(i) net tax liability with respect to the S corporation until the shareholder's taxable year that includes a triggering event described in paragraph (c)(3) of this section. This election may be revoked only by paying the full amount of the unpaid section 965(i) net tax liability.

(2) *Manner of making election*—(i) *Eligibility.* Each shareholder with a section 965(i) net tax liability with respect to an S corporation may make the section 965(i) election with respect to such S corporation, provided that, with respect to the shareholder, none of the triggering events described in paragraph (c)(3)(ii) of this section have occurred before the election is made. Notwithstanding the preceding sentence, a shareholder that would be eligible to make the section 965(i) election but for the occurrence of an event described in paragraph (c)(3)(ii) of this section may make the section 965(i) election if an exception described in paragraph (c)(3)(iv) of this section applies.

(ii) *Timing.* A section 965(i) election must be made no later than the due date (taking into account extensions, if any) for the shareholder's return for each taxable year that includes the last day of the taxable year of the S corporation in which the S corporation has a section 965(a) inclusion to which the shareholder's section 965(i) net tax liability is attributable. Relief is not available under § 301.9100–2 or 301.9100–3 to make a late election.

(iii) *Election statement.* Except as otherwise provided in publications, forms, instructions, or other guidance, to make a section 965(i) election, a shareholder must attach a statement, signed under penalties of perjury consistent with the rules for signatures applicable to the person's return, to its return for the taxable year that includes the last day of a taxable year of the S corporation in which the S corporation has a section 965(a) inclusion to which the shareholder's section 965(i) net tax liability is attributable. The statement must include the shareholder's name, taxpayer identification number, the name and taxpayer identification number of the S corporation with respect to which the election is made, the amount described in paragraph (g)(10)(i)(A) of this section as modified by paragraph (g)(6) of this section for purposes of determining the section 965(i) net tax liability with respect to the S corporation, the amount described in paragraph (g)(10)(i)(B) of this section, and the section 965(i) net tax liability with respect to the S corporation. The statement must be filed in the manner prescribed in publications, forms, instructions, or other guidance. The attachment of an unsigned copy of the election statement to the timely-filed return for the relevant taxable year satisfies the signature requirement of this paragraph (c)(2)(iii) if the shareholder retains the original signed election statement in the manner specified by § 1.6001–1(e).

(3) *Triggering events*—(i) *In general.* If a shareholder makes a section 965(i) election with respect to an S corporation, the shareholder defers payment of its section 965(i) net tax liability with respect to the S corporation until the shareholder's taxable year that includes the occurrence of a triggering event described in paragraph (c)(3)(ii) of this section with respect to the section 965(i) net tax liability with respect to the S corporation. If a triggering event described in paragraph (c)(3)(ii) of this section with respect to an S corporation occurs, except as provided in paragraph (c)(3)(iv) of this section, the shareholder's section 965(i) net tax liability with respect to the S corporation will be assessed as an addition to tax for the shareholder's taxable year that includes the triggering event.

(ii) *Triggering events.* The following events are considered triggering events for purposes of paragraph (c)(3)(i) of this section with respect to a shareholder's section 965(i) net tax liability with respect to an S corporation—

(A) The corporation ceases to be an S corporation (determined as of the first day of the first taxable year that the corporation is not an S corporation);

(B) A liquidation, sale, exchange, or other disposition of substantially all of the assets of the S corporation (including in a title 11 or similar case), a cessation of business by the S corporation, or the S corporation ceasing to exist;

(C) The transfer of any share of stock of the S corporation by the shareholder (including by reason of death or otherwise) that results in a change of ownership for federal income tax purposes; or

(D) A determination by the Commissioner described in the second sentence of paragraph (c)(3)(iv)(C)(*2*) of this section.

(iii) *Partial transfers.* If an S corporation shareholder transfers less than all of its shares of stock of the S corporation, the transfer will be a triggering event only with respect to the portion of a shareholder's section 965(i) net tax liability that is properly allocable to the transferred shares.

(iv) *Eligible section 965(i) transferee exception*—(A) *In general.* Paragraph (c)(3)(i) of this section will not apply (such that a shareholder's section 965(i) net tax liability with respect to an S corporation will not be assessed as an addition to tax for the shareholder's taxable year that includes the triggering event) if the requirements described in paragraphs (c)(3)(iv)(A)(*1*) and (*2*) of this section are satisfied. A shareholder with respect to which a triggering event described in this paragraph (c)(3)(iv)(A) occurs is referred to as an *eligible section 965(i) transferor.*

(*1*) *Requirement to have a covered triggering event.* The triggering event satisfies the requirements of this paragraph (c)(3)(iv)(A)(*1*) if it is described in paragraph (c)(3)(ii)(C) of this section.

(*2*) *Requirement to enter into a transfer agreement.* The shareholder with respect to which a triggering event occurs and an eligible section 965(i) transferee (as defined in paragraph (c)(3)(v)(B)(*1*) of this section) must enter into an agreement with the Commissioner that satisfies the requirements of paragraph (c)(3)(iv)(B) of this section.

(B) *Transfer agreement*—(*1*) *Eligibility.* A transfer agreement that satisfies the requirements of this

paragraph (c)(3)(iv)(B) may be entered into by an eligible section 965(i) transferor and an eligible section 965(i) transferee. For this purpose, the term *eligible section 965(i) transferee* refers to a single United States person that becomes a shareholder of the S corporation (including a person listed in § 1.1362–6(b)(2) with respect to a trust or estate, but not a domestic pass-through entity itself). In the case of a transfer that consists of multiple partial transfers (as described in paragraph (c)(3)(iii) of this section), a transfer agreement that satisfies the requirements of this paragraph (c)(3)(iv)(B) may be entered into by an eligible section 965(i) transferor and an eligible section 965(i) transferee for each partial transfer.

(*2*) *Filing requirements*—(*i*) *In general.* A transfer agreement must be timely filed. Except as provided in paragraphs (c)(3)(iv)(B)(*2*)(*ii*) and (*iii*) of this section, a transfer agreement is considered timely filed only if the transfer agreement is filed within 30 days of the date that the triggering event occurs. The transfer agreement must be filed in accordance with the rules provided in publications, forms, instructions, or other guidance. In addition, a duplicate copy of the transfer agreement must be attached to the returns of both the eligible section 965(i) transferee and the eligible section 965(i) transferor for the taxable year during which the triggering event occurs filed by the due date (taking into account extensions, if any) for such returns. Relief is not available under § 301.9100–2 or 301.9100–3 to file a transfer agreement late.

(*ii*) *Transition rule.* If a triggering event occurs on or before February 5, 2019, the transfer agreement must be filed by March 7, 2019, to be considered timely filed.

(*iii*) *Death of eligible section 965(i) transferor.* If the triggering event is the death of the eligible section 965(i) transferor, the transfer agreement must be filed by the later of the unextended due date for the eligible section 965(i) transferor's final income tax return or March 7, 2019.

(*3*) *Signature requirement.* The transfer agreement that is filed within 30 days of the triggering event or by the due date specified in paragraph (c)(3)(iv)(B)(*2*)(*ii*) or (*iii*) of this section must be signed under penalties of perjury by a person who is authorized to sign a return on behalf of the eligible section 965(i) transferor and a person who is authorized to sign a return on behalf of the eligible section 965(i) transferee.

(*4*) *Terms of agreement.* A transfer agreement under this paragraph (c)(3)(iv)(B) must be entitled ''Transfer Agreement Under Section 965(i)(2)'' and must contain the following information and representations:

(*i*) A statement that the document constitutes an agreement by the eligible section 965(i) transferee to assume the liability of the eligible section 965(i) transferor for the unpaid portion of the section 965(i) net tax liability, or, in the case of a partial transfer, for the unpaid portion of the section 965(i) net tax liability attributable to the transferred stock;

(*ii*) A statement that the eligible section 965(i) transferee agrees to comply with all of the conditions and requirements of section 965(i) and paragraph (c) of this section, including the annual reporting requirement, as well as any other applicable requirements in the section 965 regulations;

(*iii*) The name, address, and taxpayer identification number of the eligible section 965(i) transferor and the eligible section 965(i) transferee;

(*iv*) The amount of the eligible section 965(i) transferor's unpaid section 965(i) net tax liability or, in the case of a partial transfer, the unpaid portion of the section 965(i) net tax liability attributable to the transferred stock, each as determined by the eligible section 965(i) transferor, which amount is subject to adjustment by the Commissioner;

(*v*) A copy of the eligible section 965(i) transferor's most recent Form 965–A, if the eligible section 965(i) transferor has been required to file a Form 965–A;

(*vi*) A detailed description of the triggering event that led to the transfer agreement, including the name and taxpayer identification number of the S corporation with respect to which the section 965(i) election was effective;

(*vii*) A representation that the eligible section 965(i) transferee is able to pay the section 965(i) net tax liability being assumed;

(*viii*) An acknowledgement that the eligible section 965(i) transferor and any successor to the eligible section 965(i) transferor will remain jointly and severally liable for the section 965(i) net tax liability being assumed by the eligible section 965(i) transferee.

(*ix*) A statement as to whether the leverage ratio of the eligible section 965(i) transferee immediately after the triggering event exceeds three to one, which ratio may be modified as provided in publications, forms, instructions, or other guidance;

(*x*) Any additional information, representation, or certification required by the Commissioner in publications, forms, instructions, or other guidance.

(*5*) *Special rule in the case of death of eligible section 965(i) transferor.* Except in the case of transfers to trusts, if the triggering event is the death of the eligible section 965(i) transferor, and the identity of the beneficiary or beneficiaries (in the case of multiple partial transfers) is determined as of the due date for the transfer agreement described in paragraph (c)(3)(iv)(B)(*2*)(*iii*) of this section, then the transfer may be treated as a transfer directly between the eligible 965(i) transferor and the beneficiary or beneficiaries. If, however, the identity of the beneficiary or beneficiaries is not determined as of the due date for the transfer agreement described in paragraph (c)(3)(iv)(B)(*2*)(*iii*) of this section, then the transfer must be treated first as a transfer between the eligible section 965(i) transferor and his or her estate at the time of death and second as a transfer between the estate and the beneficiary or beneficiaries when the shares are actually transferred to the beneficiary or beneficiaries. Separate transfer agreements must be filed for each transfer. The transfer from the eligible section 965(i) transferor to his or her estate is a transfer resulting from a triggering event that is the death of the eligible section 965(i) transferor, and the transfer agreement is subject to the timing rules in paragraph (c)(3)(iv)(B)(*2*)(*iii*) of this section. The transfer from the estate to the beneficiary or beneficiaries is not a transfer resulting from a triggering event that is the death of the eligible section 965(i) transferor, and the transfer agreement is subject to the timing rules in paragraph (c)(3)(iv)(B)(*2*)(*i*) and (*ii*) of this section.

(*6*) *Leverage ratio.* For purposes of paragraph (c)(3)(iv)(B)(4)(*ix*) of this section, and except as otherwise provided in publications, forms, instructions, or other guidance, the term *leverage ratio* means the ratio that the total indebtedness of the eligible section 965(i) transferee bears to the sum of its money and all other assets reduced (but not below zero) by such total indebtedness. For this purpose, the amount taken into account with respect to any asset is the adjusted basis thereof for purposes of determining gain, and the amount taken into account with respect to any indebtedness with original issue discount is its issue price plus the portion of the original issue discount previously accrued as determined under the rules of section 1272 (determined without regard to subsection (a)(7) or (b)(4) thereof).

(C) *Consent of Commissioner*—(*1*) *In general.* Except as otherwise provided in publications, forms, instructions, or other guidance, if an eligible section 965(i) transferor and an eligible section 965(i) transferee file a transfer agreement in accordance with the provisions of paragraph (c)(3)(iv)(B) of this section, the eligible section 965(i) transferor and the eligible section 965(i) transferee will be considered to have entered into an agreement with the Commissioner for purposes of section 965(i)(2) and paragraph (c)(3)(iv) of this section. If the Commissioner determines that additional information is necessary (for example, additional information regarding the ability of the eligible section 965(i) transferee to pay the eligible section 965(i) transferor's unpaid section 965(i) net tax liability), the eligible section 965(i) transferee must provide such information upon request.

(*2*) *Material misrepresentations and omissions.* If the Commissioner determines that an agreement filed by an eligible section 965(i) transferor and an eligible section 965(i) transferee contains a material misrepresentation or material omission, or if the eligible section 965(i) transferee does not provide the additional information requested under paragraph (c)(3)(iv)(C)(*1*) of this section within a reasonable timeframe communicated by the Commissioner to the eligible section 965(i) transferee, then the Commissioner may reject the transfer agreement (effective as of the date of the related triggering event). In the alternative, on the date that the Commissioner determines that the transfer agreement includes a material misrepresentation or material omission, the Commissioner may determine that a triggering event has occurred with respect to the eligible section 965(i) transferee as of the date of the determination, such that the unpaid section 965(i) net tax liability of the eligible section 965(i) transferor that was assumed by the eligible section 965(i) transferee becomes due on the date of the determination.

(D) *Effect of assumption*—(*1*) *In general.* When the exception in this paragraph (c)(3)(iv) applies with respect to an eligible section 965(i) transferor and an eligible section 965(i) transferee, the eligible section 965(i) transferee assumes all of the outstanding obligations and responsibilities of the eligible section 965(i) transferor with respect to the section 965(i) net tax liability with respect to the S corporation as though the eligible section 965(i) transferee had included the section 965(a) inclusion in income. Accordingly, the eligible section 965(i) transferee is responsible for making payments and reporting with respect to any unpaid section 965(i) net tax liability with respect to the S corporation. In addition, for example, if a triggering event described in paragraph (c)(3)(ii) of this section occurs with respect to an eligible section 965(i) transferee, any unpaid portion of the section 965(i) net tax liability of the eligible section 965(i) transferor that was assumed by the eligible section 965(i) transferee becomes due on the date of such event, subject to any applicable exception in paragraph (c)(3)(iv) or (v) of this section.

(*2*) *Eligible section 965(i) transferor liability.* An eligible section 965(i) transferor remains jointly and severally liable for any unpaid installment payments of the eligible section 965(i) transferor that were assumed by the eligible section 965(i) transferee, as well as any penalties, additions to tax, or other additional amounts attributable to such net tax liability.

(v) *Coordination with section 965(h) election*—(A) *In general.* Subject to the limitation described in paragraph (c)(3)(v)(D) of this section, a shareholder that has made a section 965(i) election with respect to an S corporation, upon the occurrence of a triggering event with respect to such S corporation, may make a section 965(h) election with respect to the portion of the shareholder's section 965(i) net tax liability with respect to such S corporation that is assessed as an addition to tax for the shareholder's taxable year that includes the triggering event pursuant to paragraph (c)(3)(i) of this section as if such portion were a section 965(h) net tax liability.

(B) *Timing for election.* A section 965(h) election made pursuant to section 965(i)(4) and paragraph (c)(3)(v)(A) of this section must be made no later than the due date (taking into account extensions, if any) for the shareholder's return for the taxable year in which the triggering event with respect to the S corporation occurs. Relief is not available under § 301.9100–2 or § 301.9100–3 to make a late election.

(C) *Due date for installment.* If a shareholder makes a section 965(h) election pursuant to section 965(i)(4) and paragraph (c)(3)(v)(A) of this section, the payment of the first installment (as described in paragraph (b)(1)(i) of this section) must be made no later than the due date (without regard to extensions) for the shareholder's return of tax for the taxable year in which the triggering event with respect to the S corporation occurs.

(D) *Limitation*—(*1*) *In general.* Notwithstanding paragraph (c)(3)(v)(A) of this section, if the triggering event with respect to an S corporation is a triggering event described in paragraph (c)(3)(ii)(B) of this section, then the section 965(h) election may only be made with the consent of the Commissioner.

(*2*) *Manner of obtaining consent*—(*i*) *In general.* In order to obtain the consent of the Commissioner as required by paragraph (c)(3)(v)(D)(*1*) of this section, the shareholder intending to make the section 965(h) election must file the agreement described in paragraph (c)(3)(v)(D)(*4*) of this section within 30 days of the occurrence of the triggering event, except as described in paragraph (c)(3)(v)(D)(*2*)(*ii*) of this section. The agreement must be filed in accordance with the rules provided in publications, forms, instructions, or other guidance. In addition, a duplicate copy of the agreement must be filed, with the shareholder's timely-filed return for the taxable year during which the triggering event occurs (taking into account extensions, if any), along with the election statement described in paragraph (b)(2)(iii) of this section. Relief is not available under § 301.9100–2 or § 301.9100–3 to file an agreement late.

(*ii*) *Transition rule.* If a triggering event occurs on or before February 5, 2019, the agreement must be filed by March 7, 2019, in order to be considered timely filed.

(*3*) *Signature requirement.* The agreement that is filed within 30 days of the triggering event or by the due date specified in paragraph (c)(3)(v)(D)(*2*)(*ii*) of this section must be signed under penalties of perjury by the shareholder.

(*4*) *Terms of agreement.* The agreement under this paragraph (c)(3)(v)(D) must be entitled ''Consent Agreement Under Section 965(i)(4)(D)'' and must contain the following information and representations—

(*i*) A statement that the shareholder agrees to comply with all of the conditions and requirements of section 965(h) and paragraph (b) of this section, as well as any other applicable requirements in the section 965 regulations;

(*ii*) The name, address, and taxpayer identification number of the shareholder;

(*iii*) The amount of the section 965(i) net tax liability under section 965 remaining unpaid with respect to which the section 965(h) election is made pursuant to section 965(i)(4)(D) and paragraph (c)(3)(v)(A) of this section, as determined by the shareholder, which amount is subject to adjustment by the Commissioner; and

(*iv*) A representation that the shareholder is able to make the payments required under section 965(h) and paragraph (b) of this section with respect to the portion of the total net tax liability under section 965 remaining unpaid described in paragraph (c)(3)(v)(D)(*4*)(*iii*) of this section.

(*v*) A statement as to whether the leverage ratio of the shareholder and all subsidiary members of its affiliated group immediately following the triggering event exceeds three to one; and

(*vi*) Any additional information, representation, or certification required by the Commissioner in publications, forms, instructions, or other guidance.

(*5*) *Consent of Commissioner*—(*i*) *In general.* If a shareholder files an agreement in accordance with the provisions of paragraph (c)(3)(v)(D) of this section, the shareholder will be considered to have obtained the consent of the Commissioner for purposes of section 965(i)(4)(D) and paragraph (c)(3)(v)(D)(*1*) of this section. However, if the Commissioner reviews the agreement and determines that additional information is necessary, the shareholder must provide such information upon request.

(*ii*) *Material misrepresentations and omissions.* If the Commissioner determines that an agreement filed by a shareholder in accordance with the provisions of this paragraph (c)(3)(v)(D) contains a material misrepresentation or material omission, or if the shareholder does not provide the additional information requested under paragraph (c)(3)(v)(D)(*5*)(*i*) of this section within a reasonable timeframe communicated by the Commissioner to the shareholder, then the Commissioner may reject the agreement (effective as of the date of the related triggering event).

(*6*) *Leverage ratio.* For purposes of paragraph (c)(3)(v)(D)(4)(*v*) of this section, and except as otherwise provided in publications, forms, instructions, or other guidance, the term *leverage ratio* means the ratio that the total indebtedness of the shareholder bears to the sum of its money and all other assets reduced (but not below zero) by such total indebtedness. For this purpose, the amount taken into account with respect to any asset is the adjusted basis thereof for purposes of determining gain, and the amount taken into account with respect to any indebtedness with original issue discount is its issue price plus the portion of the original issue discount previously accrued as determined under the rules of section 1272 (determined without regard to subsection (a)(7) or (b)(4) thereof).

(4) *Joint and several liability.* If any shareholder of an S corporation makes a section 965(i) election, the S corporation is jointly and severally liable for the payment of the shareholder's section 965(i) net tax liability with respect to the S corporation, as well as any penalties, additions to tax, or other additional amounts attributable to such net tax liability.

(5) *Extension of limitation on collection.* If an S corporation shareholder makes a section 965(i) election with respect to its section 965(i) net tax liability with respect to an S corporation, any limitation on the time period for the collection of the net tax liability shall not begin before the date of the triggering event with respect to the section 965(i) net tax liability.

(6) *Annual reporting requirement*—(i) *In general.* A shareholder that makes a section 965(i) election with respect to its section 965(i) net tax liability with respect to an S corporation is required to report the amount of its deferred net tax liability on its return of tax for the taxable year in which the election is made and on the return of tax for each subsequent taxable year until such net tax liability has been fully assessed.

(ii) *Failure to report.* If a shareholder fails to report the amount of its deferred net tax liability as required with respect to any taxable year by the due date (taking into account extensions, if any) for the return of tax for that taxable year, five percent of such deferred net tax liability will be assessed as an addition to tax for such taxable year.

(d) *Section 965(m) election and special rule for real estate investment trusts*—(1) *In general.* A real estate investment trust may elect under section 965(m) and this paragraph (d) to defer the inclusion in gross income (for purposes of the computation of real estate investment trust taxable income under section 857(b)) of its REIT section 965 amounts and include them in income according to the schedule described in paragraph (d)(2) of this section. This election is revocable only by including in gross income (for purposes of the computation of real estate investment trust taxable income under section 857(b)) the full amount of the REIT section 965 amounts.

(2) *Inclusion schedule for section 965(m) election.* If a real estate investment trust makes the section 965(m) election, the REIT section 965 amounts will be included in the real estate investment trust's gross income as follows—

(i) Eight percent of the REIT section 965 amounts in each taxable year in the five-taxable year period beginning with the taxable year the amount would otherwise be included;

(ii) Fifteen percent of the REIT section 965 amounts in the first year following the five year period described in paragraph (d)(2)(i) of this section;

(iii) Twenty percent of the REIT section 965 amounts in the second year following the five year period described in paragraph (d)(2)(i) of this section; and

(iv) Twenty-five percent of the REIT section 965 amounts in the third year following the five year period described in paragraph (d)(2)(i) of this section.

(3) *Manner of making election*—(i) *Eligibility.* A real estate investment trust with section 965(a) inclusions may make the section 965(m) election.

(ii) *Timing.* A section 965(m) election must be made no later than the due date (taking into account extensions, if any) for the return for the first year of the five year period described in paragraph (d)(2)(i) of this section. Relief is not available under § 301.9100–2 or § 301.9100–3 to make a late election.

(iii) *Election statement.* Except as otherwise provided in publications, forms, instructions, or other guidance, to make a section 965(m) election, a real estate investment trust must attach a statement, signed under penalties of perjury consistent with the rules for signatures applicable to the person's return, to its return for the taxable year in which it would otherwise be required to include the REIT section 965 amounts in gross income. The statement must include the real estate investment trust's name, taxpayer identification number, REIT section 965 amounts, and the anticipated amounts of each portion of the REIT section 965 amounts described under paragraph (d)(2) of this section, and the statement must be filed in the manner prescribed in publications, forms, instructions, or other guidance. The attachment of an unsigned copy of the election statement to the timely-filed return for the relevant taxable year satisfies the signature requirement of this paragraph (d)(3)(iii) if the real estate investment trust retains the original signed election statement in the manner specified by § 1.6001–1(e).

(4) *Coordination with section 965(h).* A real estate investment trust that makes the section 965(m) election may not also make a section 965(h) election for any year with respect to which a section 965(m) election is in effect.

(5) *Acceleration of inclusion.* If a real estate investment trust makes a section 965(m) election and subsequently there is a liquidation, sale, exchange, or other disposition of substantially all of the assets of the real estate investment trust (including in a title 11 or similar case), or a cessation of business by the real

estate investment trust, any amount not yet included in gross income (for purposes of the computation of real estate investment trust taxable income under section 857(b)) as a result of the section 965(m) election will be so included as of the day before the date of the event. The unpaid portion of any tax liability with respect to such inclusion will be due on the date of the event (or in the case of a title 11 or similar case, the day before the petition is filed).

(6) *Treatment of section 965(a) inclusions of a real estate investment trust.* Regardless of whether a real estate investment trust has made a section 965(m) election, and regardless of whether it is a United States shareholder of a deferred foreign income corporation, any section 965(a) inclusions of the real estate investment trust are not taken into account as gross income of the real estate investment trust for purposes of applying paragraphs (2) and (3) of section 856(c) for any taxable year for which the real estate investment trust takes into account a section 965(a) inclusion, including pursuant to paragraph (d)(2) of this section.

(e) *Section 965(n) election*—(1) *In general*—(i) *General rule.* A person may elect to not take into account the amount described in paragraph (e)(1)(ii) of this section in determining its net operating loss under section 172 for the taxable year or in determining the amount of taxable income for such taxable year (computed without regard to the deduction allowable under section 172) that may be reduced by net operating loss carryovers or carrybacks to such taxable year under section 172. The election for each taxable year is irrevocable.

(ii) *Applicable amount for section 965(n) election.* If a person makes a section 965(n) election, the amount referred to in paragraph (e)(1)(i) of this section is the sum of—

(A) The person's section 965(a) inclusions for the taxable year reduced by the person's section 965(c) deductions for the taxable year, and

(B) In the case of a domestic corporation, the taxes deemed paid under section 960(a)(1) for the taxable year with respect to the person's section 965(a) inclusions that are treated as dividends under section 78.

(iii) *Scope of section 965(n) election.* If a person makes a section 965(n) election, the election applies to both net operating losses for the taxable year for which the election is made and the net operating loss carryovers or carrybacks to such taxable year, each in their entirety. Any section 965(n) election made by the agent (within the meaning of § 1.1502–77) of a consolidated group applies to all net operating losses available to the consolidated group, including all components of the consolidated net operating loss deduction (as defined in § 1.1502–21(a)).

(iv) [Reserved]

(2) *Manner of making election*—(i) *Eligibility.* A person with a section 965(a) inclusion may make the section 965(n) election.

(ii) *Timing.* A section 965(n) election must be made no later than the due date (taking into account extensions, if any) for the person's return for the taxable year to which the election applies. Relief is not available under § 301.9100–2 or § 301.9100–3 to make a late election.

(iii) *Election statement.* Except as otherwise provided in publications, forms, instructions, or other guidance, to make a section 965(n) election, a person must attach a statement, signed under penalties of perjury consistent with the rules for signatures applicable to the person's return, to its return for the taxable year to which the election applies. The statement must include the person's name, taxpayer identification number, the amounts described in section 965(n)(2)(A) and paragraph (e)(1)(ii)(A) of this section and section 965(n)(2)(B) and paragraph (e)(1)(ii)(B) of this section, and the sum thereof, and the statement must be filed in the manner prescribed in publications, forms, instructions, or other guidance. The attachment of an unsigned copy of the election statement to the timely-filed return for the relevant taxable year satisfies the signature requirement of this paragraph (e)(2)(iii) if the person making the election retains the original signed election statement in the manner specified by § 1.6001–1(e).

(f) *Election to use alternative method for calculating post-1986 earnings and profits*—(1) *Effect of election for specified foreign corporations that do not have a 52–53-week taxable year.* If an election is made under this paragraph (f) with respect to a specified foreign corporation that does not have a 52–53-week taxable year, the amount of the post-1986 earnings and profits (including a deficit) as of the E&P measurement date on November 2, 2017, is determined under paragraph (f)(3) of this section. The election described in this paragraph (f) is irrevocable. A specified foreign corporation that does not have a 52–53-week taxable year may not use the alternative method of determination in paragraph (f)(3) of this section for purposes of determining its post-1986 earnings and profits on the E&P measurement date on December 31, 2017.

(2) *Effect of election for specified foreign corporations that have a 52–53-week taxable year.* If an election is made under this paragraph (f) with respect to a specified foreign corporation that has a 52–53-week taxable year, the amount of the post-1986 earnings and profits (including a deficit) as of both E&P measurement dates is determined under paragraph (f)(3) of this section. The election described in this paragraph (f) is irrevocable.

(3) *Computation of post-1986 earnings and profits using alternative method.* With respect to an E&P measurement date, the post-1986 earnings and profits of a specified foreign corporation for which an election is properly made equals the sum of—

(i) The specified foreign corporation's post-1986 earnings and profits (including a deficit) determined as of the notional measurement date, as if it were an E&P measurement date, plus

(ii) The specified foreign corporation's annualized earnings and profits amount with respect to the notional measurement date.

(4) *Definitions*—(i) *52–53-week taxable year.* The term *52–53-week taxable year* means a taxable year described in § 1.441–2(a)(1).

(ii) *Annualized earnings and profits amount.* The term *annualized earnings and profits amount* means, with respect to a specified foreign corporation, an E&P measurement date, and a notional measurement date, the amount equal to the product of the number of days between the notional measurement date and the E&P measurement date (not including the former, but including the latter) multiplied by the daily earnings amount of the specified foreign corporation. The annualized earnings and profits amount is expressed as a negative number if the E&P measurement date precedes the notional measurement date.

(iii) *Daily earnings amount.* The term *daily earnings amount* means, with respect to a specified foreign corporation and a notional measurement date, the post-1986 earnings and profits (including a deficit) of the specified foreign corporation determined as of the close of the notional measurement date that were earned (or incurred) during the specified foreign corporation's taxable year that includes the notional measurement date, divided by the number of days that have elapsed in such taxable year as of the close of the notional measurement date.

(iv) *Notional measurement date.* The term *notional measurement date* means—

(A) With respect to an E&P measurement date of a specified foreign corporation with a 52–53-week taxable year, the closest end of a fiscal month to such E&P measurement date, and

(B) With respect to the E&P measurement date on November 2, 2017, of all specified foreign corporations not described in paragraph (f)(4)(iv)(A) of this section, October 31, 2017.

(5) *Manner of making election*—(i) *Eligibility.* An election with respect to a specified foreign corporation to use the alternative method of calculating post-1986 earnings and profits as of an E&P measurement date pursuant to this paragraph (f) must be made on behalf of the specified foreign corporation by a controlling domestic shareholder (as defined in § 1.964–1(c)(5)) pursuant to the rules of § 1.964–1(c)(3), except that the controlling domestic shareholder is not required to file the statement described in § 1.964–1(c)(3)(ii).

(ii) *Timing.* An election under this paragraph (f) must be made no later than the due date (taking into account extensions, if any) for the person's return for the first taxable year in which the person has a section 965(a) inclusion amount with respect to the specified foreign corporation or in which the person takes into account a specified E&P deficit with respect to the specified corporation for purposes of computing a section 965(a) inclusion amount with respect to another specified foreign corporation. Relief is not available under § 301.9100–2 or § 301.9100–3 to make a late election.

(iii) *Election statement.* Except as otherwise provided in publications, forms, instructions, or other guidance, to make an election under this paragraph (f), a person must attach a statement, signed under penalties of perjury consistent with the rules for signatures applicable to the person's return, to the person's return for the taxable year described in paragraph (f)(5)(ii) of this section. The statement must include the person's name, taxpayer identification number, and the name and taxpayer identification number, if any, of each of the specified foreign corporations with respect to which the election is made, and the statement must be filed in the manner prescribed in instructions or other guidance. The attachment of an unsigned copy of the election statement to the timely-filed return for the relevant taxable year satisfies the signature requirement of this paragraph (f)(5)(iii) if the person making the election retains the original signed election statement in the manner specified by § 1.6001–1(e).

(6) *Examples.* The following examples illustrate the application of this paragraph (f).

Example 1. (i)(A) *Facts.* FS, a foreign corporation, has a calendar year taxable year, and as of October 31, 2017, FS has post-1986 earnings and profits of 10,000u, 3,040u of which were earned during the taxable year that includes October 31, 2017. An election is properly made under paragraph (f)(5) of this section with respect to FS, allowing FS to determine its post-1986 earnings and profits under the alternative method with respect to its E&P measurement date on November 2, 2017.

(B) *Analysis.* As of the close of October 31, 2017, the notional measurement date with respect to the E&P measurement date on November 2, 2017, 304 days have elapsed in the taxable year of FS that includes October 31, 2017. Therefore, FS's daily earnings amount is 10u (3,040u divided by 304), and FS's annualized earnings and profits amount is 20u (10u multiplied by 2 (the number of days between the notional measurement date on October 31, 2017, and the E&P measurement date on November 2, 2017)). Accordingly, FS's post-1986 earnings and profits as of November 2, 2017, are 10,020u (its post-1986 earnings and profits as of October 31, 2017 (10,000u), plus its annualized earnings and profits amount (20u)).

Example 2. (ii)(A) *Facts.* The facts are the same as in paragraph (f)(6)(i)(A) of this section (the facts in *Example 1*), except that a deficit of 3,040u was incurred during the taxable year that includes October 31, 2017.

(B) *Analysis.* The analysis is the same as in paragraph (f)(6)(i)(B) of this section (the analysis in *Example 1*), except that FS's daily earnings amount is (10u) ((3,040u) divided by 304), and FS's annualized earnings and profits amount is (20u) ((10u) multiplied by 2 (the number of days between the notional measurement date on October 31, 2017, and the E&P measurement date on November 2, 2017)). Accordingly, FS's post-1986 earnings and profits as of November 2, 2017, are 9,980u (its post-1986 earnings and profits as of October 31, 2017 (10,000u), plus its annualized earnings and profits amount ((20u))).

(g) *Definitions.* This paragraph (g) provides definitions that apply for purposes of this section.

(1) *Deferred net tax liability.* The term *deferred net tax liability* means, with respect to any taxable year of a person, the amount of the section 965(i) net tax liability the payment of which has been deferred under section 965(i) and paragraph (c) of this section.

(2) *REIT section 965 amounts.* The term *REIT section 965 amounts* means, with respect to a real estate investment trust and a taxable year of the real estate investment trust, the aggregate amount of section 965(a) inclusions and section 965(c) deductions that would (but for section 965(m)(1)(B) and paragraph (d) of this section) be taken into account in determining the real estate investment trust's income for the taxable year.

(3) *Section 965(h) election.* The term *section 965(h) election* means the election described in section 965(h)(1) and paragraph (b)(1) of this section.

(4) *Section 965(h) net tax liability.* The term *section 965(h) net tax liability* means, with respect to a person that has made a section 965(h) election, the total net tax liability under section 965 reduced by the aggregate amount of the person's section 965(i) net tax liabilities, if any, with respect to which section 965(i) elections are effective.

(5) *Section 965(i) election.* The term *section 965(i) election* means the election described in section 965(i)(1) and paragraph (c)(1) of this section.

(6) *Section 965(i) net tax liability.* The term *section 965(i) net tax liability* means, with respect to an S corporation and a shareholder of the S corporation, in the case in which a section 965(i) election is made, the amount determined pursuant to paragraph (g)(10)(i) of this section by adding before the word ''over'' in (g)(10)(i)(A) of this section ''determined as if the only section 965(a) inclusions included in income by the person are domestic pass-through entity shares of section 965(a) inclusions by the S corporation with respect to deferred foreign income corporations of which the S corporation is a United States shareholder.''

(7) *Section 965(m) election.* The term *section 965(m) election* means the election described in section 965(m)(1)(B) and paragraph (d)(1) of this section.

(8) *Section 965(n) election.* The term *section 965(n) election* means the election described in section 965(n)(1) and paragraph (e)(1)(i) of this section.

(9) *Specified individual.* The term *specified individual* means, with respect to a taxable year, a person described in § 1.6081–5(a)(5) or (6) who receives an extension of time to file and pay under § 1.6081–5(a) for the taxable year.

(10) *Total net tax liability under section 965*—(i) *General rule.* The term *total net tax liability under section 965* means, with respect to a person, the excess (if any) of—

(A) The person's net income tax for the taxable year in which the person includes a section 965(a) inclusion in income, over—

(B) The person's net income tax for the taxable year determined—

(*1*) Without regard to section 965, and

(*2*) Without regard to any income, deduction, or credit properly attributable to a dividend received (directly or through a chain of ownership described in section 958(a))

by the person (or, in the case of a domestic pass-through owner, by the person's domestic pass-through entity) from, or an inclusion under sections 951(a)(1)(B) and 956 with respect to, a deferred foreign income corporation and paid during, or included with respect to, the deferred foreign income corporation's inclusion year.

(ii) *Net income tax.* For purposes of this paragraph (g)(10), the term *net income tax* means the regular tax liability (as defined in section 26(b)) reduced by the credits allowed under subparts A, B, and D of part IV of subchapter A of chapter 1 of subtitle A of the Internal Revenue Code.

(iii) *Foreign tax credits.* The foreign tax credit disregarded in determining net income tax determined under paragraph (g)(10)(i)(B) of this section includes the credit for foreign income taxes deemed paid with respect to section 965(a) inclusions or foreign income taxes deemed paid with respect to a dividend, including a distribution that would have been treated as a dividend in the absence of section 965. The foreign tax credit disregarded under paragraph (g)(10)(i)(B) of this section also includes the credit for foreign income taxes imposed on distributions of section 965(a) previously taxed earnings and profits or 965(b) previously taxed earnings and profits made in the taxable year in which the person includes a section 965(a) inclusion in income.

§ 1.965–8 Affiliated groups (including consolidated groups).

(a) *Scope.* This section provides rules for applying section 965 and the section 965 regulations to members of an affiliated group (as defined in section 1504(a)), including members of a consolidated group (as defined in § 1.1502–1(h)). Paragraph (b) of this section provides guidance regarding the application of section 965(b)(5) to determine the section 965(a) inclusion amounts of a member of an affiliated group. Paragraph (c) of this section provides guidance for designating the source of aggregate unused E&P deficits. Paragraph (d) provides rules regarding earning and profits and stock basis adjustments. Paragraph (e) of this section provides rules that treat members of a consolidated group as a single person for certain purposes. Paragraph (f) of this section provides definitions that apply for purposes of this section. Paragraph (g) of this section provides examples illustrating the application of this section.

(b) *Reduction of E&P net surplus shareholder's pro rata share of the section 965(a) earnings amount of a deferred foreign income corporation by the allocable share of the applicable share of the aggregate unused E&P deficit*—(1) *In general.* This paragraph (b) applies after the application of § 1.965–1(b)(2) for purposes of determining the section 965(a) inclusion amount with respect to a deferred foreign income corporation of a section 958(a) U.S. shareholder that is both an E&P net surplus shareholder and a member of an affiliated group in which not all members are members of the same consolidated group. If this paragraph (b) applies, the U.S. dollar amount of the section 958(a) U.S. shareholder's pro rata share of the section 965(a) earnings amount of the deferred foreign income corporation is further reduced (but not below zero) by the deferred foreign income corporation's allocable share of the section 958(a) U.S. shareholder's applicable share of the affiliated group's aggregate unused E&P deficit.

(2) *Consolidated group as part of an affiliated group.* If some, but not all, members of an affiliated group are members of a consolidated group, then the consolidated group is treated as a single member of the affiliated group for purposes of § 1.965–1(b)(2) and paragraph (b)(1) of this section.

(c) *Designation of portion of excess aggregate foreign E&P deficit taken into account*—(1) *In general.* This paragraph (c) provides rules for designating the source of an aggregate unused E&P deficit of an affiliated group that is not also a consolidated group taken into account under section 965(b)(5) and paragraph (b) of this section if the amount described in paragraph (f)(1)(i)(A) of this section with respect to the affiliated group exceeds the amount described in paragraph (f)(1)(i)(B) of this section with respect to the affiliated group. If this paragraph (c)(1) applies, each member of the affiliated group that is an E&P net deficit shareholder must designate by maintaining in its books and records a statement (identical to the statement maintained by all other such members) setting forth the portion of the excess aggregate foreign E&P deficit of the E&P net deficit shareholder taken into account under section 965(b)(5) and paragraph (b) of this section. See § 1.965–2(d)(2)(ii)(B) for a rule for designating the portion of a section 958(a) U.S. shareholder's pro rata share of a specified E&P deficit of an E&P deficit foreign corporation taken into account under section 965(b), § 1.965–1(b)(2), and paragraph (b) of this section, as applicable.

(2) *Consolidated group as part of an affiliated group.* If some, but not all, members of an affiliated group are properly treated as members of a consolidated group, then the consolidated group is treated as a single member of the affiliated group for purposes of applying paragraph (c)(1) of this section.

(d) *Adjustments to earning and profits and stock basis.*

(1) [Reserved]

(2) *Consolidated groups.* See § 1.1502–33(d)(1) for adjustments to members' earnings and profits and § 1.1502–32(b)(3) for adjustments to members' basis.

(e) *Treatment of a consolidated group as a single section 958(a) U.S. shareholder or a single person*—(1) *In general.* All members of a consolidated group that are section 958(a) U.S. shareholders of a specified foreign corporation are treated as a single section 958(a) U.S. shareholder for purposes of section 965(b), § 1.965–1(b)(2), and § 1.965–3. Furthermore, all members of a consolidated group are treated as a single person for purposes of paragraphs (h), (k), and (n) of section 965 and § 1.965–7. Thus, for example, any election governed by section 965(h) and § 1.965–7(b) must be made by the agent (within the meaning of § 1.1502–77) of the group as a single election on behalf of all members of the consolidated group. Similarly, the determination of whether the transfer of assets by one member to a non-member of the consolidated group would constitute an acceleration event under section § 1.965–7(b)(3)(ii)(B) takes into account all of the assets of the consolidated group, which for purposes of this determination, includes all of the assets of each consolidated group member. In analyzing issues relating to the transfer of assets of a consolidated group, appropriate adjustments are made to prevent the duplication of assets or asset value.

(2) *Limitation.* Paragraph (e)(1) of this section does not apply to treat all members of a consolidated group as a single section 958(a) U.S. shareholder or a single person, as applicable, for purposes of determining the amount of any member's inclusion under section 951 (including a section 965(a) inclusion), the foreign income taxes deemed paid with respect to a section 965(a) inclusion (see sections 960 and 902), or any purpose other than those specifically listed in paragraph (e)(1) of this section or another provision of the section 965 regulations.

(3) *Determination of section 965(c) deduction amount.* For purposes of determining the section 965(c) deduction amount of any section 958(a) U.S. shareholder that is a member of a consolidated group, the aggregate

foreign cash position of the section 958(a) U.S. shareholder is equal to the aggregate section 965(a) inclusion amount of the section 958(a) U.S. shareholder multiplied by the group cash ratio of the consolidated group.

(f) *Definitions.* This paragraph (f) provides definitions that apply for purposes of applying the section 965 regulations to members of an affiliated group, including members of a consolidated group.

(1) *Aggregate unused E&P deficit*—(i) *General rule.* The term *aggregate unused E&P deficit* means, with respect to an affiliated group, the lesser of—

(A) The sum of the excess aggregate foreign E&P deficit with respect to each E&P net deficit shareholder that is a member of the affiliated group, or

(B) The amount determined under paragraph (f)(3)(ii) of this section.

(ii) *Reduction with respect to E&P net deficit shareholders that are not wholly owned by the affiliated group.* If the group ownership percentage of an E&P net deficit shareholder is less than 100 percent, the amount of the excess aggregate foreign E&P deficit with respect to the E&P net deficit shareholder that is taken into account under paragraph (f)(1)(i) of this section is the product of the group ownership percentage multiplied by the excess aggregate foreign E&P deficit.

(2) *Allocable share.* The term *allocable share* means, with respect to a deferred foreign income corporation and an E&P net surplus shareholder's applicable share of an aggregate unused E&P deficit of an affiliated group, the product of the E&P net surplus shareholder's applicable share of the affiliated group's aggregate unused E&P deficit and the ratio described in § 1.965–1(f)(11) with respect to the deferred foreign income corporation.

(3) *Applicable share.* The term *applicable share* means, with respect to an E&P net surplus shareholder and an aggregate unused E&P deficit of an affiliated group, the amount that bears the same proportion to the affiliated group's aggregate unused E&P deficit as—

(i) The product of—

(A) The E&P net surplus shareholder's group ownership percentage, multiplied by

(B) The amount that would (but for section 965(b)(5) and paragraph (b) of this section) constitute the E&P net surplus shareholder's aggregate section 965(a) inclusion amount, bears to

(ii) The aggregate amount determined under paragraph (f)(3)(i) of this section with respect to all E&P net surplus shareholders that are members of the group.

(4) *Consolidated group aggregate foreign cash position.* The term *consolidated group aggregate foreign cash position* means, with respect to a consolidated group, the aggregate foreign cash position (as defined in § 1.965–1(f)(8)(i)) determined by treating each member of the consolidated group that is a section 958(a) U.S. shareholder as a single section 958(a) U.S. shareholder pursuant to paragraph (e)(1) of this section.

(5) *E&P net deficit shareholder.* The term *E&P net deficit shareholder* means a section 958(a) U.S. shareholder that has an excess aggregate foreign E&P deficit.

(6) *E&P net surplus shareholder.* The term *E&P net surplus shareholder* means a section 958(a) U.S. shareholder that would (but for section 965(b)(5) and paragraph (b) of this section) have an aggregate section 965(a) inclusion amount greater than zero.

(7) *Excess aggregate foreign E&P deficit.* The term *excess aggregate foreign E&P deficit* means, with respect to a section 958(a) U.S. shareholder, the amount, if any, by which the amount described in § 1.965–1(f)(9)(i) with respect to the section 958(a) U.S. shareholder exceeds the amount described in § 1.965–1(f)(9)(ii) with respect to the section 958(a) U.S. shareholder.

(8) *Group cash ratio.* The term *group cash ratio* means, with respect to a consolidated group, the ratio of—

(i) The consolidated group aggregate foreign cash position, to

(ii) The sum of the aggregate section 965(a) inclusion amounts of all members of the consolidated group.

(9) *Group ownership percentage.* The term *group ownership percentage* means, with respect to a section 958(a) U.S. shareholder that is a member of an affiliated group, the percentage of the value of the stock of the United States shareholder which is held by other includible corporations in the affiliated group. Notwithstanding the preceding sentence, the group ownership percentage of the common parent of the affiliated group is 100 percent. Any term used in this paragraph (f)(9) that is also used in section 1504 has the same meaning as when used in such section. Additionally, if the term is used in the context of a rule for which all members of a consolidated group are treated as a single section 958(a) U.S. shareholder under paragraph (e)(1) of this section, then the group ownership percentage is determined solely with respect to the value of the stock of the common parent of the consolidated group held by other includible corporations that are not members of the consolidated group.

(g) *Examples.* The following examples illustrate the application of this section.

Example 1. (1) *Application of affiliated group rule.* (i) *Facts.* (A) *In general.* USP owns all of the stock of USS1, USS2, and USS3. Each of USP, USS1, USS2, and USS3 is a domestic corporation and is a member of an affiliated group of which USP is the common parent (the ''USP Group''). The USP Group has not elected to file a consolidated federal income tax return. USS1 owns all of the stock of CFC1 and CFC2, USS2 owns all of the stock of CFC3, and USS3 owns all of the stock of CFC4. Each of CFC1, CFC2, CFC3, and CFC4 is a controlled foreign corporation within the meaning of section 957(a), and, therefore, each is a specified foreign corporation under section 965(e) and § 1.965–1(f)(45). Each of USP, USS1, USS2, USS3, CFC1, CFC2, CFC3, and CFC4 has the calendar year as its taxable year.

(B) *Facts relating to section 965.* CFC1 and CFC3 are deferred foreign income corporations with section 965(a) earnings amounts of $600x and $300x, respectively. CFC1 and CFC3 have cash positions of $0x and $50x, respectively, on each of their cash measurement dates. CFC2 and CFC4 are E&P deficit foreign corporations with specified E&P deficits of $400x and $100x, respectively. CFC2 and CFC4 have cash positions of $100x and $50x, respectively, on each of their cash measurement dates. The cash positions all consist solely of cash. CFC1, CFC2, CFC3, and CFC4 all use the U.S. dollar as their functional currency.

(ii) *Analysis.* (A) *Section 965(a) inclusion amounts before application of section 965(b)(5).* USS1 is a section 958(a) U.S. shareholder with respect to CFC1 and CFC2; USS2 is a section 958(a) U.S. shareholder with respect to CFC3; and USS3 is a section 958(a) U.S. shareholder with respect to CFC4. USS1's pro rata share of CFC1's section 965(a) earnings amount is $600x. Under section 965(b)(3)(A) and § 1.965–1(f)(9), USS1's aggregate foreign E&P deficit is $400x, the lesser of the aggregate of USS1's pro rata share of the specified E&P deficit of each E&P deficit foreign corporation ($400x) and the amount described in § 1.965–1(f)(9)(ii) with respect to USS1 ($600x). Under section 965(b) and § 1.965–1(b)(2), in determining its section 965(a) inclusion amount with respect to CFC1, USS1 reduces its pro rata share of the U.S. dollar amount of section 965(a) earnings amount of CFC1 by CFC1's allocable share of USS1's aggregate foreign E&P deficit. CFC1's allocable share of USS1's aggregate foreign E&P deficit is $400x, which is the product of USS1's aggregate foreign E&P deficit ($400x) and 1, which is the ratio determined by dividing USS1's pro rata share of the section 965(a) earnings amount of CFC1 ($600x), by the amount described in § 1.965–1(f)(9)(ii) with respect to USS1 ($600x). Accordingly, under section 965(b) and § 1.965–1(b)(2) (before applying section 965(b)(5) and paragraph (b) of this section), USS1's section 965(a) inclusion amount with respect to CFC1 would be $200x (USS1's pro rata share of the section 965(a) earnings amount of CFC1 of $600x reduced by CFC1's allocable share of USS1's aggregate foreign E&P deficit of $400x). Under section 965(b) and § 1.965–

1(b)(2) (before applying section 965(b)(5) and paragraph (b) of this section), USS2's section 965(a) inclusion amount with respect to CFC3 would be $300x (USS2's pro rata share of the section 965(a) earnings amount of CFC3).

(B) *Application of section 965(b)(5)*—(*1*) *Determination of E&P net surplus shareholders and E&P net deficit shareholders.* USS1 is an E&P net surplus shareholder because it would have an aggregate section 965(a) inclusion amount of $200x but for the application of section 965(b)(5) and paragraph (b) of this section. USS2 is also an E&P net surplus shareholder because it would have an aggregate section 965(a) inclusion amount of $300x but for the application of section 965(b)(5) and paragraph (b) of this section. USS3 is an E&P net deficit shareholder because it has an excess aggregate foreign E&P deficit of $100x.

(*2*) *Determining section 965(a) inclusion amounts under section 965(b)(5).* Under section 965(b) and paragraph (b) of this section, for purposes of determining the section 965(a) inclusion amount of a section 958(a) U.S. shareholder with respect to a deferred foreign income corporation, if, after applying § 1.965–1(b)(2), the section 958(a) U.S. shareholder is an E&P net surplus shareholder, then the U.S. dollar amount of the section 958(a) U.S. shareholder's pro rata share of the section 965(a) earnings amount of the deferred foreign income corporation is further reduced (but not below zero) by the deferred foreign income corporation's allocable share of the section 958(a) U.S. shareholder's applicable share of the affiliated group's aggregate unused E&P deficit. USS3 is the only E&P net deficit shareholder in the USP Group, and, therefore, the aggregate unused E&P deficit of the USP Group is equal to USS3's excess aggregate foreign E&P deficit ($100x). The applicable share of the USP Group's aggregate unused E&P deficit of each of USS1 and USS2, respectively, is an amount that bears the same proportion to the USP Group's aggregate unused E&P deficit as the product of the group ownership percentage of USS1 and USS2, respectively, multiplied by the amount that would (but for section 965(b)(5) and paragraph (b) of this section) constitute the aggregate section 965(a) inclusion amount of USS1 and USS2, respectively, bears to the aggregate of such amounts with respect to both USS1 and USS2. Therefore, USS1's applicable share of the USP Group's aggregate unused E&P deficit is $40 ($100x × ($200x/($200x + $300x))) and USS2's applicable share of the USP Group's aggregate unused E&P deficit is $60x ($100x × ($300x/($200x + $300x))). Because USS1 is a section 958(a) U.S. shareholder with respect to only one deferred foreign income corporation, the entire $60x of USS1's applicable share of the USP Group's aggregate unused E&P deficit is treated as CFC1's allocable share of USS1's applicable share of the USP Group's aggregate unused E&P deficit, and thus USS1's section 965(a) inclusion amount with respect to CFC1 is reduced to $160x ($200x − $40x). Because USS2 is a section 958(a) U.S. shareholder with respect to only one deferred foreign income corporation, the entire $60x of USS2's applicable share of the USP Group's aggregate unused E&P deficit is treated as CFC3's allocable share of USS2's applicable share of the USP Group's aggregate unused E&P deficit, and thus USS2's section 965(a) inclusion amount with respect to CFC3 is reduced to $240x ($300x − $60x).

(C) *Aggregate foreign cash position.* Under section 965(c) and § 1.965–1(c), a section 958(a) U.S. shareholder that includes a section 965(a) inclusion amount in income is allowed a deduction equal to the section 965(c) deduction amount. The section 965(c) deduction amount is computed by taking into account the aggregate foreign cash position of the section 958(a) U.S. shareholder. Under § 1.965–1(f)(8)(i), the aggregate foreign cash position of USS1 is $100x, and the aggregate foreign cash position of USS2 is $50x.

(D) *Section 965(c) deduction amount.* The section 965(c) deduction amount of USS1 is $102x, which is equal to (i) USS1's 8 percent rate equivalent percentage (77.1428571%) of its 8 percent rate amount for USS1's 2017 year ($60x ($160x − $100x)), plus USS1's 15.5 percent rate equivalent percentage (55.7142857%) of its 15.5 percent rate amount for USS1's 2017 year ($100x). The section 965(c) deduction amount of USS2 is $174.43x, which is equal to (i) USS2's 8 percent rate equivalent percentage (77.1428571%) of its 8 percent rate amount for USS2's 2017 year ($190x ($240x − $50x)), plus USS2's 15.5 percent rate equivalent percentage (55.7142857%) of its 15.5 percent rate amount for USS2's 2017 year ($50x). Because USS3 has no section 965(a) inclusion amount, it has no section 965(c) deduction amount and therefore is not allowed a section 965(c) deduction.

Example 2. (2) *Application to members of a consolidated group.* (i) *Facts.* The facts are the same as in paragraph (g)(1)(i) of this section (the facts in *Example 1*), except that the USP Group has elected to file a consolidated return.

(ii) *Analysis*—(A) *Section 965(a) inclusion amount*—(*1*) *Single section 958(a) U.S. shareholder treatment.* Because each of USS1, USS2, and USS3 is a section 958(a) U.S. shareholder of a specified foreign corporation and is a member of a consolidated group, paragraph (e)(1) of this section applies to treat USS1, USS2, and USS3 as a single section 958(a) U.S. shareholder for purposes of section 965(b) and § 1.965–1(b)(2).

(*2*) *Determination of inclusion amount.* The single section 958(a) U.S. shareholder composed of USS1, USS2, and USS3 is a section 958(a) U.S. shareholder with respect to CFC1, CFC2, CFC3, and CFC4. Under § 1.965–1(b)(2), in determining USS1's section 965(a) inclusion amount, the single section 958(a) U.S. shareholder decreases its pro rata share of the U.S. dollar amount of the section 965(a) earnings amount of CFC1 by CFC1's allocable share of the aggregate foreign E&P deficit of the single section 958(a) U.S. shareholder. CFC1's allocable share of the aggregate foreign E&P deficit is $333.33x, which is the product of the aggregate foreign E&P deficit of the single section 958(a) U.S. shareholder ($500x ($400x + $100x)) and .67, which is the ratio determined by dividing its pro rata share of the section 965(a) earnings amount of CFC1 ($600x) by the amount described in § 1.965–1(f)(9)(ii) with respect to the single section 958(a) U.S. shareholder ($900x ($600x + $300x)). Therefore, USS1's section 965(a) inclusion amount with respect to CFC1 is $266.67 (its pro rata share of the section 965(a) earnings amount of CFC1 ($600) less CFC1's allocable share of the aggregate foreign E&P deficit of the single section 958(a) U.S. shareholder ($333.33x)). Similarly, under § 1.965–1(b)(2), in determining the section 965(a) inclusion amount of USS2, the single section 958(a) U.S. shareholder decreases its pro rata share of the U.S. dollar amount of the section 965(a) earnings amount of CFC3 by CFC3's allocable share of the aggregate foreign E&P deficit of the single section 958(a) U.S. shareholder. CFC3's allocable share of the aggregate foreign E&P deficit is $166.67x, which is the product of the aggregate foreign E&P deficit of the single section 958(a) U.S. shareholder ($500x) and .33, which is the ratio determined by dividing its pro rata share of the section 965(a) earnings amount of CFC3 ($300x) by the amount described in § 1.965–1(f)(9)(ii) with respect to the single section 958(a) U.S. shareholder ($900x ($600x + $300x)). Therefore, USS2's section 965(a) inclusion amount with respect to CFC3 is $133.33x (its pro rata share of the section 965(a) earnings amount of CFC3 ($300x) less CFC3's allocable share of the aggregate foreign E&P deficit of the single section 958(a) U.S. shareholder ($166.67x)).

(B) *Consolidated group aggregate foreign cash position.* Because USS1 and USS2 are members of a consolidated group, the aggregate foreign cash position of each of USS1 and USS2 is determined under paragraph (e)(3) of this section. Under paragraph (e)(3) of this section, the aggregate foreign cash position of each of USS1 and USS2 is equal to the aggregate section 965(a) inclusion amount of USS1 and USS2, respectively, multiplied by the group cash ratio of the USP Group, as determined pursuant to paragraph (f)(8) of this section. The group cash ratio of the USP Group is .50, which is the ratio of the USP Group's consolidated group aggregate foreign cash position ($200x ($50x + $100x + $50x)) and the sum of the aggregate section 965(a) inclusion amounts of all members of the USP Group ($400x ($266.67x + $133.33x)). Therefore, under paragraph (e)(3) of this section, the aggregate foreign cash positions of USS1 and USS2 are, respectively, $133.34x ($266.67x × ($200x/$400x)) and $66.67 ($133.33x × ($200x/400x)).

(C) *Section 965(c) deduction amount.* The section 965(c) deduction amount of USS1 is $177.14x, which is equal to (i) USS1's 8 percent rate equivalent percentage (77.1428571%) of its 8 percent rate amount for USS1's 2017 year ($133.33x ($266.67x − $133.34x)), plus USS1's 15.5 percent rate equivalent percentage (55.7142857%) of its 15.5 percent rate amount for USS1's 2017 year ($133.34x). The section 965(c) deduction amount of USS2 is $88.56x, which is equal to (i) USS2's 8 percent rate equivalent percentage (77.1428571%) of its 8 percent rate amount for USS2's 2017 year ($66.66x

($133.33x − $66.67x)), plus USS2's 15.5 percent rate equivalent percentage (55.7142857%) of its 15.5 percent rate amount for USS2's 2017 year ($66.67x). Because USS3 has no section 965(a) inclusion amount, it has no section 965(c) deduction amount and therefore is not allowed a section 965(c) deduction.

§ 1.965–9 Applicability dates.

(a) *In general.* Sections 1.965–1 through 1.965–8 apply beginning the last taxable year of a foreign corporation that begins before January 1, 2018, and with respect to a United States person, beginning the taxable year in which or with which such taxable year of the foreign corporation ends.

(b) *Applicability dates for rules disregarding certain transactions.* Section 1.965–4 applies regardless of whether, with respect to a foreign corporation, the transaction, effective date of a change in method of accounting, effective date of an entity classification election, or specified payment described in § 1.965–4 occurred before the first day of the foreign corporation's last taxable year that begins before January 1, 2018, or, with respect to a United States person, the transaction, effective date of a change in method of accounting, effective date of an entity classification election, or specified payment described in § 1.965–4 occurred before the first day of the taxable year of the United States person in which or with which the taxable year of the foreign corporation ends.

■ **Par. 5.** Section 1.986(c)–1 is added to read as follows:

§ 1.986(c)–1 Coordination with section 965.

(a) *Amount of foreign currency gain or loss.* Foreign currency gain or loss with respect to distributions of section 965(a) previously taxed earnings and profits (as defined in § 1.965–1(f)(39)) is determined based on movements in the exchange rate between December 31, 2017, and the time such distributions are made.

(b) *Section 965(a) previously taxed earnings and profits.* Any gain or loss recognized under section 986(c) with respect to distributions of section 965(a) previously taxed earnings and profits is reduced in the same proportion as the reduction by a section 965(c) deduction amount (as defined in § 1.965–1(f)(42)) of the section 965(a) inclusion amount (as defined in § 1.965–1(f)(38)) that gave rise to such section 965(a) previously taxed earnings and profits.

(c) *Section 965(b) previously taxed earnings and profits.* Section 986(c) does not apply with respect to distributions of section 965(b) previously taxed earnings and profits (as defined in § 1.965–1(f)(40)).

(d) *Applicability dates.* The section applies beginning the last taxable year of a foreign corporation that begins before January 1, 2018, and with respect to a United States person, for the taxable year in which or with which such taxable year of the foreign corporation ends.

Kirsten Wielobob,

Deputy Commissioner for Services and Enforcement.

Approved: December 19, 2018.

David J. Kautter,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2019–00265 Filed 2–4–19; 8:45 am]

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Part III

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Copyright Royalty Board

37 CFR Part 385

Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III); Final Rule

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 385

[Docket No. 16–CRB–0003–PR (2018–2022)]

Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords 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 making and distributing phonorecords for the period beginning January 1, 2018, and ending on December 31, 2022.

DATES:

Effective Date: February 5, 2019.

Applicability Date: The regulations apply to the license period beginning January 1, 2018, and ending December 31, 2022.

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–0003–PR (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:

Final Determination

The Copyright Royalty Judges (Judges) commenced the captioned proceeding to set royalty rates and terms to license the copyrights of songwriters and publishers in musical works made and distributed as physical phonorecords, digital downloads, and on-demand digital streams. *See* 81 FR 255 (Jan. 5, 2016). The rates and terms determined herein shall be effective during the rate period January 1, 2018, through December 31, 2022. Under the Copyright Act, royalty rates for uses of musical works shall end ''on the effective date of successor rates and terms, or such other period as the parties may agree.'' 17 U.S.C. 115(c)(3)); The Judges included the designation (2018–2022) in the docket number for this proceeding for the purpose of designating the relevant five-year period with the knowledge that affected parties may agree to successor rates and terms for a different or additional period. In this proceeding, each party included in its Proposed Findings of Fact (PFF) and Proposed Conclusions of Law (PCL) a designation of the rate period as January 1, 2018, through December 31, 2022. The Judges, therefore, adopt that agreed rate period.

For the reasons detailed in this Determination,[1] the Judges establish the following section 115 royalty rate structure, and rates, for the period 2018 through 2022.

For licensing of musical works for all service offerings, the all-in rate for performances and mechanical reproductions shall be the greater of the percent of service revenue and Total Content Cost (TCC) rates in the following table.

2018–2022 ALL-IN ROYALTY RATES

	2018	2019	2020	2021	2022
Percent of Revenue	11.4	12.3	13.3	14.2	15.1
Percent of TCC	22.0	23.1	24.1	25.2	26.2

The Judges also adopt for the new rate period existing royalty floors in effect for certain streaming configurations.

In the Initial Determination issued on January 27, 2018, the Judges promulgated regulatory terms that made changes in style and substance of the regulatory terms governing administration of the section 115 licenses. In February 2018, the Judges received a motion from Copyright Owners (Owners' Motion) and a joint motion from four Services (Services' Motion) seeking clarification of regulatory terms promulgated with the Initial Determination.[2] The Judges treated both motions as general motions governed by 37 CFR 350.4 and issued their ruling on the motions by separate Order dated October 29, 2018. The Judges incorporate the reasoning and rulings in that Order and to the extent necessary for clarity, include portions of that Order in this Final Determination. The final text of the amended regulations is set out below this **SUPPLEMENTARY INFORMATION** section.

I. Background

A. Statute and Regulations

The Copyright Act (Act) establishes a compulsory license for use of musical works in the making and distribution of phonorecords. 17 U.S.C. 115. For purposes of section 115, phonorecords include physical and digital sound recordings embodying the protected musical works, digital sound recordings that may be downloaded or streamed on demand by a listener, and downloaded telephone ringtones. Entities offering bundled music services and digital music lockers are also permitted to do so under the section 115 compulsory license.

The section 115 compulsory license created in 1909, reflected Congress's attempt to balance the exclusive rights of owners of copyrighted musical works with the public's interest in access to the protected works. However, Congress made that right subject to a compulsory license because of concern about monopolistic control of the piano roll market (and another burgeoning invention, phonorecords). 17 U.S.C. 1

[1] This rate determination is not unanimous. Judge Strickler prepared, to a disproportionately large degree, the initial drafts of this Determination. Notwithstanding the Judges' concurrence on most of the factual recitation and economic analysis, they were unable to reach consensus on their conclusions. Judge Strickler's dissenting opinion is appended to and is a part of this rate determination. Note that all redactions in this publication were made by the Copyright Royalty Judges and not by the **Federal Register**.

[2] National Music Publishers' Association and Nashville Songwriters Association International together filed the Copyright Owners' Motion for Clarification or Correction . . . (Owners' Motion). Amazon Digital Services, LLC; Google Inc.; Pandora Media, Inc. and Spotify USA Inc. filed a Joint Motion for Rehearing to Clarify the Regulations (Services' Motion). The Judges did not treat the motions as motions for rehearing under 17 U.S.C. 803(c)(2), as neither requested a literal rehearing of evidence or legal argument.

(1909); *see also* H.R. Rep. No. 60–2222, at 9 (1909). This license is often referred to as the ''phonorecords'' license, but is also identified, synonymously, as the ''mechanical'' license.

Congress revised the mechanical license in its 1976 general revision of the copyright laws. The 1976 revision also created a new entity, the Copyright Royalty Tribunal (CRT), to conduct periodic proceedings to adjust the royalty rate for the license.[3]

In 1995, Congress passed the Digital Performance Right in Sound Recordings Act (DPRA),[4] extending the mechanical license to ''digital phonorecord deliveries'' (DPDs), which Congress defined as each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. 17 U.S.C. 115(d). Accordingly, the section 115 mechanical license now covers DPDs, in addition to physical copies.

By statute, the Judges commence a proceeding to determine royalty rates and terms for the section 115 license every fifth year. *See* 17 U.S.C. 803(b)(1)(A)(i)(V). The Act favors negotiated settlements among interested parties, but in absence of a settlement, the Judges must determine ''reasonable rates and terms of royalty payments. . . .'' The Judges must further set rates that comport with the itemized statutory policy considerations described in section 801(b)(1) of the Act. Rates and terms for the mechanical license are codified in chapter III, part 385, title 37, Code of Federal Regulations.

As currently configured, the applicable regulations are divided into three subparts.[5] Subpart A regulations govern licenses for reproductions of musical works (1) in physical form (vinyl albums, compact discs, and other physical recordings), (2) in digital form when the consumer purchases a permanent digital copy (download) of the phonorecord (PDD), and (3) inclusion of a musical work in a purchased telephone ringtone. Subpart B regulations include licenses for (1) interactive streaming and limited downloads. The regulations in subpart C relate to limited offerings, mixed bundles, music bundles, paid locker services, and purchased content locker services. The current regulations resulted from a negotiated settlement of the previous mechanical license proceeding.

B. Prior Proceedings

Until 1976, Congress legislated royalty rates for the mechanical reproduction of musical works and notes. In 1980, the CRT conducted the first contested proceeding to set rates for the section 115 compulsory license. The CRT increased the then-existing rate by more than 45%, from the statutory 2.75¢ rate per phonorecord to 4¢ per phonorecord. 45 FR 63 (Jan. 2, 1980).[6] By 1986, the CRT had increased the mechanical rate to the greater of 5¢ per musical work or .95¢ per minute of playing time or fraction thereof. 46 FR 66267 (Dec. 23, 1981); *see* 37 CFR 255.3(a)–(c). The next adjustment of the section 115 rates was scheduled to begin in 1987. However, the parties entered into a settlement setting the rate at 5.25¢ per track beginning on January 1, 1988, and the CRT established a schedule of rate increases generally based on positive limited percentage changes in the Consumer Price Index every two years over the following 10 years. *See* 52 FR 22637 (June 15, 1987). The rate increased until 1996, when the rate was set at 6.95¢ per track or 1.3¢ per minute of playing time or fraction thereof. *See* 37 CFR 255.3(d)–(h).

The rates set by the 1987 settlement were to expire on December 31, 1997. The Librarian of Congress announced a negotiation period for copyright owners and users of the section 115 license in late 1996. The parties reached a settlement regarding rates for another ten-year period to end in 2008.[7] Under the settlement, ultimately adopted by the Librarian, the parties agreed to a rate for physical phonorecords of 7.1¢ per track and established a schedule for fixed rate increases every two years for a 10-year period. At the beginning of January 2006, the mechanical rate was the larger of 9.1¢ per track or 1.75¢ per minute of playing time or fraction thereof. *See* 37 CFR 255.3(i)–(m); *see also* 63 FR 7288 (Feb. 13, 1998).

In 2006, with expiration of the previous settlement term nearing, the Judges commenced a proceeding to adjust the mechanical rates under section 115. On January 26, 2009, they issued a Determination, effective March 1, 2009. In that Determination, the Judges noted that the parties had settled their dispute regarding rates and terms for conditional downloads, interactive streaming, and incidental digital phonorecord deliveries (*i.e.,* rates in the new subpart B) (2008 Settlement). *See* Mechanical and Digital Phonorecord Delivery Rate Determination, 74 FR 4510, 4514 (Jan. 26, 2009) (*Phonorecords I*). The parties who negotiated the 2008 Settlement included the National Music Publishers Association (NMPA) and the Digital Music Association (DiMA), the trade association representing its member streaming services. Written Direct Testimony of Rishi Mirchandani, Trial Ex. 1, at ¶ 59 (Mirchandani WDT).

The 2008 Settlement rates that the Judges adopted maintained the existing rate and rate structure at the greater of 9.1¢ per song or 1.75¢ per minute of playing time (or fraction thereof) for physical phonorecords and permanent digital downloads (PDD). The Judges also adopted a license rate of 24¢ per ringtone, a newly regulated product. 74 FR at 4515. Physical sales, PDDs, and ringtones were included in subpart A of the regulations.

In 2011, the Judges commenced a proceeding to again determine section 115 royalty rates and terms. *See* 76 FR 590 (Jan. 5, 2011). The participants in that proceeding negotiated a settlement (2012 Settlement) that carried forward the existing rates and added a new subpart C to the regulations to cover several newly regulated service offering categories, *viz.,* limited offerings, mixed service bundles, music bundles, paid locker services, and purchased content locker services.[8] The Judges adopted the participants' settlement in 2013. *See* Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords, 78 FR 67938 (Nov. 13, 2013) (*Phonorecords II*).

The present section 115 proceeding is the third since the establishment of the Copyright Royalty Board (CRB) program

[3] In 1993, Congress abolished the CRT and replaced it with copyright arbitration royalty panels (CARPs). Copyright Royalty Tribunal Reform Act of 1993, Public Law 103–198, 107 Stat. 2304. In 2004, Congress abolished the CARP system and replaced it with the Copyright Royalty Judges. Copyright Royalty and Distribution Reform Act of 2004, Public Law 108–419, 118 Stat. 2341.

[4] Public Law 104–39, 109 Stat. 336.

[5] For clarity, references to the regulations applicable to the sec. 115 license are to the regulations as configured before conclusion of the present proceeding. The Judges discuss appropriate regulatory changes in section VII of this determination.

[6] The United States Court of Appeals for the District of Columbia Circuit affirmed the CRT. *Recording Industry Ass'n. of America* v. *Copyright Royalty Tribunal,* 662 F.2d 1 (D.C. Cir. 1981) (*1981 Phonorecords Appeal*) (remanded on other grounds).

[7] The Librarian initiated the 1996 proceeding during the CARP period, when controversies regarding royalty rates and terms were referred to privately retained arbitrators.

[8] Once again, the parties to the negotiations included the NMPA and DiMA. Mirchandani WDT at ¶ 59.

under the Copyright Royalty and Distribution Reform Act of 2004.[9] In the *Phonorecords II* settlement, the parties agreed that any future rate determination presented to the Judges for subparts B and C service offering configurations would be a *de novo* rate determination. *See* 37 CFR 385.17, 385.26 (2016).

C. Statement of the Case

In response to the Judges' notice commencing the present proceeding, 21 entities filed Petitions to Participate.[10] The participants engaged in negotiations and discovery. On June 15, 2016, some of the participants [11] notified the Judges of a partial settlement with regard to rates and terms for physical phonorecords, PDDs, and ringtones, the service offerings covered by the extant regulations found in subpart A of part 385. The Judges published notice of the partial settlement [12] and accepted and considered comments from interested parties.[13]

On October 28, 2016, NMPA, Nashville Songwriters Association International (NSAI), and Sony Music Entertainment (SME) filed a Motion to Adopt Settlement Industry-Wide. The motion asserted that SME, NMPA, and NSAI had resolved the issue raised by SME in its response to the original notice. The Judges evaluated the remaining objection to the settlement filed by George Johnson dba GEO Music Group (GEO) and found that GEO had not established that the settlement agreement ''does not provide a reasonable basis for setting statutory rates and terms.'' *See* 17 U.S.C. 801(b)(7)(A)(iii). As a part of the second settlement, SME withdrew from this proceeding. The Judges published the agreed subpart A regulations as a Final Rule on March 28, 2017.[14]

During the course of the present proceeding, the Judges dismissed some participants and other participants withdrew. Remaining participants at the time of the hearing were NMPA and NSAI, representing songwriter and publisher copyright owners (Copyright Owners) and GEO, a songwriter/publisher/copyright owner, appearing *pro se.* Copyright licensees appearing at the hearing were Amazon Digital Services, LLC (Amazon), Apple Inc. (Apple), Google, Inc. (Google), Pandora Media, Inc. (Pandora), and Spotify USA Inc. (Spotify), (collectively, the Services).

Beginning on March 8, 2017, the Judges conducted a hearing that concluded on April 13, 2017. During the course of the hearing, the Judges heard oral testimony from 37 witnesses.[15] The Judges admitted over 1,100 exhibits, exclusive of demonstrative or illustrative materials the participants offered to explicate oral testimony. The participants submitted Proposed Findings of Fact (PFF) and Proposed Conclusions of Law (PCL) on May 12, 2017, and Replies to those filings on May 26, 2017. Under 37 CFR 351.4(b)(3), a participant may amend its rate proposal at any time up to and including the time it files proposed findings and conclusions. In this proceeding, Copyright Owners and Google filed amended rate proposals contemporaneously with their respective PFF and PCL. The parties delivered closing arguments on June 7, 2017.

Based on the record of this proceeding, the Judges have determined that the mechanical license rate shall be an All-In rate derived from a Greater-Of rate structure. Weighing the advantages and disadvantages highlighted by the participants in this proceeding, the Judges conclude that a rate that balances a percent-of-service revenue with a percent-of-TCC (total cost of content) shall be the basis for the All-In phonorecords royalty. The mechanical portion of the royalty shall be the greater of those figures, *less* the actual amount services pay for the phonorecord performance right. The Judges have no role in setting the performance right license rates. Further, performance right licensees pay the performance royalties to music publishers and songwriters. Services pay mechanical royalties primarily to music publishers.

II. Context of This Proceeding

A. Changes in Music Consumption Patterns and Revenue Allocation

In recent years, music consumption patterns have undergone profound shifts—first from purchases of physical albums to downloads of digital singles, and then from downloads to on-demand access through digital streaming services. These shifts in music consumption patterns have led to corresponding changes in the magnitude and relative mix of income streams to copyright owners; in particular, copyright owners note an increased reliance on performance royalties as compared to reproduction and distribution royalties. Witness Statement of David M. Israelite, Trial Ex. 3014, ¶ 63 (Israelite WDT).

While earlier format changes (piano rolls to wax cylinders to lacquer or vinyl discs to CDs) had altered the way households consumed music, they did not fundamentally alter the distribution of music. For all these music formats, copyright owners distributed music to consumers physically, either directly or through record stores. In addition, with the exception of ''singles,'' after conversion to the vinyl format, purveyors of music typically distributed a bundle of songs (an album). Witness Statement of Bart Herbison, Trial Ex. 3015, ¶ 20 (Herbison WDT).

By the early 2000s, digital data compression and higher-bandwidth internet connections allowed relatively fast transmission of recorded music files over the internet, drastically altering the distribution and consumption of music. Music services [16] began to offer individual tracks or songs online as ''digital downloads.'' In 2008, approximately 435 million albums were sold in the U.S. (both digital and physical). By 2015, that number fell to 249 million.[17] Sales of singles, by

[9] Public Law 108–419, 118 Stat. 2341.

[10] Initial Participants were: Amazon Digital Services, LLC (Amazon); Apple, Inc. (Apple); Broadcast Music, Inc. (BMI); American Society of Composers, Authors and Publishers (ASCAP); David Powell; Deezer S.A. (Deezer); Digital Media Association (DiMA); Gear Publishing Company (Gear); George Johnson d/b/a/GEO Music Group (GEO); Google, Inc. (Google); Music Reports, Inc. (MRI); Pandora Media, Inc. (Pandora); Recording Industry Association of America, Inc. (RIAA); Rhapsody International Inc.; SoundCloud Limited; Spotify USA Inc.; ''Copyright Owners'' comprised of National Music Publishers Association (NMPA), The Harry Fox Agency (HFA), Nashville Songwriters Association International (NSAI), Church Music Publishers Association (CMPA), Songwriters of North America (SONA), Omnifone Group Limited; and publishers filing jointly, Universal Music Group (UMG), Sony Music Entertainment (SME), Warner Music Group (WMG).

[11] The settling parties were: NMPA, NSAI, HFA, UMG, and WMG. As part of the settlement agreement, UMG and WMG withdrew from further participation in this proceeding.

[12] *See* 81 FR 48371 (Jul. 25, 2016).

[13] Three parties filed comments. American Association of Independent Music (A2IM), Sony Music Entertainment (SME), and George Johnson dba GEO Music Group (GEO). A2IM urged adoption of the settlement and SME approved of all but one provision of the settlement. GEO objected to the settlement.

[14] *See* 82 FR 15297 (Mar. 28, 2017).

[15] By stipulation of the participants, the Judges also accepted and considered written testimony from six additional witnesses who did not appear. Amazon designated and other participants counter-designated testimony from the *Phonorecords I* proceeding, which was admitted as Exhibits 321 and 322.

[16] Digital download sales gained popularity in 2003 when Apple introduced the iTunes Music Store. The iTunes Store provided a convenient way for iTunes users to purchase a song or an entire album, legally, with a single click of the computer mouse. The iTunes Store also allowed users of Apple's iPod to sync songs directly to the device. Expert Report of Jui Ramaprasad, Trial Ex. 1615, at 25–26 (Ramaprasad WDT). Prior to the launch of the iTunes Music Store, virtually all music was sold as albums. Eisenach WDT at 44, n.58.

[17] Some evidence in the record suggests, however, that since 2013, with the inclusion of ''streaming

contrast, have remained fairly stable over the same period, averaging approximately one billion per year from 2008 to 2015 (with a peak of 1.4 billion in 2012). Expert Report of Jeffrey A. Eisenach, Trial Ex. 3027, at ¶ 67 & Table 4 (Eisenach WDT).

Changes in consumption patterns have had an impact on industry revenues. For example, between 2004 and 2015, record label revenues from physical sales declined from $15.3 billion to $2 billion, while digital revenues increased from $230 million to about $4.8 billion. *Id.* at ¶ 44. In 2004, over 98% of music industry revenue was the result of physical sales. Copyright and the Music Marketplace: A Report of the Register of Copyrights 70 (Feb. 2015) (Register's Report), citing RIAA-sourced chart.[18] Digital downloads made up most of the remaining revenue. *Id.* By 2013, revenues from physical sales fell to 35% of industry total revenues.[19] Digital downloads, which made up 1.5% of industry revenues in 2004, had climbed to 40% of industry revenues.

Changes in music consumption patterns have coincided with an increase in the use of musical works. Review of relevant market factors imply, however, that the ways in which those works are used currently do not compensate copyright owners as well as they did in the past. *See* Register's Report at 72–74.[20]

B. Emergence of New Streaming Services

Many diverse enterprises have launched music streaming services to meet growing consumer demand for streaming. Currently, there are at least 31 music streaming services available from 20 identifiable providers. Some of the well-known of these include: Amazon, Apple, Google (and its recently acquired YouTube), Deezer (partnered with Cricket/AT&T), iHeartRadio, Napster, Pandora, SoundCloud, Spotify, and Tidal (partnered with Sprint). Written Rebuttal Testimony of Jim Timmins, Trial Ex. 3036, ¶ 20 (Timmins WRT). Most of the companies entering the on-demand streaming music market have done so recently. *Id.* ¶ 21. In the last five years, new entrants to the market have initiated at least five interactive streaming services, joining Spotify which launched in the United States in 2011. *See id.* ¶ 22.

The largest players in the interactive streaming market by song catalog are Apple Music, Google Play, and Spotify, each of which each has a catalog that exceeds [REDACTED] million songs. Tidal, which provides an outlet for unsigned artists,[21] has a catalog of over 40 million songs. *See* Written Direct Testimony of Michael L. Katz, Trial Ex. 885, ¶ 34, Table 1 (Katz WDT). By one estimate, in 2016 there were 18 million U.S. on-demand subscribers: Spotify accounted for [REDACTED] million, followed by Apple Music (4 million), Rhapsody and Tidal (2 million each) and all others accounting for the remaining 4 million. *See id.*

Some of the services that offer music streaming are pure-play music providers, such as Spotify and Pandora.[22] Others, such as Amazon, Apple Music, and Google Play Music, are part of wider economic ''ecosystems,'' in which a music service is one part of a multi-product, multi-service aggregation of activities, including some that are also related to the provision of a retail distribution channel for music. For example, Amazon is a multi-faceted internet retail business. Amazon offers a buyers' program for an annual fee (Amazon Prime) that affords loyalty benefits to members, such as free or reduced rate shipping or faster delivery on the products members purchase. Amazon Prime reportedly has approximately [REDACTED] subscribers.[23] For its music service offering, Amazon bundles interactive streaming at no additional cost with its Prime membership. In addition to the Prime Music service offering, Amazon's U.S.-based business also includes a physical music store, a digital download store, a purchased content locker service, Amazon Music Unlimited (a full-catalog subscription music service), and Amazon Music Unlimited for Echo (a full-catalog subscription service available through a single Wi-Fi enabled device, Amazon Echo).[24] In launching Prime Music, Amazon relied on the section 115 license as it did for Amazon Music Unlimited and Amazon Music Unlimited for Echo.[25]

Google describes its ''Google Play'' offerings as its ''one-stop-shop'' for the purchase of Android applications. The Google Play Store allows users to browse, purchase, and download content, including music. Google Play Music is Google Play's entire suite of music service offerings. Google Play Music, launched in 2011, is bundled with the YouTube Red video service subscription.[26] It includes several functionalities: (1) A Music Store; (2) a cloud-based locker service; (3) an on-demand digital music streaming service; and (4) a section 114 compliant non-interactive digital radio service (in the U.S.).[27] Levine WDT, Trial Ex. 692, ¶ 43.

The evidence is conflicting regarding whether the market for streaming services is faring poorly financially or performing about the same as other emerging industries. *See, e.g.,* Timmins WRT, Trial Ex. 3036, ¶¶ 16–17; Levine WDT ¶ 16 (''streaming music services generally remain unprofitable businesses'' with content acquisition costs being ''the biggest barrier to profitability.'') For example, Spotify, one of the largest pure-play streaming services, has reportedly [REDACTED]. Katz WDS at ¶ 65. Some estimates place

equivalent'' albums, overall album consumption may have increased. *See* Katz WDT at 42.

[18] The Judges cite the Register's Report as a source of industry background, developed by the Register of Copyrights following public hearings held nationwide in 2013 and 2014. The Judges do not base their conclusions in this Determination on any background information from the Register's Report that the parties did not also present as evidence in this proceeding.

[19] Industry total revenues in this analysis include digital downloads (40%), physical sales (35%), subscription and streaming (21%), and ringtones and ringbacks (1%). Copyright and the Music Marketplace at 70, citing RIAA-sourced chart.

[20] Musical works copyright owners complain that streaming services are at least partially responsible for the paucity of revenues that the musical works generate for writers and publishers. They blame streaming services' business practices that favor growth in user base and market share over maximizing profitability. Digital services counter that they pay a substantial portion of the revenues they receive to license copyrighted works and compete with terrestrial radio, which is exempt from paying performance royalties. Digital services and broadcasters also argue that the lack of royalty compensation that makes its way to content creators is due in large part to the content creators' agreements with intermediaries, which, they argue, keep a large portion of royalties earned by content creators for their own account or to recoup advances. *Id.* at 76–77.

[21] An ''unsigned artist'' is one recording music but not under contract to a recording company.

[22] Until late 2016, Pandora operated as a noninteractive streaming service that, did not incur a compulsory license fee for mechanical royalties. Pandora recently began offering more interactive features, including a full on-demand tier. Pandora WDS Introductory Memo at 1–2; Written Direct Testimony of Christopher Phillips, Trial Ex. 877, at 8 (Phillips WDT).

[23] Amazon Prime is a $99-per-year service that offers Amazon customers access to a bundle of services including free two-day shipping, video streaming, photo storage and e-books, in addition to Prime Music. Expert Report of Glenn Hubbard, Trial Ex. 22, at 15 (Hubbard WDT).

[24] Mirchandani WDT at 5.

[25] 3/15/17 Tr. 1315–16 (Mirchandani).

[26] Google's experience with music licensing dates at least far back as 2006, when it acquired YouTube. Written Direct Testimony of Zahavah Levine, Trial Ex. 692, at 3 (Levine WDT). Google's music services were part of Google's Android Division but were recently combined within the YouTube business unit. *Id.* at 3–4.

[27] Section 114 of the Act includes requirements for the compulsory license to perform digitally sound recordings over noninteractive internet music streaming services.

Spotify's market value at more than $8 billion, suggesting perhaps, investors' expectations regarding future profits. Written Rebuttal Testimony of Marc Rysman, Trial Ex. 3032, ¶ 11, n.3 (Rysman WRT).[28] Spotify forecasts being profitable in [REDACTED]. *Id.* at ¶ 65 n.80.

C. Effects of Streaming on Publishers' and Songwriters' Earnings

Although many songwriters perform their own musical works, it is also common for songwriters to compose songs to be performed by others. Songwriters typically enter into contractual arrangements with music publishers, which promote and license the songwriters' works and collect royalties on their behalf. Music publishers and songwriters negotiate a split of the royalty payments. In some cases, songwriters are commissioned to write a song and are compensated with a flat fee for the work in exchange for giving up ownership rights to the song and any royalties it might earn.

The four largest publishers—Sony/ATV, Warner/Chappell, Universal Music Publishing Group, and Kobalt Music Publishing—collectively accounted for just over 73 percent of the top 100 radio songs tracked by Billboard[29] as of the second quarter in 2016. In addition, there are several other significant publishers, including BMG and Songs Music Publishing, and many thousands of smaller music publishers and self-publishing songwriters. *See* Katz WDT ¶ 46.

Songwriters have three primary sources of ongoing royalty income, which they generally share with music publishers: Mechanical royalties, synchronization (''synch'') royalties for use of their works in conjunction with video or film, and performance royalties.[30] *See* Katz WDT ¶ 41; Copyright and the Music Marketplace at 69. Songwriters who are also recording artists receive a share of revenues from their record labels for the fixing of the musical work in a sound recording. Sound recording royalties include those from the sale of physical and digital albums and singles, sound recording synchronization, and digital performances. *Id.* Recording artists can also derive income from live performances, sale of merchandise, and other sources. *Id.* at 69–70.

The shift in consumption from physical sales to streaming coincided with a reallocation of publisher revenue sources. In 2012, 30% of U.S. music publisher revenues came from performance royalties and 36% from mechanical royalties, with the rest coming from synch royalties and other sources. *See* Register's Report at 70. By 2014, 52% of music publisher revenues came from performance royalties[31] while 23% came from musical works mechanical royalties, with the remainder coming from synchronization royalties and other sources. *Id* at 71, n.344, *citing* NMPA press release. By one estimate, mechanical license revenues from interactive streaming services accounted for only [REDACTED] percent of total music publishing revenues in 2015. Katz WDT ¶ 42.[32]

Evidence in the present record indicates that total publishing revenue declined by [REDACTED] percent between 2013 and 2014, but increased by [REDACTED] percent between 2014 and 2015. *See* Katz WDT ¶ 58. Large publishers, such as Sony/ATV, UMPG, and Warner Chappell, were [REDACTED] in 2015, earning a combined $[REDACTED] million from U.S. publishing operations for that year. *Id.* ¶ 59.

III. The Present Rate Structure and Rates

Subpart B of the current regulations contains mechanical royalty rates payable for the delivery and offering of interactive streams and/or limited downloads. There are three product distinctions within the subpart B rate structure:

- Portable *vs.* Nonportable Services
- Bundled *vs.* Unbundled Services
- Subscription *vs.* Ad-Supported Services

37 CFR 385.13. The regulations also separate certain promotional uses for separate treatment, setting the rate for those promotional uses at zero.

Each of these offering characteristics can be combined independently with almost every other characteristic, resulting in a very complex web of rate calculations. In the 2012 Settlement, the parties structured rate calculations for both subpart B and subpart C into three arithmetic segments.

In the first step of the calculation, the parties determine the All-In royalty pool; that is, the royalty that would be payable based on a formula balancing the greater of a percent-of-service revenue and a percentage of one of two other expense measures. One expense measure if a percent-of-royalties services pay to record companies for sound recording performance rights, differing depending upon whether the sound recording licenses are pass-through or not pass-through. For certain subscription services, the percent-of service revenue is balanced against the lesser of two or three other potential mathematical outcomes.[33]

The second calculation reduces the All-In royalty pool to the ''payable'' royalty pool in a two-step process. First the parties subtract royalties the services pay for musical works performance rights from the All-In royalty established in the first calculation. This remainder is considered the payable royalty pool for certain service offerings; *viz.,* non-subscription, ad-supported, purchased content lockers, mixed service bundles, and music bundles. For subscription service offerings, whether standalone or bundled, and depending upon whether the offering is portable or non-portable, streaming only or mixed use, determining the payable royalty pool requires a balancing of the mechanical remainder against a set rate for ''qualified'' subscribers per month to determine the greater-of result. The set rate for qualified subscribers differs for each variation of subscription offering.

The final step in the rate determination for each service offering is an allocation among licensors based upon the number of plays from each licensor's catalog.[34]

The Services, the licensor participants in the present proceeding, refer to this convoluted process as the establishment of royalty rates with ''minima.'' According to the Services, these minima are designed to protect copyright owners from the potential downside of Services' business models that might

[28] In 2016, Spotify had over [REDACTED] million monthly active users, [REDACTED]% of which were in the U.S. [REDACTED] million of those U.S. users were also Premium subscribers. Written Direct Testimony of Barry McCarthy, Trial Ex. 1060, ¶ 2 (McCarthy WDT).

[29] This Billboard measure tracks songs played on AM–FM terrestrial radio broadcasters, which are not required to license the works or the sound recordings they play.

[30] Another revenue source is folio licenses, lyrics, and musical notations in written form. *See* Katz WDT ¶ 31.

[31] Performance royalties are administered primarily by Performing Rights Organizations acting as collectives and clearinghouses for songwriters and publishers as licensors, and broadcasters and streaming services as licensees.

[32] It is noteworthy that the shift from mechanical royalties to performance royalties coincides with the shift from sales of physical phonorecords (*e.g.,* CDs) and downloads, for which no performance royalty is required, to the use of interactive streaming, which pays both a mechanical royalty (when a DPD results) and a performance royalty, and to the use of noninteractive streaming, which historically pays only a performance royalty but no mechanical royalty.

[33] The lesser-of prongs include a per-subscriber per month prong and percent-of-service payments for sound recording royalties, differing depending upon whether the sound recording licenses are pass-through or not pass-through.

[34] Calculation of royalties for paid locker services varies slightly from this formula, but the complexity is similar.

minimize service revenue and thus manipulate the percent-of-service revenue rate standard. The Services, whose current royalty payments are determined under the minima prongs of the formulae, point to the minima as a reason to keep the percent-of-service revenue ''headline'' rate low, reasoning that the headline rate is not, or is rarely, binding in any event.

Notwithstanding the parties' prior agreement to the apparent complexity, the alternative calculation methods, or the variations in the descriptions of the service offerings, evidence presented in this proceeding does not support continuing the fractionalization of the rate determination for the service offerings at issue. At the conclusion of the tortured rate calculations required by the present regulations, the evidence suggests that differences in the rates Services pay are not great enough to justify the complexity of the formulae. Some of the rate determination prongs are rarely if ever triggered. Despite the myriad configurations of rate calculations, some of the service offerings are incapable of categorization under the extant rate structure. Apple and Google entered the digital music delivery marketplace by negotiating direct licenses covering several compulsory licenses, avoiding the regulatory scheme entirely.

IV. Analysis of Rate Structure Proposals

A. Parties' Proposals

1. The Services (Excluding Apple and Google)

The Services propose rates and rate structures that, while varying in their particulars, share a number of common elements. Broadly, the Services propose a rate structure that, in the main, continues the current rate structure. More particularly, the Services' proposals share core elements: (1) An ''All-In'' rate for mechanical and performance rights; (2) based upon a 10.5 percent-of-service revenue headline rate with minima; (3) *without* a ''Mechanical Floor.''

a. Amazon

In its Proposed Rates and Terms (Amazon Proposal), Amazon proposes that the rate structure as currently in the applicable regulations rollover into the 2018–22 rate period, except: (1) The per subscriber minimum and/or subscriber-based royalty floors for a ''family account'' should equal 150% of the per subscriber minimum and/or subscriber-based royalty floor for an individual account; (2) a student subscription account discount of 50% should be included in the regulations to the per subscriber minimum and subscriber-based royalty floor that would otherwise apply under the current regulations; (3) a discount for annual subscriptions equal to 16.67% of the minimum royalty rate (or rates) and subscriber-based royalty floor (or floors) that would otherwise apply under § 385.13; and (4) 15% discount to the minimum royalty rate (or rates) and subscriber-based royalty floor (or floors) to reflect a service's actual ''app store'' and carrier billing costs, not to exceed 15% for each. Amazon Proposal at 1–2.

b. Pandora

Pandora's amended proposed rates and terms (Pandora Amended Proposal),[35] seek the following changes from the current regulations: (1) Elimination of the ''Mechanical Floor;'' (2) elimination of the alternative computation of sub-minima I and II now in § 385.13 and in § 385.23 (for subparts B and C, respectively) ''in cases in which the record company is the section 115 licensee;'' (3) A broadening of the present ''not to exceed 15%'' reduction of ''Service Revenues'' in § 385.11 to reflect, *in toto,* an exclusion of costs attributable to ''obtaining'' revenue, ''including [but not expressly limited to] credit card commissions, app store commissions, and similar payment process charges;'' [36] and (4) a discount on minimum royalties for student plans ''not to exceed 50%'' off minimum royalty rates set forth in § 385.13. *Id.* at 1, 7.

c. Spotify

In its amended proposed rates and terms, Spotify proposed the following changes from the current regulations: (1) Removal of the ''Mechanical Floor'' for all licensed activity; and (2) a broadening of the present ''not to exceed 15%'' reduction of ''Service Revenues'' in § 385.11 to reflect, *in toto,* an exclusion of the actual costs attributable to ''obtaining'' revenue, ''including [but not expressly limited to] credit card commissions, app store commissions similar payment process charges, and actual carrier billing cost.'' *See* Second Amended Proposed Rates and Terms of Spotify USA Inc., *passim.*

2. Apple

Apple proposed that the Services pay $0.00091 for each nonfraudulent stream of a copyrighted musical work lasting 30 seconds or more. Apple Inc. Proposed Rates and Terms (as amended) at 3–4 (Apple Amended Proposal). Apple proposed defining a use as any play of a sound recording of a copyrighted work lasting 30 seconds or more. Additionally, Apple proposed an exemption for a ''fraudulent stream,'' which it defined as ''a stream that a service reasonably and in good-faith determines to be fraudulent.'' *Id.* at 2. For paid locker services, Apple proposes a $0.17 per subscriber fee, also as a component of an All-In musical works royalty rate that would include the ''subpart C'' royalty. *Id.* at 7–8. For purchased content locker services, Apple proposed a zero royalty fee. *Id.* at 7.

3. Google

In its amended proposed rates and terms (Google Amended Proposal),[37] Google parts company with the other Services and proposes that the rate structure ''eliminat[e] . . . different service categories'' in both subparts B and C and replace them with ''a single, greater-of rate structure between 10.5% of net service revenue and an uncapped 15-percent TCC component.'' Google Amended Proposal at 1.[38] That 15% TCC rate is reduced to 13% for pass-through licenses (*i.e.,* where a record company is the licensee under section 115, and the record company has granted streaming rights to a service). Id. at 33–34. Google's proposed rate does not include a ''Mechanical Floor.'' Similar to one of Amazon's proposals, Google also seeks a discount in rates for ''carrier billing costs'' and ''app store commissions,'' plus ''credit card commissions'' and ''similar payment process charges,'' all not to exceed 15%. *Id.* at 6 (for subpart B); 26 (for subpart C).[39] In addition, Google's proposal includes a zero rate for certain free trial periods. Id. at 35–37.

[35] The Pandora Amended Proposal superseded its original proposal filed on November 1, 2016, by adding definitions (for ''fraudulent streams'' and ''play'') that do not directly relate to the royalty rates. *See* Pandora PFF/PCL, Appx. C.

[36] Pandora does not expressly describe this change as a change in rates *per se.*

[37] The Google Amended Proposal amended its original proposal filed on November 1, 2016. Google originally proposed a subpart B rate structure that generally followed the existing structure. Google Written Direct Statement, Introductory Memorandum at 3 (Nov. 1, 2016).

[38] ''TCC'' is an industry acronym for ''Total Content Cost'', a shorthand reference to the extant regulatory language describing generally the amount paid by a service to a record company for the section 114 right to perform digitally a sound recording. Google's proposed regulatory terms retain some of the distinctions in service offerings for purposes of computing per-work royalty allocations. See, *e.g.,* id. at 29–31. This does not affect the total royalty charged to the service.

[39] Google describes this proposed change as a change in the definition of ''Service Revenue,'' unlike Amazon, which described its proposed 15% discount as a change in rates. The difference is mathematically irrelevant.

4. Copyright Owners (Excluding GEO)

The Copyright Owners proposed that the Judges adopt a unitary rate structure for all interactive streaming and limited downloads that are currently covered by subparts B and C.[40] Copyright Owners' Amended Proposed Rates and Terms, at 3 (May 11, 2017) (CO Amended Proposal). The Copyright Owners structured the proposal as the greater-of a usage charge and a per-user charge. Specifically, under the Copyright Owners' proposal, each month the licensee would pay the greater of (a) a per-play fee ($0.0015) multiplied by the number of interactive streams or limited downloads during the month and (b) a per-end user[41] fee ($1.06) multiplied by the number of end users during the month. *Id.* at 8. The license fee would be for mechanical rights only, and would not be offset by any performance royalties that the licensee paid for the same activity. *Id.*

5. GEO Music Group

The Judges accepted written and oral testimony from Mr. George Johnson dba GEO Music Group. Mr. Johnson appeared *pro se*. Mr. Johnson is a self-employed songwriter, music publisher, and performer, who formerly operated his own recording company.[42] The other participants in the proceeding agreed to preserve objections to Mr. Johnson's testimony to avoid interruptions and to submit any objections in writing after his testimony.

The crux of Mr. Johnson's case is that ''songs and copyrights have real intrinsic value in dollars'' and that current royalty rates do not fairly account for that value. Second Amended Written Direct Statement of George D. Johnson (GEO) for Proposed Subpart C or New Subpart D Rates and Terms at 3 (Johnson Second AWDS). Mr. Johnson proposes what he refers to as a ''Buy Button'' or ''Paid Permanent Digital Song Sale'' (PDS) under a newly created subpart C or subpart D of the applicable regulations. *Id.* at 2. Mr. Johnson contends that the PDS would ''eliminate the unpaid limited download in 37 CFR 385, Subparts B and C.'' *Id.* at 3. Under Mr. Johnson's proposal all ''interactive and non-interactive Subpart B and C streaming services'' would be required to include a ''buy button'' that ''allows customers to voluntarily buy or purchase a work as a permanent paid digital download.'' § 385 Regulation Redline and Changes of George D. Johnson (GEO) at 4 (Feb. 20, 2017) (Johnson Redline and Changes). Mr. Johnson proposes that the cost to the consumer for these permanent paid digital song sales would be, for 2018: $1.00; 2019: $1.50; 2020: $2.00; 2021: $2.50; 2022: $3.00. *Id.*

Mr. Johnson also proposes that proceeds from sales of permanent downloads purchased through the proposed ''buy button'' be allocated to the following groups of interested parties under one of two alternatives (A or B): Artist ($.19 or $.18 per dollar paid by the consumer), ''record'' (presumably the label or record company) ($.21 or $.20), ''AFM'' (presumably American Federation of Musicians) ($.01), ''AFTRA'' (presumably American Federation of Television and Radio Artists) ($.01), Songwriter ($.21 or $.20), Publishers ($.21 or $.20), and Services ($.16 or $.20). *Id.* Mr. Johnson refers to the alternative allocations as royalties but they appear instead to be shares of sales proceeds that he would allocate to what he believes are all of the interested parties. He does not explain why or when alternative A should be applied as opposed to alternative B.

The allocations he proposes would include royalties for the section 112/114 licenses and the section 115 license, divided equally between the section 115 and section 114 copyright owners. Johnson Redline and Changes at 4. However, under his proposal the copyright users (the Services) would still pay a mechanical royalty for streaming performances of ''$.0015, etc.'' Johnson Second AWDS at 4. It is unclear what year the $.0015 rate would apply to and what the ''etc.'' means.[43] In short, Mr. Johnson proposes two alternatives for allocating revenues from sales that might occur if a customer were to buy a song directly from a Service. Under Alternative A, the Services would effectively pay in the aggregate 84% of the PDS revenues to all copyright owners for licenses under both the section 114 (which includes section 112 royalties) and 115. Under Alternative B, the Services would pay 80% of PDS revenues for the same two licenses. Johnson Second AWDS at 4–5.

In his written direct statement Mr. Johnson does not propose any benchmark or other evidence that would justify a ''buy button'' requirement with a rate of 80% or 84% of PDS revenues. He does assert, however, that it is the ''only reasonable proposal that captures the true value of a music copyright today and historically.'' Johnson Second AWDS at 5. Ultimately, Mr. Johnson concedes that the Judges previously rejected his proposal to combine the section 112/114 and 115 rates in *Web IV* and that the proposal continues to be impracticable. 3/9/17 Tr. 433: 2–3, 11–12 (Johnson) (''that didn't happen in *Web IV* and . . . it won't happen here . . . it's so segmented, all the different licenses, it's probably impossible.'').

While the Judges appreciate Mr. Johnson's participation in the proceeding, they must view his proposal through the prism of the Copyright Act. Nothing in section 115 would authorize the Judges to require all Services availing themselves of the section 115 license to include a mandatory ''buy button'' as part of any service offering. Services may install a ''buy button'' if they wish, but the Judges cannot mandate that service business innovation as Mr. Johnson proposes.

Likewise, the Judges have no authority to set the price that Services charge consumers for purchasing a download whether from a PDD service offering or through Mr. Johnson's proposed buy button. Even if the Judges had the authority to impose a ''buy button'' requirement on the Services, it is unclear what purpose that button would serve other than to alert consumers to the possibility of buying a song they happen to stream. The Judges believe consumers of music are already aware that if they want to buy a song they can do so. Perhaps Mr. Johnson believes with a buy button, consumers might be more willing to click on the button and buy the song than if the button were not visible and readily available. Mr. Johnson provides no evidence to support that premise. As for the 80% or 84% combined royalty that Mr. Johnson proposes for the section 112/114 and 115 licenses, he provides no evidence upon which the Judges might base such a royalty other than his belief that it is the ''only reasonable proposal that captures the true value of a music copyright today and historically.'' *See* Johnson Second AWDS at 5. Mr. Johnson's opinion alone is insufficient evidence upon which to support his ''buy button'' proposal.

Given the lack of sufficient substantial and persuasive evidence to support the

[40] The Copyright Owners' rate proposal would apply the subpart A rates to so-called ''music bundles'' (''offerings of two or more subpart A products to end users as part of one transaction'') which are currently covered by subpart C. *Id.* at 3 nn. 2 & 4.

[41] The proposal would consider each paying subscriber to a service, or each active user, to be an ''end user.'' *Id.* at 8–9.

[42] At the time of hearing in the present proceeding, Mr. Johnson had stepped back from his music business and was employed in real estate. *See* 3/9/17 Tr. 418–19 (Johnson).

[43] In his oral testimony, Mr. Johnson appears to concede that if a customer purchased a song and paid whatever price he proposes that an additional streaming rate might not be necessary. 3/9/17 Tr. 432: 14–17 (Johnson) (''my proposal is that if you paid up front . . . you might not need those Subpart B [streaming] rates.'').

GEO proposal, the Judges will not further analyze it.[44] The Judges respectfully decline to adopt Mr. Johnson's proposed approach to rate setting.

B. Arguments Concerning Elements of the Proposed Rate Structures

1. Per-Unit Rate

Copyright Owners and Apple emphasize that a per-play royalty rate structure, as compared with a percent-of-revenue structure, provides transparency and simplicity in reporting to songwriters and publishers, because it requires only one metric besides the rate itself, *i.e.,* the number of plays, making it much easier to calculate, report, and understand. *See, e.g.,* Expert Report of Marc Rysman, Trial Ex. 3026, ¶ 56 (Rysman WDT); Wheeler WDT, Trial Ex. 1613, ¶ 19; Expert Report of Anindya Ghose, Trial Ex. 1617, ¶¶ 83–84 (Ghose WDT); Expert Report of Jui Ramaprasad, Trial Ex. 1615, ¶ 41 (Ramaprasad WDT); Witness Statement of Peter Brodsky, Trial Ex. 3016, ¶ 76 (Brodsky WDT); 3/22/17 Tr. 2476–78 (Dorn); 3/23/17 Tr. 2855–56 (Ghose). Relatedly, Copyright Owners argue that a transparent metric tied to actual usage is superior because, under the alternative percent-of-revenue approach, services might manipulate revenue through bundling, discounting, and accounting techniques, or might defer service revenues and emphasize increasing market share rather than profits. *See* Rysman WDT ¶¶ 43–45.

Copyright Owners and Apple contrast their proposed per play approaches with the current rate structure, which they characterize as cumbersome and convoluted. They emphasize that under the current rate structure, the Services must perform a series of different greater of and lesser of calculations, depending on a service's business model, to determine which prong of the rate structure is operative. *See* Copyright Owners' Proposed Findings of Fact (COPFF) (and record citation therein). Copyright Owners assert that because of this complexity, publishers and songwriters cannot easily verify the accuracy of data the Services input when calculating royalty payments. *See* Brodsky WDT ¶ 76; Ghose WDT ¶¶ 80, 81, 82; Ramaprasad ¶¶ 4, 38, 42–44; Rysman WDT ¶ 57; Tr. 2865 (Ghose); Tr. 824 (Joyce); Tr. 247778 (Dorn).

Beyond the issue of complexity, Copyright Owners and Apple argue that interactive streaming services do not need the present *upstream* rate structure in order to adopt any particular *downstream* business model. Rather, Copyright Owners and Apple assert that a per-play structure would establish a level of equality in the royalty rates across the Services, without regard to business models. Songwriters and publishers would be paid on the same transparent, fixed amount without advantaging any one business model over another. 3/23/17 Tr. 2849, 2863 (Ghose). Thus, Copyright Owners and Apple maintain that a royalty based on the number of plays aligns the compensation paid to the creators of the content with actual demand for and consumption of their content. Ghose WDT ¶ 84; Rysman WDT ¶¶ 9, 58; Testimony of David Dorn, Trial Ex. 1611, ¶ 33 (Dorn WDT).

Copyright Owners further argue that the present rate structure's failure to measure royalties based on per-play consumption is counterintuitive, because it permits a decreasing *effective* per-play rate even as the quantity of songs listeners consume via interactive streaming is increasing. Israelite WDT ¶ 39. Copyright Owners note, for example, that listening to [REDACTED] increased from [REDACTED] streams in July 2014 to [REDACTED] streams in December 2016, a [REDACTED] increase in the number of streams. Rebuttal Report of Glenn Hubbard, Trial Exs. 132–33, Ex. 1 and ¶ 2.22 (Hubbard WRT); 4/13/17 Tr. 5971–72 (Hubbard). However, contemporaneously [REDACTED]'s mechanical royalty payments to the Copyright Owners only increased [REDACTED], from $[REDACTED] in mechanical royalties in July 2014 to only $[REDACTED] in December 2016. Hubbard WRT ¶ 3.9; 4/13/17 Tr. 5971–73 (Hubbard). The upshot, Copyright Owners assert, is that, as streaming consumption increased dramatically from 2014 to 2016, the effective per stream mechanical royalties paid by [REDACTED] to Copyright Owners decreased from [REDACTED] per hundred streams in July 2014 to [REDACTED] per hundred streams in December 2016—only [REDACTED]% of the effective per stream rate in July 2014. 4/13/17 Tr. 5972–73 (Hubbard).

The Services made four arguments in opposition to the use of a per-play royalty rate. The overarching theme of these arguments is that an inflexible ''one size fits all'' rate structure would be ''bad for services, consumers, and the copyright owners alike.'' *See* Services' Joint Proposed Findings of Fact (SJPFF) at 89.

First, the Services argued that an upstream per-play rate would not align with the downstream demand for ''all-you-can-eat'' streaming services. As Professor Marx testified, a per stream fee introduces a number of distortions and inefficiencies, encouraging a capping of downstream plays and reduces incentives for services to meet the demand of consumers ''who are going to stream a lot of music.'' Written Direct Testimony of Leslie Marx, Trial Ex. 1065, ¶¶ 130–131 (Marx WDT). In this vein, Pandora's then-president, Michael Herring, noted that a per-play consumption-based model where the revenue is fixed creates uncertainty and volatility, which discourage investment and hamper profitability. 3/14/17 Tr. 894–95 (Herring). Mr. Herring noted that this is a general economic problem that occurs when a retail subscription business has fixed subscription revenues per customer, but variable (and unpredictable) costs derived from variable (and unpredictable) downstream usage. Written Rebuttal Testimony of Michael Herring, Trial Ex. 888, at ¶ 17 (Herring WRT); 3/14/17 Tr. 894–98 (Herring); *see* Mirchandani WDT ¶ 39 (one-size-fits-all rate is not ''offering agnostic'' as Copyright Owners claim, but rather is ''offering determinative.'').

Second, the Services argued that there is no ''revealed preference'' in the marketplace for a per-play royalty rate structure for licensing musical works or sound recordings rights, as opposed to a percent-of-revenue (with minima) royalty structure. In particular, they contended that mechanical royalties have never been set on a per-play basis. *See* Herring WRT ¶ 19. The Services also pointed to the interactive services' direct licenses with music publishers, PROs and record companies, claiming that all rely on a percent-of-revenue royalty calculation. SJPFF ¶¶ 174–175 (and record citations therein). They acknowledged that some of the direct license agreements with record companies contain alternative per-user prongs but they noted that this is consistent with the existing rate structure which already contains a per-subscriber minimum, but not a per-play prong. *Id.* ¶ 175. Further, the Services noted that Apple, which is proposing a per-play rate, in fact has [REDACTED]. *See* 3/23/17 Tr. 2857 (Ghose); 3/22/17 Tr. 2479 (Dorn).

[44] Mr. Johnson's oral testimony went well beyond his ''buy button'' proposal and included criticism of the current Copyright Act as well as criticism of the Services' rate proposals and business models and other concerns about the music industry more generally. While the Judges considered Mr. Johnson's testimony in determining the appropriate royalty rates for the upcoming rate period, as a lay witness sponsored by no party other than himself the Judges placed little weight on his opinions regarding the various rate proposals of the Services and the condition of the industry. As for his criticism of the Copyright Act, those opinions are more appropriately directed to Congress.

Third, the Services discounted the argument that Copyright Owners' proposed rate structure is superior to the present rate structure because the latter is too complicated or cumbersome. They characterized this criticism as ''overblown'' and assert that any problems arising in the use of a revenue-based headline rate is mitigated by the inclusion of per subscriber and TCC minima. SJPFF ¶ 174. They further noted that section 801(b)(1) does not list as a criterion or objective that the rates be simple, easy to understand, or otherwise ''transparent.'' Services' Joint Reply to Apple PFF (SJR(Apple)) at 34, 36. Thus, they argued, the Judges cannot jettison an otherwise appropriate rate structure because some unquantified segment of the songwriting community might be uncertain as to how their royalties were computed.

Separate from these four arguments against per-play rate proposals, the Services noted a practical problem related to Apple's specific proposal: Apple's proposal calls for deducting performance royalties from the per-play mechanical royalty, yet it does not explain how to convert the typical percent-of-revenue performance royalty into a per play rate in order to perform that computation.[45] The Services noted that Apple Music's Senior Director, David Dorn, was unable to explain how this calculation would be made. *See* 3/22/17 Tr. 2508–09 (Dorn). Thus, the Services asserted that Apple's proposal would introduce ''more complexity, not less,'' SJR (Apple) at 34.

2. Flexible Rate

The Services propose a rate structure for configurations in extant subparts B and C that follows the structure in the existing regulations adopted after the 2012 Settlement.[46] The Services asserted that they are not advocating preservation of the basics of the settlement rate structure merely to preserve the *status quo. See* 3/13/17 Tr. 564 (Katz). Rather, the Services, through their economic experts, argue that the settlement rate structure as an appropriate benchmark for the Judges to weigh, consider, adjust (if appropriate), and apply or reject, as they would any proffered benchmark. The Services note that considering the current rate structure as a benchmark is instructive because it allows for identification of market value by analogy. The Services assert that examination of a comparable circumstance obviates the need for experts and the Judges to build a theoretical model from the ''ground up.'' *See* 3/13/17 Tr. 691–2 (Katz).

The Services' experts opine that, for a number of reasons, the 2012 rate structure is a highly appropriate benchmark. First, they note that it applies to (1) the same rights; (2) the same uses; and (3) the same types of market participants. *See* 3/15/17 Tr. 1082–83 (Leonard); 3/13/17 Tr. 551, 566–67 (Katz). Additionally, the Services maintain that because the 2012 rate structure resulted from a negotiated settlement, it reflects market forces, including an implicit consensus on such issues as substitutional effects. *See* 3/13/17 Tr. 580, 722 (Katz). More broadly, the Services assert the 2012 Settlement demonstrates the ''revealed preferences'' of these economic actors. *See* 3/15/17 Tr. 1095 (Leonard); *see also* Amended Written Direct Statement of Gregory K. Leonard, Trial Ex. 695, ¶ 72 (Leonard AWDT) (direct license agreements that track statutory structure evidence ''revealed preference''). Finally, the Services assert that the 2012 Settlement rate structure as benchmark is relevant and helpful because, although it was adopted five years ago, it is nonetheless a relatively recent agreement, covering the current rate period. *See* Katz WDT ¶¶ 6, 71; 3/13/17 Tr. 608–09 (Katz); Leonard AWDT ¶ 45 *et seq.;* 3/15/17 Tr. 1082 (Leonard).

The Services' experts candidly acknowledge that the rate structure they advocate cannot be construed economically as the ''best'' approach to pricing in this market. *See, e.g.,* 4/7/17 Tr. 5574–76 (Marx). Rather, the Services' experts uniformly link the fact that the marginal physical cost of streaming is zero to the need for a flexible rate structure, such as now exists. *See, e.g.,* 3/20/17 Tr. 1829 (Marx); 3/13/17 Tr. 558 (Katz); 3/15/17 Tr. 122 (Leonard). Indeed, Copyright Owners' economic experts acknowledge this underlying fact. *See, e.g.,* 3/30/17 Tr. 4086 (Gans) (streamed music is ''non-rival good.''); 3/27/17 Tr. 3167 (Watt); 4/3/17 Tr. 4318 (Rysman); 4/13/17 Tr. 5917–18 (Hubbard).

Professor Katz noted that the existing revenue-based rate structure captures important specific aspects of the economics of the interactive streaming market, accounting for the variable willingness to pay (WTP) among listeners and the corollary variable demand for streaming services. *See* 3/13/17 Tr. 586–87 (Katz); *see also* Written Rebuttal Testimony of Leslie M. Marx, Trial Ex. 1069, ¶¶ 239 *et seq.* (Marx WRT); 4/7/17 Tr. 5568 (Marx) (present structure serves customer segments with variety of preferences and WTP).[47] Professor Rysman, an expert for Copyright Owners, hypothesized that under the current rate regime overall revenues might be increasing because of movements ''down the demand curve'' (*i.e.,* changes in quantity demanded in response to lower prices), rather than because of, or in addition to, an outward shift of the demand curve (*i.e.,* increase in demand at every price). 4/3/17 Tr. 4373–74 (Rysman). Professor Hubbard perceives a link between the existing rate structure and the ''growth in the number of consumers, number of streams, entry, the number of companies providing the streaming services, and the identity of the companies providing those services . . . .'' 4/13/17 Tr. 5978 (Hubbard); *see* Hubbard WDT ¶ 4.7 (settlement rate structure provides ''necessary flexibility to accommodate the underlying economics of [REDACTED]'s various digital music service offerings.''); [48] 3/15/17 Tr. 1176 (Leonard) (notwithstanding changes in streaming marketplace, economic structure of marketplace, which made percent-of-revenue appropriate, has not changed).

The Services' experts further assert that the multiple pricing structures necessary to satisfy the WTP and the differentiated quality preferences of downstream listeners relate directly to the upstream rate structure to be established in this proceeding. Professor Marx opines that the appropriate *upstream* rate structure is derived from the characteristics of downstream demand. 3/20/17 Tr. 1967 (Marx) (rate structure upstream should be derived from need to exploit WTP of users downstream via a percentage of revenue). This upstream to downstream consonance in rate structures represents an application of the concept of ''derived demand,'' whereby the demand upstream for inputs is dependent upon the demand for the

[45] This problem is irrelevant to Copyright Owners' proposal, because they propose the elimination of the All-In provision in the rate structure.

[46] *Except when it doesn't.* The Services seek the elimination of the ''Mechanical Floor,'' a significant departure from the existing structure.

[47] In more formal economic terms, Professor Katz noted that the present structure enhances variable pricing that allows streaming services ''to work [their] way down the demand curve,'' *i.e.,* to engage in price discrimination that expands the market, providing increased revenue to the Copyright Owners as well as the Services.'' 3/13/17 Tr. 701 (Katz).

[48] The Copyright Owners sought to rebut Professor Hubbard's argument by confronting him with the offerings of Tidal, a streaming service that does not compete by offering a low-cost service. Eisenach WDT ¶¶ 49–50. However, Tidal's offering of a higher priced subscription service that provides enhanced features such as hi-fidelity sound quality actually proves the point that Professor Hubbard and the other Service economists are making: There is a segmentation of demand across product characteristics and WTP that permits differential pricing in this industry.

final product downstream. *Id.; see* P. Krugman & R. Wells, *Microeconomics* at 511 (2d ed. 2009) (''[D]emand in a factor market is . . . *derived demand* . . . [t]hat is, demand for the factor is derived from the [downstream] firm's output choice'').

The Services' economists also contend that the existing rate structure has produced generally positive practical consequences in the marketplace. As the Services' joint accounting expert, Professor Mark Zmijewski testified, the decrease in publishing royalties from the sale of product under subpart A since 2014 has been offset by an increase in music publisher royalties (mechanical + performance royalties) over the same period. Expert Report of Mark E. Zmijewski, Trial Ex. 1070, ¶¶ 38, 40 (Zmijewski WRT); 4/12/17 Tr. 5783 (Zmijewski). Professor Hubbard dismisses as economically ''meaningless'' the argument that Copyright Owners have suffered *relative* economic injury under the current rate structure simply because the increase in their revenues from interactive streaming has been proportionately less than the growth in the number of interactive streams. 4/13/17 Tr. 5971–73 (Hubbard). There is no evidence in this record that, if the price of the services available to these low to zero WTP listeners had been increased, they would have paid the higher price. In fact, the only survey evidence in the record suggests that listeners to streaming services have a highly elastic demand, *i.e.,* they are highly sensitive to price increases.[49]

On the Licensee Services' side of the ledger, Professor Katz identifies the entry of new interactive streaming services and new investment in existing interactive streaming services during the present rate period as evidence that the present rate structure is ''working.'' 3/13/17 Tr. 667 (Katz). He notes the ubiquity of percent-of-revenue based royalty structures in the music industry, indicating (as a matter of revealed preference) the practicality of a revenue-based royalty system. *See* 3/13/17 Tr. 766–67 (Katz).[50]

Although the Services' economic experts extol the benefits of the current rate structure, they acknowledge the problem, whether hypothetical or real, that the Services have an incentive and a capacity to minimize the amount of revenue that is attributed to the revenue base. Further, even absent any wrongful intent with regard to the measurement of revenue, the Services recognize that attribution of revenue across product/service lines of various service offerings can be difficult and imprecise. *See, e.g.,* 4/5/17 Tr. 5000 (Katz). Additionally, the Services might focus on long-term profit maximization, thereby deferring shorter-term profits through temporarily lower downstream pricing in a manner that suppresses revenue over that shorter-term. The Services might also use music as a ''loss leader,'' displacing streaming revenue to encourage consumers to enter into the so-called economic ''ecosystem'' of the streaming services, especially the multi-product/service firms in this proceeding, such as Amazon, Apple, and Google. The operators of these multi-product environments might assume music consumers can be exposed to other goods and services available for purchase. Third, the Services might obscure royalty-based streaming revenue by offering product bundles that include music service offerings with other goods and services, rendering it difficult to allocate the bundle revenue between royalty-bearing service revenue and revenue attributable to other products in the bundle.

Professor Katz testified, however, that the existing rate structure accommodates these bundling, deferral, and displacement issues by the use of minima that are triggered if the royalty resulting from the headline percent-of-service revenue falls below the established minima. Katz WDT ¶¶ 82–83; 3/13/17 Tr. 670 (Katz). Moreover, he concluded that because the marketplace appears to be functioning, the alternative minimum rates must be adequately handling revenue measurement issues. *Id.* at 738; 4/5/17 Tr. 5055–57 (Katz). In similar fashion, Dr. Leonard opined that the 2012 Settlement rate structure created a number of ''buckets'' to deal with problems of this sort, although he acknowledged that there was no reason why adjustments could not be made to the ''buckets'' going forward. 3/15/17 Tr. 1227–28 (Leonard); *see also* 3/13/17 Tr. 670–71 (Katz) (did not analyze whether to adjust ''specific rates'' of the minima).

Copyright Owners criticize the 2012 rate structure because of the inherent problems with measurement of revenue. Specifically, Copyright Owners focus on deferral and displacement problems. *See* Rysman WDT ¶ 13. With regard to revenue deferral, Copyright Owners argue that the services' attempt to grow their customer base and future profits is fueled by a strategic decision to lower retail prices, thus sacrificing current revenue for future economic benefits. *Id.*; *see also* 3/21/17 Tr. 2081–83 ([REDACTED]).

The Services concede that there is a period in the life-cycle of a streaming service when ''user numbers'' may be more important to a service, its investors, and its market price; however there comes a time, in the ''late-stage private and public markets,'' when ''[REDACTED].'' Written Rebuttal Testimony of Barry McCarthy, Trial Ex. 1066, ¶¶ 37 (McCarthy WRT).[51] The Services argue, however, that Copyright Owners misunderstand the emphasis on long term growth. That emphasis, they argue, relates to the Services' willingness to sacrifice short-term profitability by incurring up-front costs, which has no bearing on current period revenues. 3/21/17 Tr. 2085 ([REDACTED]). The Services nonetheless acknowledge that they focus currently on the second derivative of revenue—the ''growth of the growth''—rather than revenue growth.

The Judges find that the record in this proceeding indicates that the Services do seek to engage to some extent in revenue deferral to promote a long-term growth strategy. A long-term strategy that emphasizes scale over current revenue can be rational, especially when a critical input is a quasi-public good. Growth in market share and revenues is not matched by a commensurate increase in the cost of inputs, whose marginal cost of production (*reproduction* in this context) is zero. It appears to the Judges that the nature of the downstream interactive streaming market and its reliance on scaling for success, results

[49] In a real-life example of this phenomenon, [REDACTED] explained [REDACTED]'s internal analysis of the marketplace impact of [REDACTED]'s decision to discount the monthly subscription price of its [REDACTED] service [REDACTED]. The analysis indicated that [REDACTED]% of the subscribers were new to the interactive streaming segment of the market, and [REDACTED]% came from existing subscribers to other services at the standard $9.99 monthly price. As [REDACTED] explained, music publishers would lose royalties on $[REDACTED] of revenue on the [REDACTED]% who migrated away from a $9.99 service, but would add royalties on the $[REDACTED] for each subscriber who was part of the [REDACTED]% cohort. *See* 3/16/17 Tr. 1576–1639 ([REDACTED]); *see also* 3/21/17 Tr. 2243–44 (Hubbard).

[50] There is a facially discordant aspect to the Services' argument. They are consistently incurring losses under this rate structure and the present rates, yet they are essentially content for the present rates and structure to be continued. The presence of chronic losses would facially suggest that the Services would be in need of rate reduction (as some of their experts suggest would be proper given their analyses). This conundrum is explained by the Services' engaging in competition for market share, as discussed *infra*.

[51] No witness offered any testimony that might indicate whether the currently operating Services perceive themselves to be at the beginning, middle, or ''late-stage'' of this cycle.

necessarily in a competition *for the market* rather than simply competition *in the market.* This competition emphasizes the importance of the dynamic creation of new markets and ''new demand curves,'' recognizing that short-term profit or revenue maximization might be inconsistent competing for the market long-term.

When the Services pay royalties as a percent of their *current* revenue, the input suppliers, *i.e.,* Copyright Owners, are likewise deferring some revenue to a later time period and assuming some risk as to the ultimate existence of that future revenue. One way the Copyright Owners could avoid this impact would be to refuse to accept a percent-of-revenue form of payment and move to a fixed per-unit price. Another way would be to establish a pricing structure that provides minima and floors, below which the revenue could not fall. The bargain struck between Copyright Owners and Services in 2012 is an example of the latter structure.

In this proceeding, the Services assert there is no evidentiary support for Copyright Owners' conclusory assertion that the Services intentionally displace revenue by engaging in ''cross-selling'' or revenue bundling. *See* SJPFF at 308. The Judges agree that there is no support for any sweeping inference that cross-selling has diminished the revenue base.

Regardless of the existence or extent of cross-selling, Copyright Owners argue that the Services manipulate revenue calculations in their favor, allegedly defining revenue in opportunistic ways. *See* Rysman WDT ¶ 44; Rysman WRT ¶ 15; see also Ghose WDT ¶¶ 78 (arguing on behalf of Apple that ''service revenue for . . . bundles is subjective and can be interpreted differently by different service providers''). Copyright Owners maintain that they cannot discern the alleged manipulation and opportunism as it occurs, because the booking of revenue among lines of business is ''opaque to publishers.'' Rysman WDT ¶ 43; Rysman WRT ¶ 15; Ghose WDT ¶¶ 80–81. In support of this assertion of revenue manipulation, Copyright Owners point to [REDACTED].

Before [REDACTED] engaged in [REDACTED], it engaged in a pricing analysis to determine its optimal price point for [REDACTED] and interactive streaming access. *See* [REDACTED] Pricing Study—Final Report, Trial Ex. 113 ([red] Study). [REDACTED] contends its pricing analysis demonstrated that [REDACTED]. Trial Ex. 111, ¶ 14 n.9 ([REDACTED] WRT). In conjunction with [REDACTED]. [REDACTED] lowered the [REDACTED] subscription price to $[REDACTED] per month, compared to the full $[REDACTED] per month price. Amazon determined that Prime members who were unwilling to pay the full [REDACTED]/month subscription price for [REDACTED] could be enticed to pay $[REDACTED] per month less, subscribing to [REDACTED] service at $[REDACTED]/month. *Id.* ¶ 22.

[REDACTED] maintains these [REDACTED] created ''unique distribution channels'' generating new listeners and thus new royalties for the licensors without cannibalizing higher royalties at the full $[REDACTED] per month subscription price. Id. ¶¶ 25, 21–22.[52] [REDACTED] asserts that the net benefits of its pricing strategies are confirmed by a consumer survey undertaken by [REDACTED] Mr. Robert L. Klein, Chairman and co-founder of Applied Marketing Science, Inc. (''AMS''), a market research and consulting firm. In that survey (Klein Survey), Mr. Klein identified [REDACTED]. At a high level, the Klein Survey results indicated that [REDACTED]'s music listeners had an overall high elasticity of demand for streamed music, meaning that their subscription demand was highly sensitive to changes in subscription prices. Written Rebuttal Testimony of Robert L. Klein, Trial Ex. 249, ¶ 67 (Klein WRT).[53]

Copyright Owners attack the Klein Survey on several fronts. The arguments made by Copyright Owners are insufficient, however, to seriously weaken the probative value of the Klein Survey. In the end, the Judges are not persuaded by the Copyright Owners' revenue bundling arguments not to adopt a flexible, revenue-based royalty rate.

3. All-In Rate vs. Independent Mechanical Rate

The current mechanical royalty rate is calculated as a so-called ''All-In'' rate. When calculating the mechanical rate the parties subtract from the base rate the amount paid by the interactive streaming services to performing rights organizations (PROS) for the musical works performance right. All five Services urge the Judges to establish a statutory rate structure for the forthcoming rate period that contains this ''All-In'' feature; whereas Copyright Owners request that the rate for the forthcoming rate period be set without regard to the amounts the Services pay PROs for the performance rights.

According to the Services, a key aspect of the 2008 and 2012 settlements was the deduction of expenses for public performance royalties; in other words, the top-line rate the Services paid under the section 115 license would be added to the performance rights royalties for an All-In musical works fee from the Services' point of view. Levine WDT ¶ 35; Written Direct Testimony of Adam Parness, Trial Ex. 875, ¶ 7 (Parness WDT); 3/8/17 Tr. 298–99 (Parness). According to Apple, the absence of any value in the mechanical license separate from the performance license is underscored by the fact that interactive streaming is the only distribution channel that pays both a performance royalty and a mechanical royalty. Noninteractive services, SDARS, and terrestrial radio pay a performance royalty but not a mechanical royalty, whereas record companies pay a mechanical royalty under subpart A but not a performance royalty. Rebuttal Testimony of David Dorn, Trial Ex. 1612, ¶ 10 (Dorn WRT).

According to the Services this All-In rate structure is consistent with the parties' expectations in settling *Phonorecords I* and *II. See* SJPFF ¶ 112. Additionally, the Services note that many direct licenses between musical works copyright owners and streaming services incorporate the ''All-In'' feature of the existing section 115 license. *See* SJPFF ¶¶ 143–145 (and record citations therein).

Separately, Apple concurs in the proposal of an ''All-In'' rate in the forthcoming rate period. According to Apple, the Judges

> should adopt an All-In rate for interactive streaming because (1) mechanical and performance royalties are complementary rights that must be considered together in order to prevent exorbitant costs, (2) the current statute use an All-In rate, (3) All-In rates provide greater predictability for businesses, and (4) recent fragmentation and uncertainty with respect to performance licenses threaten to exacerbate the problems of high costs and uncertainty already present in the industry.

Apple PFF ¶¶ 138, *et seq.* (and record citations therein). Apple maintains that, as a policy matter, an All-In rate helps maintain royalties at an economically

[52] More precisely, although *some* [REDACTED] listeners might have paid the full subscription price, the [REDACTED] pricing analysis indicated that any revenue losses arising from discounts obtained by these sub-groups were dwarfed in term of revenue gains from the new subscribers at the lower discounted rates [REDACTED]. [REDACTED] WRT ¶ 22.

[53] It is important to note that Copyright Owners' attacks on the Klein Survey are not levelled by any witnesses, nor contradicted by their own survey expert, because Copyright Owners elected not to proffer such an expert in their direct (or rebuttal) cases. Rather, Copyright Owners elected to make a descriptive argument regarding the elasticity of demand among different segments of the market, as opposed to a survey-based or econometric study of price elasticity.

efficient level because it sets a single value for all of the rights that interactive streaming services must obtain from publishers and songwriters. *See* Rebuttal Report of Professor Jui Ramaprasad, Trial Ex. 1616, ¶ 13 (Ramaprasad WRT) (separate mechanical royalty could lead to ''unreasonably high combined royalties for publishers and songwriters''); 3/23/17 Tr. 2667–69, 2670 (Ramaprasad); *see also* Leonard AWDT ¶ 56; Katz WDT ¶ 94; Written Direct Testimony of Michael Herring, Trial Ex. 880, ¶ 59 (Herring WDT). Accordingly, Apple asserts that adoption of an All-In rate will ensure that these two complementary rights are considered in tandem, with the cost of one offset against the cost of the other. *See* Dorn WRT ¶ 15; *see also* 3/13/17 Tr. 587–588 (Katz); 3/15/17 Tr. 1191–92 (Leonard); Herring WDT ¶ 59.

Apple, consistent with the other Services, argues that the All-In rate structure is particularly important because of recent ''fragmentation'' [54] and uncertainty in performance rights licensing. The Services all claim this potential fragmentation threatens to exacerbate existing uncertainty over royalty costs. *See* Dorn WRT ¶¶ 17–18; Ramaprasad WRT ¶¶ 13, 63; Parness WDT ¶¶ 16–20; Katz WDT ¶¶ 87–94; 3/13/17 Tr. 602–04 (Katz). Apple notes that this problem may be amplified because of the emergence of a fourth PRO, Global Music Rights (GMR) in addition to SESAC which, like GMR, is not subject to musical works performance license proceedings in the Rate Court.[55] Parness WDT ¶ 18; Katz WDT ¶ 91; *see* 3/9/17 Tr. 382–83 (Parness); 3/13/17 Tr. (Katz) 602–04.[56] The Services also raise the specter of future ''withdrawals'' by music publishers from one or more PROs.

Copyright Owners' initial response to the All-In structure is a jurisdictional argument. They emphasize that this is a proceeding to set rates and terms for the section 115 compulsory mechanical license to make and distribute phonorecords, not to perform works. 17 U.S.C. 115, 801(b)(1). More particularly, Copyright Owners note that, the section 115 compulsory license explicitly applies solely to the exclusive rights bestowed by clauses (1) and (3) of section 106; that is the rights to make and to distribute phonorecords of [nondramatic musical] works.'' This proceeding does relate to the exclusive right provided by clause (4) to perform the work publicly. 17 U.S.C. 106, 115. Thus, Copyright Owners argue, the public performance right provided by 17 U.S.C. 106(4) is an entirely separate and divisible right from the mechanical right at issue in this proceeding and is not subject to the section 115 license. *See* COPCOL ¶ 314 (citing 17 U.S.C. 106, 115, 201(d) and 2 *Nimmer on Copyright* sec. 8.04[B] (''[T]he compulsory license does not convey the right to publicly perform the nondramatic musical work contained in the phonorecords made under that license. Similarly, a grant of performing rights does not, in itself, confer the right to make phonorecords of the work.'')).

Copyright Owners note that performance royalties are negotiated between licensors and licensees, subject to challenge in a Rate Court proceeding. They conclude that the Judges cannot set an ''All-In'' rate because they have ''not been vested with the authority to set rates for performance rights because they are not covered by section 115.'' Copyright Owners' Proposed Conclusions of Law ¶ 315 (COPCL). Copyright Owners further note that the Services have not provided evidence in this proceeding to justify an ''All-In'' rate, such as evidence showing the rates and terms in existing performance licenses; the duration of such licenses; benchmarks for performance rights licenses; and the impact of interactive streaming on other sources of performance income, including non-interactive streaming, terrestrial radio, and satellite radio income. Further, Copyright Owners point out that the PROs and all music publishers would be necessary parties for any such determination. *See id.* ¶ 319.

For these reasons, Copyright Owners decry as mere ''sophistry'' the Services' argument that they are not asking the Judges to set performance rates, but rather only to ''set'' a ''mechanical'' rate that permits them to deduct what they pay as a performance royalty. More particularly, they argue that this approach, if adopted, would leave the mechanical rate indeterminate, subject to negotiations or judicial action regarding the performance license rate. *See id.* ¶ 320. Indeed, Copyright Owners note, under the Services' ''All-In'' proposal, the mechanical rate could be zero (if performance royalties are agreed to or set by the Rate Court at a rate that is greater than or equal to the ''All-In'' rate proposed by the Services here). Copyright Owners argue that a mechanical royalty rate of zero ''is anything but reasonable. . . .'' *Id.* ¶ 322.

In an evidentiary attack, Copyright Owners demonstrate that the only percipient witness who engaged directly in the 2008 negotiations involving the ''All-In'' rate was the NMPA president, David Israelite. By contrast, the Services' two witnesses, Mr. Parness and Ms. Levine, did not participate directly in those negotiations. *See* Copyright Owners' Reply Proposed Findings of Fact ¶ 125 (CORFF). Thus, Copyright Owners assert that the Services cannot credibly argue based on what the negotiating parties actually intended with regard to, *inter alia,* the ''All-In'' rate.[57]

Copyright Owners also take aim at the Services' argument that it matters not whether they pay royalties designated as ''performance'' or ''mechanical,'' because the same rights owners are also receiving performance royalties. According to Copyright Owners, this argument (1) ignores the Copyright Act's separate and distinct mechanical and performance rights; (2) ignores that the rates for the use of those two rights, to the extent not agreed, are set in different jurisdictions; and (3) ignores the disruption that would be caused by eliminating mechanical royalties, *e.g.,* disruptions arising from (a) the fact that mechanical royalties are the most significant source of recoupment of advances to songwriters; and (b) songwriters receive a greater share of mechanical royalties than they do of performance royalties (both because of the standard splits in songwriter agreements and the fact that performance income, unlike mechanical income, is diminished by PRO commissions). COPCL ¶ 323; COPFF ¶ 640.

[54] In this context, ''fragmentation'' refers to the existence of more than one owner of copyrights to a single musical work.

[55] Since 1941, ASCAP and BMI have been subject to Consent Decrees they reached with the Department of Justice in a DOJ antitrust suit. *See, e.g., United States* v. *Broadcast Music, Inc.,* 1940–43 Trade Cas. ¶ 56,096 (W.D.Wis. 1941).

[56] Apple also claims that there is recent legal uncertainty because of the 2016 decision regarding fractional licensing in *United States* v. *Broadcast Music Inc.,* 64 Civ. 3787 (LLS), 2016 WL 4989938 (S.D.N.Y. Sept. 16, 2016), which Apple claims has created even more market power for the owners of musical works. Apple hypothesizes fractional licensing ''almost certainly will lead to higher total payments for performance rights, higher transactions costs, and greater uncertainty.'' Parness WDT ¶ 20. In the *BMI* case, according to Apple, the Rate Court confirmed that PROs can grant licenses for fractional interests in musical works, meaning that in order to offer a work, interactive streaming services must obtain licenses from every entity with any *de minimis* interest in the work. *Id.*

[57] Copyright Owners take this argument one step further—maintaining that consequently the Services ''have presented no competent evidence that an ''All-In'' rate structure ''is consistent with the parties' expectations in settling *Phonorecords I* and *II.*'' CORSJPCL ¶ 112. It is difficult to conclude that this fundamental rate structure, agreed to in two separate settlements between the parties, was not consonant with their ''expectations.''

Copyright Owners also assert that ''a single All-In payment will . . . diminish payments to songwriters, and will negatively impact the publishers' ability to recoup advances, which will, in turn, negatively impact the size and number of future advances.'' Witness Statement of Thomas Kelly, Trial Ex. 3017, ¶ 66 (Kelly WDT); Witness Statement of Michael Sammis, Trial Ex. 3019, ¶ 27 (Sammis WDT); Witness Statement of Annette Yocum, Trial Ex. 3021, ¶ 23 (Yocum WDT); Israelite WDT ¶ 71.

Copyright Owners counter the Services' claim that increasing ''fractionalization'' of licenses justifies an ''All-In'' rate as a red herring. Specifically, they argue there has *always* been fractional licensing of performance rights by the PROs; there typically are multiple songwriters and publishers with ownership rights in a song and they might not all be affiliated with the same PRO. The recent litigation only confirmed that there is no legal basis on which any one PRO has the right to license rights it does not have. Rebuttal Witness Statement of David M. Israelite, Trial Ex. 3030, ¶¶ 65–66 (Israelite WRT); 3/29/17 Tr. 3662–63 (Israelite); 3/9/17 Tr. 372–373 (Parness).

Moreover, contrary to the Services' assertions, they presented no evidence that the presence of GMR, a new PRO, has altered the extent of fragmentation in any manner, let alone increased the degree of fragmentation in the marketplace. Copyright Owners point out that the Services admitted that GMR represents fewer than 100 songwriters and has a meager market share of roughly 3 percent of the performance market. 3/9/17 Tr. 365–67 (Parness); *see* Israelite WRT ¶ 59. Copyright Owners also note that the Services presented no evidence either that there has been an increase in performance rates in licenses issued by GMR, or, more generally, of any actual or potential impact of this alleged ''fragmentation'' of the performance rights marketplace on their interactive streaming businesses. 3/9/17 Tr. 381 (Parness)).

Finally, Copyright Owners note that, if it ever were a justification for an All-In rate, the issue of publisher withdrawals from PROs has been overtaken by events. Specifically, they note that the ASCAP and BMI Rate Courts in the Southern District of New York, the Second Circuit, and the Department of Justice have determined that partial withdrawals by publishers are not permitted. Israelite WRT ¶¶ 62–63, *citing In re Pandora Media,* 785 F.3d 73, 77–78 (2d Cir. 2015), *aff'g* 6 F. Supp. 3d 317 (S.D.N.Y. 2014).[58]

4. Mechanical Floor

Copyright Owners urge the Judges to retain the feature of the extant rate regulations establishing a Mechanical Floor; that is, a rate below which the calculated mechanical license rate could not fall.[59] They emphasize that the revenue displacement and deferral problems they perceive under a percent-of-revenue rate structure are alleviated with a Mechanical Floor because that rate is based on a per-subscriber calculation. COPFF ¶¶ 639–40. Copyright Owners maintain that the Services' desire to eliminate the Mechanical Floor is nothing other than a ''thinly veiled effort to sharply reduce the already unfairly low mechanical royalties.'' COPFF ¶ 644. The import of the Mechanical Floor is underscored by Dr. Eisenach who testifies that, in 2015, the Services triggered the Mechanical Floor in over 43% of service-months (66 of 152 such months). Written Rebuttal Testimony of Jeffrey A. Eisenach, Trial Ex. 3033, ¶ 115 (Eisenach WRT).

Copyright Owners further argue that the Mechanical Floor is necessary to preserve a source of publishers' advances to songwriters and recoupments of prior advances. COPFF ¶ 640 (and record citations therein). They assert that songwriters benefit more from publishing agreements than from performance agreements with PROs because, under current publishing agreements, songwriters typically receive 75% or more of mechanical royalty income; whereas, PRO's split performance royalty income 50/50 between publishers and songwriters. *Id.* Moreover, PROs charge songwriters an administrative fee, further reducing the value of the performance royalty income relative to mechanical royalty income. *Id.*

Despite their proffer of the 2012 rates as an appropriate benchmark, the Services[60] propose elimination of the Mechanical Floor in the forthcoming rate period. In support of this position, the Services assert that they acquiesced to the Copyright Owners' insistence on the Mechanical Floor in the 2012 Settlement, because they believed the Mechanical Floor was ''illusory,'' *i.e.,* that it was ''highly unlikely to ever be triggered. . . .'' SJPFF ¶¶ 127, 160 (and record citations therein).[61] According to the Services, experience has shown that the Mechanical Floor in the current rate structure has added uncertainty and has led to Services paying ''windfall'' royalties to Copyright Owners well above the stated ''All-In'' amount. *See* Apple PFF ¶¶ 85, 165; *see also* Google PCOL ¶ 22 (triggering of Mechanical Floor caused in some circumstances by Copyright Owners leveraging market power).

The Services argue that the Mechanical Floor is tantamount to a separate rate and defeats the benefits of an All-In rate. Apple PFF ¶¶ 164–167 (and record citations therein). They acknowledge the mechanical rights and public performance rights are ''perfect complements'' from the perspective of an interactive streaming service, but assert there is no economic rationale for setting the two rates separately from one another. *Id.* ¶ 88. The Services fear the alternative minimum Mechanical Floor could supersede a ''reasonable headline royalty rate.'' Marx WDT ¶ 165; *see* Leonard AWDT ¶¶ 54, 80–81 (''perfect complements'' argue for elimination of Mechanical Floor). The Services also argue that removal or adjustment of the Mechanical Floor would improve economic efficiency. Marx WDT ¶¶ 135, 165.

5. Greater-Of per Unit/per User Structure

Copyright Owners' proposal constitutes a ''greater of'' rate structure, whereby the royalty would equal the greater of $.0015 per play and $1.06 per-end user per month. In support of this approach, Copyright Owners contend it establishes a value for each copy of a musical work, independent of the Services' business models and pricing strategies. Rysman WDT ¶ 89. They argue that the greater-of structure is no more complicated than a per-play rate alone and is much less complicated

[58] *See also* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III); subpart A Configurations of the Mechanical License, Docket No. 16–CRB–0003–PR, 82 FR 15297, 15298 n. 15 (March 28, 2017). (''[M]usic licensing is fragmented, both by reason of the Consent Decree and the fragmentation of the statutory licensing schemes in the Act. These issues are beyond the scope of authority of the Judges; they can only be addressed by Congress.'').

[59] If the All-In Rate calculation results in a dollar royalty payment below the stated Mechanical Floor rate, then that floor rate would bind.

[60] Although Apple does not join in the endorsement of the 2012 rates as benchmark, Apple does propose elimination of the Mechanical Floor for the upcoming rate period. Apple Inc. Proposed Rates and Terms, at 4, 7–8 (royalties calculated by multiplying number of streams times per-stream rate, subtracting public performance royalties, and allocating per work) (May 11, 2017). Google's revised rate proposal, which also does not rely on the 2012 rate as a benchmark, does not include a Mechanical Floor. *See,* Google Amended Proposal, at 1.

[61] This claimed ''illusion'' became a reality, as the [REDACTED], has been paying the vast majority of its royalties pursuant to the Mechanical Floor, as has [REDACTED]. *See, e.g.,* Marx WDT ¶ 76; Marx WRT ¶ 40.

than the 2012 Settlement rate structure. According to Copyright Owners, a per-user rate adds only one additional metric for royalty calculation. Brodsky WDT ¶ 76. Copyright Owners also assert that their usage-based structure is aligned with the value of the licensed copies because couples rates with usage and consumption. CORFF at 22. Finally, Copyright Owners note that in music licensing agreements it is not uncommon to find royalty rates set in a greater-of formula that includes a per-user and a per-play prong, as well a percent-of-revenue prong. *See* CORFF at 97 (and record citations therein).

The Services assert that the greater-of aspect of Copyright Owners' rate proposal would lead to absurd and inequitable results, well above the rates established under Copyright Owners' per-play rate prong. Professor Ghose, one of Apple's economic expert witnesses, calculated that under Copyright Owners' greater-of structure, interactive streaming services would pay under the per-user prong if the number of monthly streams per user averaged less than 707. 4/12/17 Tr. 5686–87 (Ghose). In other words, the hypothetical service would be required to pay $1.06 per user rather than $0.0015 per stream.[62] *Id.* at 5687.

Importantly, Apple argues that the record in this proceeding shows that Services' monthly streams have been historically less than 707 per user per month. Specifically, relying on data in Dr. Leonard's Written Rebuttal Testimony, Apple contends that the annual weighted average number of streams per user per month across current subpart B and subpart C service offerings has been below [REDACTED] in each year from 2012 to 2016, while the average number of streams per user per month has exceeded 707 (which would trigger the per play prong) only [REDACTED] according to service-by-service data. *Id.*;[63] *see* Written Rebuttal Testimony of Gregory K. Leonard, Trial Ex. 698, at Ex. 3b (Leonard WRT). Apple argues that these historical data indicate that the Services would consistently pay more than the $0.0015 per play rate emphasized by Copyright Owners in this proceeding. *See* Apple PFF 284.[64]

According to Apple, even Copyright Owners' own expert, using different data, found that if the Copyright Owners' proposal had been in effect, [REDACTED] of the [REDACTED] Services he reviewed would have been required to pay under the per-user prong in December 2015. Rysman WRT ¶ 87, Table 1. Professor Rysman's data for December 2014 indicated that [REDACTED] of the [REDACTED] Services would have been required to pay under the per-user prong. *Id.* at Table 2.

Copyright Owners do not dispute the statistical analyses; rather, they claim that the binding nature of the per-user prong is not problematic. They cite sound recording performance license agreements in which a per-user of prong binds interactive streaming services at a rate of $[REDACTED], well above the $1.06 proposed by Copyright Owners for mechanical licenses. *See* CORPFF (Apple) at 104. Copyright Owners also attempt to support the higher effective per play rates by explaining that per-user rates reflect the value of *access* to the publishers' repertoires, not just the value of an individual stream. *See* CORPFF (Apple) at 104–05 (and citations therein).

C. 2012 Settlement as Rate Structure Benchmark

The Services request a rate structure that (although not uniform in the respective particulars) generally tracks the present rate structure (including the All-In rate approach, but excluding the present Mechanical Floor). More particularly, they propose a structure based on a ''headline'' percent-of-revenue royalty, but, subject to certain minima that are triggered if the revenue-based royalty is either too low or inapplicable.

By contrast, Copyright Owners seek a radical departure from the present rate structure. First, Copyright Owners seek to eliminate the All-In rate, thus decoupling the mechanical rate from the performance rate. Second, they advocate for a replacement of the ''percent-of-revenue with minima'' structure and a substitution of a rate equal to the greater of a per-play royalty and a per-user royalty. *Copyright Owners' Amended Proposed Rates and Terms* at 8.

Copyright Owners criticize using the 2012 rate structure as a benchmark for rates in the present market. Copyright Owners contend that results of a negotiated settlement have limited evidentiary value in the present context. They also argue that the parties arrived at the 2012 rate structure and rates in a market that was not mature and that, thus, the settlement rates were merely ''experimental.'' The Copyright Owners further contend that any benchmark based upon a compulsory, statutory rate is suspect because of the ''shadow'' of the statutory construct.

1. Evidentiary Value of Settlement Rates

Copyright Owners criticize the relevance of the 2012 settlement-based rate structure. First, they note that, as terms in a settlement, the elements of the rate structure do not reflect the structure the market would set, but rather reflect the parties' own understanding of how the Judges would rule in the absence of a settlement.

Second, Copyright Owners assert that, assuming *arguendo* that the current rate structure can be used for benchmarking purposes, the Services have not presented competent evidence or testimony as to the intentions of the settling parties who had negotiated the 2012 settlement, or, for that matter, the 2008 settlement that preceded it. Specifically, Copyright Owners claim that the witnesses who were called by the Services to testify did not negotiate directly with the Copyright Owners. 3/29/17 Tr. 3621–22 (Israelite).[65] More particularly, the two Services' witnesses who provided testimony concerning the negotiations, Adam Parness and Zahavah Levine, acknowledged they had no *direct* involvement in the *Phonorecords I* negotiations, and Ms. Levine did not engage in direct negotiations with regard to the *Phonorecords II* settlement either. 3/9/17 Tr. 339–40 (Parness); 3/29/17 Tr. 3885–86 (Israelite); Israelite WRT ¶ 14 (indicating that Ms. Levine had left Real Networks in 2006, before her former

[62] Professor Ghose used a hypothetical scenario in which a service had one user who listened to 300 streams in a given month. Under Copyright Owners' $0.0015 *per play* prong, the service would pay $ 0.0015 × 300, or $.45 in royalties. Under Copyright Owners' *per user* prong, the service would pay a royalty of $1.06 for the one user, which is an *effective* per play rate of $0.0035 per play ($1.06 ÷ 300) or more than twice the $0.0015 per-play rate. 4/12/17 Tr. 5687 (Ghose).

[63] Deezer averaged [REDACTED] streams in 2014 and Tidal averaged [REDACTED] streams in 2016. *Id.*

[64] This analysis underscores the inconsistency between Copyright Owners' claim that each stream of a musical work has ''inherent value.'' *See, e.g.,* Israelite WDT ¶ 39 (it ''makes no sense'' if ''[e]ach service effectively pays to the publisher and songwriter a different per-play royalty''). But in reality, Copyright owners understand that each musical work also contributes to a different value—access value (what economists call ''option value'')—when the musical works are collectivized and offered through an interactive streaming service, resulting in different effective per play rates paid by services if the per user prong is triggered. To explain this inconsistency, Copyright owners note the existence of a second ''inherent value''—not created by the songwriter in his or her composition—but rather created *by the user*—who inherently values access to a full repertoire. But these two purportedly ''inherent'' values are inconsistent (which is why there are two prongs in the proposal) and, given the heterogeneity of listeners, the ''access value'' is not ''homogeneous throughout the market. These points illustrate but some of the reasons why a single per play rate is inappropriate.

[65] *See supra* note 57 and accompanying text.

subordinate was negotiating the 2008 settlement).

Mr. Parness testified, at the time of the *Phonorecords I* settlement, he was Director of Musical Licensing for RealNetworks, Inc., an interactive streaming service and a member of DiMA, its bargaining representative. In that capacity, Mr. Parness was ''actively involved'' on behalf of Real Networks. Parness WDT ¶ 5. Substantively, Mr. Parness testified to his understanding that the important aspects of the *Phonorecords I* negotiations and settlement were: (1) An agreement that noninteractive services did not need a mechanical license; (2) the interactive mechanical license would be calculated on an ''All-In'' basis; (3) the rate would be structured as a percent-of-revenue with certain minima; and the headline rate would be 10.5%. Parness WDT ¶ 7. He noted that the rate minima were included at the behest of Copyright Owners, who were concerned that low retail pricing by the services would cause a revenue-based rate to result in too little royalty revenue. *Id.* ¶ 8. Mr. Parness further testified, with regard to the 2012 negotiations, that he directly negotiated with Mr. Israelite and the general counsel for the NMPA–negotiations that led to the parties' agreement essentially to maintain the subpart B structure and to create what became the new subpart C rate structure. *Id.* at 11; *see also* 3/9/17 Tr. 325–27 (Parness).

Ms. Levine, who was employed by Google YouTube at the relevant time, testified that in the *Phonorecords II* negotiations, Copyright Owners sought an increase in the subpart B rates, the services refused, and Copyright Owners ultimately withdrew that demand. Written Rebuttal Statement of Zahavah Levine, Trial Ex. 697, ¶ 2 (Levine WRT). Ms. Levine was not directly involved in the negotiations, however, as DiMA represented the interests of the services in those negotiations. Knowing the outcome of the negotiations does not illuminate the thought processes (or the horse-trading) that actually drove the negotiations or shaped the settlement structure.

The Copyright Owners proffered no specific testimony as to how or why the provisions of the 2008 and 2012 settlements were negotiated and valued, either in their constituent parts or as they were integrated into the rate structure ultimately adopted.

2. The 2012 Rates Were ''Experimental''

Copyright Owners maintain that the current rate structure was ''experimental,'' *i.e.,* when it was first agreed to there was no data to evaluate the business and Copyright Owners lacked knowledge as to the future development of the interactive market. Thus, they claim to have accepted the present rate structure because it offered protection against poorly monetized services, through the establishment of the alternate prongs. In fact, it was *Copyright Owners* that first proposed the three tiered rate structure that now exists, but the specific percentages and rates were the subject of negotiation. Copyright Owners' understanding of the characterization of the 2012 rates is informative; Mr. Israelite, who engaged in the negotiations, did not view the minima in the structure *as* minima, but rather as alternative rate prongs by which Copyright Owners would be paid the greatest of the rates calculated. 3/29/17 Tr. 3637 (Israelite). Copyright Owners acknowledge that they had no idea which prong would bind—because they had no control over the services business models or over the performance rates that are deductions to the All-In rate—so they negotiated all three alternatives to reflect that uncertainty. *Id.* at 3636–38.

With regard to the Mechanical Floor, Copyright Owners assert that they required this provision in part to protect against a severe or complete reduction in mechanical royalties that would as possible by virtue of the All-In structure. *See* Israelite WRT ¶¶ 19–22, 29, 81; 3/29/17 Tr. 3632, 3634–36, 3638, 3754, 3764–65 (Israelite); 3/8/17 Tr. 259 (Levine).[66]

The Services assert that there is no record evidence, beyond Mr. Israelite's testimony, that the existing rate structure was, or remains, experimental. They further note that by 2012, when this rate structure was renewed, consumer adoption of streaming was obvious, contrary to Copyright Owners' allegations. Levine WRT ¶ 5. The Services also assert that numerous services, including those backed by large companies, such as Yahoo and Microsoft, had already entered the market, and some of those services had achieved significant subscriber numbers. 3/8/17 Tr. 155–57 (Levine); *see also* Parness WDT ¶ 12.

The Services also dispute the assertion that there was no significant market development by the time of *Phonorecords II.* Levine WRT ¶¶ 5–6; 3/8/17 Tr. 171–72, 270–72 (Levine). Numerous services, including the more recent large new entrants, had already entered the market, with some realizing significant subscriber numbers. *Id.* at 155–57 (Levine).

[66] The Mechanical Floor is discussed in greater detail, *supra,* section IV.B.4.

3. The ''Shadow'' of the Statutory License

Copyright Owners assert that any benchmark, including the Services' proffered benchmarks, based on rates set for a compulsory license, is inherently suspect, because they are distorted by the so-called ''shadow'' of the statutory license. This is a recurring criticism. *See, e.g., Web IV,* 81 FR at 26329–31.

More particularly, Copyright Owners argue: ''The royalty rate contained in virtually any agreement made by a music publisher or songwriter with a license for rights subject to the compulsory license will be depressed by the availability of the compulsory license.'' COPFF ¶ 708 (and record citations therein). In summary, this alleged shadow diminishes the value of a benchmark rate that was formed by private actors who negotiated the rate while understanding that either party could refuse to consummate a contract and instead participate in a proceeding before the Judges to establish a rate. Thus, neither side can utilize any bargaining power to threaten to actually ''walk away'' from negotiations and refuse to enter into a license. In that sense, therefore, any bargain they struck would be subject to the so-called ''shadow'' of the regulatory proceeding.

The metaphorical shadow actually can be cast in two ways. First, when the parties are negotiating, they are aware of the rates established in *prior* proceedings, which shape their expectations of the likely outcome if they do not enter into a negotiated agreement. Second, there is the alleged shadow of the *upcoming* proceeding, should the parties fail to negotiate an agreement. That *in futuro* shadow reflects not merely the prior rulings of this tribunal (and its predecessors), but also any predictions the parties may make regarding, for example, the Judges' likely positions with regard to the present and changing nature of the industries involved, the economic issues, the weight of various types of evidence, the credibility of witnesses and the Judges' application of the 801(b)(1) standards.

The argument that the shadow taints the use of statutory rates, and direct agreements otherwise subject to the statutory license must be considered in light of section 115 of the Copyright Act, which provides that in addition to the objectives set forth in section 801(b)(1), in establishing such rates and terms, the Copyright Royalty Judges may consider rates and terms under voluntary license agreements described in subparagraphs (B) and (C). 17 U.S.C. 115(c)(3)(D). Subparagraphs (B) and (C), respectively,

refer to agreements on ''the terms and rates of royalty payments under this section'' by ''persons entitled to obtain a compulsory license under [17 U.S.C. 115(a)(1)]'' and ''licenses'' covering ''digital phonorecord deliveries.'' *Id.* Thus, it is beyond dispute that Congress has authorized the Judges, in their discretion, to consider such agreements as evidence, notwithstanding the argument that the compulsory license may cast a shadow over those agreements.

Additionally, the Judges may consider the existing statutory rates themselves as evidence of the appropriate rate for the forthcoming rate period. Indeed, the Judges may consider existing rates as *dispositive evidence* when setting new rates. *Music Choice, supra,* 774 F.3d at 1012 (the Judges may ''use[ ] the prevailing rate as the starting point of their Section 801(b) analysis'' and may ultimately find that ''the prevailing rate was reasonable given the Section 801(b) factors.''). Of course, the fact that the Copyright Act and the D.C. Circuit grant the Judges statutory authority to consider statutory rates and related agreements as evidence does not instruct the Judges as to *how much weight* to afford such agreements. The exercise of that judicial discretion remains with the Judges.

Further, there is no reason to find such benchmark agreements *per se* inferior to other marketplace benchmark agreements that may be unaffected by the shadow, because the latter may be subject to their own imperfections and incompatibilities with the target market. Thus, the Judges must not only consider (i) the importance, *vel non,* of any ''shadow-based'' differences between the regulated benchmark market and an unregulated market; but also (ii) how those differences (if any) compare to the differences (if any) between the unregulated market and the target market (*e.g.,* differences based on complementary oligopoly power, bargaining constraints and product differentiation).[67]

In the present proceeding, the parties weigh in on the shadow issue with several additional arguments. Copyright Owners emphasize that the purpose of their benchmarking approach is to avoid the distortions of the shadow, by utilizing the unregulated sound recording agreements between labels and interactive streaming services and then applying a ratio of sound recording to musical works royalties, also in unregulated contexts, to develop a benchmark wholly free of the shadow cast by the statute. *See* Eisenach WDT ¶¶ 34–40. The Judges agree that a strength of the Copyright Owners' benchmarking approach is that it allows for the identification of marketplace benchmarks, so that the Judges can ascertain whether there are analogous markets from which statutory rates can be derived.

The Services' experts discount the shadow argument and, indeed, essentially rely on the statutory rates in subpart B and in subpart A as their benchmarks. Professor Marx opines that the statutory rates are superior in at least one way, because they incorporate the elements the Judges must consider—both the market forces and the section 801(b)(1) factors that are the bases for the statutory rates. 3/20/17 Tr. 1843–44, 1914 (Marx); *see also* 3/13/17 Tr. 575 (Katz) (the shadow leads the parties to meet the 801(b)(1) objectives).

However, when the rates are the product of settlements rather than a Determination by the Judges, they do not reflect the Judges' application of the elements of section 801(b)(1). Rather, the settlement rates reflect (implicitly) the parties' *predictions* of how the Judges may apply such factors. Although the Judges reasonably can, and do, accept the parties' understanding of how market forces shape their negotiations (indeed, economic actors' agreements are part and parcel *of* the market),[68] the Judges cannot defer to any implicit ''mindreading'' by the parties as to the Judges' application of the elements of section 801(b)(1). Rather, the Judges have a duty to independently apply the statute. Accordingly, the Judges reject the idea that rates and terms reached through a settlement can be understood to supersede—or can be *assumed* to embody—the Judges' application of the statutory elements set forth in section 801(b)(1). However, if on further analysis, the Judges find that provisions arising from a settlement reflect the statutory principles set forth in section 801(b)(1), then the Judges may adopt the provisions of that settlement if it is superior to the evidence submitted in support of alternative rates and terms.

With regard to the alleged impact of the shadow, Professor Katz offers a perspective. He opines that the so-called shadow imbues licensees with countervailing power, to offset or mitigate the bargaining power of licensors who otherwise have the ability to threaten to ''walk away'' from negotiations and thus decimate the licensees' businesses. 3/13/17 Tr. 661 (Katz). The Judges find merit in this perspective, because it underscores the fact that a purpose of the compulsory license is to prevent the licensor from utilizing or monetizing the ability to ''walk away'' as a cudgel to obtain a better bargain. In this limited sense, the agreements created under the so-called shadow thus are beneficial, to the extent that they provide one potential way in which to offset the complementary oligopoly power of the record companies, especially the Majors. Indeed, this countervailing power argument is consistent with the Judges' ''shadow'' analysis in *Web IV,* 81 FR, at 26330–31 (noting the counterbalancing effect of the statutory license in establishing effectively competitive rates).[69]

Professor Leonard presents yet another perspective on the statutory benchmarks, arguing that the alleged shadow they cast acts as a ''focal point'' around which parties negotiate, with the statutory license acting as either a ceiling or a floor. 3/15/17 Tr. 1263 (Leonard). In a second-best market where price discrimination is economically appropriate, the continuation of a rate structure, over two rate cycles, might suggest the parties' acceptance of that structure as an efficient ''focal point,'' absent sufficient evidence to the contrary. However, as the Judges noted in *Web IV,* whatever theoretical appeal there may be in this focal point analysis (if any), it cannot be credited as an independent basis for using an existing statutory rate, absent ''a sufficient connection between theory and evidence.'' *Id.* at 26630.

[67] The Judges note that one of the two benchmarking methods relied upon by Copyright Owners subtracts the *statutory* rate set in *Web III* for noninteractive streaming from a royalty rate derived from the unregulated market for sound recording licenses between labels and interactive streaming services. This would seem to violate the Copyright Owners' own assertion that statutorily set rates cannot be used to establish reasonable rates. However, Copyright Owners' expert testified that, in his opinion, the Judges in *Web III* accurately identified the market rate for noninteractive streaming, so that rate could be utilized as if it were set in the market. 4/4/17 Tr. 4643 (Eisenach). This assertion proves too much. If one expert on behalf of a party may equate a rate set by the Judges with the market rate, why cannot the Judges, or any other party's expert, do the same? The end result of such an approach takes us back to the point the Judges made at the outset in this section: Any rate set by the Judges or influenced by the Judges' rate-setting process must be considered on its own merits.

[68] For example, the Judges regularly assume that the parties have ''baked-in'' the values of promotion and substitution when agreeing to rates. *See, e.g., Web IV,* 61 FR at 26326.

[69] The Shapley analyses conducted by Professors Marx and Watt also eliminate this ''walk away'' power by valuing all possible orderings of the players' arrivals. *See* discussion, *infra,* section V.D.1.

D. Greater-Of Percent of Revenue/TCC Rate Structure

In its revised rate proposal Google presents an all-in royalty rate for all service offerings set as the greater of 10.5% of revenue and 15% of TCC. TCC is one metric used in computing mechanical royalties under the 2012 rates and numerous direct licenses. In the 2012 rate structure a percentage of TCC is generally combined with percentage of revenue in a greater-of calculation, but is capped by a fixed per-subscriber royalty. *See, e.g.,* 37 CFR 385.13(a)(3), (b). A number of direct licenses in the record mirror this approach, or directly incorporate the terms of 37 CFR part 385. *See, e.g.,* Leonard AWDT ¶ 54 (describing royalty calculation methodology in direct licenses between [REDACTED] and several music publishers, including [REDACTED], [REDACTED], and [REDACTED]; License Agreement between [REDACTED] and [REDACTED], Trial Ex. 749, at ¶ 6(a) ([REDACTED]).

Several direct licenses between [REDACTED] and music publishers base royalties on a straight, uncapped [70] percentage of TCC, with no ''greater-of'' prong. *See, e.g.,* Music Publishing Rights Agreement between [REDACTED] and [REDACTED], Trial Ex. 760, at ¶ 5(a) (all-in mechanical rate of [REDACTED]% of TCC); accord Leonard AWDT ¶ 64 (describing terms of [REDACTED] direct licenses with music publishers including [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]). Still other direct licenses include an uncapped TCC metric in a three-pronged ''greater-of'' calculation (along with percentage of revenue and a per-subscriber fee). *See, e.g.,* [REDACTED] Music Publishing Rights Agreement with [REDACTED], Trial Ex. 757, at ¶ 4(a)(ii) and (iii). Some direct licenses eschew TCC entirely and compute royalties as the greater of a percentage of revenue and a per-subscriber fee. See Leonard AWDT ¶ 71 (describing terms of six agreements with [REDACTED]).

Dr. Leonard, an expert for Google, reviewed and analyzed a number of direct licenses that Google and other services have entered into with muCsic publishers for, *inter alia,* mechanical rights. Dr. Leonard found the agreements to be useful benchmarks due to the similarity of rights, parties, economic circumstances, and time period. *See* 3/15/17 Tr. 1084 (Leonard). He found the direct agreements to support the reasonableness of Google's proposed rate structure, notwithstanding variations among the agreements and between many of the agreements and Google's rate proposal. At the time, Google was proposing a structure that (like other of the Services' proposals) largely followed the statutory rate structure, but without a Mechanical Floor. Nevertheless, Dr. Leonard's analysis demonstrates that the marketplace supports a number of rate structures, and that no single structure, or element of a structure, is indispensable. The Judges find that Dr. Leonard's analysis, and the marketplace benchmarks that he relies on, support the rate structure that Google proposes in its amended rate proposal.

E. Judges' Conclusion Concerning Rate Structure

In their rate determination proceedings, the Judges are informed, but not bound, by the parties' proposals. The Judges' task is to analyze the record evidence and determine a rate structure and rates that are reasonable, even though they might vary from any one party's proposals. Weighing all the evidence and based on the reasoning in this Determination, the Judges conclude that a flexible, revenue-based rate structure is the most efficient means of facilitating beneficial price discrimination in the downstream market.[71] The Judges, therefore, reject the per-play/per-user rate structures proposed by the Copyright Owners and Apple.

The Judges also find that the All-In rate is a necessary and proper element of a mechanical rate determination and conclude it must remain in the rate structure for the forthcoming rate period. Specifically, the Judges find that the deduction of performance royalties accounts appropriately for the perfect complementarity of the performance and mechanical licenses.[72] The Judges reject the argument that the All-In feature is unlawful because the Judges do not regulate performance rates. The All-In feature does not constitute a regulation of the performance rate, but rather represents a *cost exclusion (or deduction)* from the mechanical rate. The Judges and the parties recognize that the royalties otherwise due under a revenue-based format may exclude certain costs. *See* 73 CFR 385.11(Definition of ''Service Revenue,'' paragraph (3) therein).[73]

Two of the proposed rate structures—the Services' variations on the existing structure and Google's proposed structure—have the foregoing elements. Of those two, the Judges find that Google's proposal is superior for the following reasons.

First, the use of an uncapped TCC metric is the most direct means of implementing a key finding of the Shapley analyses conducted by experts for participants on both sides in this proceeding: The ratio of sound recording royalties to musical works royalties should be lower than it is under the current rate structure.[74] Incorporating an uncapped TCC metric into the rate structure permits the Judges to influence that ratio directly.[75]

Second, an uncapped TCC prong effectively imports into the rate structure the protections that record companies have negotiated with services to avoid the undue diminution

[70] In other words, TCC is not part of a ''lesser-of'' calculation with another metric such as a per-subscriber fee.

[71] Rates based on a percent-of-revenue (even without any alternative rate prongs) are themselves a form of price discrimination. See J. Cirace, *CBS* v. *ASCAP: An Economic Analysis of a Political Problem,* 47 Ford. Rev. 277, 288 (1978); W.R. Johnson, *Creative Pricing in Markets for Intellectual Property,* 2 Rev. Econ. Res. Copyrt., Issues 39, 40–41 (2005). To the extent they incorporate revenue-sharing in the underlying licenses between services and record companies, percent of TCC rates are also a form of price discrimination.

[72] As discussed infra, the fact that the performance right and the mechanical right are necessary complements to the licensees does not, however, end the inquiry. As Copyright Owners point out, the publishers use mechanical royalties in part to fund advances to songwriters or to assure their subsequent recoupment. The Judges will, therefore, retain the ''Mechanical Floor'' for the upcoming rate period, to ensure the continuation of this important source of liquidity to songwriters.

[73] The Judges recognize that the reduction of the mechanical rate interim calculation by the amount of the performance rate in ''Step 2'' (*see* § 385.12(b)(2)), acts as an exclusion from royalties rather than a deduction from revenue (by analogy, just as a tax credit is a subtraction from taxes, whereas a tax deduction is a subtraction from income). However, there is no statutory or regulatory impediment that prohibits this exclusion from royalties, especially given the economic interrelationship between performance rights and mechanical rights, discussed in the text *infra.*

[74] The Shapley analyses are discussed *infra,* section V.D.

[75] Google notes, concerning its proposal, that the removal of a cap on TCC ''does leave the services exposed to the labels' market power, and would warrant close watching if adopted.'' GPFF ¶ 73. While true, Google fails to note that the services are already exposed to the labels' market power. Record companies could, if they so chose, put the Services out of business entirely. Uncapping the TCC rate prong does not change that. Nor can any decision by this tribunal. While the possibility of the record companies using their market power in a way that harms the Services is a real concern, the Judges cannot allow that concern to grow into a form of paralysis, where any change from the status quo is deemed too dangerous to contemplate. *Any* increase in mechanical royalty rates, whether or not they are computed with reference to record company royalties, has the potential of leading to a bad outcome for the Services. *Even maintaining the status quo* could lead to a bad outcome for the Services, as it surely would for the songwriters and publishers. Ultimately the Judges must go where the evidence leads them and, as with any economic exercise, trust in the rational self-interest of the market participants.

of revenue through the practice of revenue deferral.[76] The Judges find that the present record indicates that the Services do seek to engage to some extent in revenue deferral in order to promote their long-term growth strategy. A long-term strategy that emphasizes scale over current revenue can be rational, especially when a critical input is a quasi-public good. Growth in market share and revenues is not matched by a commensurate increase in the cost of such inputs, whose marginal cost of production, or reproduction as in this case, is zero. It appears to the Judges that the nature of the downstream interactive streaming market, and its reliance on scaling for success, results necessarily in a competition *for the market* rather than simply competition *in the market.*[77] Revenue deferral argues against adopting a pure percent-of-revenue rate structure.

Third, in the absence of Congressional guidance as to the meaning of a ''reasonable rate,'' the Judges determine that, as a matter of policy, transparency and administrative rationality are factors in determining whether a rate is ''reasonable.'' Those who pay and receive royalties, those who calculate the royalties, and those (like the Judges) who are sometimes called upon to interpret the regulations implementing the royalties, are best served by a rate structure that is understandable and administrable. Absent compelling reasons to adopt a more complex rate structure (which are not present in the record), simpler is better.[78] Google's proposed rate structure reduces the Rube-Goldberg-esque complexity and impenetrability of the existing, settlement-based rate regulations. In particular, it merges ten separate rates for different service offerings into a single rate that would apply to all service offerings, thus avoiding the potential for confusion and conflict as new service offerings emerge that do not fall neatly into any of the existing categories.

Fourth, Google's proposed rate structure is supported by voluntary agreements that were reached outside the context of litigation. They are thus free from trade-offs motivated by avoiding litigation cost, as distinguished from the underlying economics of the transaction. The same cannot be said of the existing rate structure. While both are affected by the ''shadow'' of the compulsory license, the Judges find the voluntary agreements more informative of the behavior of market participants.

The Judges adopt Google's proposed rate structure for the foregoing reasons.[79] However, the Judges modify Google's proposed rate structure by including the Mechanical Floor from certain configurations in the existing rate structure. The Mechanical Floor appropriately balances the Service's need for the predictability of an All-In rate with publishers' and songwriters' need for a failsafe to ensure that mechanical royalties will not vanish either through the actions of the Services or the PROs and the Rate Court. Testimony of publishers and songwriters has established the critical role that mechanical royalties play in making songwriting a viable profession.[80]

The Judges reject the Services' arguments for eliminating the Mechanical Floor. For example, the Judges find the Services' argument that the mechanical right has no standalone value to be incomplete and, to an extent, self-serving. To the music publishers and songwriters, the mechanical right does have a value in the funding of songwriters, a value not provided by the performance royalty. By analogy, the cost of any publisher input, not just the cost of providing liquidity to songwriters, such as, for example, the cost of heating the buildings in which songwriters toil, has no standalone value to the Services, yet no one would assert that the licensors are not entitled to royalties from which they can recover their heating costs. Liquidity funding for songwriters is a necessity, just as heat is a necessity—the complementary nature of the rights *to the Services* is of no relevance.

The Judges also reject Apple's argument that the Mechanical Floor should be eliminated because of the potential for fragmented musical works licenses due to threatened publisher withdrawal from PROs, and the creation of new PROs. The Services have offered no evidence that the introduction of the new PRO, Global Music Rights, will have any impact on the performance royalty rate. As confirmed by recent litigation, partial withdrawals are not permitted by the rate court, the Second Circuit, or the Department of Justice. There is no evidence of a trend of increasing performance rates. Fractional (a/k/a fragmented) licensing has always been present in the market. *See* CORPFF at pp. 87–90 (and record citations therein).

Finally, the Judges reject Google's proposed rates within that structure. Google's proposed rates are derived from the subpart A benchmark that the Judges have rejected. *See* GPFF ¶¶ 21, 26–30.[81] The Judges look elsewhere in the record for reasonable percent-of-revenue and TCC rates to use in the two prongs of Google's proposed greater-of rate structure.

The Judges' adoption of a Mechanical Floor for the selected streaming services satisfies the objectives of section 801(b)(1). The Mechanical Floor offers protection for Copyright Owners, thus maximizing the availability of creative works to the public. The ''safety net'' of the Mechanical Floor assures a fair return to Copyright Owners, serving as a counterweight to the All-In rate, without an unfair impact on the income of the copyright users. The balanced protection of the songwriter's livelihood afforded by the Mechanical Floor recognizes the contribution of musical works to all music delivery mechanisms. Finally, the current regulations include Mechanical Floor rates; the Judges' retention of those rates for streaming services is not disruptive to the music industry.

In the Owners' Motion, the Copyright Owners argued that the Judges' elimination of a subscriber-based minimum fee for paid locker services and limited downloads could only have been an oversight. For all the reasons detailed in the Judges' Order on the motions for clarification, the Judges' decision was purposeful. Paid locker

[76] *See* 4/6/17 Tr. 5215–16 (Leonard); *see also* GPFF ¶ 73 (arguing that ''removing the caps allows the TCC prong to flexibly protect against downside risks associated with revenue deferment, displacement, or attribution issues.'').

[77] This is the form of dynamic competition known as Schumpeterian competition (named after the economist Joseph Schumpeter). Such competition emphasizes the importance of the dynamic creation of new markets and ''new demand curves,'' recognizing that short-term profit or revenue maximization may be inconsistent with the rationality of competing for the market in this manner.

[78] ''There is beauty in simplicity.'' 3/23/17 Tr. at 2855 (Ghose).

[79] The Copyright Owners have two overarching objections to Google's revised rate proposal. The first is a procedural objection: Google's revised proposal was submitted after all evidence was taken and the Copyright Owner's had no opportunity to cross-examine any witness about it. *See* CO Reply to GPFF at 1–2, 18. Google was entitled, under the Judges' procedural regulations, to change its rate proposal up to, and including, the filing of proposed findings and conclusions. 37 CFR 351.4(b)(3). Google did so—at the Judges' request. *See* 4/13/17 Tr. 6019. The Judges find no merit in the Copyright Owners' procedural objection.

The Copyright Owners also argue that Google's revised rate proposal is without evidentiary support. *See, e.g.,* CO Reply to GPFF at 2, 15–18. The Judges do not rely on Google's proposed findings. Rather, the Judges rely upon the evidence in the record they deem relevant and persuasive. The Judges have found sufficient evidence to support the rate structure, and the rates within that structure, as detailed in this Determination. The Determination speaks for itself.

[80] *See infra,* section VI.A.

[81] The subpart A benchmark is discussed *infra,* section V.B.3.

services and limited offerings are licensed uses that are of a nature totally different from other streaming services. The existing regulations treated them differently and afforded them an alternative minimum royalty. The existing minimum for these services was not a Mechanical Floor.

V. Determining Royalty Rates

Establishing a rate structure resolves only one aspect of the overall rate determination. The next issue for the Judges to decide is the setting of rates *within* the appropriate rate structure. In that regard, it is noteworthy that several of the Services' expert economists have asserted that, although the 2012 rate structure is an appropriate benchmark, the rates within that structure should be modified.[82] Thus, the Judges must consider the record evidence that relates to the rates themselves in order to determine the rates to be set for the forthcoming rate period within the price discriminatory rate structure.

A. Rejection of the Copyright Owners' Approach

Copyright Owners proposed a single per-unit rate (in their greater-of format). They did not propose a set of different rates (per-unit or otherwise), that would be applicable to a rate structure similar to the 2012 rate structure. Thus, the Judges consider the benchmarking approach undertaken by Copyright Owners for the purpose of determining whether any portions of their benchmarking exercise provides evidence of rates that the Judges should properly incorporate into the differentiated rate structure they are adopting in this determination.

Copyright Owners' proposal for a per-unit rate is based on an overarching premise: A single musical work has an ''inherent value.'' See, *e.g.,* Israelite WDT ¶¶ 29, 31, 33, 48; Herbison WDT ¶ 35; Brodsky WDT ¶ 68. To make that principle operational, Copyright Owners presented a benchmarking analysis through Dr. Eisenach, one of their economic expert witnesses.

1. Dr. Eisenach's Methodology

a. Benchmarking

Dr. Eisenach sought to identify benchmarks that support Copyright Owners' per-play and per end-user rate for the mechanical license. He began by noting that ''an economically valid approach for assessing the value of intellectual property rights which are subject to compulsory licenses is to examine *market-based valuations* of reasonably comparable benchmark rights—that is, fair market valuations determined by voluntary negotiations.'' Eisenach WDT ¶ 8 (emphasis added). In selecting potential benchmarks, Dr. Eisenach identified what he understood to be key characteristics'' that would make a benchmark useful: ''[U]nderlying market factors . . . ; the term or time period covered by the agreements; factors affecting the relative bargaining power of the parties; and differences in the services being offered.'' *Id.* ¶ 80.

Dr. Eisenach found useful the license terms for the *sound recording rights* utilized by interactive streaming services, because they are negotiated freely between record companies (a/k/a labels) and the interactive streaming services. *Id.* These rates made attractive inputs for his analysis because they: (1) Relate to the same composite good—the sound recording that also embodied the musical work; and (2) the interactive streaming service licensees were the same licensees as in this proceeding. Thus, to an important degree, Dr. Eisenach found these agreements to possess characteristics similar to those in the mechanical license market at issue in this proceeding. Moreover, Dr. Eisenach found that ''[d]ata on the royalties paid under these licenses are available and allow . . . estimat[ion of] the rates actually paid by the [interactive] streaming services to the labels for sound recordings on both a per-play and a per-user basis.'' *Id.*

However, as Dr. Eisenach noted, these benchmark agreements related to a different right—the right to a license of sound recordings—not the right to license musical works broadly, or to the mechanical license more specifically. Thus, as with any benchmark that does not match-up with the target market in all respects,[83] Dr. Eisenach had to examine how the rates set forth in the benchmark agreements for interactive streaming of sound recordings could be utilized. *Id.* More particularly, Dr. Eisenach posited that there may be a relationship (or ratio) between the sound recording royalty rate and the musical works royalty rate. To that end, he ''examine[d] a variety of markets in which sound recording and musical works rights are *both* required in order to ascertain the relative value of the two rights as actually reflected in the marketplace.'' *Id.* (emphasis added).

Through this examination, Dr. Eisenach concluded that these proposed benchmarks ''establish upper and lower bounds for the relative value of sound recording and musical works rights . . . estimate[d] to be between 1:1 and 4.76:1.'' *Id.* To make these ratios more instructive, the Judges note that the inverse of these ratios (*e.g.,* 1:4.76 instead of 4.76:1) can be expressed as a percentage. Thus, the ratio of 1:4.76 is equivalent to a statement that musical works royalties equal 21% of sound recording royalties in agreements struck in the purported benchmark market. More obviously, the 1:1 ratio means that, in agreements within that purported benchmark market, musical works royalties equal 100% of sound recording rates. By converting the ratios into percentages, it is easier to see that the high end of Dr. Eisenach's benchmark range is almost five times as large as the low end of the range.

b. Dr. Eisenach's Potential Benchmarks

Dr. Eisenach considered a variety of benchmark categories in which the licensee was obligated to acquire licenses for musical works and licenses for sound recordings. His selection and consideration of each category of benchmark markets are itemized below.

i. The Current Section 115 Statutory Rates

The current statutory rate structure contains several alternate rates explicitly calculated as a percentage of payments made by interactive streaming services to the record companies for sound recording rights. Such rates are identified in the industry as the ''TCC'' rates, an acronym for ''Total Content Cost.'' *Id.* ¶ 82.[84] In the subpart B category, the TCC is 22% for ad-supported services and 21% for portable subscriptions. *Id.; see also* 37 CFR 385.13(b)(2) and (c)(2).[85] These percentage figures correspond to sound recording to musical works royalties of 4.55:1 and 4.76:1, respectively.

Dr. Eisenach notes that these statutory rates were not set by the Judges pursuant to a contested hearing, but rather reflect two settlements, one in

[82] To be sure, those Services' witnesses advocated for a reduction in the rates, but their acknowledgement that the usefulness of the 2012 structure does not *ipso facto* demonstrate the appropriateness of the 2012 rates is a general point that the Judges readily accept.

[83] The lack of a perfect identity is essentially tautological. If a ''benchmark'' was identical to the target market, it would *be* the target market. The issue for economists and for the Judges is to identify the differences, weigh the importance of those differences, and then either rely on the benchmark, reject or adjust the benchmark so that it is probative, or find that the proffered benchmark is so inapposite that it, even with any proffered adjustments, it must be disregarded.

[84] This rate prong is sometimes identified as ''TCCi,'' which is an acronym the parties adopted for ''Total Content Cost Integrity.''

[85] Lower percentages apply if the record companies' revenue includes revenue to be ''passed through'' by them to pay mechanical license royalties. However, according to Dr. Eisenach, such ''pass-throughs'' are not typical. *Id.* at 82 n.67.

2008 and the other in 2012. *Id.* ¶ 83. However, Dr. Eisenach discounts the value of these settlement rates for three reasons. First, he notes that they were established prior to the ''marketplace success'' of Spotify in the interactive streaming industry.[86] Second, he notes that the settlements, although voluntary, ''were negotiated under the full shadow of the compulsory license.'' Third, he finds that, although the settlement incorporates rate prongs based on a percent of sound recording rates (the TCC prongs), those provisions are part of a ''lesser of'' segment of the rate structure, and thus capped by alternative per subscriber rates. *Id.* & n.70. Thus, Dr. Eisenach concludes: ''In my opinion, the evidence . . . indicates that the relative valuation ratios implied by the current section 115 compulsory license . . . represent *an upper bound on the relative market valuations* of the sound recording and musical works rights.'' *Id.* ¶ 92 (emphasis added). (As an ''upper bound,'' these ratios would represent the lower bound of the reciprocal percentage of the value musical works rights relative to sound recording rights, again, 21% and 22%.).

The Judges note that Dr. Eisenach identifies the 21% and 22% TCC rates within the current rate structure. Thus, for example, if the sound recording royalty rate for interactive streaming is 60% of revenue, then, using these TCC figures, the implied musical work royalty rate is calculated as 12.6% of revenue (.21 × .60) (a ratio of 4.76:1), or 13.2% (.22 × .60) (a ratio of 4.5:1). Again, because Dr. Eisenach opines that these are upper bounds on the relative market valuations,'' that is the equivalent of opining that they represent the lower bound of a percentage-based royalty calculated via this ratio approach.

ii. Direct Licenses Between Parties Potentially Subject to a Section 115 Compulsory License

Dr. Eisenach also examined direct agreements between record companies and interactive streaming services that contained rates for sound recordings and mechanical royalties, respectively. *See, e.g., id.* ¶¶ 84–91. In such cases, the ratio of sound recording to musical works royalties ranged tightly between 4.2:1 and 4.76:1, closely tracking the regulatory ratios implicit in the section 115 TCC. *Id.* ¶ 92. (The 4.2:1 ratio equates to a TCC rate of 23.8%, and the 4.76:1 ratio equates to a mechanical rate of 21%.).

According to Dr. Eisenach, the similarity of these direct contract rate ratios to the statutory ratios reflects the ''shadow of the statutory license,'' by which direct negotiations between parties regarding rights that are subject to (or can be fashioned to be subject to) a statutory license are influenced by the presence of statutory compulsory rates and/or the prospect of a future rate proceeding. 4/4/17 Tr. 4591 (Eisenach) (''The underlying problem with looking at an agreement negotiated under the shadow of a license'' is that [i]t shifts bargaining power from the compelled party to the uncompelled party by the very nature of the exercise.'').[87]

Given these limitations, Dr. Eisenach concluded, as he did with regard to the actual section 115 rates licenses, that ''[i]n my opinion, the evidence presented . . . indicates that the relative valuation ratios implied by the . . . negotiations under [the statutory] shadow—ranging from 4.2:1 [23.8%%] to 4.76:1[21%]—represent an upper bound on the relative market valuations of the sound recording and musical works rights.'' Eisenach WDT ¶ 92.

iii. Synchronization Agreements

Synchronization (Synch) agreements are agreements by audio-video producers, such as movie and television producers, with, respectively, music publishers and record companies, allowing for the use, respectively, of the musical works and the sound recordings in ''timed synchronization'' with the movie or television episode. *See generally* D. Passman, *All you Need to Know About the Music Business* 265 (9th ed. 2015). Dr. Eisenach found these Synch Agreements to be a mixed bag in terms of their value as a benchmark. On the one hand, he recognized that the licenses they conveyed ''do not apply to music streaming services as such'' but, on the other hand, they ''are negotiated completely outside the shadow of the compulsory license. . . .'' *Id.* ¶ 93. Dr. Eisenach notes, from his review of other testimony and an industry treatise, that these freely negotiated market agreements grant the musical composition royalty payments equal to the corresponding royalty paid for the sound recording,'' which is the equivalent of a 1:1 sound recording to musical works ratio.[88] *Id.* ¶¶ 94–95 & nn.87, 88.

Dr. Eisenach finds this 1:1 relationship to be important benchmark evidence, concluding:

> The synch and micro-sync examples confirm that in circumstances in which licensees require both sound recording and musical composition copyrights in order to offer their service, *and* where that service is not entitled to a compulsory license for either right, the sound recording rights and the musical composition rights are in many cases equally valued, that is, the ratio of the two values is 1:1.

Id. ¶ 98.

iv. YouTube Agreements

Dr. Eisenach also examined licenses between: (1) YouTube (owned by Google) and record companies; and (2) YouTube and music publishers, to determine their potential usefulness as benchmarks. He noted that they provide further insight into the relative value of sound recordings and musical works. He added that, because these licenses also include [REDACTED] (which, he noted, are not [REDACTED] uses) these rights are partially outside the purported shadow of compulsory licensing. Moreover, these agreements essentially grant to YouTube [REDACTED], analogous to the provision of on-demand streaming by the interactive services licensed under subpart B. Additionally, Dr. Eisenach noted that these YouTube agreements met certain standards for a useful benchmark, *viz.* the parties, the domestic (U.S.) market and the time period all correspond to the parties, market and time period involved here. *Id.* ¶ 100. For these reasons, Dr. Eisenach concluded that ''for purposes of assessing the relative value of the sound recording and musical works rights, the YouTube agreements represent reasonably comparable benchmarks for the purpose of assessing the relative value of sound recordings and musical works rights.'' *Id.*

In his original Written Direct Testimony, Dr. Eisenach relied upon seven agreements between YouTube and several music publishers pertaining to [REDACTED]. *Id.* ¶ 101 n.93. In those [REDACTED] agreements, Dr. Eisenach found that publishers receive [REDACTED] when the video is [REDACTED]. However, with regard to the revenue received by the record companies, Dr. Eisenach could only speculate based on public reports as to the percent of revenue received by the record companies for the sound

[86] Spotify was launched in the United States in the summer of 2011. *See* 3/20/17 Tr. 1778 (Page).

[87] The Judges discuss the issue of the ''shadow'' of the statutory license in section IV.C.3.

[88] Dr. Eisenach finds this 1;1 ratio to be present in the two types of Synch agreements he identified. One version represents an agreement relating to a specific musical work and sound recording combination. The other version, a ''Micro-Synch'' agreement, which he describes as ''essentially 'blanket' synch licenses, in that the license grants the right to synchronize not just one particular song . . . but any song in the publisher's catalog (or a significant portion thereof). . . .'' Eisenach WDT ¶ 96.

recordings embedded in the posted YouTube videos. *Id.* ¶ 102. Thus, he was unable to make an informed argument in his *original* written testimony regarding the ratio of sound recording royalties to music publisher royalties in his YouTube [REDACTED] benchmark analysis.

However, after the Judges compelled Google to produce in discovery copies of the YouTube agreements with the record companies, Dr. Eisenach filed (with the Judges' approval) Supplemental Written Rebuttal Testimony (SWRT) addressing these agreements. In that testimony, Dr. Eisenach examined 49 YouTube licenses with eight record labels and four form agreements (under which approximately 1,350 independent labels are actively licensed), spanning the period 2012 to 2019. Eisenach SWRT ¶ 6 & n.5. Dr. Eisenach identified nine of these licenses specifically in his SWRT, and noted that YouTube paid to [REDACTED] for sound recordings in a [REDACTED]—which Dr. Eisenach found to be the comparable YouTube category—whereas the [REDACTED] received [REDACTED]. *Id.* & Table 1.

As Dr. Eisenach accurately calculated, the [REDACTED] revenue split reflects a ratio of [REDACTED]:1, (a musical works rate equal to [REDACTED]% of the sound recording rate), whereas the [REDACTED] revenue split reflects a ratio of [REDACTED]:1 (a musical works rate equal to [REDACTED]% of the sound recording rate).

v. The Pandora ''Opt-Out'' Deals

Dr. Eisenach also examined certain direct licensing agreements entered into between Pandora and major music publishers from 2012 through 2016, to determine whether they constituted useful benchmarks in this proceeding. *Id.* ¶ 103. Pandora had negotiated these direct agreements with major publishers for musical works rights after certain publishers had decided to ''opt-out,'' *i.e.,* to withdraw their digital music performance rights from performance rights organizations (PROs), and asserted the right to negotiate directly with a digital streaming service. As Dr. Eisenach acknowledges, the music publishers' legal right to withdraw these rights remained uncertain during that five year period. Nonetheless, Pandora negotiated several agreements with an understanding that the rates contained in those direct agreements might not be subject to rate court review.[89]

Given this phenomenon, and given that the markets and parties involved in the Pandora agreements are somewhat comparable to the markets and parties at issue in this proceeding,[90] Dr. Eisenach concluded that these agreements provided ''significant insight into the relative value of the sound recording and musical works rights in this proceeding.'' *Id.*

Dr. Eisenach compared the musical works rates in these ''opt-out'' agreements with the sound recording royalty rates paid by Pandora, which he obtained from the revenue disclosures in Pandora's Form 10K filed with the SEC that provided royalties (''Content Costs'') as a percent of revenue, and he also relied on data contained in prior rate court decisions. Eisenach WDT ¶ 125 & Table 6. With this data, he calculated that the ratio of sound recording: Musical works royalties in existing agreements was [REDACTED]:1 for 2018, *i.e.,* the musical works rate equaled [REDACTED]% of sound recording royalties. This [REDACTED]% ratio would correspond to a mechanical rate of [REDACTED], assuming, *arguendo,* the sound recording rate is 60%.

Dr. Eisenach also made an estimation and forecast, linking the passage of time to an assumption that after the Rate Court proceedings concluded (and all appeals were exhausted) the parties, without further legal uncertainty, would permanently be ''permitted to negotiate freely outside of the control of the rate courts.'' He made this estimation and forecast through a temporal linear regression, extrapolating from the prior [REDACTED] in these Pandora ''opt out'' musical works rates. *See* Eisenach WDT ¶ 129. Dr. Eisenach's linear regression further [REDACTED] the ratio to [REDACTED], which would be equivalent to [REDACTED] the musical works rate, as a percentage of sound recording royalties, from the [REDACTED]% noted above for actual agreements in force in 2018 to [REDACTED]%, almost a [REDACTED]% [REDACTED] based on the extrapolation alone. *Id.* ¶¶ 104; 128 & Table 8, Fig. 13. (This [REDACTED]% ratio would correspond to a musical works rate of [REDACTED], assuming the sound recording rate is 60%.)

However, the assumption behind Dr. Eisenach's regression was not borne out. In 2015, the Second Circuit Court of appeals affirmed a 2014 decision by the Southern District of New York, prohibiting such partial withdrawals. *In re Pandora Media,* 785 F.3d 73, 77–78 (2d Cir. 2015), *aff'g* 6 F. Supp. 3d 317, 322 (S.D.N.Y. 2014). Subsequently, in August 2016, the Department of Justice issued a statement announcing that, consistent with these judicial decisions, it would not permit partial withdrawals under the existing consent decrees. *See* Eisenach WDT ¶ 114, n.109. Moreover, there were actual Pandora ''Opt-Out'' agreements that set rates through 2018 that established a sound recording to musical works ratio of [REDACTED]:1, that Dr. Eisenach chose to disregard in favor of his extrapolated lower ratio.

Having calculated these five benchmarks, Dr. Eisenach applied them in two separate methods to estimate the mechanical rate to be adopted in this proceeding.

c. Dr. Eisenach's Ratio Equivalency Approach

Dr. Eisenach testified that ''[f]or music users that require both sound recording rights and musical works rights, the two sets of rights can be thought of in economic terms, as *perfect complements* in production: Without both inputs, output is zero.'' *Id.* ¶ 76 (emphasis added).[91] Dr. Eisenach also notes that, ''for interactive streaming services, the two categories of rights [sound recordings and musical works] are further divided into a reproduction license [*i.e.,* the mechanical license] and a performance license . . . .'' *Id.* (Thus, the mechanical license and the performance license likewise are perfect complements with each other and with the sound recording license.)

[89] The ''rate court'' is a short-hand reference to the proceedings before designated judges in the U.S. District Court for the Southern District of New York, who set performance royalty rates, pursuant to existing consent decrees between the U.S. Department of Justice and, respectively ASCAP and BMI.

[90] At the relevant time, Pandora operated a noninteractive service and only paid the performance right royalty, not the mechanical right royalty, for the right to use musical works. Because the parties agree that the performance right and the mechanical right are perfect complements, Pandora's payments for the performance right are relevant and probative.

[91] Google's economic expert, Dr. Gregory Leonard, made an important qualification regarding this point: At the time a musical work is selected by a label for recording by an artist, *ex ante* recording, the label can choose among competing and substitutable musical works. Thus, it is only *ex post* recording that the particular musical work that had actually been selected is necessary to create a level of output (and value) greater than zero. 4/5/17 Tr. 5180–81 (Leonard).

Dr. Eisenach acknowledges that [t]he relative value of sound recording [to] musical works licenses may depend on a variety of factors, and traditionally the relationship has differed across different types of services and situations.'' *Id.* ¶ 78. Dr. Eisenach eschewed unnecessary ''assumptions, complexities and uncertainties associated with theoretical debates'' as to why the particular existing market ratios existed. *Id.* ¶ 79. Rather, instead of ''put[ting] forward a general theory of relative valuation,'' he found it ''sufficient . . . to assume that the relative values of the two rights should be stable across similar or identical market contexts.'' *Id.*

d. Dr. Eisenach's Two Methods for Estimating the Mechanical Rate

i. Method #1

Dr. Eisenach's Method #1 for estimating the mechanical rate is based on the following premises:

1. The sound recording royalty paid by *interactive* streaming services is unregulated and thus negotiated in the marketplace. Eisenach WDT ¶ 16.

2. The sound recording royalty paid by *noninteractive* services is regulated, but, Dr. Eisenach finds the royalties set by the Judges in *Web III* to reflect a market rate. 4/4/17 Tr. 4643 (Eisenach); *see also* Eisenach WDT ¶ 136 & n.123.

3. The *interactive* streaming services require a mechanical license (the license at issue in this proceeding), whereas the *noninteractive* services are not required to obtain a mechanical licenses.[92]

4. According to Dr. Eisenach, the difference between the rates paid by interactive services and non-interactive services for their respective sound recording licenses equals the value of the remaining license, *i.e.,* the mechanical license. *Id.* ¶ 137 (''[T]he difference between these two rights is akin to a 'mechanical' right for sound recordings, directly paralleling the mechanical right for musical works in this proceeding.'').[93]

5. The mechanical rate implied by this difference in sound recording rates must be ''adjust[ed] for the relative value of sound recordings [to] musical works'' (as discussed *supra*). *Id.* ¶ 140.

Dr. Eisenach combines these steps and expresses his Method #1 in the form of an algebraic equation:

$$MR_{MW} = (SR_{IS} - SR_{NIS})/RV_{SR/MW},$$

Where

MR_{MW} = Mechanical Rate for Musical Works
SR_{IS} = Sound Recording Rate for Interactive Streaming (All In)
SR_{NIS} = Sound Recording Rate for Non-Interactive Streaming (Performance Only)
$RV_{SR/MW}$ = Relative Value of Sound Recording to Musical Works Rights.

Eisenach WDT ¶ 140.

Dr. Eisenach determined the per play rate paid by interactive services by identifying certain services and ''tally[ing] the total payments . . . and divid[ing] by the total number of interactive streams the service reports.'' *Id.* ¶ 148. The average sound recording per play royalty calculated by Dr. Eisenach was $[REDACTED] (or $[REDACTED] per 100 plays), when excluding [REDACTED]. *Id.* Table 11.[94]

The final inputs for Dr. Eisenach's Method #1 have already been identified, *i.e.,* the $0.0020 per play (or $0.20 per 100 plays) royalty rate estimated for noninteractive streaming, and the several benchmark ratios of sound recording: Musical works royalties in the markets selected by Dr. Eisenach. After Dr. Eisenach inserted the foregoing data into the algebraic expression set forth above, he presented his data in the following tabular form:

MUSICAL WORKS MECHANICAL PER 100 PLAYS RATE CALCULATION
[Method 1]

SR_{IS} per 100 (1)	SR_{NIS} per 100 (2)	Difference (3)	$RV_{SR/MW}$ (4)	MR_{MW} per 100 (5)
$[REDACTED]	$0.20	$[REDACTED]	1:1	$[REDACTED].
$[REDACTED]	0.20	$[REDACTED]	[REDACTED]:1	$[REDACTED].
$[REDACTED]	0.20	$[REDACTED]	[REDACTED]:1	$[REDACTED].
$[REDACTED]	0.20	$[REDACTED]	[REDACTED]:1	$[REDACTED].
$[REDACTED]	0.20	$[REDACTED]	4.76:1	$[REDACTED].

See id., Table 12.[95] Thus, applying his five potential benchmark ratios, Dr. Eisenach determined that the mechanical works royalty rate the Judges should set in this proceeding ranged from $[REDACTED] per play to $[REDACTED] per play (*see* column (5) above, dividing by 100 to reduce the rate from ''per 100'' to per play).

ii. Method #2

Dr. Eisenach describes his Method #2 as an alternative method of deriving a market-derived mechanical royalty. His Method #2 ''derive[s] an All-In musical works value based on the relative value of sound recordings to musical works and then remove[s] the amount of public performance rights paid for musical works, leaving just the mechanical rate.'' *Id.* ¶ 142. The algebraic expression for Method #2 is:

$$MR_{MW} = (SR_{IS}/RV_{SR/MW}) - PR_{MW},$$

Where PR_{MW} is the public performance royalty rate for musical works, and the other variables are as defined and described in Method #1. *Id.*

Dr. Eisenach calculates PR_{MW}, as an average of $[REDACTED] per 100 plays for the licensees that he included in his data analysis. *Id.* ¶ 156, Table 13. Applying all the inputs across the various benchmark ratios, the results from Dr. Eisenach's Method #2 can also be depicted in tabular form, as set forth below:

[92] The affected industries have agreed through settlements that interactive services pay mechanical royalties but noninteractive services do not. *See* Parness WDT ¶ 7. No party in the present proceeding has sought a mechanical license rate for noninteractive services.

[93] Dr. Eisenach refers at times to this difference in sound recording royalties as the ''implied value of the mechanical right.'' *See, e.g., id.* ¶ 138. However, this difference is only an input for deriving the mechanical rate implied by his analysis (as noted in the subsequent step), and the Judges choose to consider the final rate developed by Dr. Eisenach in Method #1 as the ''implied mechanical rate'' he advances through this method.

[94] Dr. Eisenach's decision to rely on a per play calculation that excluded [REDACTED] and all of Dr. Eisenach's challenged data selections, are discussed *infra* in the Judges' analysis of his benchmarking approach and the criticisms levelled by the Services.

[95] Dr. Eisenach testified that the [REDACTED]:1 ratio should be revised [REDACTED] to [REDACTED]:1, to reflect the sound recording royalty rates in the [REDACTED] licenses he examined after the Judges compelled [REDACTED] to produce [REDACTED]'s agreements with record companies.

MUSICAL WORKS MECHANICAL PER 100 PLAYS RATE CALCULATION

[Method 2]

SR_{IS} (1)	$RV_{SR/MW}$ (2)	Ratio adj. (3) = (2) × (1)	(Avg.) PR_{MW} (4)	MR_{MW} (5)
$[REDACTED]	1:1	$[REDACTED]	$[REDACTED]	$[REDACTED].
$[REDACTED]	[REDACTED]:1	$[REDACTED]	$[REDACTED]	$[REDACTED].
$[REDACTED]	[REDACTED]:1	$[REDACTED]	$[REDACTED]	$[REDACTED].
$[REDACTED]	[REDACTED]:1	$[REDACTED]	$[REDACTED]	$[REDACTED].
$[REDACTED]	4.76:1	$[REDACTED]	$[REDACTED]	$[REDACTED].

See id., Table 14.

After considering all of his benchmarks from both of his methods, Dr. Eisenach concluded that ''the YouTube and Pandora [Opt Out] agreements represent the most comparable and reliable benchmarks, implying ratios of [REDACTED]:1 and [REDACTED]:1, respectively, with a mid-point of [REDACTED]:1.'' *Id.* ¶ 130 (The Judges note that converting these end-points and mid-point of his range to TCC percentages results in a range from [REDACTED]% to [REDACTED]% and a mid-point of [REDACTED]%.) [96]

2. Analysis of Dr. Eisenach's Benchmark Methods

a. Dr. Eisenach's Ratio of Sound Recordings-to-Musical Works

The Judges find Dr. Eisenach's attempt to identify comparable benchmarks and corresponding ratios of sound recording rates to musical works rates to be a reasonable first step in seeking to identify usable benchmarks. The Judges find potentially useful his decision to rely on empirics over abstract theory, *viz.,* that a tightly clustered set of ratios across several markets would tend to support applying a reasonably central tendency from among those ratios to identify a ratio that could aid in the identification of the statutory rates.[97]

However, the data that Dr. Eisenach identified was not sufficiently clustered to establish a predictive ratio within the data set. That is, the problem does not lie in the analysis, but rather in the implications from the data regarding ratios of sound recording royalties to musical works royalties. The Services make this very criticism, noting the instability of the ratio across the several markets in which Dr. Eisenach identified potential benchmarks. See SJRPFF ¶ 241 (and record citations therein). Apple finds that the wide range of ratios is unsurprising, because Dr. Eisenach's benchmarks do not relate to the same products and same uses of the two rights. Indeed, Apple's [REDACTED], confirming, according to Apple, that there is no fundamental market ratio that can be applied in this proceeding. Dorn WRT ¶¶ 6, 24, 28–29.

To be sure, this point does not go unnoticed by Dr. Eisenach, who focuses on the royalty ratios arising from two potential benchmarks in the middle of his range—the Pandora ''Opt-Out'' agreements and the User Audio YouTube agreements.

The Services assert an additional and fundamental criticism of Dr. Eisenach's approach. They note that his use of sound recording royalties paid by interactive services embeds within his analysis the inefficiently high rates that arise in that unregulated market through the complementary oligopoly structure of the sound recording industry and the Cournot Complements inefficiencies that arise in such a market. *See* Corrected Written Rebuttal Testimony of Michael L. Katz, Trial Ex. 886, ¶ 56; Marx WRT ¶¶ 137–141; Hubbard CWRT ¶¶ 6.26–6.27; Leonard WRT ¶¶ 24, 44. The Judges agree with this criticism.

The Judges explained at length in *Web IV* how the complementary oligopoly nature of the sound recording market compromises the value of rates set therein as useful benchmarks for an ''effectively competitive'' market. In *Web IV,* the Judges were provided with evidence of the ability of noninteractive services to steer some performances toward recordings licensed by record companies that agreed to lower rates in exchange for increased plays. Here, the Judges were not presented with such evidence, likely because an interactive streaming service needs to play any particular song whenever the listener seeks to access that song (that is the essence of an *interactive* service). Thus, the Judges have no direct evidence sufficient to apply a discount on the interactive sound recording rate to adjust that potential benchmark in order to fashion an effectively competitive rate, as required by the ''reasonable rate'' language in section 801(b)(1).

b. Dr. Eisenach's Specific Benchmarks

i. Section 115 Benchmark

The Services assert that Dr. Eisenach's calculation of a section 115 ''valuation ratio'' of 4.76:1 is incomplete, because he limited this statutory ratio to the 21% and 22%TCC prongs. They note that under the percentage-of-revenue prong of section 115 (10.5%), this statutorily-derived ratio would have ranged between 5:1 and 6:1, *see* 4/5/17 Tr. 5152 (Leonard), implying a musical works rate equal to only 16.67% to 20% of sound recording royalty rates. The Judges agree that Dr. Eisenach's statutory benchmarks would have been more comprehensive if he had included the ''valuation ratios'' derived from this headline prong of the present royalty rate structure. However, the fact that the existing rate structure, on which the Services rely in this proceeding, includes the potential use of the 21% and 22% prongs, demonstrates the usefulness of this benchmark as a representation of a rate the parties are willing to accept.

ii. Direct Licenses

The Services disagree with Dr. Eisenach's minimization of the relevance of this benchmark. They argue that the direct licenses between

[96] Dr. Eisenach also calculates a per user rate, using his Method #2. As he explains, ''this is accomplished by calculating All-In publisher royalties on a per user basis and subtracting the average effective per-user performance royalties to publishers, leaving an appropriate rate for mechanical royalties.'' *Id.* ¶ 159. He finds that the sound recording rate per user is $[REDACTED] (the per user analog to the $[REDACTED] per 100 plays in his per play analysis). Applying the same ratios and utilizing similar market data as in his per play approach, Dr. Eisenach concludes that a ''mechanical rate of between $[REDACTED] and $[REDACTED] per user reflects the range of relative values for sound recordings and musical works. . . .'' *Id.* ¶ 165. Finally, he notes that, at the [REDACTED]:1 ratio (his mid-point of the YouTube and Pandora benchmarks, the ''mechanical only'' rate would be $[REDACTED] per user (greater than the $1.06 per user rate proposed by Copyright Owners.) *Id.*

[97] Dr. Eisenach eschewed unnecessary ''assumptions, complexities and uncertainties associated with theoretical debates'' as to why the particular existing market ratios existed. *Id.* ¶ 79. In this regard, the Judges understand that Dr. Eisenach was following a well-acknowledged principle of economic analysis, articulated by the Nobel laureate economist Milton Friedman, who famously eschewed excessive theorizing that failed to match the predictive power of empirical analysis. *See* M. Friedman, *The Methodology of Positive Economics,* reprinted in D. Hausman, *The Philosophy of Economics* at 145, 148–149 (3d ed. 2008).

interactive services and music publishers ''are by far the most directly apposite benchmarks used in Dr. Eisenach's analysis,'' because they, like the section 115 rates and terms themselves, possess the characteristics of a useful benchmark, *viz.* they: (1) Are voluntary; (2) concern the same licensors/publisher; (3) relate to the same market; and (4) pertain to the same rights. *See* Katz WDT ¶¶ 97–113; Leonard AWDT ¶¶ 45–70; *see also* 4/5/17 Tr. 5152 (Leonard) (noting that, for services paying under the percentage-of-revenue prong under section 115 and based on prevailing sound recording rates, ''[t]he ratio would be more like . . . 5-to-1 to 6-to-1'').

The Judges find that these direct licenses are as useful, if not more so, than the 115 benchmark itself. The so-called ''shadow'' of section 115 provides a default rate for the licensing parties, so direct licenses that deviate in some manner from the rates in the statutory license are revealing a preference for other rates and terms that, at least marginally, are below the statutory rate. Thus, as the Services note, these benchmarks are useful, because ''these agreements . . . were voluntarily entered both in 2008 and 2012, by the very same publishers in the same markets and for the same rights. . . .'' SJPFF ¶ 261 (and record citations therein). More generally, the Judges find that the so-called ''shadow'' of the statutory license on a benchmark does not disqualify that benchmark as useful evidence, though it goes to its weight.

iii. Synchronization Licenses

The Services also take issue with Dr. Eisenach's inclusion of synchronization licenses in his collection of benchmarks. *See, e.g.,* Leonard WRT ¶¶ 37–40 (testifying that synchronization licenses are not comparable for interactive streaming licenses because synchronization differs in important economic respects from streaming); Hubbard CWRT ¶¶ 6.31–6.32 (testifying on various ''economic characteristics of synch licenses, that render the ratio between sound recording royalties and musical works royalties different between synch and interactive streaming services''); Marx WRT ¶¶ 148–151 (''Synch royalty rates are a poor benchmark for streaming royalty rates''). Even Dr. Eisenach acknowledged that, at best, the low ratio in the synch licenses indicates an unusually high musical works royalty rate among his collection of benchmarks. 4/4/17 Tr. 4671, 4799 (Eisenach); Eisenach WDT Appx. A–9.

In a prior proceeding, the Judges rejected the synch license benchmark as useful ''[b]ecause of the large degree of its incomparability.'' *See Phonorecords I,* 74 FR at 4519. The Judges find that nothing in the present record supports a departure from that prior finding. The lack of comparability remains because the synchronization market differs in important economic respects from the streaming market. *See* Leonard WRT ¶ 39. Because synch rights pertain to media such as music used in films or in television episodes,[98] the historical equal valuation of publishing rights and sound recording rights arises from the particular conditions faced in those industries. *Id.* Movie and television producers may have a certain musical work in mind as a good fit for a particular scene in the film. *Id.* However, these producers have the option of making their own sound recording of that musical work, and for this reason, cover songs are quite common in films. *Id.; see also* Ex. 1069, Marx WRT ¶ 149 (''Both film and television production companies have the option of recording their own versions of songs, rather than paying royalties to use a pre-recorded song. . . . This option gives the users of synch rights, such as movie producers, more bargaining power relative to the labels than would be the case with streaming services.''). Thus, the contribution to value of the sound recording is less vis-à-vis the musical work in the synch market. Leonard WRT ¶ 39.

Additionally, in the case of synchronization rights, the marketplace for sound recording rights is more competitive than other music licensing contexts because individual sound recordings compete against one another for inclusion in the final product (*e.g.,* a movie or television episode). By contrast, in the interactive streaming market, services must build a catalog of sound recordings and their included musical works, so that many works can be streamed to listeners. *Id.*[99] That is, in the interactive streaming market, the sound recordings are ''must have'' complements, not in competition with each other. However, in the synch market the sound recording of any given musical work identified by the movie or television produce is a substitute good, in competition with any other existing or future sound recording of the same musical work for inclusion in the movie or television show.

iv. YouTube Licenses

The Services disagree with Dr. Eisenach's opinion that the YouTube licenses on which he relies constitute strong benchmarks. As an initial point, they note that, from a statutory perspective, the video component of the YouTube licenses renders those licenses inapposite as benchmarks in this proceeding. *See* SJRPFF ¶ 249 (and record citations therein) (noting that YouTube's ability to utilize the ''safe harbor'' provisions of 17 U.S.C. 512 provides YouTube with strong negotiating power against publishers and labels because the copyright holders must identify unauthorized uploadings and issue ''take down notices,'' a cumbersome and often futile process). The Judges agree that this statutory provision significantly alters the bargaining landscape between the sound recording and the musical works licensors, on the one hand, and YouTube as the licensee, on the other.

The Services further maintain that, even assuming YouTube licenses are appropriate benchmarks, Dr. Eisenach has relied on the wrong type of YouTube licenses for his benchmark analysis. As noted, Dr. Eisenach selected the agreements and rates pertaining to [REDACTED]. He selected this type of YouTube contract because neither the musical works license nor the sound recording license is subject to the section 115 license. *See* SEJRPFF ¶ 350 (and record citations therein).

However, the Services maintain that the more appropriate YouTube benchmarks would be the agreements *between YouTube and publisher and record companies,* respectively, for [REDACTED]—agreements that contain a [REDACTED] royalty rate, rather than the [REDACTED] figure from the [REDACTED] YouTube agreements. If the Services' are correct in their assertion that the [REDACTED] YouTube agreements are the appropriate benchmark inputs, the sound recording: Musical works ratio (applying the [REDACTED] royalty rate) thus increases to as low as [REDACTED], implying a ratio as high as [REDACTED]:1, implying a musical works rate of [REDACTED]%, far lower than Dr. Eisenach's calculated YouTube royalty of [REDACTED]% (but still above Copyright Owners' proposed rate). If the [REDACTED] royalty rate of

[98] The Copyright Owners also rely on blanket (''microsynch'') licenses by which publishers grant their entire catalogs for use in synchronized audio-video productions, and they also rely on synch licenses for mobile and video game applications. The Judges' critique of synch licenses as benchmarks is equally applicable to these licenses.

[99] As discussed *infra,* Dr. Leonard makes an analogous point with regard to the weaker bargaining position of musical works when record companies and artists select a song to be recorded. Like the movie or television producer who can choose among a number of somewhat substitutable recordings, a record producer can choose among a number of somewhat substitutable musical works.

[REDACTED]% is applied instead, the ratio rises to [REDACTED], or [REDACTED]:1, implying a musical works rate of [REDACTED]%.

The Judges find that the static-image YouTube rates are more analogous to the interactive market, compared with the YouTube agreements concerning embedded videos. The salient rationale in Dr. Eisenach's analysis is the sound recording to musical works ratio, so injecting the video as another element of value into the mix renders the sound recording to musical works ratio too difficult to identify with sufficient certainty. However, the Services assert that, given that the Majors comprise [REDACTED]% of the YouTube market, the appropriate ratio should be [REDACTED], implying the [REDACTED]% of sound recording percentage identified above. The Judges find that it would be proper to weight the YouTube benchmark by applying a [REDACTED]% weight to [REDACTED]%, and a [REDACTED]% weight to [REDACTED]%, which results in a benchmark rate of [REDACTED]% ([REDACTED]).[100]

Finally, the Services take issue with Copyright Owners' assertion that YouTube is a competitor to interactive streaming services, despite the acknowledgements by those services that such competition is present. *Compare* CPFF ¶¶ 263–266 (and record citations therein) *with* SJRPFF ¶¶ 263–266 (and record citations therein). The Judges find that competition does not in itself make the rates in those YouTube agreements particularly helpful benchmarks, because the addition of video content creates a bundling of value distinguishable from the value of interactive streaming alone. However, Google's/YouTube's acknowledgement of the competitive posture of YouTube *vis-à-vis* interactive streaming services renders the ratio of sound recording: Musical works royalty ratio in the YouTube stati-screen agreements a useful benchmark in this proceeding.

Even in those cases, however, the YouTube royalty rates and ratios remain imperfect because other relevant factors are not necessarily constant. The Judges agree that the relatively strong bargaining power of the licensee created by the DMCA ''safe harbor'' provisions, distinguishes the YouTube market from the market for streaming services. Copyright Owners seek to minimize this lack of comparability by arguing that, although YouTube's relatively strong bargaining power depresses the copyright holders' royalties, ''[s]ince the DMCA safe harbor applies equally to sound recording and musical works copyrights, there is no reason to think that their relative valuation would be affected.'' Eisenach WRT at 66. However, Copyright Owners do not provide any factual support for this conclusory assumption of a ''relative value'' effect, and the Judges thus cannot find with sufficient certainty that it in fact is likely that the enhanced bargaining position of YouTube affects the publishers and the labels equally. Accordingly, the Judges do not find the YouTube market and licenses to be sufficiently analogous to the interactive streaming market to make the benchmark derived from the YouTube analysis to be useful in determining rates in this proceeding.

v. Pandora ''Opt-Out'' Agreements

Together with his YouTube benchmark, Dr. Eisenach finds the Pandora ''Opt-Out'' agreements to be the most useful among the several potential benchmarks he examined. The Judges agree. The Judges agree with Dr. Eisenach that the Pandora ''Opt-Out'' agreements are useful benchmarks. These agreements have the level of comparability necessary for a benchmark to be useful. However, the Judges do not agree with Dr. Eisenach's attempt to extrapolate from the actual rates in those Opt-Out Agreements. Rather, the Judges find that the [REDACTED]:1 ratio Dr. Eisenach identified for the year 2018 in existing agreements is the most useful benchmark derived from the ''Opt-Out'' data. As the Services note, Pandora's most recent direct license agreements during the ''Opt-Out'' period with the publishers who control many of the works embodied in the sound recordings performed by Pandora provide that publisher royalties will be determined [REDACTED].[101] This resulted in a shift of the sound recording: Musical works ratio to [REDACTED]:1, implying a musical works TCC percentage of [REDACTED]%. *See* Katz CWRT ¶¶ 101–104; Herring WRT ¶¶ 28–29).

The Judges reject Dr. Eisenach's identification of a useful trend in the shrinking of that ratio (*i.e.,* a growth in the musical works royalty percentage). His change in the ratio to [REDACTED]:1 was driven by expectations regarding the likelihood of an uncertain change in the legal landscape regarding publisher withdrawals from performing rights organizations. Such uncertain potential changes are not well-captured by mapping them over a time horizon. Moreover, as the Services note and as Dr. Eisenach concurs, even assuming such a change in relative uncertainty could be captured in a regression, other regression forms, such as a quadratic form, could be used to demonstrate a return of the ratio to its prior level (an equally plausible future event) rather than a continuation of its shorter-term increase. *See* 4/5/17 Tr. 495963 (Katz); Katz CWRT ¶¶ 104–107, Table 1, F; 4/4/17 Tr. 4807–08 (Eisenach) (linear form of regression not ''material'').

c. Dr. Eisenach's per Play Sound Recording Rate

The Judges also have difficulty relying on the data set Dr. Eisenach developed for his estimation of a $[REDACTED] per play sound recording royalty rate. He used that $[REDACTED] per play figure in several benchmark ratios. Two principal problems with Dr. Eisenach's data are:

1. The data covered a non-random sample of only approximately 15% of all interactive plays; and
2. the data excluded [REDACTED]'s [REDACTED] services, large portions of the interactive streaming market. Inclusion of those [REDACTED] services would have reduced his per play rate from $[REDACTED] to $[REDACTED]. Inclusion of only [REDACTED] service would have reduced the $[REDACTED] estimate to $[REDACTED].

SJRFF ¶ 22 (and record citations therein).

Dr. Eisenach explained his small data sample as resulting in part from his deliberate decision to omit several sound recording labels [REDACTED], which he asserted gave them an incentive to allow [REDACTED] to pay below-market royalties. Eisenach WDT ¶ 150. The Judges acknowledge Dr. Eisenach's assertion that this fact could, on the margin, drive down the royalties paid by [REDACTED] to those labels. However, the evidence does not bear that out, because the royalty rates [REDACTED] pays to these labels are comparable to the rates it pays to other labels that do not have [REDACTED]. More particularly, the [REDACTED] contracts with record labels that Dr. Eisenach reviewed show the same [REDACTED], a rate no lower than the rate paid by other interactive streaming services. 4/4/17 Tr. 473953 (Eisenach); *see also, e.g.,* Trial Ex. 2760 (Digital

[100] If the sound recording royalty rate for interactive streaming is 60%, as discussed infra, this YouTube benchmark equals [REDACTED] × 0.60 = [REDACTED]%.

[101] Pandora's status as a purely noninteractive service prior to 2018 does not decrease the relevancy of this benchmark, because: (1) Noninteractive and interactive services both pay performance royalties; (2) noninteractive services historically have not paid mechanical royalties; and (3) the performance license and the mechanical license are perfect complements.

Product Agreement Specific Terms between [REDACTED] and [REDACTED], 2013, [REDACTED]0005221); Trial Ex. 2765 (Digital Audio Distribution Agreement between [REDACTED] and [REDACTED], July 1, 2013, [REDACTED]0005548). Further, for every dollar in royalties a label [REDACTED], the label would [REDACTED].

With regard to the specific omission of data from Spotify's ad-supported service, Copyright Owners make additional arguments. They claim that the ad-supported service does not reflect the actual value of the sound recordings, because that service acts as a funnel to draw listeners to the subscription service. Therefore, Copyright Owners maintain, the ad-supported service is essentially a loss-leader, with the difference between the higher effective per play rates for subscription services and the lower effective per play rates for ad-supported services more in the nature of a marketing expense that should not be deducted from Dr. Eisenach's royalty calculations. *See* Eisenach WDT ¶ 148, n.127.

That analysis, however, omits the fact that Spotify's ad-supported service only [REDACTED]. *See* Marx WDT ¶ 55, n.77. [REDACTED]. These listeners and the advertising revenue they generate are real and reflect the WTP of a large swath of interactive listeners.[102] *See* Marx WRT ¶ 115–16 (''[O]ne aspect of the ad-supported service is to provide an on-ramp to paid services, it also has another important aspect, namely to serve low WTP customers. . . .''). Copyright Owners' economists err in not calculating the impact of Copyright Owners' proposal on ad-supported services. Ad-supported services currently make up [REDACTED] and [REDACTED]% of all streams in the industry. The Judges agree with Professor Marx that Dr. Eisenach's omission of the Spotify data undercuts his analysis.[103]

The Judges accept, to some degree, Copyright Owners' argument that ad-supported services are a marketing tool to identify future subscribers. Until those subscribers are identified and ''signed,'' however, they are not subscribers. In that sense, ad-supported services may be marketing tools, but they do not reduce present royalties because the future subscribers have not yet been identified. There is no record evidence that Spotify's hard cost saving translates directly into royalty revenue lost to Copyright Owners. Apparently, Copyright Owners argue that their loss is in the form of an opportunity cost, *i.e.,* losing the opportunity to obtain subscription-level royalties from the ad-supported listeners. But if Spotify paid subscription-level royalties for all ad-supported listeners, it would be paying an implicit marketing cost that inefficiently was allocated to the [REDACTED]% or so ad-supported listeners who, historically, will not become paid subscribers.

The use of an ad-supported service as a ''freemium'' model serves a dual purpose: First, it is an efficient means of marketing—segregating listeners according to WTP—still allowing them to ''experience'' interactive streaming, while, second, simultaneously providing ad-revenue-based royalties to Copyright Owners. If Spotify substituted advertising as a marketing tool, Copyright Owners would realize zero royalties until the advertising resulted in new subscribers.[104]

d. Analysis of Dr. Eisenach's Method #1

The Services criticize Dr. Eisenach's Method #1 calculation as being based upon the incorrect assumption that the entire difference between interactive and noninteractive rates must be attributed to the mechanical license right. As the Services properly note, there are several reasons, all unrelated to the mechanical right and license, why interactive rates are higher than noninteractive rates for musical works performance rights. Leonard WRT ¶ 55; Katz CWRT ¶¶ 117–118; Hubbard CWRT ¶ 6.4; 4/5/17 Tr. 4972–74 (Katz). Dr. Eisenach's Method #1 did not account for the presence of the ephemeral right in licensing noninteractive streaming, which accounts for 5% of the noninteractive rate. *See* 4/4/17 Tr. 485152 (Eisenach); 4/5/17 Tr. 5158–61 (Leonard); *see also* Leonard WRT ¶¶ 55–56.

Further, there is a difference in the performance rights royalty rates PROs charge interactive and noninteractive services that is not captured by Method #1. *See, e.g., In re Petition of Pandora Media, Inc.,* 6 F. Supp. 3d at 330. Had Dr. Eisenach considered other explanations for the difference between the All-In sound recording royalty rates for interactive and noninteractive services, he might well have estimated a mechanical rate ''[REDACTED]'' *See* Katz CWRT ¶ 122.

The Services also note the impact in Method #1 of Dr. Eisenach's decision to omit [REDACTED] data from his modeling. The Services contend adding the [REDACTED] data to Dr. Eisenach's effective per play rate for sound recording results in a per-play rate of $[REDACTED]. *See* 4/4/17 Tr. 4771–74 (Eisenach).

Combining the foregoing criticisms, the Services conclude:

> If one were to use $[REDACTED] per hundred plays for the sound recording rate (which includes the [REDACTED] data) (*id.* at 4771–74), reduce that by 12% as the Board did in *Web IV* for complementary oligopoly power, increase the $[REDACTED] per hundred plays Dr. Eisenach uses for musical works performance rights by 60% to account for the difference in ASCAP rates identified by Judge Cote, and then apply Dr. Eisenach's invalid ''valuation ratio'' of [REDACTED]:1, the result would be $[REDACTED] per hundred plays ($[REDACTED] per play), way below the $0.15 per hundred plays rate ($.0015 per play) that Dr. Eisenach attempts to validate.

SJPFF ¶ 279 (and record citations therein).

The Judges agree with the Services that Eisenach's Method #1 does not provide a useful benchmark in this proceeding. The absence of interactive streaming data from [REDACTED] is a critical omission. The fact that much of that data relates to [REDACTED] services [REDACTED] does not justify removing the data from a market analysis; that service is a part of the market. In fact, Copyright Owners' argument proves too much. That is, their willingness to distinguish and isolate the [REDACTED] service and related data actually underscores the need for a differentiated/price discriminatory rate structure, such as the Judges have adopted in this proceeding.

The Judges are less sanguine, however, with regard to the Services' argument for a 12% reduction to the sound recording rates to reflect the complementary oligopoly effect arising

[102] In the parlance of platform economics, Spotify's ad-supported service provides a multi-platform approach, in which listeners, advertisers, sound recording rights holders and musical works holders all combine to obtain revenue based on the mutual values each brings to that platform.

[103] Copyright Owners belatedly propose that if the Judges intend to include the Spotify ad-supported service in the rate structure and rate calculations, they should establish (1) separate rates for ad-supported services that are not incorporated into the calculation of rates set for other services; and (2) separate terms for an ad-supported service that limit the functionality of the service, to avoid potential cannibalization of services paying higher royalties. COPCL at 106, n.34. This argument is a tacit acknowledgement by Copyright Owners that a segmented market might require a differentiated rate structure, even as they strenuously dispute the appropriateness of such a structure.

[104] The provision of a monetarily free-to-the user service is a reasonable marketing tool, and the Judges are loathe to second-guess the business model incorporating that marketing approach, especially while it provides royalties to rights owners. Also, the Judges do not find it relevant that other interactive streaming services have not utilized an ad-supported service. There is no record evidence regarding why other Services have ceded that market to Spotify.

from the ''must have'' status of the sound recordings in the interactive streaming distribution channel. The Judges are reluctant to simply import the 12% rate reduction from *Web IV* into other determinations, even though that figure was used to adjust from interactive streaming rates to noninteractive streaming rates. The specific 12% figure was based on record evidence derived from steering experiments and agreements analyzed in *Web IV.*

The Judges agree with the Services that it is inaccurate in Method #1 to subtract a performance rate that reflects the higher interactive performance rate, rather than the lower noninteractive performance rate.

e. Analysis of Dr. Eisenach's Method #2

The Judges find that Dr. Eisenach's Method #2 does not contain sufficient industrywide performance royalty and sound recording data to provide a meaningful analysis for determining a per-user monthly mechanical works royalty. The Judges are also troubled by the apparent inconsistent use of Rate Court established rates in Method #2, when Dr. Eisenach had indicated in other contexts that rates unshackled from Rate Court decisions provide a truer indication of market rates.

The Judges understand that Dr. Eisenach omitted [REDACTED] user data because of [REDACTED], which is itself a function of its [REDACTED] service. The Judges recognize that combining [REDACTED] user data with other interactive streaming services' data would significantly change the results, in a manner that Copyright Owners find to be anomalous. *See* CORPFF at 183–184 (noting what Copyright Owners describe as ''[t]he profound impropriety of ''blending'' [REDACTED] rate into Copyright Owners' benchmarking and calculations.) However, that seeming anomaly actually underscores why the Judges find a differentiated rate structure to be appropriate.

The royalty rates paid by all Services should be reflective of the differentiated WTP of listeners.

f. Conclusion

For the foregoing reasons, the Judges do not adopt Dr. Eisenach's proposed benchmark rates as the mechanical rates for the upcoming rate period. However, the Judges do find several of the benchmark rates implied by his sound recording to musical works ratios to be useful guideposts for identifying the headline percent-of-revenue rate to be incorporated into the rate structure in the forthcoming rate period.

B. Rejection of Services' 2012-Based Proposals

1. Section 115 Benchmark Rates

The Services do not examine in detail the particular rates within the existing rate structure. Rather, they treat the rates within that structure as benchmarks, *i.e.,* generally indicative of a sufficiently analogous market [105] that has ''baked-in'' relevant economic considerations in arriving at an agreement. Dr. Eisenach did not analyze *why* he chose the levels for the rates and ratios on which he relied as benchmarks or consider the subjective understandings of the parties who negotiated his benchmarks. Similarly, the Services' economists elected to rely on the 2012 rates as objectively useful without further inspection.[106]

Copyright Owners take the Services to task for failing to present evidence of the negotiations that led to the prior settlements. They argue that, without relevant evidence or testimony, the Services cannot provide support for their proposed rates. The Services take a very broad approach in their attempt to establish the usefulness of the rate levels within the 2012 benchmark. They note that music publishers have consistently realized profits under these rates, including profits from musical works royalties. Copyright Owners counter that mechanical royalties have not created a profit for Copyright Owners, and the Services' assertion of overall publisher profitability is based on their lumping of performance royalties together with mechanical royalties.

The Services maintain that they relied on the continuation of the existing rates in developing their business models. For example, Pandora, the latest entrant into the interactive streaming market, asserts that it based its decision to enter this market on its assumption that mechanical royalty rates would not increase. Herring WRT ¶ 3.

The Judges categorically reject this argument. The statute is plain in its requirement that the rates be established *de novo* each rate period. A party might feel confident that past is prologue and that the parties will agree to roll over the extant rates for another period. A party could be sanguine as to its ability to make persuasive arguments to keep the rates unchanged. A party might conclude that the mechanical rate is such a small proportion of a licensee's total royalty obligation that its increase would be unlikely to alter long-term business plans. But for sophisticated commercial entities to claim that they assumed the rates would remain static is incredible.

The record indicates that an increase in the rates might affect different interactive streaming services in different ways. In particular, there might be a dichotomous effect as between essentially pure play streaming services (such as Spotify and Pandora) and the larger new entrants with a wider commercial ''ecosystem'' (such as Amazon, Apple and Google). As Spotify's CFO testified:

> The Copyright Owners argue that ''a change in market-wide royalty rates such as this would affect all participants in a similar way,'' suggesting that the industry as a whole could increase prices without affecting their relative price points. Rysman WDT ¶ 94. *However, not all Digital Services use the same business model.* For example, several Digital Services are owned by large corporate parents who can use streaming music as a ''loss leader'' to build brand awareness, keep users in their broader ecosystem, or promote other products and/or services. *See, e.g.,* Rysman WDT ¶ 29 . . . . The industry has already seen a few examples of *downward* pressure on prices from this strategy. *See* WDT ¶ 50. [REDACTED] *See* WDT ¶ 73.

McCarthy WRT ¶ 38; *see* Written Direct Testimony of Barry McCarthy, Trial Ex. 1060, ¶ 50–51 (McCarthy WDT) ([REDACTED]); McCarthy WRT ¶ 36 ([REDACTED]).[107]

[105] Here, the ''analogous market'' is the same as the target market across all dimensions, except that the benchmark is temporally removed from the target, with the rates in the benchmark having been formed five years ago.

[106] This point is not made to be critical of Dr. Eisenach's approach, but rather to show that the Services' reliance on the 2012 settlement as a benchmark shares this similar analytical characteristic, typical and appropriate for the benchmarking method. (The factual wrinkle here is that, hypothetically, the Services could have called witnesses and presented testimony regarding the negotiations that led to the 2012 (and 2008) settlements, but did not, rendering the 2012 benchmark similar to other benchmarks taken from other markets. Mr. Israelite provided some testimony on behalf of Copyright Owners regarding those negotiations (as discussed *supra*), but even that testimony related to the rate *structure*, rather than to the *level* of the rates themselves.

[107] As noted elsewhere, the Judges find it highly informative that the Services agree to a continuation of the present rates even though: (1) They are all losing money under these rates; and (2) their experts suggest much lower rates than the Services propose. While the assertions of ''conservatism'' and reasonableness'' suggest strategic prudence, the Services' acquiescence to these rates indicates that year-over-year accounting losses are not of great concern—certainly not great enough for the Services to rely on their own experts' opinions to advocate for lower rates. Rather, they seem to be locked in a battle for market share, in which the single survivor, or the several survivors serving discrete downstream segments, can acquire the market power sufficient to appropriate a sufficient share of the surplus, as explained in the discussion of the Shapley value. That is, the interactive streaming services seemed to be in a Schumpeterian competition *for the market,* not merely in competition *in the market.* Given this finding, the Judges do not find that the year-over-year losses

The Judges construe this argument as an iteration of the ''business model'' argument that they have consistently rejected. The Judges cannot and will not set rates to protect any particular streaming service business model. The Judges distinguish between: (1) Business models that are necessary reflections of the fundamental nature of market demand, particularly, the varied WTP among listeners; and (2) business models that may simply be unable to meet dynamic competition. If pure play interactive streaming services are unable to match the pricing power of businesses imbued with the self-financing power of a large commercial ecosystem, nothing in section 801(b)(1) permits, let alone requires, the Judges to protect those pure play interactive streaming services from the forces of *horizontal* competition. Moreover, any disruption arising from the disparate impact of a rate increase among interactive streaming services would not constitute ''disruption'' under Factor D. Disruption resulting from competition would not upend the structure of the industry or generally prevailing industry practices; rather it would influence particular business models.

2. The Services' Subpart A Benchmark

The Services utilize the rate in extant subpart A as an additional benchmark for the subpart B rates to be determined in this proceeding. Subpart A describes the rates record companies pay Copyright Owners for the mechanical license, *i.e.,* the right to reproduce musical works in digital or physical formats. The particular subpart A benchmark rate on which the Services' rely is the existing rate, which the subpart A participants have agreed to continue through the forthcoming rate period through settlement.[108]

In support of this benchmark, the Services emphasize that the total revenue created by the sale of digital phonorecord downloads and CDs is essentially commensurate with the revenues created through interactive streaming, indicative of an equivalent financial importance to publishers when negotiating rates with licensees in subparts A and B respectively. *See* 3/20/17 Tr. 1845 (Marx) (''downloads, in particular, are comparable to interactive streaming.''). Also, although the subpart A rate is the product of a settlement, the Services argue that the rate is a useful benchmark because it reflects both the industry's sense of the market rate and the industry's sense of how the Judges would apply the section 801(b)(1) considerations to those market rates. 3/15/17 Tr. 1184, 1186 (Leonard); 3/20/17 Tr. 1842–43 (Marx).

In opposition, Copyright Owners argue, for several reasons, that the subpart A rates are not proper benchmarks. First, they emphasize that revenue from the sale of PDDs and CDs has been declining over the past several years. Second, they note, as the Services acknowledge, that the parties are not identical; specifically, the licensees in subpart A are record companies whereas in subpart B the licensees are interactive streaming services. *See, e.g.,* 3/15/17 Tr. 1193 (Leonard). Third, Copyright Owners emphasize that the existing subpart A rate is itself the product of a settlement, rather than a market rate. Fourth, and relatedly, they raise their overarching argument against any purported benchmark rate set in ''the shadow'' of the statutory license, because the licensee record companies had the option of refusing to settle and to seek instead a potentially lower statutory rate.

Copyright Owners note that the subpart A settlement establishes a per-unit royalty rate of $0.091 per physical or digital download delivery (with higher per-unit rates for longer songs), rendering that rate inapposite as a benchmark for the Services' present subpart B proposal. *See* 3/20/17 Tr. 1960 (Marx). In support of this position, Copyright Owners argue that because the subpart A rate is expressed as a monetary unit price, Copyright Owners have eliminated the risk that retailers' downstream pricing decisions will affect the Copyright Owners. More specifically, they note that, ''[u]nder the subpart A rate structure, the [record company] (as licensee) pays the same [penny rate] amount in mechanical royalties regardless of the price at which the sound recording is ultimately sold [within the] range of price points for individual tracks in the market ranging from $0.49 to $1.29 and the mechanical penny rate binds regardless of the price of the track. COPFF ¶ 727 (citing Ramaprasad WDT ¶ 28 & Table 1; 3/20/17 Tr. 1956–58 (Marx)).

Copyright Owners further attempt to distinguish subpart A from subpart B based on the fact that downstream listeners to PDDs and CDs (and any other physical embodiment of a sound recording) become *owners* of the sound recording and the musical work embodied within it, whereas under subpart B the listeners only obtain *access* to the musical works for as long as they remain subscribers or registered listeners (to a non-subscription service). The Judges find this point to be a distinction without a sufficient economic difference. The Judges note with favor the testimony of Professor Leonard, who said of the ''ownership vs. access'' distinction that, although it is a real legal distinction, it does not reflect as fundamental an economic difference as might appear on the surface. Leonard WRT ¶ 27; 3/15/17 Tr. 1098, 1113 (Leonard).

The Judges accept Professor Leonard's economic analogy. Ownership is in essence a more comprehensive and unconditional form of access. A downstream purchaser acquires ownership of the digital or physical reproduction of a sound recording and the embodied musical work for an up-front charge (the purchase price). The purchaser then has unlimited free access to that sound recording/musical work going forward. A subscriber to an interactive streaming service pays an up-front charge (usually monthly), and then likewise has unlimited access to the entire catalog of sound recordings (and the embodied musical works) for each paid period.

In economic terms, each approach contains the features of a ''two-part tariff,'' where the end user pays a fixed access fee (an ''option'' price, *i.e.,* the right to use the owned or accessible music) and a zero marginal per play charge that efficiently corresponds with the zero physical marginal cost of creating another play of the owned or accessible sound recording/musical work.[109] The salient difference is that the subscriber does not get unlimited marginal plays for zero additional charge. The monthly subscription fee is the measure of the marginal cost to the

suffered by the Services constitute a serious competitive detriment. Accordingly, in setting effectively competitive rates, the Judges are more concerned with providing the Copyright Owners with a rate that appropriately compensates them in a manner consistent with the relevant and persuasive benchmarks, even if the Services may incur a somewhat higher level of accounting losses. Alternately stated, the Judges find that it would be highly coincidental (and is unsupported by any evidence) that the present rate levels establish in essence a maximum level of losses the Services collectively can sustain, such that a reduction in losses is unnecessary but an increase in losses will lead to their demise.

[108] The Services did not rely on the settlement that led to the continuation of these rates into the next rate period as a benchmark. The Services moved for discovery regarding this most recent settlement but the Judges denied that motion on the grounds that the new settlement was not a benchmark on which the Copyright Owners had relied and therefore was not within the scope of allowable discovery. *See* 37 CFR 351.5 (scope of discovery limited to materials relevant to the responding party's Written Direct Statement). The Copyright Owners did not proffer any evidence regarding their most recent settlement.

[109] This point is more general in nature. Any item that is ''owned'' creates value in use because it is *capable* of being accessed, not that it is *continuously* accessed.

listener who streams. Determination of the allocation of that marginal cost is impossible, however, as the Judges recognize that the subscription fee allows for access to a large, comprehensive repertoire, whereas access stemming from the purchase of a download, CD, or vinyl record is limited to the specific sound recording and embodied musical work. For this reason, there is less access value in the sale of a download or a CD, compared to the access value of a subscription to a streaming service, rendering the subpart A rate at best a guideline as to the rates below which the subpart B and C rates cannot fall.[110]

In other respects, the Judges find the subpart A settlement to be somewhat useful. The licensed right in question is identical: The right to reproduce musical works for sale into a downstream market. Further, the licensors, *i.e.,* the music publishers and songwriters, are identical. Finally, the time period is reasonably recent and Copyright Owners have not explained whether or how the particular market forces in the subpart A market sectors have changed since 2012 to make the rate obsolete. The usefulness of the subpart A rate as a benchmark is limited, however, because: (1) The access value of downstream services is greater than the access value of an individual purchase of a sound recording/musical work; (2) there is a partial difference in economic risk to the licensors between a per-unit royalty and a royalty based on a percent-of-revenue (with minima); and (3) the licensees in the benchmark market are not the same.

3. The Two Subpart A Benchmarking Approaches

In their first benchmarking exercise, the Services attempt to convert the per-unit rate in subpart A into a subpart B percent-of-revenue rate. To that end, they attempt to identify an equivalency between a given number of interactive streams and a single play of a purchased DPD.

Professor Marx first applies a conversion ratio of PDDs to streams of 1:150, calculated by the RIAA. Second, she takes note of an academic study which estimated that marketplace 137 interactive streams was equivalent to the sale of one DPD. Marx WDT ¶ 108 & n.21 (citing L. Aguiar and J. Waldfogel, *Streaming Reaches Flood Stage: Does Spotify Stimulate or Depress Music Sales?,* (working paper, National Bureau of Economic Research, 2015)); Katz WDT ¶ 110 (same). Apple's economic expert, Professor Ramaprasad, also relied on the Aguiar/Waldfogel article to support Apple's benchmark per play proposal. Ramaprasad WDT ¶ 56, n.102.[111]

Professor Marx applied this approach and formula to Spotify's revenues. She calculated that, given the number of songs played on Spotify that were longer than five minutes, the per-recording rate in subpart A is $[REDACTED]. Dividing that per recording rate by 137 yields $[REDACTED] royalty per stream. She then multiplied that per stream ''equivalent'' royalty by the total number of streams to estimate a total royalty. Professor Marx then divided the total royalty by total revenues. Given the All-In approach proposed by the Services, Professor Marx subtracted Spotify's performance royalty rate of [REDACTED]% of revenue to determine a mechanical royalty rate of [REDACTED]% of revenue using this approach. Marx WDT ¶ 112, Fig. 22. When she applied the Aguiar/Waldfogel 137:1 ratio, she identified a musical works All-In royalty rate derived from subpart A of [REDACTED]% of revenue, and a mechanical royalty rate (*i.e.,* after subtracting the [REDACTED]% performance rate) of [REDACTED]% of revenue.

On behalf of Pandora, Professor Katz used the same 1:150 conversion ratio as Professor Marx. He calculated a mechanical rate implied by the subpart A rate of [REDACTED]% of revenue, higher than Professor Marx's implied rate, but still lower than the existing headline rate of 10.5% in subpart B. Katz WDT ¶ 111.

On behalf of Apple, Professor Ramaprasad utilized the same 1:150 ratio, which she adopted from Billboard magazine's ''Stream Equivalent Albums'' analysis. Ramaprasad WDT ¶ 84. Because Apple has advocated for a per-stream rate, her conversion was expressed on a per-stream basis, at $0.00061 per stream. Professor Ramaprasad noted that this rate was not only lower than the $0.0015 per stream rate proposed by Copyright Owners, but also significantly lower than Apple's own proposed per-stream rate of $0.00091. Ramaprasad WDT ¶ 86. When Professor Ramaprasad applied the Waldfogel/Aguiar 1:137 ratio, expressed on a per-play basis, she calculated a rate of $0.00066 per stream for interactive streaming, which she noted was even lower than the per-stream rate of $0.00091 Apple had proposed.

The Judges do not base any conclusions on this ''conversion'' approach. Copyright Owners express numerous criticism of the ratio approach, and many of those criticisms, each on its own merit, serve to discredit the ratio approach. First, the Services and Apple simply adopted the equivalence ratios without defining what ''equivalence'' means. For example, the RIAA used the concept to identify albums that were sufficiently popular to garner ''gold'' or ''platinum'' awards. That use, absent other evidence, does not indicate that the conversion ratio is appropriate for rate-setting purposes. *See generally* Rysman WRT ¶ 96; 3/23/17 Tr. 2775–76 (Ramaprasad). Second, and relatedly, the experts who relied on the Aguiar/Waldfogel article did not verify that the input data that was used by the authors was appropriate for the purposes for which it has been relied upon in this proceeding. *See* 3/20/17 Tr. 1945–46 (Marx); 3/23/17 Tr. 2789–90 (Ramaprasad). Third, the Aguiar/Waldfogel article appears not to specifically address two issues that would make the equivalency ratio meaningful: (a) What happens to the download behavior of an individual who adopts streaming; and (b) how the availability of streaming alters the consumption of a particular song. *See* Rysman WRT ¶ 97. Fourth, the experts for the Services and Apple ignore that Aguiar and Waldfogel conducted an additional analysis described in the same article on which they rely. In that second analysis, the authors compared the weekly data from Spotify for the period April to December 2013 with weekly data from Nielson on digital download sales for the same songs during the same overlapping time period. That approach, which Aguiar and Waldfogel called their ''matched aggregate sales'' analysis, yielded a ratio of 43:1, implying a much higher

[110] The Judges note though that Copyright Owners' appropriate reliance on the different access value in subpart A is an argument relating to the downstream value, confirming that upstream value demand is a ''derived demand,'' based on values in the downstream market. This argument therefore further undercuts Copyright Owners' claim that there is an ''inherent value'' in musical works that applies in these proceedings.

[111] Professor Ramaprasad also relied on two other equivalency ratios, the first from *Billboard* magazine, and the second from another entity, UK Charts Company (UK Charts). However, she acknowledges that the *Billboard* ratio combines *video* streaming royalty data with *audio* streaming royalty data, which results in an overestimation of the ratio of streams to track sales relative to an audio-stream-only analysis. 3/26/17 Tr. 2760–61 (Ramaprasad). She also acknowledges that UK Charts changed its ratio from 100:1 to 150:1 without explanation, rendering uncertain that purported industry standard. *See* COPFF ¶ 683 (and record citations therein). Also, there was no evidence indicating that streaming and download activity in the United Kingdom would be comparable to U.S. activity.

mechanical rate for streaming. *See* COPFF ¶¶ 663–64 (and record citations therein).

The Services and Apple offer insufficient evidence to overcome these criticisms of their ''equivalence'' approach to applying the subpart A rates in this proceeding. Accordingly, the Judges do not rely on these ''equivalence'' approaches in this determination.

By contrast, the Services' *second* subpart A benchmarking approach, utilized by both Professor Marx and Dr. Leonard, is more straightforward; it does not require a conversion of downloads into stream-equivalents. Rather, under this approach, Professor Marx simply divides the effective per-unit download royalty of $.096 by the average retail price of a download, $1.10, to calculate an All-In musical works royalty percent of [REDACTED]%. Subtracting Spotify's [REDACTED]% performance rate nets a mechanical works rate of [REDACTED]. In similar fashion, given an average CD price of $1.24 per song, she finds that the All-In musical works rate equals [REDACTED]%. Subtracting Spotify's [REDACTED]% performance rate nets an ''effective'' mechanical royalty rate of [REDACTED]% under this approach. Thus, she concludes that the Services' proposal in general, and Spotify's proposal in particular, are conservative and reasonable, because those proposals provide for substantially higher royalty rates than suggested by this subpart A benchmark analysis. Marx WDT ¶¶ 113–114 & Fig. 23.

Dr. Leonard did a similar calculation. He found that, applying the subpart A rates expressed as a percentage of revenue, interactive streaming services would pay an All-In rate to Copyright Owners of 8.7% of revenue, based on the average retail price of digital downloads in 2015. Leonard AWDT ¶ 42. Dr. Leonard further calculated that, expressed as a percentage of payments to the record labels (rather than total downstream revenues) the subpart A settlement reflects a payment of 14.2% of sound recording royalties, when compared to payments to record labels in 2015. Leonard AWDT ¶ 46.

Using updated 2016 data, which lowered the DPD retail price to $.99, Dr. Leonard calculated an ''effective'' percentage royalty rate of 9.6%. 3/15/17 Tr. 1108–09 (Leonard). Dr. Leonard then adjusted this result to make it comparable to Google's proposal, which seeks a reduction of up to 15% of certain costs incurred to acquire revenues. Adjusting for this cost reduction, Dr. Leonard concludes that the equivalent percent of revenue (after deducting similar costs) in subpart A was 10.2% in 2015 and 11.3% in 2016. *Id.* at 1109.

Copyright Owners do not dispute the calculations made by Professor Marx and Dr. Leonard. However, their general criticisms of the overall concept of using subpart A as a benchmark, discussed and rejected below, are equally applicable to this second approach.

The Judges find that the subpart A benchmark determined by this second approach is useful—not to establish the appropriate benchmark—but to incorporate into the development of a zone of reasonableness of royalty rates within the rate structure adopted by the Judges in this proceeding. The subpart A rates satisfy important criteria for a useful benchmark: The licensors are the same in the benchmark and target market; the rights licensed are the same in both markets; the time period of the rates in both markets is proximate; and the amount of revenue realized by the licensors in both markets is comparable. Additionally, the second approach is straightforward—simply converting a per unit price into a percent of revenue. Finally, the Judges take note of a point made by Professor Marx: Copyright Owners, like any seller/licensor, would rationally seek to equalize the rate of return from each distribution channel, *i.e.,* from licensing rights to sell DPDs/CDs under subpart A and from licensing interactive streaming services under subpart B. As she explains:

> This principle of equalizing rates of return across different platforms has some similarities with that underlying the approach of W. Baumol and G. Sidak, ''The Pricing of Inputs Sold to Competitors,'' . . . . They propose an efficient component pricing rule whose purpose is to ensure that the bottleneck owner (in our case, the copyright holder) should get compensation for access from all downstream market participants, whether existing or new entrants, that leaves him as well off as he would have been absent entry.

Marx WDT ¶ 104, n.118.

The Judges first identified this principle in *Web IV,* through a colloquy with an economic witness, and it remains persuasive in this proceeding. *See Web IV,* 81 FR at 26344 (Economic expert, Professor Daniel Rubinfeld, acknowledging as ''a fundamental economic process of profit maximization . . . [licensors] would want to make sure that the marginal return that they could get in each sector would be equal, because if the marginal return was greater in the interactive space than the noninteractive . . . you would want to continue to pour resources, recordings in this case, into the [interactive] space until that marginal return was equivalent to the return in the noninteractive space.''). Further, the Judges only recently credited this ''efficient component pricing rule''/opportunity cost approach in *SDARS III.*[112]

C. Rejection of Apple's Proposed Rate

Apple proposes an All-In per-unit rate of $0.00091 per play. However, that rate is premised on two analytical factors that the Judges have rejected in this proceeding. First, as a single, per-play rate, Apple's proposal fails to reflect the variable WTP in the market, rendering it a less efficient upstream royalty rate. Second, Apple's proposed $0.00091 per-play rate is derived from the subpart A conversion ratio approach that the Judges rejected in this proceeding.

D. Deriving Royalty Rates From Shapley Analyses

The Judges look to the Shapley analyses[113] utilized by the Professors Marx and Watt and, to a lesser extent, the ''Shapley-inspired'' analysis utilized by Professor Gans, as one means of deriving a reasonable royalty rate (or range of reasonable royalty rates).[114] The Judges defined and described the Shapley value in a prior distribution proceeding: ''[T]the Shapley value gives each player his 'average marginal contribution to the players that precede him,' where averages are taken with respect to all potential orders of the players.'' *Distribution of 1998 and 1999 Cable Royalty Funds,* 80 FR 13423, 13429 (Docket No. 2008–1) (March 13, 2015) (citing U. Rothblum, *Combinatorial Representations of the Shapley Value Based on Average Relative Payoffs,* in *The Shapley Value: Essays in Honor of Lloyd S. Shapley* 121 (A. Roth ed. 1988)); *see* Expert Report of Joshua Gans, Trial Ex. 3028, ¶ 64 (Gans WDT) (''The Shapley value approach . . . models bargaining processes in a free market by considering all the ways each party to a bargain would add value by agreeing to the bargain and then assigns to each party their average contribution to the cooperative bargain.''); Marx WDT ¶ 144 (''The idea of the Shapley value is that each party should pay according to its average contribution to cost or be paid according

[112] Of course, because copies of musical works (embodied in copies of sound recordings) are non-rivalrous quasi-public goods, licensing a copy to licensees in one platform does not prevent the licensing of another copy to licensees on a different platform. The equalization of returns for such goods relates to the elimination of opportunity costs.

[113] The ''Shapley Analysis'' or ''Shapley Models'' are so called based on the work of Nobel Economics Prize winner, Dr. Lloyd S. Shapley.

[114] The Judges will revisit the Shapley Analyses in evaluating factors B and C under section 801(b)(1).

to its average contribution to value. It embodies a notion of fairness.''); Written Rebuttal Testimony of Richard Watt, Trial Ex. 3034, ¶ 23 (Watt WRT) (''The Shapley model is a game theory model that is ultimately designed to model the outcome in a hypothetical 'fair' market environment. It is closely aligned to bargaining models, when all bargainers are on an equal footing in the process.'').

1. Shapley Models

A Shapley Analysis requires the economic modeler to identify downstream revenues available for division among the parties. The economic modeler must also input costs that each provider must recover out of downstream revenues, in order to identify the residue, *i.e.,* the Shapley ''surplus,'' available for division among the parties. A Shapley Model is cost-based, similar to a public utility-style rate-setting process, which identifies a utility's costs to be recovered before determining an appropriate rate of return.[115] In the present case, Copyright Owners and the Services have applied this general approach in different ways, and each challenges the appropriateness of the other's model.

To summarize the differences in their approaches, Professor Marx utilizes a Shapley Model that purposely alters the actual market structure in order to obtain results that *intentionally deviate* from the market-based distribution of profits. She makes these alterations in her model to determine rates she identifies as reflecting a ''fair'' division of the surplus (Factor B) and recompense for the parties' relative roles (Factor C). By contrast, Professor Watt's ''correction'' of Professor Marx's model rejects her alteration of the market structure. Rather, he maintains that the incorporation of ''all potential orders of the players'' in her model (as in all Shapley Models) already eliminates the hold-out power of any input provider who might threaten to walk away from a transaction.

Professor Gans, like Professor Watt, does not attempt to alter the market structure. However, Professor Gans concedes that he is not attempting to derive Shapley values from a ground–up analysis. Rather, Professor Gans takes as a given Dr. Eisenach's estimation that record companies receive a royalty of $[REDACTED] per play from interactive streaming services. Since Professor Gans identifies musical works and sound recordings as perfect complements, he assumes that the musical works licensors would receive the same profit as the record companies (but not the same royalty rate, given their different costs). Because this is not a Shapley ground-up approach, which would require estimating the input costs of *all three input providers*—the record companies, the music publishers, and the interactive streaming services, Professor Gans candidly acknowledged on cross-examination that he did not perform a full-fledged Shapley Analysis. He describes his methodology as a ''Shapley-inspired'' approach. 3/30/17 Tr. 4109 (Gans).

a. Professor Marx's Shapley Analysis

Professor Marx testified that, as an initial matter ''[t]he Shapley value depends upon how [the modeler] delineate[s] the entities contributing to a particular outcome.'' Marx WDT ¶ 145. More particularly, Professor Marx delineated the entities in a manner that she claimed to ''adjust[ ] the model for monopoly power.'' 3/20/17 Tr. 1862–63 (Marx). She modeled the downstream interactive streaming services as a combined single service and added to her model other distribution types as another form of downstream distribution to account for the potential opportunity cost of interactive streaming. By modeling the downstream market in this manner, Professor Marx artificially, but intentionally, treated the Services as a *single* service, a device to countervail the allegedly real market power of the collectives (the music publishers and the record companies respectively) that owned the other inputs. Professor Marx concluded the publishers' and record companies' must be offset to establish a fair division of the surplus and a fair rate. *See* 3/20/17 Tr. 1865, 1907 (Marx).

With regard to the upstream market of copyright holders, Professor Marx utilized two separate approaches. In her self-described ''baseline'' approach, she ''treat[ed] rights holders as one upstream entity, reflecting the broad overlap in ownership between publishers and record labels.'' Marx WDT ¶¶ 146, 162. In her ''alternative'' approach, she uncoupled the two collectivized copyright holders, grouping the songwriters/publishers, on the one hand, and the recording artists/record companies, on the other. *Id.* The two purposes of her alternative approach were: (1) To separately allocate surplus and indicate rates for musical works (the subject of this proceeding); and (2) to illuminate the additional ''bargaining power'' of each category of copyright holder when these two categories of necessary complements arrive separately in the input market under the Shapley methodology. 3/20/17 Tr. 1883–84 (Marx).

i. Professor Marx's Baseline Approach

Professor Marx noted the undisputed principle that ''[t]he calculation of the Shapley value depends on the total value created by all the entities together and the values created by each possible subset of entities.'' Marx WDT ¶ 147. Equally undisputed is the understanding that ''[t]hese values are functions of the associated revenue and costs.'' *Id.*

The surplus to be divided (from which rates can be derived) is realized at the downstream end of the distribution chain when revenues are received from retail consumers. That surplus can be measured as the profits of the downstream streaming services (and the alternative services in her model), *i.e.,* their ''revenue minus . . . non-content costs.''[116] The total combined value created by the delivery of the sound recordings through the interactive (and substitutional) streaming services consists of: (1) The aforementioned profits downstream (*i.e.,* service revenue − non-content cost) *minus* (2) ''the copyright owners' non-content costs. Simply put, ''surplus'' reflects the amount of retail revenue that the input providers can split among themselves after their non-content costs (*i.e.,* the costs they do not simply pay to each other) have been recovered.

In her Shapley Analysis, Professor Marx relied on 2015 data from Warner/Chappell for her music publisher non-content cost data and its ownership-affiliated record company, Warner Music Group, for record company non-content costs.[117] Utilizing the Warner cost data and extrapolating to the entire industry, Professor Marx estimated that ''Musical Work Copyright Holders' Total Non-Content Costs'' equaled $424 million; and ''Sound Recording Copyright Holders' Total non-content

[115] Unlike in public utility regulation, the Shapley Analysis considers the costs of all input providers whose returns will be determined. In traditional public utility rate regulation, the utility is a monopoly and thus the only provider of a regulated input.

[116] Content costs, as opposed to non-content costs, are not deducted because the content costs comprise the surplus to be allocated in terms of royalties paid and residual (if any) that remains with the interactive streaming (and substitute) services. The non-content costs, as discussed *infra,* must be recovered by each input provider as part of its Shapley value, because entities must recover costs to the extent their share of revenues allows such recovery.

[117] Professor Marx was limited to the Warner data for non-content costs because, among all major holders of musical works and sound recording copyrights, ''only Warner . . . breaks down its cost by geographic region and by source in enough detail to estimate the amounts needed.'' Marx WDT ¶¶ 149–150.

costs equaled $2.605 billion (more than six times musical works' copyright holders' non-content costs). Total licensors' upstream non-content costs totaled $3.028 billion. *Id.* ¶ 150, Fig. 26.

Turning to the downstream distribution outlets, Professor Marx identified and relied on Spotify's 2015 revenue and cost data from for interactive streaming services; for the alternative distribution modes, she relied on Pandora's and Sirius XM's revenue and cost data. *Id.* ¶ 152 & nn.149–52. Using that data, Professor Marx estimated interactive streaming revenue of $[REDACTED] billion; and (2) interactive streaming profit of $[REDACTED]. For the alternative distributors (Pandora and Sirius XM), she estimated (1) revenues of $8.514 billion; and (2) profits of $3.576 billion. The total downstream revenue, according to Professor Marx, equaled an estimated $10.118 billion. *Id.* ¶ 153 & Fig. 27.

Professor Marx noted some degree of substitution between interactive streaming services and alternative distribution channels (*e.g.,* non-interactive internet radio and satellite radio). *Id.* ¶ 154. She opined that ''it is difficult to determine the exact value of this substitution effect,'' so she reported a range of Shapley value calculations that corresponded to ''a range of possible substitution effects.'' *Id.*

These data were inputs into Professor Marx's Shapley algorithm, *i.e.,* assigning value to each input provider for each potential order of arrival among these categories of providers to the market. The multiple values were summed and averaged as required by the Shapley methodology to arrive at the ''Shapley value,'' which accounts for each entity's revenues and (non-content) costs under each possible ordering of market-arrivals.

Based on the foregoing, Professor Marx estimated that the total royalty payment due from the Services to Copyright Owners would range from $[REDACTED] million to $[REDACTED] million, depending on varying assumptions as to the substitution between interactive services and alternate delivery channels. This range of revenues reflected a ''percent of revenue'' paid by interactive streaming services to all copyright holders (musical works and sound recordings) ranging from [REDACTED]% to [REDACTED]%. *Id.* ¶¶ 159–160. Professor Marx then noted that this is well below the combined royalty rate of [REDACTED]% Spotify pays for musical works and sound recording rights, indicating that the actual combined royalty payments are clearly too high. *Id.* ¶ 161.[118]

ii. Professor Marx's Alternative Approach

Professor Marx also performed an ''alternative'' Shapley Analysis in which she modeled the upstream market as *two* entities: ''a representative copyright holder for musical works and a representative copyright holder for sound recordings.'' *Id.* ¶ 163. In all other respects, Professor Marx's methodology was the same as in her baseline approach. *See id.* ¶ 199, App. B.

Under the alternative approach with two owners of collective copyrights upstream, interactive streaming services' total royalty payments range from [REDACTED]% to [REDACTED]% of service revenue. *Id.* Sound recording copyright holders' total royalty income under this alternative approach ranged from [REDACTED]% to [REDACTED]% of revenue. *Id.* Professor Marx explained that this higher range of combined royalties arose from the fact that splitting the copyright holders into two creates two ''must-haves'' providing each upstream entity with more ''market power and consequently higher payoffs than the baseline calculation.'' *Id.* ¶ 164, n.153. By splitting the upstream licensors into two categories (record companies and songwriters/publishers), Professor Marx calculated that ''musical work copyright holders' total royalty income as a percentage of revenue ranges from [REDACTED]% to [REDACTED]%.'' *Id.* ¶ 163. By way of comparison, Spotify actually pays [REDACTED]% of its revenue for musical works royalties (*i.e.,* All-In royalties). Accordingly, Professor Marx concludes that ''[b]ecause this proceeding is about mechanical rates, the fairness component of 801(b) factors suggests that interactive streaming's mechanical rates should be reduced from their current level.'' *Id.* ¶ 161.

iii. Copyright Owners' Criticisms

Copyright Owners criticize Professor Marx's model for ''failing to accurately reflect realities of the market, where current observed market rates for sound recording royalties alone are approximately 60% of service revenue. *See* Watt WRT ¶ 23; Written Rebuttal Testimony of Joshua Gans, Trial Ex. 3035, ¶¶ 19, 28 (Gans WRT); *see also* COPFF ¶ 741. More technically, Copyright Owners object to Professor Marx's joinder of the sound recording and musical works rights holders as a single upstream entity in her ''baseline'' model, claiming that combination had the undisputed effect of lowering Shapley values, and hence royalties, available to be divided between the two categories of rights holders. Gans WRT ¶ 21; Watt WRT App. 3 at 2 (in real world, as opposed to stylized Shapley-world, rights holders would not *jointly* negotiate with licensees); *see also* COPFF ¶ 742. Further, Professor Gans questions Professor Marx's rationale for her joint negotiation assumption, *viz.,* the overlapping ownership interests of record companies and music publishers. Gans WRT ¶ 21.

The Judges find this criticism of Professor Marx's baseline approach to be appropriate, in that it was not *necessary* to combine the two rights holders in a Shapley Analysis. As Professor Watt explained in his separate criticism, there is no need to collapse the rights holders into a single bargaining entity to eliminate holdout power by the respective rights holders, because the ''heart and soul'' of the Shapley Model is exclusion of the holdout value that any input supplier could exploit in an actual bargain. 3/27/17 Tr. 3073 (Watt). He emphasized that, because the Shapley Model incorporates all possible ''arrivals'' of input suppliers, it eliminates from the valuation and allocation exercise the effect of an essential input supplier holding out every time or arriving simultaneously with another input supplier (or apparently creating Cournot Complement inefficiencies). *Id.* at 3069–70.

However, the foregoing criticism does not pertain to Professor Marx's second Shapley Model—her ''Alternative'' model—in which she maintains the two separate rights holders for musical works and sound recordings. Marx WDT ¶ 146, n.153; 3/20/17 Tr. 1871–72 (Marx). With regard to this Alternative model, Copyright Owners level a more general criticism of Professor Marx's approach that does pertain to her Alternative model (as well as her Baseline model). They assert, through both Professors Gans and Watt, that Professor Marx wrongly distorted the actual market in yet another manner—by assuming the existence of only one interactive streaming service—rather than the presence of competing interactive streaming services. Watt WRT ¶¶ 25, 32 n.19, 17; Gans WRT ¶¶ 55–56; see *also* COPFF ¶ 755. By this change, they argue, Professor Marx inflated the Shapley surplus attributable

[118] Because her baseline approach combines sound recording and musical works licensors into a single entity, Professor Marx does not break out separate royalties for musical works performances or mechanical licenses. However, she recommends that the mechanical rate should be lowered based on this finding. Professor Marx does specifically estimate the musical works rate under her Alternative approach.

to the interactive streaming services compared to the actual proportion they would receive in the market.

According to Professor Gans, this simplified assumption belies the fact that the market is replete with many substitutable interactive streaming services, whose competition *inter se* reduces each service's bargaining power. The problem, he opines, is that to the extent the entities being combined are substitutes for one another–such as alternative music services–then combining them ignores the effects of competition between them, thereby inflating their combined share of surplus from the joint enterprise (*i.e.* their Shapley value). Gans WRT ¶ 21.

Professor Marx does not deny that she intentionally elevated the market power of the services by combining them in the model as a single agent. However, she explained that she made this adjustment to offset the concentrated market power that the rightsholders possess, separate and apart from any holdout power, which the Shapley ordering algorithm would address. Thus, Professor Marx explained that her alteration of market power apparently was designed to address an issue—market power—that the Shapley Analysis does not address. 3/20/17 Tr. 1863 (Marx) (''I want a model that represents a fair outcome in the absence of market power, so I am going to have to be careful about how I construct the model that I am not putting in market power into the model.'').[119]

Professor Gans testified that Professor Marx's approach was erroneous because Shapley values are meant to incorporate market power asymmetries, not to eliminate them. Gans WRT ¶ 31 (Shapley values incorporate market power asymmetries). However, the Judges note that Professor Gans acknowledged that in an Australian legal proceeding, he too combined multiple downstream entities into a single entity in his Shapley Model in ''comparison'' to two upstream rights holders. 3/30/17 Tr. 4179 (Gans). Additionally, Professor Watt has authored and published an article (cited at Gans WDT ¶ 65, n.36) in which he too ''artificially'' equalized market power between rights holders and licenses (radio stations) in the same manner. *See* R. Watt, *Fair Copyright Remuneration: The Case of Music Radio,* 7, 25, 35 (2010) 7 Rev. of Econ. Res. on Copyright Issues 21, 25, 35 (2010) (''artificially'' modeling the ''demand side of the market as a single unit, rather than individual radio stations . . . thereby . . . add[ing] (notionally) monopsony power to the demand side'' to offset the monopoly power of the input supplier).

In essence, the import of this criticism is not the faithfulness of Professor Marx's testimony to the Shapley Model; rather, it pertains to her decision to include an adjustment for market power asymmetry that seeks to equalize market power as between Copyright Owners and the streaming services. Her adjustment is consistent with testimony by Professor Katz, who cautioned that a Shapley Analysis takes the parties' market power as a given, locking-in whatever disparities exist. 4/15/15 Tr. 4992–93 (Katz).

The Judges agree with Professor Watt and find that the Shapley Analysis, taking the number of sellers in the market as a given, eliminates the ''hold-out'' problem that would otherwise cause a rate to be unreasonable, in that it would fail to reflect effective (or workable) competition. However, Professor Marx's Shapley Model also attempts to eliminate a separate factor—market power—that she asserts renders a market-based Shapley Analysis incompatible with the objectives of Factors B and C of section 801(b)(1). The Judges will consider the appropriateness of Professor Marx's adjustment for market power in their discussion of these two factors.[120] For purposes of deriving a reasonable (and effectively competitive) rate prior to application of the 801(b)(1) factors, it is sufficient to note that Professor Marx's adjustment is not inconsistent with the traditional Shapley Analysis (as both Professors Watt and Gans have acknowledged in their work outside of this proceeding), and does not disqualify her Shapley value analysis from further consideration.

Professor Marx's alternative approach yielded a musical works royalty rate of between [REDACTED]% and [REDACTED]% of service revenue. 3/20/17 Tr. 1885 (Marx). In that alternative model, Professor Marx found that Spotify's total royalties for musical works and sound recordings combined would range from [REDACTED]% to [REDACTED]% of total revenue, meaning that payments for sound recording rights would be approximately [REDACTED]% to [REDACTED]% of total revenue. *Id.* The ratio of sound recording royalties to musical works royalties under Professor Marx's model is no lower than [REDACTED]% to [REDACTED]%, or [REDACTED]:1. Stated as a percentage of sound recording royalties (*i.e.,* TCC), musical works royalties would thus be [REDACTED]%.[121]

b. Professor Gans's ''Shapley-Inspired Approach''

On behalf of Copyright Owners, Professor Gans presented a model that he described as ''inspired'' by the Shapley approach, but not *per se* a Shapley Analysis. 3/30/17 Tr. 4109 (Gans). At a high level, his Shapley-inspired approach attempted to determine the ratio of sound recording royalties to musical works royalties that would prevail in an unconstrained market. After calculating that ratio, he estimated what publisher mechanical royalty rates would be in a market without compulsory licensing by multiplying the benchmark sound recording rates by this ratio. Gans WDT ¶ 63.

Professor Gans began his analysis with two critical assumptions: (1) Publishers and record companies must have equal Shapley values (*i.e.,* must recover equal profits from total surplus), because musical compositions and sound recording performances are perfect complements and essential components of the streamed performance;[122] and (2) record

[119] Although at first blush it would seem more appropriate for Professor Marx to have *directly* adjusted the copyright holders' market power by breaking them up into several entities each with less bargaining power, such an approach would make Shapley modeling less tractable (by increasing the number of arrival alternatives in the algorithm), compared with the practicality of equalizing market power by inflating the power of the streaming services (by reducing them to a single representative agent). For example, in Professor Marx's ''alternative'' Shapley Model, she models four entities, two upstream (musical works holders and sound recording holders), and two downstream (the representative single streaming service and a single alternate distribution outlet). With these four entities, the number of different arrival orders is 4! (factorial), or 24. If Professor Marx instead had broken the musical works copyright holders and the sound recording copyright holders respectively into two entities, the number of total entities would have increased from 4 to 6. The number of arrival orders would then have increased from 24 to 720.

[120] *See infra,* section VI.B. Although the Judges find a market power adjustment relevant in a section 801(b)(1) Factor B and C analysis, it is not a consideration when determining a rate that reflects ''effective competition.'' An effectively competitive rate need not adjust for market power because such a rate does not include consideration of these two factors or their public utility style legislative history antecedents.

[121] TCC percentage is the reciprocal of the sound recording to musical work royalty ratio, expressed as a percentage. Thus, 1/[*redacted*] = [*redacted*] (rounded) or [REDACTED]%.

[122] Modeling the market as having two upstream suppliers of complementary inputs (*i.e.,* a musical works copyright owner and a sound recordings copyright owner) produces the result that Professor Gans assumed in his analysis: The upstream suppliers reap equal profits, though their royalties differ due to differences in their cost structures. Professors Marx, in her ''alternative approach,'' and Watt, in his ''Shapley Model with 3 Streaming Services, models the market in this way. Marx WDT ¶ 201 (Figure 33 in Appendix B) (fifth column shows identical Shapley values for both upstream

company profits from interactive streaming services are used as benchmark Shapley values. Gans WDT ¶ 77. The royalties that result from Professor Gans's analysis will differ, given the different level of costs incurred by music publishers and record companies respectively. *See* Gans WDT ¶¶ 23, 71, 74, 76; Gans WRT ¶¶ 15–17; *see also* 3/30/17 Tr. 3989 (Gans).

Echoing Dr. Eisenach, Professor Gans found these assumptions critical because agreements between record companies and interactive streaming services are freely negotiated, *i.e.,* they are not set by any regulatory body or formally subject to an ongoing judicial consent decree and, accordingly, are also not subject to any regulatory or judicial ''shadow'' that arguably might be cast from such governmental regulation in the market. Accordingly, Professor Gans uses the profits arising from these unregulated market transactions to estimate what the mechanical rate for publishers would be if they too were also able to freely negotiate the rates for the licensing of their works. *See* Gans WDT ¶ 75.

Professor Gans utilized data from projections in a Goldman Sachs analysis to identify the aggregate profits of the record companies and the music publishers, respectively. *See* 3/30/17 Tr. 4017 (Gans). Given his assumption that sound recordings and musical works were both ''essential'' inputs and thus able to claim an equal share of the profits, Professor Gans posed the question: ''[H]ow much revenue do we need to hand to the publishers so that they end up earning the same profits as the labels? *Id.* at 4018.

He found that, for the music publishers to recover their costs and achieve profits commensurate with those of the record companies under his approach, the ratio of sound recording royalties to musical works royalties derived from his Shapley-inspired analysis was 2.5:1 (which attributes equal profits to both classes of rights holders and acknowledges the higher costs incurred by record companies compared to music publishers). *See* Gans WDT ¶ 77, Table 3.

As noted, Professor Gans made a key assumption, treating as accurate Dr. Eisenach's calculation of an effective per play rate for sound recordings of $[REDACTED]. Given those two inputs (the 2.5:1 ratio and the $[REDACTED] per play rate) Professor Gans's approach indicated a market-derived musical works per play royalty rate of $[REDACTED] (rounded). *Id.* ¶ 78, Table 3. However, because the musical works royalty is comprised of the mechanical rate and the performance rate paid to PROs (not to publishers), Professor Gans had to subtract the performance rate. He determined that the percent of revenues attributable to mechanical royalties was 81% of the total musical works royalties, under his approach. Thus, he estimated a mechanical royalty rate of $[REDACTED].[123] well above the Copyright Owners' proposed $0.0015 statutory per play rate, and thus confirming the reasonableness of the Copyright Owners' proposal. *Id.* ¶ 78.

On this basis, Professor Gans also concluded that his Shapley-inspired approach supports the Copyright Owners' per-user rate proposal. Applying the Shapley -based ratio of 2.5:1 to the benchmark per-user rate negotiated by the labels of $[REDACTED] per user per month, and after subtracting the value of the performance rights royalty, Professor Gans obtains an equivalent publisher mechanical rate of $[REDACTED] (rounded) per user per month (*i.e.,* ($[REDACTED]/2.5) × 80%[124]). *Id.* ¶ 85.

The Judges do not accept the rates derived by Professor Gans's Shapley-inspired model, because of its assumption and use of the $[REDACTED] per play sound recording interactive rate. Dr. Eisenach's $[REDACTED] per play sound recording rate is not supported by the weight of the evidence. Moreover, the record company profits are inflated by the inefficient rates created through the Cournot Complements problem that affects the agreements between record companies and streaming services, as noted by the Services' experts in this proceeding, and as the Judges noted in *Web IV.*

However, the Judges find the *ratio* of sound recording to musical work royalties that Professor Gans derived from his analysis to be informative. Professor Gans computed this ratio based on an assumption of equal Shapley values between musical works and sound recording copyright owners. The Judges find this assumption to be reasonable and confirmed by Professor Marx's Shapley Analysis. The Judges also find Professor Gans's reliance on financial analysts' projections for the respective industries to be reasonable.

Expressed as a percentage of sound recording royalties, Professor Gans's 2.5:1 sound recordings to musical works royalty ratio yields a musical works royalty rate of 40% of TCC.

c. Professor Watt's Shapley Analysis

As a rebuttal witness, Professor Watt testified regarding purported defects in Professor Marx's Shapley Model. In addition, he presented alternative modeling intended to apply an adjusted version of Professor Marx's Shapley Model.

Professor Watt found that Professor Marx's approaches contained several flaws and methodological issues. *See* 3/27/17 Tr. 3057 (Watt). Accordingly, he, like Professor Gans, attempted to adjust her modeling in a manner that, in his opinion, generated ''decent, believable results.'' *Id.* at 3058.

In his Shapley Model adjusting Professor Marx's analysis, Professor Watt found that at least [REDACTED]% of interactive streaming revenue should be allocated to the rights holders (as distinguished from a range of [REDACTED]% to [REDACTED]% of total revenues going to rights holders under Professor Marx's analysis). Of this [REDACTED]%, [REDACTED]% should be retained by the musical works copyright holders and [REDACTED]% should be allocated to record companies. Expressed as percentages of revenue, musical works copyright owners would receive [REDACTED]%[125] of total interactive streaming revenue while record companies would receive [REDACTED]%.[126] *See* Watt WRT ¶ 35; 3/27/17 Tr. 3083, 3115–16 (Watt).[127] The ratio of sound recording to musical works royalties under Professor Watt's analysis is thus [REDACTED]% to [REDACTED]%, or [REDACTED]:1. Expressed as a percentage of sound recording royalties, musical works royalties would be [REDACTED]%.

2. Deriving a Royalty Rate

Professors Marx, Gans, and Watt reached conclusions that were broadly consistent insofar as they all found that *the ratio* of sound recording to musical

providers); Trial Ex. 2619, at 8 (Appendix 3 to Watt WRT) (''Since there are only two players in this game, and each would have veto rights over the business, the net surplus would be shared equally between them.'').

[123] [*redacted*] × 0.81 = 0.0025 (rounded).

[124] Professor Gans multiplies the per play rate by 81% but the per user rate by 80%. *Compare* Gans WDT ¶ 78 *with* Gans WDT ¶ 85. The rate derived by Professor Gans was the 80% figure. Gans WDT ¶ 77, Table 3, line 17. This discrepancy has no impact on the relevance of his analysis.

[125] [REDACTED] (rounded).

[126] [REDACTED] (rounded).

[127] At present, record companies receive approximately 60% of total interactive streaming revenue, substantially higher than the [REDACTED]% calculated by Professor Watt. He explains that the reason for this difference is clear; the mechanical rate is artificially depressed by regulation, allowing the sound recording rate (set in an unregulated market) to appropriate a larger share of the royalties, given the perfect complementarity of the two rights. Watt WRT ¶ 36.

works royalty rates should decline. The following table summarizes these experts ratios, expressed both as ratios and percentages, and includes for comparison the actual ratio of sound recording to musical works royalties paid by Spotify, as well as the ratio implied by the prevailing headline percent of revenue rates for musical works and sound recordings.

SOUND RECORDING TO MUSICAL WORKS RATIOS AND TCC PERCENTAGES

Scenario	Ratio	TCC percentage [128]
Watt Shapley Analysis	[REDACTED]:1	[REDACTED]
Gans Shapley-inspired Analysis	[REDACTED]:1	[REDACTED]
Marx Shapley Analysis	[REDACTED]:1	[REDACTED]
Spotify Actual	*[REDACTED]:1*	*[REDACTED]*
Headline Percent of Revenue Rates	*5.71:1*	*17.5*

All of the experts' ratios are well below the current ratio of approximately [REDACTED]:1 for Spotify, and approximately 5.71:1 comparing the 10.5% headline rate to an average sound recording rate of approximately 60% of revenue. Accordingly, under their respective Shapley Models, Professors Marx, Gans, and Watt appear to be in general agreement that the ratio of sound recording to musical works royalties should decline.

Both Professor Marx's and Professor Watt's models show lower combined royalties being paid by services than are currently paid in the marketplace. Professor Marx's model produces combined royalties of between [REDACTED]% and [REDACTED]% of service revenue, while Professor Watt's model produces combined royalties of between [REDACTED]% and [REDACTED]%.[129] Even the highest of these values is less than [REDACTED].

The discrepancy in total royalties between the models and the real world is explained, in part, by the absence of supranormal complementary oligopoly profits in the Shapley Model, and the presence of those profits in the actual market. In addition, the total royalties paid in Professor Marx's model are lowered still further by her decision to equalize bargaining power between the content providers and services by modeling the services as a single entity.

Even with lower combined royalties, the models also show musical works royalties at or above the prevailing headline rate of 10.5%. Mathematically that is possible only because the models also yield lower royalties for sound recordings at all levels of total royalties. The following tables show the percentage revenue royalty rates for musical works and sound recordings that are produced by applying the experts' ratios to the different levels of total royalties. The final column shows the rates yielded by applying the ratios to Spotify's total royalty obligation of [REDACTED]%.

IMPLIED MUSICAL WORK ROYALTY (% OF REVENUE) BASED ON RATIO AND TOTAL ROYALTIES [130]

Expert	Ratio	TCC %	[REDACTED] %	[REDACTED] %	[REDACTED] %	[REDACTED] %	[REDACTED] %	[REDACTED] %
Watt	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Gans	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Marx	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

IMPLIED SOUND RECORDING ROYALTY (% OF REVENUE) BASED ON RATIO AND TOTAL ROYALTIES [131]

Expert	Ratio	TCC %	[REDACTED] %	[REDACTED] %	[REDACTED] %	[REDACTED] %	[REDACTED] %	[REDACTED] %
Watt	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Gans	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Marx	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Professor Watt explains the discrepancy between the sound recording royalty rates yielded by the Shapley Analysis and the higher rates that exist in the market:

> [The reason] my predicted fraction of revenues for sound recording royalties is significantly less than what is observed in the market [is] simple. The statutory rate for mechanical royalties in the United States is significantly below the predicted fair rate, and the statutory rate effectively removes the musical works rightsholders from the bargaining table with the services. Since this leaves the sound recording rightsholders as the only remaining essential input, bargaining theory tells us that they will successfully obtain most of the available surplus.

Watt WRT ¶ 36.[132]

Applying the ratios derived from the experts' models to the higher total royalties that prevail in the marketplace would yield musical works royalty rates higher than the models predict. For example, based on Professor Marx's lowest estimate of overall royalties of [REDACTED]%, her [REDACTED]:1

[128] TCC percentage is the reciprocal of the sound recording to musical work royalty ratio, expressed as a percentage.

[129] Professor Watt identified [REDACTED]%—the arithmetic mean of these two numbers—as his preferred figure.

[130] The royalty rate is computed using the formula $R_{mw} = R_t \div (1 + r)$ where R_{mw} is the musical work royalty rate, R_t is the combined royalty rate for musical works and sound recordings, and r is the ratio of sound recording to musical work royalties.

[131] The royalty rate is computed using the formula $R_{sr} = R_t \div (1 + 1/r)$ where R_{sr} is the musical work royalty rate, R_t is the combined royalty rate for musical works and sound recordings, and r is the ratio of sound recording to musical work royalties.

[132] More specifically, Professor Watt calculates that, for each dollar that the statutory rate holds down fair market musical works royalties, [REDACTED] cents is captured by the record companies (and [REDACTED] cents is captured by the streaming services). Watt WRT ¶ 23, n.13 & App. 3.

ratio (or [REDACTED]% TCC percentage) would yield percent-of-revenue rates for musical works of [REDACTED]%.[133] Using Spotify as an example, however, actual combined royalties for musical works and sound recordings are approximately [REDACTED]% of revenue. That same [REDACTED]:1 ratio would yield a percent-of-revenue rate for musical works of [REDACTED]%.[134] or nearly [REDACTED] percentage points higher than the model.

This is problematic because the sound recording rate against which the TCC rate would be applied is inflated both by the existence of complementary oligopoly conditions in the market for sound recordings and what Professor Watt describes as the record companies' ability to obtain most of the available surplus due to the music publishers' absence from the bargaining table. In order to derive usable TCC rates from the Shapley Analyses the Judges must address these two issues.

The Judges find that the problem of, in essence, importing complementary oligopoly profits into the musical works rate through a TCC percentage can be avoided by reducing the TCC percentage. Specifically, the TCC percentage should be reduced to a level that produces the same (non-complementary-oligopoly) percentage revenue rate when applied to the existing [REDACTED]% combined royalty as the Shapley-produced TCC percentage yields when applied to the theoretical combined royalties in the model. For example, Professor Watt's Shapley Analysis produces a [REDACTED]:1 sound recording to musical work ratio, or a [REDACTED]% TCC percentage. At his preferred combined royalty rate of [REDACTED]%, the implied musical works rate is [REDACTED]% of revenue. The TCC rate that produces the same [REDACTED]% of revenue rate under existing conditions would be [REDACTED]%.[135] These adjusted TCC rates are summarized in the following table.

Expert	TCC from model	Adjusted TCC using [REDACTED]% combined royalties	Adjusted TCC using [REDACTED]% combined royalties	Adjusted TCC using [REDACTED]% combined royalties	Adjusted TCC using [REDACTED]% combined royalties	Adjusted TCC using [REDACTED]% combined royalties
Watt	[REDACTED]%	[REDACTED]%	[REDACTED]%	[REDACTED]%	[REDACTED]%	[REDACTED]%
Gans	[REDACTED]%	[REDACTED]%	[REDACTED]%	[REDACTED]%	[REDACTED]%	[REDACTED]%
Marx	[REDACTED]%	[REDACTED]%	[REDACTED]%	[REDACTED]%	[REDACTED]%	[REDACTED]%

As to the issue of applying a TCC percentage to a sound recording royalty rate that is artificially high as a result of musical works rates being held artificially low through regulation, the Judges rely on Professor Watt's insight (demonstrated by his bargaining model) that sound recording royalty rates in the unregulated market will decline in response to an increase in the compulsory license rate for musical works.

> [T]he reason why the sound recording rate is so very high is because the statutory rate is very low. And if you increase the statutory rate, the bargained sound recording rate will go down.

3/27/17 Tr. 3090 (Watt). Professor Watt's bargaining model predicts that the total of musical works and sound recordings royalties would stay ''almost the same'' in response to an increase in the statutory royalty. Id. at 3091.

As must-have suppliers in an unregulated market, record companies are in a position to walk away from negotiations with the Services and, effectively, put them out of business. That they have not done so demonstrates that it is not in their economic interest to do so.[136] The decline in sales of physical copies and permanent digital downloads, along with the growth of streaming, is a powerful economic motivation for record companies to pursue deals with the Services that ensure the continued survival and growth of the music streaming industry. In negotiating those deals both sides will be cognizant of the effect on the Services' content cost of a decision by this body.

In his separate opinion, Judge Strickler expresses concern that ''if mechanical royalty rates were to increase to a level that significantly reduced the profits of the record companies from streaming, there is no evidence in the record in this proceeding that indicates whether the record companies would decide to maintain the current vertical structure of the market and docilely accept such a revenue loss.'' [137] The Judges acknowledge the concern articulated by Judge Strickler, but note that it applies potentially to any rate increase for musical works that reduces record company streaming profits.[138] Just as the Judges have noted that there is no evidence to suggest that the current level of short-term losses is the maximum that the Services can absorb in their Shumpeterian competition for market share, they note that there is no basis to assume that record companies will head for the exits if their profits from streaming drop below current levels. At bottom, this concern goes not to the decision whether or not to increase the mechanical rate, or to adopt a particular rate structure, but to the *magnitude* of any rate increase, and measures that should be taken to reduce any disruption the increase might cause to the industry. The Judges take both concerns into account in this Determination.

The foregoing exercise produced a broad range of potential rates: TCC rates ranging from [REDACTED]% to [REDACTED]%, which correspond to implied percent of revenue rates from [REDACTED]% to [REDACTED]%. The Judges narrow that range by reference to the strength of the evidence supporting the numbers underlying those rates.

Professor Watt testified that the data Professor Marx used in her Shapley model was derived from 2015 Spotify financials and, as a result, understated current downstream revenue. Watt WRT ¶¶ 37, 43–44. In addition, Professor Marx included a number of items as downstream costs that, in Professor Watt's view, should be excluded from

[133] [REDACTED] (rounded).

[134] [REDACTED]

[135] The target TCC rate is computed using the formula $TCC = 1 \div ((R_t/R_{mw}) - 1)$, where R_t is the combined royalty rate in the marketplace ([REDACTED]%), and R_{mw} is the musical work royalty rate yielded by the Shapley value analysis.

[136] The evidence in *Web IV* revealed that the record companies' strategy has been to ''[REDACTED].'' *Web IV* (restricted version) at 63.

[137] Judge Strickler expresses concern that an increase in the mechanical rate might prompt the record companies to create (or acquire) their own streaming services, rather than accept a lower royalty rate from the existing Services. It is well-established that it is not the Judges' role to protect the current players in the industry. Companies—even major players in the industry—enter and exit the market regularly. That market fluidity is not the sort of disruption the Judges consider under the fourth 801(b)(1) factor.

[138] The Judges note that Professor Watt's insight applies not only to a Shapley-derived TCC rate, but to *any* rate structure that results in an increase in what services pay for musical works. Bargaining theory instructs that the services and the record companies will take into account any increase in the statutory royalties that the services must pay.

the model. Id. ¶¶ 57–59. The net effect of understating downstream revenue and overstating downstream costs is to drive down the amount of surplus allocated to the upstream content providers. Id. ¶ 42. Although Professor Marx addressed the reasons for her decision to use 2015 cost and revenue data in her model, she did not address the effect that her choice had on allocation of surplus, or attempt in any way to correct for it. See 3/20/17 Tr. 1880–81, 1906–08 (Marx). The Judges find that the total royalty values produced by Professor Marx's models understate what would be a fair allocation of surplus to the upstream content providers. Consequently, the Judges view Professor Marx's top value for total royalties ([REDACTED]%) to constitute a lower bound for total royalties in computing a royalty rate.

As Professor Watt's total royalty figures were presented as rebuttal testimony, Professor Marx, on behalf of the services, did not have an opportunity to rebut them. The Judges give them weight only to the extent of viewing his lowest figure ([REDACTED]%) as an upper bound for total royalties in computing a royalty rate.

In a similar vein, Professor Marx did not have an opportunity to rebut Professor Watt's [REDACTED]:1 sound recording to musical work royalty ratio. Professor Watt derived that ratio using data from Professor Marx's model, yet produced vastly different results. *See* Trial Ex. 2619, at 9 (Appendix 3 to Watt WRT). The reason for this disparity in outcome was not adequately explored or explained. The Judges give Professor Watt's [REDACTED]:1 ratio no weight.[139]

The Judges are left with the following potential royalty rates.

Expert	TCC from model	Adjusted TCC using [REDACTED]% combined royalties	Implied percent of revenue rate using [REDACTED]%	Adjusted TCC using [REDACTED]% combined royalties	Implied percent of revenue rate using [REDACTED]%
Gans	[REDACTED]%	[REDACTED]%	[REDACTED]%	[REDACTED]%	[REDACTED]%
Marx	[REDACTED]%	[REDACTED]%	[REDACTED]%	[REDACTED]%	[REDACTED]%

The Judges find, therefore, that the zone of reasonable rates ranges from [REDACTED]% to [REDACTED]% of TCC, or, expressed as equivalent percent of revenue rates, [REDACTED]% to [REDACTED]%. Taking into consideration the totality of the evidence presented in this proceeding, the Judges select [REDACTED]% of TCC/[REDACTED]% of revenue as the most appropriate rate within that zone of reasonableness.

E. Other Royalty Rates

1. Royalty Rate for Incidental Digital Phonorecord Deliveries

The Act requires the Judges in setting phonorecord mechanical license royalty rates and terms to distinguish between (i) digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and (ii) digital phonorecord deliveries in general. 17 U.S.C. 115(c)(3)(C), (D). The extant regulations do not mention incidental DPDs, but provide that a limited download is ''a general digital phonorecord delivery under 17 U.S.C. 115(c)(3)(C) and (D).'' 37 CFR 385.11 (and incorporated into § 385.21). It appears the parties' 2012 Settlement terms failed to make the distinction the statute requires of the Judges.

Legislative history leading up to the enactment of the Digital Performance Right in Sound Recording Act of 1995 describes incidental DPDs as the transmission of copies that are made solely to facilitate streaming, *i.e.,* via a transmission system ''designed to allow transmission recipients to hear sound recordings substantially at the time of transmission.'' *See* S. Rep. No. 104–138, at 39 (1995). If the recipient does not retain those copies for subsequent playback, then the copies are considered ''incidental deliveries.'' *Id.* Copies retained for subsequent playback, whether ''limited'' or ''permanent'' fall into the category of ''general phonorecord delivery.'' *Id.* Further, if a transmission system supports retention of digital phonorecords for subsequent playback, but the transmission recipient chooses not to do so, then the initial delivery could be consider incidental. *Id.*

The Copyright Office explored the question of identifying incidental DPDs in an extended rulemaking proceeding.[140] During the study of the issue, Services identified potentially incidental copies at the service offering level (variously called ''server-, root-, encoded-, or cached-'' copies) as well as at the end user level (often called ''buffer'' copies). The question, however, remained unresolved. In *Phonorecords I,* the Judges adopted the 2008 Settlement which included ''an incidental digital phonorecord delivery'' in the definition of ''Interactive Stream.'' 74 FR at 4529. After a finding of legal error by the Register of Copyrights (Register),[141] the Judges deleted the reference. *See* 74 FR 6832, 6833 (Feb. 11, 2009). The distinction did not reappear in the *Phonorecords II* adoption of the 2012 Settlement. *See* 78 FR 67938, 67943 (Nov. 13, 2013).

The record in this proceeding is devoid of factual evidence that demands the rate distinction. The Judges conclude, however, that they may, indeed must, address the distinction as a matter of law. Reviewing the legislative history, the statutory language, and the history of study of the issue by the Copyright Office, the Judges conclude that classification of an incidental DPD is a function of a Service's technological functionality and, to some extent, an end user's subsequent conduct.

In the context of interactive streaming and similar modes of delivery where there is no general DPD, the royalty rates in this determination covering that mode of delivery are, *de facto,* the royalty rates for the incidental DPDs that enable the activity. To the extent

[139] By contrast, Professor Marx had ample opportunity to critique Professor Gans's report. See Marx WRT ¶¶ 73–75. Her criticism focuses on his decision not to use the Shapley model to determine the division of surplus between the downstream services and the upstream copyright owners. Id. ¶ 74. She does not challenge the specific ratio of sound recording to musical works royalties that he derives from his model and that the Judges use here.

[140] When it issued an interim rule, the Copyright Office concluded that in a determination turning upon a conclusion of ''when a DPD is an incidental DPD,'' the Judges should make that determination ''in the context of a factual inquiry . . . if such a determination proves to be relevant.'' 73 FR 66173, 66179 (Nov. 7, 2008).

[141] The Register noted that the regulation the Judges adopted as part of a settlement among the parties ''overstates the scope of the section 115 license with respect to interactive streams.'' 74 FR at 4539. By way of clarification, the Register noted that ''an interactive stream that delivers a reproduction of a sound recording that qualifies as a DPD is, for purposes of the license, an incidental DPD.'' *Id.* (''a stream—whether interactive or non-interactive—may or may not result in a DPD depending on whether all the aforementioned criteria are met.'').

any of the configurations covered by the royalty rates set in this determination entail both incidental and general DPDs, the royalty rate is for all DPDs, incidental or general, that result from the activity.[142]

2. Royalty Rates for Non-Revenue Bearing Service Offerings

In the 2012 rates and terms, the parties essentially rolled forward the rate structure first constructed in the 2008 Settlement. In 2012, the parties created a separate aggregation of service offerings in a new subpart C[143] to the regulations, agreeing to rates and terms similar to those to which they agreed in subpart B for interactive streams and limited digital downloads. Based on the evidence in this record, it appears limited offerings, and bundled service offerings are not different in kind from interactive streaming and limited downloads. No party offered compelling evidence to establish the necessity for segregating the current subpart C service offering configurations from current subpart B service offering configurations.

In their review of the current and proposed rates and terms, however, the Judges see a basis to distinguish promotional or non-revenue producing offerings from revenue-producing offerings. In some instances locker services—particularly purchased content locker services—are free to the user and produce no revenue for the Service separate from the purchase price for the content. In some instances, a service may transmit a sound recording embodying a musical work that fits the definition of a promotional offering; that is, a sound recording that a Record Company makes available at no cost to the service and for a limited period. The Services' transmissions of those sound recordings are made solely for the purpose of promoting a particular sound recording, an album, or the artist performing the musical work. Record companies distributing promotional recordings bear responsibility, if any there be, for the licensing of the embodied musical work. In other instances, a Service might offer a free or reduced-price subscription to its streams, or modified versions of its subscription-based services, to entice free users to become paying subscribers after the free trial period. When services choose to deliver no-cost or non-revenue bearing offerings qualifying as promotional, ''free trial,'' or no-charge locker services, the Services will not pay mechanical musical works royalties. Neither shall the Services deduct the costs of those service offerings from service revenue, for purposes of calculating royalties payable on a percent of service revenue.

VI. The Four Itemized Factors in Section 801(b)(1)

The Copyright Act requires that the Judges establish ''reasonable'' rates and terms for the section 115 license. In addition, section 801(b)(1) instructs the Judges to set these rates ''to achieve the following objectives'':

> Factor A: To maximize the availability of creative works to the public;
>
> Factor 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;
>
> Factor C: To reflect 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; and
>
> Factor D: To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

17 U.S.C. 115(c), 801(b)(1).[144]

The four itemized factors in section 801(b)(1) require the Judges to exercise ''legislative discretion'' in making independent policy determinations that balance the interests of copyright owners and users.'' *SoundExchange, Inc.* v. *Librarian of Cong.,* 571 F.3d 1220, 1224 (D.C. Cir. 2009); *see Recording Indus. Ass'n Am.* v. *CRT,* 662 F.2d 1, 8–9 (D.C. Cir. 1981) (''*Phonorecords 1981 Appeal*'') (analyzing identical factors applied by predecessor rate-setting body and holding that statutory policy objectives of 801(b)(1) ''invite the [Board] to exercise a legislative discretion in determining copyright policy in order to achieve an equitable division of music industry profits between the copyright owners and users'').

The four factors ''pull in opposing directions,'' leading to a ''range of reasonable royalty rates that would serve all these objectives adequately but to differing degrees.'' *Phonorecords 1981 Appeal,* 662 F.2d at 9. (D.C. Cir. 1981) (citations omitted). Certain factors require determinations ''of a judgmental or predictive nature,'' while others call for a broad fairness inquiry. *Id.* at 8 (citations & quotations omitted). Accordingly, the Judges are ''free to choose'' within the range of reasonable rates . . . within a 'zone of reasonableness.' '' *Id.* at 9 (citations omitted).

In prior rate determination proceedings, the Judges have undertaken the ''reasonableness'' analysis followed by consideration of the four itemized factors. They followed that approach in this proceeding. The Judges conclude, however, that their consideration of the four itemized section 801(b)(1) factors in this proceeding also provides further support for their findings regarding a reasonable rate structure and reasonable rates.

The D.C. Circuit recently reiterated the relationship between the 801(b) standard and market-based rates by contrasting that standard with the willing buyer/willing-seller standard set forth in 17 U.S.C. 114(f)(2)(B). The court noted that the two standards are distinguishable by the fact that, unlike section 114(f)(2)(B), *section 801(b)(1) does not focus on unregulated marketplace rates. SoundExchange, Inc.* v. *Muzak LLC,* 854 F.3d 713, 715 (D.C. Cir. 2017). However, to the extent market factors may implicitly address any (or all) of the four itemized factors, the reasonable, market-based rates may remain unadjusted. If the evidence suggests that market-based rates fail to address any (or all) of these four itemized policy factors, the Judges may adjust the reasonable, market-based rate appropriately. *See* Determination of Rates and Terms . . . , 73 FR 4080, 4094 (Jan. 24, 2008) (*SDARS I)* (applying same factors, holding ''[t]he ultimate question is whether it is necessary to adjust the result indicated by marketplace evidence in order to achieve th[e] policy objective[s].'').[145]

A. Factor A: Maximizing Availability of Creative Works to the Public

Factor A provides that rates and terms should be determined to ''maximize the availability of creative works to the public.'' 17 U.S.C. 801(b)(1)(A). Of particular importance, this provision unambiguously links the *upstream* rates

[142] The rates for permanent digital downloads and limited downloads set by the parties to the March 2017 subpart A settlement do not distinguish between incidental DPDs and DPDs in general. The Judges deem those rates to cover all DPDs, incidental and general, that result from those modes of delivery.

[143] The so-called subpart C service offerings included limited offerings, mixed service bundles, music bundles, paid locker services, and purchased content locker services.

[144] The 1976 Act applied section 801(b)(1) and its four-factor test to new licenses. The lone existing statutory license carried forward into the 1976 Act from the 1909 Copyright Act and made subject to this standard was the mechanical license at issue in this proceeding.

[145] Thus, the Judges reject Copyright Owners' argument that the first three itemized section 801(b)(1) factors *per se* reflect the same forces that shape the rate set in the marketplace. *See* 4/4/17 Tr. 4589, 4666 (Eisenach).

and terms that the Judges are setting with the *downstream* market, in which ''the public'' is listening to sound recordings that embody musical works.

In the *SDARS I* Determination, the Judges made a general statement, attributed to an expert economic witness, Dr. Ordover, that ''[w]e agree . . . that 'voluntary transactions between buyers and sellers as mediated by the market are the most effective way to implement efficient allocations of societal resources.' '' *SDARS I,* 73 FR at 4094 (quoting from Written Direct Testimony of Janusz Ordover at 11). However, as the Judges' present discussion of the economics of this market should make plain, they do not agree that such a broad statement captures all the economic realities of the market. In fact, Professor Ordover's full testimony in *SDARS I* demonstrates that he based his statement on the same particular aspects of the pricing of copies of intellectual property (such as musical works or sound recordings) that the Services' expert witnesses and the Judges have identified in this proceeding.

On behalf of the Services in the present proceeding, Professor Marx approaches Factor A in a manner that is at once novel (for these proceedings) and consistent with fundamental and relevant economic principles. Specifically, she asserts that maximization of the availability of musical works (embodied in sound recordings) to the public, through interactive streaming, requires that the combined ''producer surplus'' and ''consumer surplus'' be maximized, because that leads to listening by all segments of the public regardless of their WTP. In Professor Marx's analysis ''producer surplus'' means ''the amount by which the total revenue received by a firm for units of its product exceeds the total marginal cost. . . .'' A Schotter, *Microeconomics: A Modern Approach* at 389 (2009).[146] The ''consumer' surplus'' means ''[t]he difference between what the consumer would be willing [and able] to pay and what the consumer actually has to pay.'' *Mansfield & Yohe,* at 93.

When a perfectly competitive market is in equilibrium (or tending that way) ''the sum of consumer surplus . . . and producer surplus . . . is maximized.'' *Schotter,* at 420. By contrast, if a market is not perfectly competitive because the sellers have some degree of market power, then the level of output is somewhat restricted, producer surplus is increased and consumer surplus is decreased—with a portion of the overall surplus redistributed to producers/sellers. Another portion lost as ''a pure 'deadweight' loss . . . the principal measure of the allocation of harm'' arising from the exercise of market power. *Mansfield & Yohe, supra,* at 499; *see* Schotter, at 398 (accepted definition of ''deadweight loss'' is ''[t]he dollar measure of the loss that society suffers when units of a good whose marginal social benefits exceed the marginal social cost of providing them are not produced because of the profit-maximizing motives of the firm involved.'').[147]

As the foregoing definitions imply, the two surpluses are measured by reference to a single equilibrium price. However, when Copyright Owners, like any sellers, are able to *price discriminate,* they enlarge the total value of the combined surpluses, diminish the ''deadweight loss'' and appropriate the larger, combined surplus for the producers. *See* H. Varian, *Intermediate Microeconomics: A Modern Approach* 462–63 (2010) (With price discrimination, ''[j]ust as in the case of a competitive market, the sum of producer's and consumer's surplus is maximized [but with] the producer . . . getting *the entire* surplus generated in the market. . . .'').

Professor Marx marshals these microeconomic principles to explain why the 2012 Settlement rate structure tends to incentivize and support the maximization of musical works available to the public under Factor A. Marx WDT ¶¶ 119–122, 123–133. As she testified at the hearing:

> [H]aving different means of price discrimination is going to allow greater efficiency to be achieved [i]f we have a way for low willingness to pay consumers to access music, for example, student discounts, family discounts or *ad-supported streaming, where low-willingness-to-pay consumers can still access music in a way that still allows some monetization of that provision of that service.*

3/20/17 Tr. 1894–95 (Marx) (emphasis added); *see* Marx WDT ¶ 12 (''An economic interpretation of [F]actor A is that the royalty structure should ''maximize the pie'' of total producer and consumer surplus. . . .'').

Professor Marx contends that the price discriminatory rate structure is superior to a per play model in maximizing the availability of musical works to the public:

> The subscription model provides an efficiency benefit because the price of a play is equal to the marginal cost of roughly zero—a subscriber faces the true marginal cost of playing a song over the internet and thus consumes music at the efficient level. When subscribers face a per-play royalty cost of zero, interactive streaming services have the appropriate incentive to encourage music listening at the margin.
>
> In contrast, if interactive streaming services faced a positive per-play royalty cost, they would have a diminished incentive to attract and retain high-use consumers, the very type of consumers who create the most social surplus through their listening. They would also have an incentive to discourage music listening among the high-use consumers they retain. The higher the level of per-play royalties is, the more this incentive might affect the behavior of interactive streaming services.

Id. at ¶¶ 130–131 & n. 135.[148]

Professor Marx's analysis is based on an understanding that maximizing the availability of musical works is a function of incentives to distributors and a function of *downstream* demand. She notes, however, that the variable, percent-of-revenue rate structure is consistent with agreements in the unregulated *upstream* sound recording market, where record companies license sound recordings to these same interactive streaming services. She notes:

> Ironically, given the preference of . . . Copyright Owners' economists for market outcomes, . . . they support a proposal that would tend to eliminate [REDACTED] interactive streaming, *which the unregulated sound recording side of the market has facilitated.* [Copyright Owners'] proposal would also completely do away with percentage-of-revenue rates that form a key part of unregulated rates negotiated between

[146] For present purposes, marginal cost includes opportunity cost as well as marginal production cost, regarding the marginal cost of distributing copies of the musical works (embodied in interactively streamed sound recordings).

[147] To be clear, this ''harm'' is not conclusive evidence that such static market power is harmful, or even inefficient, on balance, in a dynamic sense. A monopoly may be more efficient in reducing unit costs because of necessary scale (such as a natural monopoly) or because of superior production techniques. And again, when marginal production costs (of copies) are essentially zero, exercise of market power by copyright owners (including owners of collectivized repertoires such as record companies, music publishers and PROS) can be necessary to induce the production of copyrighted goods (such as musical works and sound recordings), because without production there is nothing to be copied. But these efficiencies only demonstrate why such market power should not be dissipated, and are not relevant to the narrower issues at hand: how to maximize the availability of goods and to set reasonable rates given the otherwise beneficial existence of such market power.

[148] With regard to Factor A as it relates to Copyright Owners' proposal, Professor Marx also notes the supply-side ''Cournot Complements'' problem created by Copyright Owners' reliance on the unregulated sound recording market. This is a problem because rates in such a ''must have'' unregulated market can be even higher than monopoly rates, thereby depressing the quantity supplied—contrary to a goal of maximizing the availability of musical works. *See* 4/7/17 Tr. 5532 (Marx).

music labels and interactive streaming services.

Marx WRT ¶ 84 (emphasis added).

Beyond Professor Marx's theoretical arguments, Dr. Leonard notes that the existing (price-discriminatory) rate structure that has existed for two rate periods. He contends there is no evidence that songwriters as a group have diminished their supply of musical works to the public. In fact, he notes that the music publishing sector has been profitable throughout the present rate period. 3/15/17 Tr. 1120 (Leonard).

Dr. Leonard is correct that there is no evidence in the record that songwriters as a group have diminished their supply of musical works to the public. No participant performed such an empirical study. Nevertheless, there is ample, uncontroverted testimony that songwriters have seen a marked decline in mechanical royalty income over the past two decades, and that this decline has rendered it increasingly difficult for non-performing songwriters (*i.e.,* songwriters with income from songwriting only and not from performing or recording music) to earn a living practicing their craft. For example, Mr. Steve Bogard, a successful veteran songwriter from Nashville, testified that ''I have written many songs that have become hits and continue to do so. However, over the past few years, my income has not reflected my continued success because the interactive streaming services are paying a fraction of what I earn from physical sales and permanent downloads.'' Witness Statement of Steve Bogard, Trial Ex. 3025, ¶ 32 (Bogard WDT). Lee Thomas Miller, another successful Nashville-based songwriter, when asked to describe the mechanical royalty income he earns from on-demand streaming, stated ''[i]t is so insignificant that we rarely even scroll down and look at the line items. . . . [Y]ou look at these numbers of millions of spins and then you look at the tens of dollars that they pay.'' 3/28/17 Tr. 3517–18 (Miller).

Mechanical royalties play a critical role in enabling professional songwriters to write songs as a full-time occupation.[149] Professional songwriters have traditionally subsisted on a ''draw,'' a periodic advance against future mechanical royalties that music publishers pay out like a salary. See 3/23/17 Tr. 2931 (Herbison). ''In many cases, the advances we pay our songwriters are their main source of income to cover living expenses, allowing them to dedicate as much of their time as possible to songwriting instead of having to take other work to make ends meet.'' Witness Statement of Justin Kalifowitz, Trial Ex. 3022, ¶ 15 (Kalifowitz WDT). If the mechanical royalties from which music publishers can recoup advances decrease, so too do the advances that music publishers are willing to pay out. ''[I]n the non-digital era, those draws for brand new writers, it wasn't uncommon for them to be in the $20,000, $30,000 range when those dollars meant more, 20 years ago. Today the standard is $12,000.'' 3/23/17 Tr. 2932 (Herbison).

The decline in royalties has diminished some music publishers' willingness to make or continue publishing agreements with songwriters:

> The availability of publishing deals has significantly decreased. It is alarming that in Nashville there are so many fewer songwriters than there were just a few years ago. Most estimates say that there are less than one-quarter of the number of professional songwriters than there were just 10 years ago. Many songwriters in Nashville who earned a full-time living from royalty payments are no longer signed to publishing deals.

Bogard WDT ¶ 41. Diminished availability of publishing deals means fewer new songwriters entering the profession:

> Publishers cannot afford to sign as many songwriters as they did in the past. Music publishers typically invested in younger writers who might not produce immediate results and then recouped their money when those writers started earning royalties on album cuts. Now, when they do sign writers, music publishers increasingly turn to recording artist and producer writers, so they can hedge their bets with a better chance of recordings being released.

Bogard WDT ¶ 42; see also Witness Statement of Liz Rose, Trial Ex. 3024, ¶ 20 (Rose WDT) (''we used to sign more songwriters and give them five or six years to hone their craft . . . but we can't afford to do that anymore''). Development of those songwriters who are fortunate enough to sign publishing deals is also suffering.

> When I first arrived in Nashville, experienced and established songwriters would invite young, talented songwriters to write with them. This was a very illuminating experience for the young songwriters and helped them grow into better professionals. It also gave the established writer new ideas and influences. Today, a professional non-performing songwriter cannot simply try to write a great song alone or with co-writers who are also professional songwriters, then hope that an artist records it.
>
> Now, an established songwriter cannot mentor young songwriters if he or she wants to maintain his living. Veteran songwriters, such as myself, simply do not have time. Instead, I spend three to four days a week with young recording artists who already have record deals and need help writing their songs. These recording artists are sometimes very talented songwriters, but it often takes the craft and art of the professional writer to turn their thoughts into commercial songs.

Id. ¶¶ 44–45; see also Witness Statement of Lee Thomas Miller, Trial Ex. 3023, at ¶ 6 (L. Miller WDT) (''Publishers can simply not afford to 'develop' as many writers as they once did.'').

To be sure, not all of the diminution of mechanical royalty income has been a result of the shift from physical product and permanent downloads to streaming. Digital piracy, and the unbundling of the album [150] have played significant parts in reducing songwriter income. *See* 3/23/17 Tr. 2937, 2940–41 (Herbison). It is not within the Judges' authority to roll back the clock, as it were, and remedy every economic force that has diminished songwriters' income over the past two decades. Nevertheless, the Judges find that the evidence in this proceeding supports a conclusion that the existing rates for mechanical royalties from interactive streaming are a contributing factor in the decline in songwriter income, and that this decline has led to fewer songwriters. If this trend continues, the availability of quality songs will inevitably decrease.[151]

Copyright Owners, principally through the rebuttal testimony of Professor Watt, argue that Professor Marx has made a fundamental error in equating the maximizing of availability of musical works with a maximization of the sum of the producer and consumer surplus. Watt WRT ¶ 10. According to Professor Watt, ''A better understanding of criterion A is that the royalty payments should ensure that a

[149] Justin Kalifowitz, founder and CEO of an independent music publisher, testified that ''[q]uality songwriting cannot be relegated to a part-time hobby; it is a calling and a career.'' Witness Statement of Justin Kalifowitz, Trial Ex. 3022, ¶ 14 (Kalifowitz WDT).

[150] Album sales provided songwriters income from ''album cuts,'' *i.e.,* songs that were not hits, but provided royalty income from album sales. In the current singles market that dominates download sales, hit singles get sold (and provide royalty income), but lesser-known tracks generally have much lower sales and royalties. 3/23/17 Tr. 2938–40 (Herbison). Similarly, interactive streaming permits listeners to stream individual songs, even if they were released as part of an album. Noninteractive streaming of albums is not permitted without a waiver of the sound recording performance complement. 17 U.S.C. 114(d)(2)(C)(i), j(13)(A)).

[151] The Judges do not discount the quality of existing songs. Indeed, music publishers continue to market the ''old standards'' to young performers. The Judges do not measure availability of creative works by looking at music publishers' profits or by counting recycled songs contributing to those profits. Maximizing the availability of creative works includes, if not focuses on, new creative works.

plentiful supply of works is forthcoming into the future. . . .'' *Id.* To accomplish that end, Professor Watt argues the rates should be set to ensure that ''creators are given the correct incentives to continue to create and make available valuable works.'' *Id.*

Professor Watt argues that even if the rates and rate structure are designed to maximize consumer and producer surplus, that maximization would not inform the Judges as to whether that result satisfies Factor A. Rather, according to Professor Watt

> In effect, a royalty structure is simply a way in which producer surplus, once created, is shared between the interactive streaming firms and the copyright holders, but in and of itself, the structure does not determine the size of either producer or consumer surplus. Consumer surplus and producer surplus are both entirely determined by the interplay of the demand curve for the product in question (here, interactive music streaming) and the way the product is priced by the interactive streaming industry to its consumers. That is, regardless of the structure of the royalty payments, the ''size of the pie'' is determined by the unilateral decisions made by interactive streaming firms about their pricing to consumers.

Watt WRT ¶ 11.

Professor Watt also attempts to de-couple the upstream and downstream rate structures by analogizing interactive streaming to a retail restaurant offering of an ''all you can eat buffet.'' He concludes that a retailer, such as an interactive streaming service or a buffet restaurant, can pay for inputs (musical works or food) per-unit while still charging an up-front access fee ($9.99 per monthly subscription or $9.99 for a buffet meal). By this analogy, Professor Watt purports to demonstrate that interactive streaming services do not *require* non-unit royalty rates to serve their downstream listeners. *Id.* ¶ 12.

Professor Watt asserts that Spotify's claim that listeners to it ad-supported service do not pay a marginal positive price is inaccurate. He notes that listening to advertising that interrupts the music imposes a time-related/annoyance cost that the listeners must accept.[152] This suggests to Professor Watt that per-unit pricing (at least in a non-monetary manner) indeed is possible downstream. Id. ¶ 13.

Professor Watt further opines that any positive marginal cost pricing of songs by interactive streaming services on subscription plans necessarily would be offset by a reduction in the up-front subscription price. He suggests that this consequence would not necessarily be deleterious for the streaming service because ''[w]ith the reduction in the fixed fee (along with the positive per-unit price), it becomes entirely possible that consumers who were not initially in the market now find it to be in their interests to join the market, consuming positive amounts of streamed music where previously they consumed none.'' *Id.* ¶ 15.

In their affirmative case regarding Factor A, Copyright Owners argue that ''availability maximization'' should be considered through the lens of the creators, who seek high rates as a signal to spur creation and would see low rates as a disincentive.

In undertaking a Factor A evaluation, the Judges are cognizant of the double meaning of ''availability'' of creative works in a tiered market such as the music streaming business at issue in this proceeding. On the one (upstream) hand, maximizing availability of creative works might refer to encouraging artists to produce more prolifically. On the other (downstream) hand, maximizing availability might refer to encouraging more entry into the music streaming business to maximize options for end-users and, presumably expand the overall consumption of music. The Judges must weigh the impact of their rate decisions so as not to favor one interpretation of availability of creative works over the other.

With regard to the downstream market, the Judges find that Professor Marx's analysis of how a price discriminatory model maximizes availability is correct. Price discrimination not only serves low WTP listeners, but it also indirectly serves copyright owners, by incentivizing interactive streaming services to increase the total revenue that price discrimination enables. Any seller or licensor would prefer to maximize its revenue, and a rate structure that will effect such maximization thus would be the best structural inducement. For purposes of applying Factor A, a rate structure that better increases revenues, *ceteris paribus,* should induce more production of musical works, a result that Copyright Owners should desire.[153]

By contrast, to equate ''availability'' solely with a higher rate would produce, ultimately, a lower surplus. The Judges find that Copyright Owners have taken a cramped and unrealistic view of incentives created by price discrimination. Although a per-unit rate structure with higher royalty rates might have an immediate superficial appeal, the consequence will most assuredly be lower revenues both downstream and upstream.

The Judges find that the objective of maximizing the availability of musical works *downstream* to the public is furthered by an *upstream* rate structure that enhances the ability of the interactive streaming services to engage in *downstream* price discrimination (''down the demand curve,'' increasing revenue for both Copyright Owners and the interactive streaming services).

In sum, the Judges are persuaded that Professor Marx's analysis of Factor A is consistent with the purpose of that statutory objective and sound economic theory. An upstream rate structure based on monetizing downstream variable WTP will facilitate beneficial price discrimination. In turn, that price discrimination will allow for more affordable access ''down the demand curve,'' making musical works available to more members of the public. The rate structure determined by the Judges, in which both rate prongs monetize downstream variable WTP, satisfies Factor A.

Although largely anecdotal and unsupported by sophisticated surveys, studies, or economic theories, the uncontroverted evidence from songwriters and publishers should not go unheeded. That evidence points strongly to the need to increase royalty rates to ensure the continued viability of songwriting as a profession. The rate determined by the Judges represents a 44% increase over the current headline rate, and thus satisfies the Factor A objective in this respect as well.

B. Factors B and C: Fair Income and Returns and Consideration of the Parties' Relative Roles

Factor B directs the Judges to set rates that ''afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.'' Factor C, instructs the Judges to weigh ''the relative roles of the copyright owner and copyright user in the product made available to the public,'' across several dimensions. 17 U.S.C. 801(b)(1)(B), (C).

[152] The record does not address an assessment of the advertising interruption cost. Advertising in today's technological environment is often informative, especially when it is targeted to specific listeners, adding some measure of value, rather than cost, to the listener.

[153] This point appears to raise a question: How could Copyright Owners and their economic experts argue against a rate structure that inures to their benefit as well? The answer is: They do not. As stated supra, they advocate for a rate set under the bargaining room theory, through which mutually beneficial rate structures can still be negotiated, but not subject to the ''reasonable rate'' and itemized factor analysis required by law. In those negotiations, as Dr. Eisenach candidly acknowledged, Copyright Owners would have a different threat point to use in order to obtain better rates and terms.

Congress included Factors B and C in section 801(b)(1) to establish a legal standard for the Judges to use to move their determination of new rates for existing licenses beyond a strictly market-based analysis. In an attempt to pass constitutional muster, Congress crafted statutory language that paralleled public utility-style regulatory principles.[154] According to 1967 Congressional testimony, these principles were ill-suited for setting rates that equitably divided compensation for the ''relative roles'' of licensors and licensees in order to provide a ''fair'' outcome.[155] However, as the parties' economic experts make clear in their approaches to Factors B and C in this proceeding, the discipline of economics has evolved since Mr. Nathan criticized as economically impossible any regulatory attempt to equitably divide creative contributions.[156]

In the present proceeding, the parties' economic experts agreed on the propriety of joint consideration of Factors B and C either through a Shapley value analysis or an analysis ''inspired'' by the Shapley valuation approach.[157] *See* Marx WDT ¶¶ 11–2 (considering ''a 'fair return' according to . . . relative contributions (factors B and C)'' because of the use of ''[a]n economic interpretation of factors B and C . . . a commonly used economic approach, the Shapley value, which . . . operationalizes the concept of fair return based on relative contributions.''); Watt WRT ¶ 22 (''I agree with Dr. Marx's assertion that the Shapley model is a very appropriate methodology for finding a rate that satisfies factors B and C of 801(b); *see also* Gans WDT ¶¶ 65 n. 35, 67 (noting the Shapley approach provides for a ''fair allocation'' as among input suppliers to reflect ''the contributions made by each party.''). The Judges concur with this joint analysis.

The Judges used Shapley analyses to derive royalty rates in this Determination, and discussed the experts' respective Shapley (or Shapley-inspired) models in that context.[158] To summarize briefly, Professors Marx, Gans, and Watt's analyses all produced a lower ratio of sound record to musical work royalties than exists under current conditions, implying that a fair allocation of surplus between those two groups would be more even than under the current market structure. Professors Marx's and Watt's Shapley analyses also pointed to a lower overall percentage of service revenue being directed to copyright royalties than exists under the current rate structure. Due, in part, to her decision to design the model to equalize bargaining power between copyright owners and users, Professor Marx's model produced lower overall royalties for copyright owners than Professor Watt's model.

The Judges have determined a rate that is computed based on the highest value of overall royalties predicted by Professor Marx's model and the ratio of sound recording to musical work royalties determined by Professor Gans's analysis.[159] The Judges find that these rates are consistent with the experts' analyses and constitute a fair allocation of revenue between copyright owners and services. The Judges' analysis with regard to Factors B and C demonstrates (whether that analysis was undertaken as part of the reasonable rate analysis or as a separate analysis), that there is no basis to depart from the Judges' determination of the reasonable rate structure and rates as set forth *supra.*

C. Factor D: Avoidance of Disruption

The last itemized factor of section 801(b)(1) directs the Judges ''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)(D). In *Phonorecords I,* 74 FR at 4525, the Judges reiterated their understanding of Factor D, concluding that a rate would need adjustment under Factor D if that rate

> directly produces an adverse impact that is substantial, immediate and irreversible in the short-run because there is insufficient time for either [party] to adequately adapt to the changed circumstance 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.

Id. The Judges adopt and apply in this Determination the same Factor D test.

Copyright Owners and Apple advocate a complete abandonment of the current rate structure. The upshot of each proposal is a dramatic swing in royalties: Increases under Copyright Owners' proposal and decreases under Apple's proposal. For all the reasons detailed in this Determination, the Judges do not adopt either of the per-unit rate structures these parties advocate. The Judges decline to make the requested changes in rate structure not because the structure is different and unfamiliar, but because of the dramatic, disruptive effects of the proposed per-unit rate structures.

The Services advocate essentially the rate structure that now exists. *See* SJPFF at 1. The Judges' proposed rate structure adopts some attributes of the existing rate structure, incorporating the economically reasonable features and abandoning unsupported features that unduly fracture and complicate the rate structure.

The record shows that interactive streaming services are failing to realize an accounting profit under the current structure and nothing the Judges do in this proceeding will change the Services' business models to change that circumstance.[160] The Services remain in business and new streaming services enter the market despite the existence of

[154] Public utility-style regulation, especially in 1967 when Congress was working on copyright reform legislation, was classic rate-of-return regulation. Essentially, the regulator would establish the utility's costs and determine the rate charged to customers (or rates charged to different customers), sufficient to provide the utility with a reasonable rate of return. *See generally* Decker, Modern Economic Regulation at 104 (2014).

[155] *See* Hearing on S. 597, Subcomm. on Patents, Trademarks and Copyrights of the S. Committee on the Judiciary (Mar. 20–21, 1967).

[156] Economics experts in the present proceeding for both Copyright Owners and the Services acknowledge that microeconomic principles (pre-Shapley values) do not provide insights as to what constitutes ''fairness.'' *See, e.g.,* 3/30/17 Tr. 3991 (Gans) (''fairness . . . is not a topic that is sitting in an economics textbook somewhere.''); 3/20/17 Tr. 1830 (Marx) (''Fairness is not a notion that has a unique definition within economics.''); 1128–29 (Leonard) (''economists . . . typically don't do 'fair' ''); 4/13/17 Tr. 5919 (Hubbard) (''Economists aren't philosophers. I can't go to the biggest picture meaning of 'fair'. . . .''). Rather, economists attempt to identify *ex ante* ''fairness'' by identifying fair *processes* in the workings of and structure of markets, in bargaining, and in the efficiency of outcomes generated by these processes, although their understanding of what constitutes a fair ''process'' varies. *See, e.g.* 3/13/17 Tr. 555 (Katz) (''[T]he most useful or practical way of thinking about it here was really to focus on whether the process is fair'' . . . [and] a conception that's often used in economics is that a process is fair if it's . . . competitive or the outcome of a competitive market. A competitive bargaining process is fair. And so that's the—the central notion of fairness that I used here.''); 3/15/17 Tr. 1129 (Leonard) (''My concept of fair . . . and what I think a lot of economists would say is that if you have . . . a negotiation between two parties and there are no . . . constraints such as holdup . . . and there's no market power . . . again I hesitate to use the word, so maybe I'll put it in quotes, would be fair.); Eisenach WDT ¶ 24 (''a rate set at the fair market value by definition provides fair returns and incomes to both the licensee and licensor.'')

[157] The Shapley approach, named for Nobel Memorial Prize winner Dr. Lloyd Shapley, represents a method for identifying fair outcomes, previously unaddressed in microeconomics. Congress did not apply the Shapley value approach, perhaps because this methodology, although developed in 1953, was not yet widespread in the economic literature in 1967.

[158] See supra, section V.D.1.

[159] See supra, section V.D.2.

[160] It is likely the Services have made and will make business decisions that defer accounting profits. The Judges' approach offers no criticism of the Services' business decisions; rather, the Judges attempt to assure a structure that permits the Services' competitive tactics without penalizing the creators of the works they exploit.

chronic accounting losses. The Services' inability to become profitable will persist based on the record, under existing competitive conditions. As Mr. Pakman testified: [N]o current music subscription service—including marquee brands like Pandora, Spotify and Rhapsody—can ever be profitable, even if they execute perfectly. . . .'' Testimony of David B. Pakman, Trial Ex. 696, ¶ 23 n.5 (citation omitted) (Pakman WDT). Although Mr. Pakman blames the lack of profitability (in part) on the level of mechanical royalties, the Judges find, based on the Services' own acknowledgement, that the lack of profitability is a function of a lack of scale (which is another way of indicating that market share is divided among too many competing interactive streaming services). *Id.* Lowering mechanical royalties to provide the Services profitability, in the face of the acknowledged problem of a lack of scale, would constitute an unwarranted subsidy to these services at the expense of Copyright Owners.[161]

Although the Services have indicated their ability to withstand short-term losses as they compete for scale/market share, the record also indicates that there is a limit to such losses, however imprecise and unknown, beyond which services will be unable to attract capital and survive until the long run market dénouement. As Dr. Leonard testified, ''[REDACTED] is relevant and suggests [REDACTED].'' Leonard AWDT ¶ 101 n.151. This testimony reflects the well-understood principle that ''[t]here is no specific time period . . . that separates the short run from the long run.'' R. Pindyck & D. Rubinfeld, *Microeconomics* at 190 (6th ed. 2005). Thus, although the Services appear able to withstand current rates, a rate increase of the magnitude sought by Copyright Owners would run the very real risk of preventing the services from surviving the ''short-run,'' threatening the type of disruption Factor D is intended to prevent.

While the reasonable rate determined by the Judges does not present the same risk of disruption as the rates sought by the Copyright Owners, it does represent a not insubstantial increase of approximately 44% over the current headline rate. In order to mitigate the risk of short-term market disruption, and to afford the services sufficient opportunity ''to adequately adapt to the changed circumstance produced by the rate change,'' the Judges will phase in the new rate in equal annual increments over the rate period. Thus, the rates for the 2018–2022 rate period shall be the greater of the percent of revenue and percent of TCC rates in the following table:

	2018	2019	2020	2021	2022
Percent of Revenue	11.4	12.3	13.3	14.2	15.1
Percent of TCC	22.0	23.1	24.1	25.2	26.2

The Judges' rate structure continues to produce an All-In rate, from which the portion for the mechanical rights is derived. The two rights are perfect complements. Without sufficient evidence to establish independent respective values, any attempt to segregate the two could result in disruptive unintended consequences. In the rate structure the Judges adopt, they attempt to ensure that no one of the myriad licenses required for the public to enjoy broadcast music swallows up payment for any other license.

VII. Terms

Before enactment of the Copyright Royalty and Distribution Reform Act of 2004, the Register held exclusive authority to set terms for use of the section 115 compulsory license(s). In the 2004 Act, Congress gave the Judges authority to set ''reasonable rates and terms of royalty payments'' for section 115 licenses, as well as terms establishing ''requirements by which copyright owners may receive reasonable notice of the use of their works under . . . section [115], and under which records of such use shall be kept and made available. . . . '' *See* 17 U.S.C. 115(c)(3)(D), 801(b)(1). The Register retained authority to regulate ''notice of intention to obtain the section 115 license and requirements regarding monthly payment and monthly and annual statements of account. . . .'' *See* Final Order, Division of Authority Between the Copyright Royalty Judges and the Register of Copyrights under Section 115 Statutory License, 73 FR 48396, 48397 (Aug. 19, 2008) (*Register's Rulemaking Opinion*). In adopting terms, the Judges may adopt ''additional terms 'necessary to effectively implement the statutory license.' '' *Id.* at 48398. In this Determination the Judges' cleave to the division of authority between them and the Register, declining to adopt terms any of the participants proposed that might impinge on the Register's authority.

The extant regulations for the section 115 license have developed over time. Participants in prior proceedings crafted the regulations to codify the structure and terms of their settlements. The most recent regulatory amendment occurred in November 2017, when record labels and Copyright Owners negotiated a settlement relating to the use of musical works embodied in physical phonorecords, permanent digital downloads and ringtones, the so-called ''subpart A'' configurations.

With the Judges' determination to change section 115 rate structures and to realign service offerings for rate purposes, the regulatory terms must likewise change. Further, beginning in 2013–14 with the *Web IV* determination, the Judges launched an initiative to simplify copyright royalty regulations, by eliminating duplication and, to the extent possible, using plain English. The regulations codifying the terms of the present determination are no exception. To standardize the part 385 regulations, the Judges begin with a reorganization that consolidates all regulations of general application in a new subpart A.

In this Determination, it is not the Judges' intention to change the agreed terms for extant subpart A. The Judges do, however, move some of the agreed subpart A regulations to the new subpart A regulations of general application. Further, given the changes in rate structures effected by this determination, the Judges now include Music Bundle configurations in the same regulatory category as the constituent parts of the music bundle, *viz.,* physical phonorecords, permanent digital downloads, and ringtones.

[161] Copyright Owners argue that the services could attempt to cut their non-content costs in order to remain sustainable. They suggest that the services emulate Sirius XM, which successfully reduced its non-content costs as a percent of revenue. *See* Rysman WDT ¶¶ 98–100. However, as Spotify's CFO, Mr. McCarthy notes, Sirius and XM (the pre-merger predecessors to Sirius XM) ''nearly bankrupted themselves and merged in order to survive.'' McCarthy WRT ¶ 42. Moreover, not only were Sirius XM's content costs lower as a percent of revenue, but also its ''costs declined as a percentage of revenue *as they grew their subscriber base.* . . . Their costs declined as they achieved scale.'' *Id.* Once again, the necessity of scale remains paramount.

Regulations specific to physical phonorecords, PDDs, and ringtones adopted by agreement together with regulations specific to Music Bundles will now appear in subpart B.

New subpart C includes all streaming service offerings that are revenue bearing, including offerings that the Services market at discounted prices, such as annual subscriptions, family plans, or student plans. Regulations for promotional streams and service offerings for which the Licensee receives no consideration and that are free to the end-user are contained in subpart D.

A. Definitions

1. Service Revenue

Participants in the present proceeding disagree on the definition of Service Revenue to be used in setting a base for application of the percent of revenue prong in the greater-of rate structure. Copyright Owners' proposed per-unit rate structure obviates the need for a Service Revenue definition; consequently it does not include one.

Pandora seeks an express exclusion of revenue from a Services' products outside the purview of the section 115 license, *e.g.,* Pandora's linked concert ticket sales app, TicketFly. Pandora PFF 84. Pandora also seeks to expand the current deduction from gross revenues for the costs associated with producing advertising revenue by permitting a similar deduction for such costs of doing business as credit card fees, app store fees, and carrier service billings. *Id.* PFF 85; *see* Herring WDT ¶ 63. Interestingly, Amazon joins in this request even though Amazon [REDACTED]. *See* Amazon PFF ¶ 107 (and record citations therein).

For the Judges, it is almost axiomatic that revenues from product offerings unrelated to the section 115 license should not be included in the revenue base for calculation of section 115 royalties. On the other hand, the section 115 revenues should not be diminished by such costs of doing business as paying app store and carrier service fees and commissions or credit card fees. The Judges will retain the cost-of-revenue-production deduction for marketing to create advertising revenue but decline to deduct other administrative costs from the revenue base.

Amazon and Pandora also ask for adjustments to per-subscriber calculations to accommodate discounted service offerings, such as discounted annual subscriptions, family plans, and student accounts. *See, e.g.,* Amazon PCL ¶¶ 36–39; Pandora PFF ¶ 83. The rationale offered by the Services is that discounts for a family group or for a student build the ultimate customer base, by orienting the discounted service users to their particular formatting and increasing user comfort and convenience. *Id.* Copyright Owners urge the Judges to require the Services to pay the same royalty rate for discounted offerings as they pay for full-price subscription offerings.

Relying on their rationale for choosing a percent-of-revenue rate structure rather than a per-unit rate structure, the Judges recognize that the Services are, to some extent, focusing more on growth of market share than growth of revenue. But the Judges also recognize that marketing reduced rate subscriptions to families and students is aimed at monetizing a segment of the market with a low WTP (or ability to pay) that might not otherwise subscribe at all. The Services, as they work toward profitability, are likely to continue to market aggressively to users with the WTP full subscription prices and to monetize other users in hopes of getting them into the ''funnel'' for full-price subscriptions.

2. Fraudulent Streams

Apple, Google, Pandora, and Spotify seek inclusion of a definition of ''fraudulent streams'' in the section 115 regulations to avoid royalty payments for them. Google proposes defining a fraudulent stream in terms of the origin of the request with an alternative quantitative limitation. *See* Google Inc.'s Amended Proposed Rates and Terms at 3. Spotify combines the two criteria. *See* Spotify's PFF/PCL at 115. Apple revised its original quantitative definition to a reasonableness determination delegated to the Service. *See* Apple Inc. Proposed Rates and Terms at 2.

In light of technological developments that permit non-human streaming of sound recordings for purposes other than consumer listening, the Judges concur that these non-consumer streams should not be counted in determining the allocation of royalties. Accordingly, a definition of Fraudulent Stream is appropriate. The Judges conclude that the definition should establish a quantitative measure, removing the subjective determinations of the various Services from the equation.

3. Royalty-Bearing Streams

Apple led the Services in asking for a definition of ''Play'' that eliminates from any per-play calculation a stream lasting fewer than 30 seconds. Apple contends including these partial plays are not indicative of true consumer demand. *See* Ghose WDT ¶¶ 54, 60. Mr. Vogel, testifying for Spotify asserted that counting streams of under 30 seconds affords a substantial windfall to Copyright Owners. Written Rebuttal Testimony of Paul Vogel, Trial Ex. 1068, ¶ ¶ 39–40 (Vogel WRT). Pandora and Spotify join in the request to add a 30-second threshold to the definition of ''Play.'' Apple contends that the time threshold is a feature of [REDACTED]. Apple PFF ¶ 240. Copyright Owners argue against the proposal arguing that the definition for section 115 should align with that adopted for noninteractive streaming licenses under section 114.

The Judges' rate structure in this proceeding does not stand on a per-play base. Nonetheless, the section 115 regulations must clarify that allocation of mechanical royalties is based on the relative number of plays of a Copyright Owners' works. Copyright Owners advocate for a per-unit rate structure that reflects demand. The Judges cannot find that a partial play of a work signifies consumer demand; in fact, a skip-though might indicate just the opposite consumer conclusion. The Judges adopt the definition of ''Play'' that exempts streams of under 30 seconds for tracks that are, in their entirety longer than 30 seconds.

4. Pass-Through Licenses

The extant regulations provide alternative measures in the calculus for finding the greater-of all-in royalty pool or, in some instances, the measure of the lesser-of prong to be used to determine the greater-of royalty pool. The difference is in the percent-of-TCC depending on whether the record company's licenses are ''pass-through'' or not. The parties offered minimal evidence on the topic. Pandora proposed to eliminate the distinction as ''unnecessary.'' Pandora PFF ¶ 79. Pandora's conclusion is consistent with Professor Eisenach's observation that the pass-through rate is rarely used. Eisenach WDT ¶ 82 n.67.

The Judges find the separate pass-through TCC rate is unnecessary and decline to include one in the regulations.

B. Offerings

1. Limited Downloads and Interactive Streaming

The Judges do not alter definitions identifying Limited Downloads and Interactive Streaming, as the settling parties defined those service offerings in the 2012 Settlement. The Judges do, however, add other offering

configurations to those configurations to enlarge the rate category.

2. Mixed Bundles

In the current regulations based on the 2012 Settlement, mixed service bundles regulated in current subpart C and are differentiated from music bundles in the same subpart. *Compare* 37 CFR 385.21 (definition of ''mixed service bundle'') *with id.* (definition of ''music bundle'').[162] The rate structures for the two bundle types, with one exception, and the rates for the two bundle types are identical. The difference between the bundle calculations occurs at the final step, allocation of the payable royalty pool. For mixed service bundles, the payable royalty pool is allocated to musical works rightsholders on the basis of relative number of plays. For music bundles, which include up to three service configurations, the payable royalty pool is subdivided by configuration (CD, PDD, ringtone) and the per-play allocation is calculated for each configuration separately.

Copyright Owners proposed combining regulations for mixed bundle offerings with the regulations for their component parts. The Judges conclude that the differences in kind between mixed offerings including streaming and a mixed music offering including only currently regulated configurations are sufficient to separate them. Mixed bundles will be subject to the streaming rate structure, with allocation allowed based on the relative values of music streaming and any other bundled offering.

3. Music Bundles

The Judges now include Music Bundles with the regulations adopted for physical phonorecords, permanent downloads, and ringtones—the three potential components of a ''music bundle.'' Each separate offering within the bundled configuration shall be subject to the rate agreed by the parties that proposed the subpart A settlement, as applicable to that component part.

4. Lockers

In the existing regulations, Paid Locker Services and Purchased Content Locker Services are both royalty-bearing configurations. In the present proceeding, the only evidence regarding locker services was expository. To the extent Services offered a purchased content locker service, the evidence was that those Services are exiting the arena. For example, Apple described its Purchased Content Locker Service as a non-remunerative service that it is phasing out and no longer marketing. *See, e.g.,* Apple PCL 52.

For Purchased Content Locker Services that do not generate revenue for the Service, no royalty should accrue. For Paid Locker Services, a Service receives subscription payments[163] and subscription revenues for those offerings are part of the service revenue to which the percent-of-revenue calculation applies.

5. Family and Student Plans

The Judges adopt here a greater-of rate structure that measures a percent of service revenue against a percent of TCC. The basic rate calculations are straightforward. The Judges also adopt a Mechanical Floor for Offerings that currently have a Mechanical Floor alternative. In the present proceeding, the Judges adopt a Mechanical Floor for certain configurations. For purposes of determining that minimum rate, should the need ever arise, the parties ask for clarification regarding subscriber counts.

The Services presented evidence of three subscription variations: Discounted annual subscriptions, family subscriptions, and student subscriptions. A discounted annual subscription is no different from any subscription for purposes of calculating the per-subscriber minimum mechanical rate.

As an example, Spotify proposed, albeit for a different purpose in a different rate structure, that family accounts be treated as 1.5 subscribers per month and student accounts be treated as .5 subscriber per month. *See, e.g.,* Spotify Second Amended Proposed Rates and Terms at 16. Copyright Owners' rate proposal is based not on subscribers, but on end users, which they define to include any person who streams at least one play during an accounting period, apparently without regard to that user's subscription status.

For purposes of calculating a Mechanical Floor rate, the Judges adopt the Services' proposal, in the form articulated by Spotify. Family accounts are to be counted as 1.5 subscribers and student accounts are to be counted as .5 subscriber.

6. Unremunerated Offerings

No party in this proceeding offered evidence or argument against continuing the zero royalty rate for promotional streams, as they are defined in the regulations. The Judges accept the agreed definition in the extant regulations, with substantial editing to eliminate unnecessary complexity, and adopt the agreed zero rate for promotional streams.

In addition, the Judges include in the new subpart D regulations other offerings for which a Service receives no remuneration. Free trial subscriptions and purchased content locker services that are free to the user and not associated with any revenue (such as advertising revenue) bear a royalty rate of zero.

C. Reporting and Auditing

Among the areas open to the Judges for rulemaking are notice and recordkeeping, to the extent the Judges find it necessary to augment the Register's reporting rules. The Judges' regulations must be supported by record evidence and may include guidance on how payments are made and when, accounting practices, audits, and acceptable deductions from royalties. *See Register's Rulemaking Opinion* at 48398. With respect to the section 115 licenses, the Register's regulations address licensees' Notice of Intent to obtain a section 115 license, details of the licensees' monthly payments, and specifications for licensees' monthly and annual Statements of Account. *Id.* at 48397.

In the present proceeding, the parties' proposed terms by and large described rate structures and calculations of payable rates. Given the rate structure the Judges adopt, many of the parties' proposed terms are inapplicable. Some participants did propose rule changes that are appropriate even with the new rate structure and that would appropriately augment the Register's rules. In some instances, however, the parties' regulatory proposals are proffered as part of their legal argument but are not supported by factual evidence in the record.

The Judges include in the part 385 regulations provisions that augment the part 210 statement of information Services must record and retain with regard to promotional and trial streaming offerings. The Judges decline to adopt other changes to part 210 requested by Spotify. The Judges will forward those change requests to the Register of Copyrights for such consideration as the Register deems appropriate.

[162] ''Mixed service bundles'' are a product package that includes music access together with a non-music product, such as Internet services. A ''music bundle'' refers to packaging different music access configurations in a single music sale for a single price, such as authorizing a PDD with the purchase of a CD.

[163] The Judges heard no testimony regarding ad-supported locker services, but to the extent they exist, the conclusions for subscription paid locker services apply equally to ad-supported locker services.

D. Late Fees

The Act expressly authorizes the Judges to include in a determination ''terms with respect to late payment . . .'' provided the late payment terms in no way interfere with other rights or remedies of copyright holders. 17 U.S.C. 801(c)(7). In the extant regulations, only subpart A contains a provision for late fees. The Judges did not previously include late fee provisions in prior subparts B and C because the settling parties did not include those provisions. In the present proceeding, Copyright Owners asked the Judges to adopt late fee provisions for all royalty payments. Copyright Owners contend that adding the late fee provision to all section 115 royalties simply ''clarifies'' the intention of the parties that settled on rates and terms in 2012.

The Judges cannot divine the intentions or missed opportunities of parties not before them. On the other hand, the Judges are aware that section 115 establishes a royalty due date and assigns to the Register of Copyrights authority to develop regulations detailing payment procedures. *See* 17 U.S.C. 115(c)(5). Rate terms under other sections of the Act require licensees to pay a late fee, if warranted. The Judges see no reason for Copyright Owners to receive late fees for ''subpart A'' activities, but forego late fees for other licensed activities. A late fee provision is now included in the subpart containing regulations of general application and applies to all section 115 royalties.

E. Part 210 Regulations

The Register's rules are codified in part 210 of 37 CFR. The Judges decline to adopt proposed changes that encroach on the settled part 210 regulations. The Judges defer to the Copyright Office for terms that are the responsibility of and under the authority of the Register of Copyrights.

VIII. Conclusion

The section 115 phonorecords license has a long history. Application of the license has changed significantly as the methods of musical works delivery have evolved.[164] While the current market, increasingly dominated by digital streaming, cannot be characterized as immature, it cannot either be characterized as stable.

Determination of royalty rates and terms for the section 115 license is complex and arduous, and reasonable people can differ as to the best approach—as evidenced by the issuance of a dissenting opinion in this proceeding. Judge Strickler's dissent follows this majority opinion and the regulatory terms codifying the Determination are set out below this **SUPPLEMENTARY INFORMATION** section.

In this market, with the evidence before them, the Judges have attempted to establish royalty rates and terms that compensate songwriters and music publishers and offer to licensees appropriate returns and incentives for continued development. The rates and terms established in this Final Determination shall supplant existing rates and terms effective as of January 1, 2018.

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.

Suzanne M. Barnett,
Chief Copyright Royalty Judge.

Jesse M. Feder,
Copyright Royalty Judge.

Dated: November 5, 2018

DISSENTING OPINION OF COPYRIGHT ROYALTY JUDGE DAVID R. STRICKLER

I respectfully dissent from the Majority Opinion, for the reasons set forth below.

II. The Majority Opinion Lacks an Adequate Basis in the Record

A. The Rate Structure Adopted by the Majority was not proposed during the Proceeding.

The Majority Opinion establishes an all-in rate and rate structure for performances and mechanical reproductions, equal to the greater of the percent of total service revenue and Total Content Cost (TCC), as set forth in the following table:

	2018 (percent)	2019 (percent)	2020 (percent)	2021 (percent)	2022 (percent)
Percent of Revenue	11.4	12.3	13.3	14.2	15.1
Percent of TCC [165]	22.0	23.1	24.1	25.2	26.2

See Majority Opinion, *supra* at 1.[166]

The Majority does not deny that this rate structure was never proposed by any party *during* the proceeding. In fact, this rate structure was only proposed *after* the hearing, when the record had already been closed. More particularly, this rate structure was proposed post-hearing by Google, Inc. (Google) in an amended rate proposal, which Google supported in its Proposed Findings of Fact and Conclusions of Law (GPFF). *See* GPFF ¶ 4.[167] (However, the majority expressly asserts that, although they selected this rate structure after consideration of Google's post-hearing amended rate proposal, they ''did not rely'' on Google's post-hearing proposal. Majority Opinion at 37 n.39)

The fact that the two prongs in this rate structure were not combined as the only two parts of a rate structure proposed by any party *during the hearing* is critical. The gravamen of this proceeding was the issue of how to combine different proposed rate prongs (and discard others) in order to establish a rate structure that meets the statutory requirements that the structure be ''reasonable'' and that it address the four itemized statutory objectives. *See* 17 U.S.C. 801(b)(1). The majority has selected two rates that, although parts of

[164] Passage of the Hatch-Goodlatte Music Modernization Act (MMA) introduces further changes in the administration of the section 115 license. Under the MMA, the Register and the Judges are required to make sweeping changes to applicable regulations. Rather than attempt to adapt the regulations the Judges adopt based on the record before them in this proceeding, the Judges will engage in a notice and comment rulemaking procedure to conform all affected regulations to the provisions of the MMA.

[165] ''TCC'' is shorthand for ''Total Content Cost,'' the cryptic industry terminology used to measure royalties paid by interactive streaming services to music publishers for musical works, as a percent of these services' payment to record companies for sound recording licenses.

[166] As this Dissent was initially written, the Majority Opinion was not final and therefore the page citations had been left blank. Page numbers are now included.

[167] However, Google proposed rates that were well below the rates adopted by the majority. *See* GPFF ¶ 4 (proposing the greater of 10.5 percent of service revenue or 15 percent of TCC). In the event these rates are deemed too low by the Judges (as has occurred), Google requests that the Judges abandon this structure and adopt instead *the 2012 rate structure,* because that structure ''still adhere[s] to the Sec. 801(b) factors by setting sustainable, fair rates that would not disrupt the industry.'' *Id.* ¶ 8.

other proposals made during the proceeding, were never combined in this manner *during the hearing.* Because it is the *combination of rates* that is crucial, the majority erred by plucking two rates from the record, combining them post-hearing, and then wrongly declaring that this ''mash-up'' was actually based on the record.

Copyright Owners filed a post-hearing submission that calls these matters to the Judges' attention, in connection with Google's identical rate structure contained in its amended rate proposal submitted after the record had closed.[168] *Copyright Owners' Reply to Google's Proposed Findings of Fact and Conclusions of Law* (CORPFF-Google). In their submission, Copyright Owners correctly noted the absence of an evidentiary record to support the combination of a percent-of-revenue rate and a TCC rate. *See* CORPFF-Google at p. 2 (''Google's new proposal is not only unsupported by any evidence, it is divorced from the evidence in the record [and] neither Dr. Leonard [Google's expert witness] nor any other expert opined on the new proposal, let alone provide a basis for assessing its reasonableness.''). As a substantive matter, Copyright Owners describe this mix-and-match rate structure as a Frankenstein's Monster. *Id.* at pp. 2, 17. Using a different analogy, they argue that this jury rigged rate structure is nothing more than an unlitigated, post-hearing selection of one rate from ''Column A'' and another from ''Column B.'' *Id.* at p. 15.

Because this particular rate structure was not proffered at the hearing, the parties had no ability to mount a challenge to it during the proceeding. The statute and the Judges' regulations set forth in detail how the parties must present evidence, testimony and arguments. See 17 U.S.C. 803(b)(6); 37 CFR 351.1 through 351.15. At the hearing in this proceeding (as in all rate proceedings), the parties submitted detailed written testimonies, engaged in extensive direct and cross-examination of witnesses, including expert economic witnesses, who supported and attacked the rate proposals made a part of the record. It must come as quite a shock when, after all that testimony, evidence and analysis has been presented, the majority decides to ignore the parties' rate proposals presented at the hearing and create a new combination that no party had presented. I do not think the majority can overcome this problem by relying on the fact that the two elements of the majority's new rate structure appeared in different rate proposals, because, again, the key issue in this proceeding was how to establish a rate structure that combined various rate prongs.

This shock to the parties is not speculative, and the inappropriateness of using an amended rate proposal to inject untested rate structures was clearly articulated by Copyright Owners' counsel at oral argument. As counsel explained:

> [Google] decided it would be a good idea to give you something simple. . . . I agree that they are allowed to change their proposal, but when I talk about the inability to address all the depth, no one has been able to analyze it. They haven't run numbers, right? There are no forecasts for this proposal. [N]o one has been able to test out what this proposal would do. So that's why I say it is difficult to address it all because we weren't given an opportunity to have our experts test out the structure.

6/7/17 Tr. 6275–76 (Copyright Owners' Closing Argument).

The majority's error in creating and adopting its own rate structure (identical in structure to Google's post-hearing structure) has created a real risk of economic harm that the parties were not able to address at the hearing. As discussed below, this risk of harm extends not only to Copyright Owners, but also to the interactive streaming services, a fact acknowledged by Google, the proponent of this rate structure, as explained below.

B. The Majority Opinion Causes Injury to Licensees and Licensors

1. Injury to Licensees (the Services)

The crucial aspect of the majority's rate structure, absent from any rate proposal presented at the hearing, is the use of an uncapped TCC prong in a greater of rate structure. Because the TCC prong will be triggered when it is greater than the percent-of-revenue prong, the mechanical royalty rate will be determined by reference to whatever rate has been established by the record companies for sound recording royalties. However, it is undisputed that the record companies, by statutory design, have the unfettered legal ability to set their sound recording royalty rates, allowing them to exercise their economic power to demand rates that embody their ''complementary oligopoly'' status, as previously described by the Judges. *See Web IV,* 81 FR 26316, 26333–34 (May 2, 2016). Accordingly, whenever the record companies demand and obtain a higher sound recording royalty rate, under the majority's rate structure, the services' section 115 mechanical royalty rate *must increase as well.*[169]

Although it proposed such a structure, Google candidly identified this exact risk arising from an uncapped TCC. Specifically, Google acknowledged:

> Having no cap on TCC . . . leaves the services exposed to the labels' market power, and would warrant close watching if adopted . . . .

Google PFF ¶ 73 (emphasis added). But obvious and crucial questions arise: *Who* would do the ''watching''? *When* would such watching occur? Congress directed the Judges to be the ''watchers,'' and Congress instructed that the ''watching'' should occur only through rate proceedings, scheduled at specified intervals. The majority has not adequately addressed Google's candid warning as to the risk of an uncapped TCC, to the extent it has even addressed the issue at all.

The injury to the services from the majority's uncapped TCC rate structure is easily demonstrated. For example, as discussed *infra,* the unregulated sound recording royalty rate charged to interactive streaming now ranges from approximately [REDACTED] % TO [REDACTED] % of total service revenue. With a TCC of 26.2% (the majority's TCC rate in 2022) the TCC prong would equal as much as [REDACTED] % (*i.e.,* [REDACTED]). However, if the unregulated record companies demanded 70% of revenue as sound recording royalty payments, the mechanical rate would then rise to 18.34% (*i.e.,* $.70 \times .262$). This would be a [REDACTED] % increase in the mechanical rate, arising from the exercise of the absolute discretion and self-interest of the record companies. Moreover, the total royalty cost to the service paying these royalties would be [REDACTED] %, leaving the service with only [REDACTED] % of revenue to fund the rest of its operations.

It is important to distinguish the TCC rate in the 2012 benchmark, advocated in this Dissent, with the TCC rate in the Majority Opinion. Under the 2012 benchmark, the TCC is capped in a ''lesser of'' prong, such that, if the prong in which the TCC is set forth should be

[168] A party is entitled to ''revise its . . . requested rate at any time during the proceeding up to, and including, the filing of the proposed findings of fact and conclusions of law.'' 37 CFR 351.4(b)(3). However, nothing in the regulations permits the amendment to create a new rate structure that was not supported by the evidence at the hearing. Otherwise, a party could subvert the entire adversarial process by inserting a new proposal after the record had closed.

[169] Tying the section 115 mechanical license royalty to another rate is analogous to what a country does when it adopts a ''currency board,'' giving up its own sovereignty over the value of its currency by tying it to the value of another currency. Here, the majority has relinquished its ''sovereignty'' over the setting of rates over the five year rate term, 2018–2022.

triggered, it generally cannot exceed a specified per-subscriber rate, thus placing a limit on the reliance on the effect of the record companies' market power. *See, e.g.,* 37 CFR 385.13(a)(2) and (3). This has been a tradeoff the services have been willing to accept, because they have agreed to settlements in 2008 and again in 2012 incorporating this constrained use of TCC. However, they never accepted a complete deferral to the sound recording rate as an uncapped measure of the mechanical rate for all tiers of service.

The majority apparently responds to this problem of record company influence and market power with a figurative shrug. First, the majority concedes that Google's expressed concern is ''*true,*'' but irrelevant, because the record companies could put the services out of business with high rates at any time, even without the imposition of the TCC prong. Majority Opinion, *supra* at 35 n. 75. But this point ignores the fact that, at present, the record companies do not have to be concerned with a reduction of their royalties because of the linking of those royalties to the mechanical license royalties. That is new and, as explained *infra,* the record companies may decide to keep their rates high despite the increase in mechanical rates, or decide it is in their interest to avoid a reduction in royalty revenue by creating a completely different paradigm for streaming, by which the record companies move the streaming service in-house and effectively destroy the existing services. Is this speculative? Of course it is, but *that is precisely the problem.* As Copyright Owners' counsel stated in closing argument, and as Google intimated in its post-hearing filing, the potential impact of the record companies' responses to such a rate structure, given their market power, needed to be tested at the hearing, which, of course, it was not.

Then, in what may reasonably be characterized as a combination of naiveté and wishful thinking, the majority notes that the parties simply ''must . . . trust in the rational self-interest of the market participants.'' *Id.* at 36 n.75. But Congress delegated the authority to set mechanical royalty rates to the Judges and, as noted in both the Majority Opinion and this Dissent, the section 801(b)(1) standards and objectives are not to be determined simply by reference to the market, let alone by a referral to a market actor economically adverse to the parties in this proceeding.[170]

2. Injury to Licensors (Copyright Owners)

The Majority Opinion's rate structure would jeopardize Copyright Owners as well, as they note in their post-hearing filing in response to Google. In that reply, Copyright Owners take note of the new risks—*unaddressed at the hearing*—that they would face under such a structure:

—record companies could acquire the streaming services, and then set low internal sound recording royalty rates (transfer prices) that would amount to ''sweetheart'' deals intended to diminish the royalties paid to Copyright Owners;
—services could start their own record companies, and then engage in the same transfer pricing/''sweetheart'' deals that include low sound recording royalties;
—record companies could grant sound recording licenses in exchange for equity interests in services (short of outright acquisition) and then agree to accept lower royalty rates than would exist in the absence of the equity payments, thus reducing mechanical license royalties.

CORPFF-Google at pp. 2–3, 24, 40, 44.

Also of great importance to Copyright Owners, a rate structure limited to a percent of revenue or a TCC rate does nothing to protect Copyright Owners from the potential displacement, deferment, bundling or attribution indeterminacy of a revenue-based structure. That is, even a TCC prong is a revenue-based prong, but under that prong the task of calculating ''revenue'' is delegated to the record companies, over whom the Judges have no control.

Google claims that its proposed structure (and, by extension, the majority's structure) does protect against the problems that can arise under a revenue-based royalty. GPFF ¶¶ 67, 72 (''Because record labels will always protect their own interest, this prong ensures that, through that process, they also protect the interest of Copyright Owners . . . . Today, Copyright Owners still recognize the virtue of the TCC structure in protecting their interest . . . .'').

However, Copyright Owners rightly note that they obtain no legal protection under such a TCC prong. In making this argument regarding displacement and deferral of revenue, Copyright Owners lay out comprehensively *all the problems* inherent in an uncapped TC prong set in a greater of rate structure, such as adopted in the majority opinion:

The notion that Google's TCC prong will provide protection from revenue gaming, deferral and displacement, and other revenue prong problems is unsupported and speculative. Relying on just the TCC to solve those admitted problems leaves the Copyright Owners' protection from such problems entirely outside the statute . . . . [REDACTED] are what protects the Copyright Owners from price-slashing by the services. What is left unanswered . . . is . . . how can it be reasonable to ask the Judges to set a rate that does not itself provide for a fair return . . . but simply puts the Copyright Owners' fair return in the hands of the labels to negotiate terms that will adequately protect the publishers and songwriters as well? The labels do not have a mandate to ensure that the Services provide a fair return to the Copyright Owners, and cannot be directed to ensure such. Indeed, labels may not have the same incentives as songwriters and publishers to negotiate such protections in their deals. To wit, a label could make an agreement with a service that includes only a revenue prong in exchange for equity or some other consideration that it may never include in the applicable revenue subject to the TCC. . . . [W]hat if Google purchased one or more record labels and did not have to pay any label royalties? Or what if Spotify chose to avail itself of the compulsory license to create its own master recordings embodying musical works—which it is already doing [COPFF ¶ 396]—and chose to compensate itself for its use of the master recordings on a sweetheart basis (or not at all)? Or what if one or more labels decided to enter the interactive streaming market and did not have to pay themselves royalties? In each case, the Copyright Owners' protection—the protection that the Services admit the Copyright Owners need and is provided by the TCC—would be gone.

CORPFF-Google at 39–41 (emphasis in original).

I cannot improve upon Copyright Owners' statement of the problems they face from an uncapped TCC rate prong in a greater of structure.

The majority however dismisses this argument, stating (as noted *supra*) that they do not rely on ''Google's revised rate proposal.'' Majority Opinion at 37 n.39. However, that response misses the point: Google's argument is the same as the majority's argument with regard to rate structure. Because one is deficient as a consequence of not having been not presented and tested at the hearing—failing to afford the parties the ability to cross-examine witnesses and present a rebuttal case—then the other is deficient as well.

C. The Majority Misunderstands the Record

The majority pins its novel rate structure not on any party's proposals, but rather on the direct mechanical license agreements entered into [REDACTED] and a single license entered into by a non-participant and

[170] It may be the case that sound recording rights and the musical works rights should be placed on an equal regulatory (or deregulatory) footing. However, that is the role of Congress, not the Judges, and the Judges cannot fix the disparity in the regulatory structure by simply ceding to the record companies the power to set mechanical royalty rates (And even if the Judges could accomplish this, they certainly could not do so absent a record, and after the record had closed).

peripheral licensee, Microsoft.[171] *See Majority Opinion, supra,* at 34. However, the majority recognizes that many other interactive streaming agreements with music publishers contain different rate structures, including the rate structure consistent with the 2012 benchmark. *Id.*

But the majority's rationale for relying on the [REDACTED] (and Microsoft) agreements to support its rate structure is bewildering. The majority, relying on the testimony of Dr. Leonard, writes that the ''marketplace supports a number of rate structures and that no single structure or element of a structure is indispensable.'' *Id.* at 34. The majority's reliance on this point is bewildering because it (rightly) praises a market with *multiple* rate structures as support for its adoption of *a single rate structure.* This makes no sense.

Moreover, the ''marketplace'' of which the majority speaks so approvingly is not an unregulated market. Rather, it is a ''marketplace'' that has flourished for a decade, as discussed *infra* in this Dissent, *while the 2012 benchmark (and its fundamentally identical economic antecedent, the 2008 rate structure) were in place.* It is this regulated ''marketplace,'' with its multi-tiered rate structure, that has enabled creation of the multiplicity of rates that the majority lauds. Unwittingly the majority has adopted the perverse notion that ''no good deed goes unpunished,'' by relying on the benefits of the 2012 benchmark as a basis to eliminate it! Perhaps the more appropriate adage to follow should be: ''If it ain't broke, don't fix it.'' [172]

D. The Majority Makes the Heroic Assumption that the Major Record Companies will Docilely Accept Millions of Dollars in Lost Revenue, by Agreeing to Accept Lower Sound Recording Royalties

The majority is sanguine as to the impact of the uncapped TCC prong rate in its proposed rate structure, because it has confidence that the major record companies will recognize that they have no choice but to decrease their royalty rates and reduce their revenues by millions of dollars, in order to subsidize the section 115 royalty rate increases adopted in the Majority Opinion. The complacency of the majority is based on the application of the Shapley value approaches modeled by experts for the services and for Copyright Owners.

To summarize,[173] the Shapley models estimate a ''surplus'' of revenue from downstream revenues, after all the non-content costs of the market participants are recovered, that is available to be distributed among the services and the input providers, *i.e.,* the record companies (who provide the sound recordings) and the music publishers (who provide the music works). The division of that surplus is determined by an algorithm that measures and averages the value of each party's contribution to the creation of the surplus, over all possible arrival sequences in the marketplace.

As the majority correctly notes, the parties' Shapley value models all predict that the ratio of sound recording royalties to musical works royalties should decrease from current levels. However, the majority is merely *assuming* that the sound recording rates will adjust downward. They base their assumption on the testimony of Professor Watt, who identified what another economic witness (Professor Katz, for Pandora) described as the ''see-saw'' effect. Simply put, this effect arises from the *assumption* that the interactive streaming services must be permitted to retain enough revenue to survive,[174] but, beyond that, the suppliers of the two ''must have'' inputs can negotiate in a free market to share *equally* the remainder of the surplus generated by downstream revenue. (They receive different percentages of total revenue because, although their share of the Shapley surplus is equal, they have different non-content costs).[175]

In this see-saw paradigm, the present ratio of sound recording: musical works royalties is too high at present, according to the Shapley valuations, because the mechanical royalty has been set under section 115 at too low a rate, allowing the record companies to appropriate the remainder of the surplus, *i.e.,* more than the percentage suggested by the Shapley approach. According to the majority and the Shapley experts, applying the Shapley values would eliminate this regulatory effect and, the ratio of sound recording royalties to musical works royalties theoretically then should fall, with the fall in the ratio arising from *a significant reduction in sound recording royalties and an increase in musical works rates.*

But theory must meet reality. As I note in greater detail *infra* in connection with my own analysis of the Shapley approach, no witness could state whether this see-saw effect would occur, and there were no witnesses from the record companies who testified that the record companies would impotently acquiesce to a significant loss in royalties to accommodate the diversion of a huge economic surplus away from them and to the Copyright Owners.[176]

I am unwilling to adopt the hypothetically plausible idea of a see-saw effect impacting the division of this surplus, when there is simply no evidence that such an adjustment would occur. Given the $1.604 billion in interactive streaming revenue reported by RIAA, I cannot merely assume that the record companies would acquiesce to a substantial reduction in royalty revenue, rather than seek some other market structure in which to protect this revenue, such as, for example, resurrecting the idea of establishing or otherwise integrating their own streaming services. The Services' experts, and Apple's expert, testified that any purported see-saw effect was indeterminate with regard to its impact on the interactive streaming services. *See* 4/5/17 Tr. 4944–45 (Katz) (acknowledging the possibility that a mechanical royalty rate increase would affect sound recording royalties in the future but not immediately, and that there is no reliable estimate of the size of any such adjustment); 4/7/17 Tr. 5515–5516(Marx) ((stating that there would ''[m]aybe [there would] be some adjustment on the sound recording side . . . . [H]ow those negotiations play out, I think it's complicated and hard to guess''); 4/5/17 Tr. 5704–05 (Ghose) (''[I]t's quite likely that the streaming service will want to maintain their royalties and their revenues at the current levels. And so, you know, to me it seems like an extreme statement that the entire increase in publisher profits will come at the expense of the streaming services.''). And, to repeat, Copyright Owners own Shapley value expert, Professor Gans, suggests that the

[171] There is no record evidence that Microsoft continues to operate an interactive streaming service.

[172] I note that Google's economic expert, Dr. Leonard, did not testify in support of the rate structure for which the majority and Google have advocated for the first time post-hearing. In fact, he opined that the 2012 rate structure (without the Mechanical Floor) was the best rate structure for the 2018–2022 rate period.

[173] The Shapley value approach is described in more detail, *infra.*

[174] I will return to this crucial assumption presently.

[175] Another Shapley value expert for Copyright Owners, Professor Gans, does not concede that the ''see-saw'' effect will occur. Rather, he testified that the services might simply raise downstream prices or pay the higher royalties out of higher profits (which to date do not exist). Gans WRT ¶ 32. This opinion only underscores the tenuous nature of the see-saw hypothesis.

[176] The record companies would have to accept substantial losses in royalty income. According to the RIAA, interactive streaming revenues for 2015 totaled $1.604 billion. *See* Marx WDT ¶ 153 & App. B.1.b (citing RIAA figures). The extent of this assumed loss by record companies, absent any evidence, makes the assumption of the see-saw effect completely unreasonable.

burden will fall on the services, not the record companies.

To convince itself of the unlikelihood of such results, the majority notes that, as a matter of economic theory, given the present interactive streaming market structure, the record companies already have the economic power to put streaming services out of business, because the market in which record companies and interactive streaming services negotiate is unregulated. Indeed, the record companies' strategy has been to '[REDACTED].'' *Web IV, supra,* at 63 (restricted version).

But the static nature of this assumption is not reasonable in this context. It may be reasonable to assume, given the royalty revenue allocations *now present in the interactive streaming market,* that the record companies would continue to find it in their self-interest to maintain the existence of interactive streaming services. However, if mechanical royalty rates were to increase significantly, there is no evidence in the record in this proceeding that indicates whether the record companies would decide to maintain the current vertical structure of the market and docilely accept such a revenue loss. For example, they could create their own streaming services (perhaps learning the lessons from the failed Pressplay and MusicNet attempts of the past). Or, they could adopt what Professor Gans suggests, maintain the sound recording royalty rates, thereby hastening a more immediate exit of streaming services from the market, or reduce their potential for success, making them ripe for acquisition by record companies at distress prices.[177]

In any event, from an evidentiary perspective, there is no reason why the Judges should either indulge in or dismiss such speculation. There is absolutely no evidence that such a significant shift in royalty distribution would occur, nor is there sufficient evidence as to the potential consequences of such a draconian reallocation of revenue. Accordingly, I cannot agree with a rate structure that implicitly depends on the voluntary reduction in royalty income of by an unregulated input provider to whom the majority has ceded control over the statutory rates.

E. The Majority Denigrates the Parties' Ten- Year Rate Structure as a ''Rube-Goldberg-esque'' Device.

The majority disparages the parties' ten year rate structure, spanning two settlements, as ''Rube-Goldberg-esque.'' Moreover, the majority characterizes the existing structure as ''impenetrable.'' That is a remarkable statement, given that the parties have operated under the structure for a decade—clearly they know how to penetrate the language and understand its meaning. It may be true, as discussed in more detail *infra,* that some songwriters and others may find the calculation of their royalties to be difficult to understand. However, the creative artists can utilize the services of their agents—the NMPA and others—to answer any questions that may arise. It seems close to hubris for any jurist to dismiss a decade-long voluntary rate structure, one that the parties have extended by agreement, as ''impenetrable,'' merely because the jurist finds the structure too difficult to understand.

The majority also indicates that it has the power to make certain that the regulations it adopts are sufficiently simple and understandable. Such a common sense point cannot be disputed, but it is misapplied here. Again, the proof of the pudding is in the eating, so to speak; the parties have operated under the existing rate structure for a prolonged period, belying any concern that the Judges should adopt regulations that are simpler, and reject those that are more complicated. Moreover, as noted *infra* (in response to the same ''complexity'' argument made by Copyright Owners), the issue of regulatory complexity is not a factor or objective in the rate-setting process under section 801(b)(1). Thus, if the 2012 rate structure otherwise is best suited to effectuate the statutory objectives as compared with the other alternatives, there is no basis for the complexity of the structure to override the specific application of the express statutory factors.

III. The Majority Opinion is Legally Erroneous

A. The Majority has not ''Determined'' Statutory Rates

Pursuant to 17 U.S.C. 801(b)(1), the Judges have the duty to make a determination'' of rates that are ''reasonable'' and that are calculated to achieve four itemized sets of objectives. The majority's two-pronged rate proposal fails to discharge this duty. Rather, the majority has adopted a rate structure that is *indeterminate,* allowing the record companies, especially the major record companies with ''must have'' repertoires, to set the mechanical rates that are paid under section 115.

Merely setting the ratio between sound recording royalty rates and mechanical royalty rates is not the same as actually making a ''determination'' setting the rates. As noted in Section I, *supra,* pegging the *regulated* mechanical royalty rate to the *unregulated* sound recording royalty rate through the ''greater of'' uncapped TCC prong leaves the statutory mechanical rate *indeterminate.* Nothing in section 801(b)(1) permits the setting of an indeterminate rate that becomes determined only when an unregulated private party sets its own rates.[178]

B. The Majority Decision Unlawfully Delegates to Private Entities, Unrepresented in this Proceeding (the Record Companies), the Ability to Set the Section 115 Royalty Rates

The majority's adoption of an uncapped TC C prong in a greater of structure constitutes an improper delegation of a statutory duty to the record companies, who are private entities. However, the majority has not cited any authority supporting such a private delegation, nor has it suggested that its uncapped TCC presents an issue regarding the delegation of duties.

The Supreme Court and the D.C. Circuit have established a ''private nondelegation doctrine,'' which prohibits the delegation of statutory duties to private entities. *Carter v. Carter Coal Co.,* 298 U.S. 238 (1936); *Ass'n of Am. R.R.s v. U.S. Dep't of Transp.,* 721 F.3d 666, 675 (D.C. Cir. 2013), *vacated and remanded sub nom. Dep't of Transp. v. Ass'n of Am. R.Rs.,*

[177] The majority dismisses the risk of the destruction of the present market structure as not the type of disruption that the Judges may consider. Majority Opinion at 74 n.137. However, the majority finds that it must implement its 44% rate increase incrementally over five years, because a more sudden implementation would be disruptive under the statutory standard. It seems apparent that establishing a rate structure that cedes control to the record companies who can increase the mechanical rate at will is at least as disruptive to the industry. Moreover, the disruption is not merely to one business, but rather to every service and every service business model now in operation. (Recall that even Google, who claims to support this rate structure, acknowledges that the services are subject to abuse from the record companies' market power, and Google puzzlingly calls on ''someone'' to ''watch'' the situation.) Moreover, as Copyright Owners point out, as discussed *supra,* even they face significant risk from this structure. *Indeed, this rate structure is an ''equal opportunity disrupter.''*

[178] This point needs to be distinguished from the case where the parties voluntarily agree to recognize the perfect complementarity between inputs, such as in the ''All-In'' context, and deduct the cost of the perfectly complementary performance right when calculating the mechanical license. In the ''All-In'' case, the parties' prior agreement is part and parcel of the useful 2012 benchmark adopted in this Dissent, and the licensors are essentially the same underlying entities.

135 S.Ct. (2015) (*Railroad v. DOT*). In *Railroad v. DOT,* the D.C. Circuit struck down a statute that explicitly delegated regulatory authority to Amtrak, allegedly a private entity, to develop standards to evaluate passenger service quality. *Id.* at 673–677. The Association of American Railroads had challenged the delegation of authority to Amtrak, claiming it was a private entity and that the holding in *Carter Coal* precluded the delegation of such authority to a private entity. The D.C. Circuit agreed that this express grant of authority by Congress to a private entity was unconstitutional under the private nondelegation doctrine. *Id.*[179]

If Congress cannot expressly delegate statutory and regulatory power to a private entity, then, *a fortiori,* a subordinate administrative agency, the Copyright Royalty Board, cannot (or at least should not) be able to implicitly delegate statutory and regulatory authority to private entities. Yet in this case, the majority has implicitly made such a subdelegation, yoking the mechanical royalty rates paid by interactive streaming services to the rates set by record companies, an unregulated sector of the music industry. Thus as explained *supra,* the level of rates can rise at the unfettered discretion of the record companies, to the detriment of the streaming services, and the measurement of royalties can lead to the diminution of the royalty base, to the injury of Copyright Owners, through the record companies' unbound right to define ''revenue'' and to compartmentalize consideration (*e.g.,* through equity instead of royalties).[180]

Not only does the private delegation of section 115 rate-setting authority via the pegging of that rate to the unregulated sound recording royalty rate appear to violate the private non-delegation doctrine, it also appears to be inconsistent with the Judges' expansive powers under *Chevron U.S.A. Inc. v. Nat'l Resources Defense Council,* 467 U.S. 837 (1984). Under the *Chevron* doctrine, courts defer to administrative agencies for three broad reasons: First, the agencies are presumed to have technical expertise. Second, as arms of the government, they are politically accountable. Third, an express delegation of authority by Congress to a public agency is an expression of legislative intent as to how a statute should be applied. *See* K. Brown, *Public Law and Private Lawmakers,* 93 Wash. U. L. Rev. 616, 655–57 (2016).

However, when an agency in turn delegates its powers to private entities, such as the record companies, these rationales disappear. With regard to the first rationale, technical expertise, the record companies certainly have expertise in the area of music royalty rate-setting. However, that expertise is married to an intention—indeed, a fiduciary obligation—that they seek to maximize their own profit, even if that maximization ''conflict[s] with the legislative mandates of Congress,'' such as the standards set forth in section 801(b)(1). *See id.* at 655. As for the second rationale, private entities, such as the record companies in this context, ''are not beholden to the democratic process,'' and the public therefore ''has no legal mechanism'' to hold them accountable. Thus, the second *Chevron* rationale is inapplicable. *See id.* at 657. Finally, with regard to the third basis for *Chevron* deference, legislative intent, private entities do not have the interest in filling in the interstices of ambiguous statutory authority by ascertaining the public interest. *See id.* at 658. Indeed, as corporations, their duty is to their shareholders, which, to state the obvious, is not the same as the public interest expressed in section 801(b)(1).

In the present case, the private delegation is even more problematic. The record companies to whom implicit rate-setting authority has been delegated are not in any sense neutral. In relation to the interactive streaming services, the record companies are licensors, seeking payment from the interactive streaming services. In relation to Copyright Owners, they are competitors for royalty revenue, in the sense that both the record companies and music publishers are input providers who compete for the downstream revenue generated by the interactive streaming services. It is hard to imagine that the Majority Opinion would (or should) be afforded *Chevron* deference, when the structure it creates smacks too much of the fox guarding not one but two henhouses.

Of course, a full evaluation of these legal issues, by the parties and the Judges, was skirted, because no party proposed during the hearing a rate structure with an uncapped TCC. If this structure had been proposed, the parties would most certainly have fully briefed the issue in their proposed Conclusions of Law and Reply Proposed Conclusions of Law. Alas, they were not given that opportunity, and the majority has acted without the aid of the parties' input.

There is a better approach. As set forth in full *infra,* I have presented an Alternative Dissenting Determination.

ALTERNATE DISSENTING DETERMINATION

IV. INTRODUCTION

The Copyright Royalty Judges (Judges) commenced the captioned proceeding to set royalty rates and terms to license the copyrights of songwriters and publishers in musical works made and distributed as physical phonorecords, digital downloads, and on-demand digital streams during the rate period January 1, 2018, through December 31, 2022. *See* 81 FR 255 (Jan. 5, 2016).

Below, I set forth my alternative analysis, rate structure and rates, in the form of a comprehensive alternative determination.

V. ALTERNATIVE DETERMINATION OF RATE STRUCTURE AND RATES

In this alternative determination, I would establish the section 115 royalty rate structure, and rates, for the period 2018 through 2022, by adopting the 2012 settlement as the appropriate benchmark, thereby maintaining the same structure and rates as now exist under the current regulations. My decision in this regard is based on a comparative analysis of that benchmark and other benchmarks, and a consideration of other record evidence submitted by the parties, as fully set forth herein.

Additionally, had the record evidence not included the 2012 rate structure and rates as a designated benchmark, I nonetheless would have established for the 2018–2022 period the same rate structure and rates as now exist, pursuant to the Judges' authority to adopt the existing rates and rate structure when they find that those prevailing provisions better satisfy the statutory standards than any other proposed structures and rates properly discernible from the record evidence. *Music Choice v. Copyright Royalty Bd.,* 774 F.3d 1000, 1009 (D.C. Cir. 2014).

A. Background

1. Statute and Regulations

The Copyright Act (Act) establishes a compulsory license for use of musical works in the making and distribution of phonorecords. 17 U.S.C. 115. Phonorecords licenses now include physical and digital sound recordings embodying the protected musical works as well as digital sound recordings that may be streamed on demand by a listener.

The Section 115 compulsory license, created in 1909, reflected Congress's

[179] The Supreme Court vacated and remanded the case, after granting *certiorari,* holding that Amtrak was not in fact a private entity.

[180] The majority's concern for ''transparency,'' expressed as a criticism of the parties' workable ten year rate structure, disappears in connection with it delegation of rate-setting to the record companies. The definition of revenue, the handling of bundled products and the exclusion of certain consideration from royalties will remain opaque to the Judges and to Copyright Owners.

attempt to balance the exclusive rights of owners of copyrighted musical works with the public's interest in accessing protected works. In 1897, Congress extended copyright protection for the benefit of rightsholders to the performance of their musical compositions. Act of Jan. 6, 1897, 54th Cong., 2d Sess. Ch. 4, 29 Stat. 481 (1897). However, at the dawn of the 20th century, the standardization and commercialization of a prior technological advance roiled the musical works markets. That period saw the expansion of the manufacture and sale of piano rolls—a system of perforated notations that could be used in conjunction with ''player pianos''—to play music automatically.

The copyright implications of this commercial advancement were adjudicated in a 1908 Supreme Court decision, *White-Smith Music Publishing Co. v. Apollo Co.,* 209 U.S. 1 (1908). That decision held that piano rolls did not embody a system of notation that could be read and therefore were not ''copies'' of musical works within the meaning of the existing copyright laws, but rather were merely parts of devices for mechanically performing the music. *Id.* at 17. Thus, the owners of otherwise copyright-protected musical works lacked such protection vis-à-vis piano rolls.

In reaction to that decision, Congress expanded the rights of musical works copyright owners to include the right to make ''mechanical'' reproductions, such as piano rolls, that embody musical works. However, Congress made that right subject to a compulsory license because of concern about *monopolistic control* of the piano roll market by the makers of piano rolls (and another burgeoning invention, phonorecords). 17 U.S.C. 1 (1909); *see also* H.R. Rep. No. 60–2222, at 9 (1909).[181] Specifically, under the 1909 legislation, upon payment of a royalty rate of 2¢ per ''mechanical,'' any person was permitted to manufacture and distribute a reproduction of a musical work.

Congress revised the mechanical license in its broader 1976 revision of the copyright laws. Among the various changes relating to the phonorecords license, Congress directed licensees to provide copyright owners with a pre-use written ''notice of intention,'' in order to obtain the Section 115 license. The 1976 revisions to the Copyright Act retained the then extant royalty fee of 2.75¢ per phonorecord (or 0.5¢ per minute of playing time or fraction thereof, whichever amount was larger). However, the 1976 revision also created a new entity, the Copyright Royalty Tribunal (CRT), to conduct periodic proceedings to adjust the rate.[182]

In 1995, Congress passed the Digital Performance Right in Sound Recordings Act (DPRA), Public Law No. 104–39, 109 Stat. 336, extending the mechanical license to ''*digital* phonorecord deliveries'' (DPDs) (emphasis added), which the statute defines as each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. 17 U.S.C. 115(d). Accordingly, the license now covers DPDs, in addition to physical copies, such as compact discs (CDs), vinyl records and cassette tapes.

A proceeding to determine reasonable royalty rates and terms for the section 115 mechanical license is commenced by the Judges on the schedule provided by 17 U.S.C. 803(b)(1)(A)(i)(V). Although a contested hearing may ultimately be necessary, the Act strongly encourages negotiated settlements among interested parties. *See* 17 U.S.C. 115(c)(3)(E)(i) (''License agreements voluntarily negotiated at any time between one or more copyright owners . . . and one or more persons entitled to obtain a compulsory license . . . shall be given effect in lieu of any determination . . . .''); 17 U.S.C. 803(b)(3) (requiring a ''Voluntary Negotiation Period''); 17 U.S.C. 803(b)(6)(C)(x) (requiring a settlement conference prior to a hearing).

As currently configured, the applicable regulations are divided into three subparts. Subpart A regulations govern licenses for reproductions of musical works (1) in physical form (vinyl albums, compact discs, and other physical recordings), (2) in digital form when the consumer purchases a permanent digital copy (download) of the phonorecord, and (3) inclusion of a musical work in a purchased telephone ringtone. Subpart B regulations govern licenses for interactive streaming and limited downloads. Subpart C regulations govern limited offerings, mixed bundles, music bundles, paid locker services, and purchased content locker services.

2. Prior Proceedings

In 1980, the CRT conducted the first contested proceeding to set rates for the Section 115 compulsory license. The CRT increased the then-existing rate by more than 45%, from 2.75¢ rate per phonorecord to 4¢ per phonorecord. 45 FR 63 (Jan. 2, 1980).[183] By 1986, the CRT had increased the mechanical rate to the greater of 5¢ per musical work or .95¢ per minute of playing time or fraction thereof. 46 FR 66267 (Dec. 23, 1981); *see also* 37 CFR 255.3(a)–(c). The next adjustment of the Section 115 rates was scheduled to begin in 1987. However, the parties entered into a settlement that the CRT adopted, setting the rate at 5.25¢ per track beginning on January 1, 1988, and established a schedule of rate increases generally based on positive limited percentage changes in the Consumer Price Index every two years over the next 10 years. *See* 52 FR 22637 (June 15, 1987). The rate increased until 1996, when the rate was set at the greater of 6.95¢ per track or 1.3¢ per minute of playing time or fraction thereof. *See* 37 CFR 255.3(d)–(h).

The rates set by the CRT pursuant to the 1987 settlement were set to expire on December 31, 1997. The Librarian of Congress announced a negotiation period for owners and users of the section 115 license in late 1996, during which the parties reached a settlement regarding rates for a ten-year period to end in 2008.[184] Under the settlement, (ultimately adopted by the Librarian), the rate for physical phonorecords was set at 7.1¢ per track beginning on January 1, 1998, and a schedule was established for fixed rate increases every two years over the next 10-year period with the rate beginning on January 1, 2006, being the larger of 9.1¢ per track or 1.75¢ per minute of playing time or fraction thereof. *See* 37 CFR 255.3(i)–(m); *see also* 63 FR 7288 (Feb. 13, 1998).

[181] Because of this history, and the fading importance of mechanical piano rolls, this license is often referred to as the ''phonorecords'' license, but still also remains identified, synonymously, as the ''mechanical'' license. In point of fact, vinyl records, CDs, tapes and any other physical reproductions would still constitute ''mechanical'' reproductions.

[182] *See* H.R. Rep. No. 94–1476 at 111 (1976); 17 U.S.C. chapter 8 (1978). In 1993, Congress abolished the CRT and replaced it with copyright arbitration royalty panels (CARPs). Copyright Royalty Tribunal Reform Act of 1993, Public Law No. 103–198, 107 Stat. 2304. In turn, Congress abolished the CARP system and replaced it with proceedings before the Copyright Royalty Judges. Copyright Royalty and Distribution Reform Act of 2004, Public Law No. 108–419, 118 Stat. 2341.

[183] The United States Court of Appeals for the District of Columbia Circuit affirmed the CRT. *Recording Industry Ass'n. of America v. Copyright Royalty Tribunal,* 662 F.2d 1 (D.C. Cir. 1981) (*1981 Phonorecords Appeal*) (remanded on other grounds).

[184] The Librarian initiated the 1976 proceeding during the period after the termination of the CRT and the inception of the CRB, a time during which controversies regarding royalty rates and terms were referred to privately retained arbitrators under the CARP program,

The rates adopted for DPDs for the 10-year period were the same as those set for physical phonorecords, and the rates for incidental DPDs were deferred until the next scheduled rate proceeding. *See* 37 CFR 255.5, 255.6; *see also* 64 FR 6221 (Feb. 9, 1999).

In 2006, with expiration of the previous settlement term nearing, the Judges commenced a proceeding to adjust the mechanical rates under section 115. On January 26, 2009, they issued a Determination, effective March 1, 2009. In that Determination, the Judges noted that the parties had settled their dispute regarding rates and terms for conditional downloads, interactive streaming and incidental digital phonorecord deliveries (*i.e.,* rates in the new subpart B). *Mechanical and Digital Phonorecord Delivery Rate Determination,* 74 FR 4510, 4514 (Jan. 26, 2009) (*Phonorecords I*). The parties who negotiated the settlement included the NMPA and DiMA, the trade association representing its member streaming services. *Testimony of Rishi Mirchandani,* Trial Ex. 1, ¶ 59 (Mirchandani WDT).

With regard to the subpart A rates, the Judges in *Phonorecords I* rejected the parties' proffered benchmark evidence, and instead adopted the existing rates and rate structure, holding as follows:

> Based on the evidence before us, we conclude that no single benchmark offered in evidence is wholly satisfactory with respect to all of the products for which we must set rates. . . . [W]e are not persuaded that the . . . existing rate . . . now in effect for nearly three years is . . . inappropriate.

Phonorecords I at 4522 (emphasis added).

Thus, in the first (and only) litigated section 115 proceeding before the Judges, they adopted the existing rates and structure for the subsequent rate period, rather than rates and a structure that were proposed by the parties, because the Judges were concerned that the parties' proposals would not be appropriate *for all of the products at issue.*[185]

In 2013, the Judges adopted a settlement that carried forward the existing rates and added a new subpart, subpart C, which, as noted *supra,* covers several newly regulated categories—''limited offerings, mixed service bundles, music bundles, paid locker services and purchased content locker services.'' *Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords,* 78 FR 67938 (Nov. 13, 2013) (*Phonorecords II*). Once again, the settling parties included the trade associations for the licensors and licensees, NMPA and DiMA, respectively. Mirchandani WDT ¶ 59.

The present section 115 proceeding thus is the third since the Judges were given jurisdiction under the Copyright Royalty and Distribution Reform Act of 2004.[186] In the *Phonorecords II* settlement, the parties agreed that any future rate determination for subparts B and C configurations presented to the Judges would be a *de novo* rate determination. *See* 37 CFR 385.17, 385.26 (2016). However, they did not agree that the existing rate structure or rates could not be considered as the bases for future rate determinations.[187]

B. The Present Proceeding

In response to the Judges' notice regarding the present proceeding, 21 entities filed Petitions to Participate.[188] The participants engaged in negotiations and discovery. On June 15, 2016, some of the participants [189] notified the Judges of a partial settlement with regard to rates and terms for physical phonorecords, permanent digital downloads, and ringtones—the services covered by the extant regulations found in subpart A of part 385. The Judges published notice of the partial settlement [190] and accepted and considered comments from interested parties.[191]

On October 28, 2016, NMPA, Nashville Songwriters Association International (NSAI), and Sony Music Entertainment (SME) filed a Motion to Adopt Settlement Industry-Wide. The motion asserted that SME, NMPA, and NSAI had resolved the issue raised by SME in response to the original notice. The Judges evaluated the remaining objection to the settlement filed by George Johnson dba GEO Music Group (GEO) and found that GEO had not established that the settlement agreement ''does not provide a reasonable basis for setting statutory rates and terms.'' *See* 17 U.S.C. 801(b)(7)(A)(iii). As a part of the second settlement, Sony withdrew from this proceeding. The Judges published the agreed subpart A regulations as a Final Rule on March 28, 2017.[192]

During the course of the proceeding, the Judges dismissed some participants and other participants withdrew. Remaining participants at the time of the hearing were NMPA and NSAI, representing songwriters and publisher copyright owners (collectively Copyright Owners), and GEO, the *pro se* songwriter/copyright owner. Licensees of the copyrights appearing at the hearing were Amazon Digital Services, LLC (Amazon), Apple Inc. (Apple), Google, Inc. (Google), Pandora Media, Inc. (Pandora), and Spotify USA Inc. (Spotify) (collectively referred to as the Services).

Beginning on March 8, 2017, the Judges conducted a twenty-one day hearing that concluded on April 13, 2017. During the course of the hearing, the Judges heard oral testimony from 37 witnesses,[193] and admitted over 1,100 exhibits. The participants submitted

[185] That is, the Judges in *Phonorecords I* recognized that the existing rate structure and *rates were sufficient to cover all products at issue, a result that this Dissent likewise would accomplish. But, a fortiori,* in the present case this result is also backed by an evidentiary record supporting the continuation of the existing structure and rates, because the present regulatory structure has been presented by the Services *as a benchmark,* rather than as a default position.

[186] Pub. L. No. 108–419, 118 Stat. 2341.

[187] The *Phonorecords I* settlement agreement contained a clause stating that ''[s]uch royalty rates shall not be cited, relied upon, or proffered as evidence or otherwise used in the Proceeding,'' where ''the Proceeding'' was a defined term meaning *Phonorecords I.* Trial Ex. 6013, Ph*onorecords I* Agreement at Sec. 3. By contrast, the *Phonorecords II* settlement agreement did *not* contain such a clause that would preclude reliance on the evidentiary value of the *Phonorecords II* royalty rates. *See* Trial Ex. 6014, *Phonorecords II* Agreement at Sec. 5.5 (including a full-integration clause of the *Phonorecords II* wrapper agreement). I find this distinction important, because it demonstrates that the parties to the 2012 settlement understood the evidentiary value of the *Phonorecords II* settlement in the next section 115 proceeding, *i.e., this proceeding.*

[188] Initial Participants were: Amazon Digital Services, LLC (Amazon); Apple, Inc. (Apple); Broadcast Music, Inc. (BMI); American Society of Composers, Authors and Publishers (ASCAP); David Powell; Deezer S.A. (Deezer); Digital Media Association (DiMA); Gear Publishing Company (Gear); George Johnson d/b/a/GEO Music Group (GEO); Google, Inc. (Google); Music Reports, Inc. (MRI); Pandora Media, Inc. (Pandora); Recording Industry Association of America, Inc. (RIAA); Rhapsody International Inc.; SoundCloud Limited; Spotify USA Inc.; ''Copyright Owners'' comprised of National Music Publishers Association (NMPA), The Harry Fox Agency (HFA), Nashville Songwriters Association International (NSAI), Church Music Publishers Association (CMPA), Songwriters of North America (SONA), Omnifone Group Limited; and publishers filing jointly, Universal Music Group (UMG), Sony Music Entertainment (SME), Warner Music Group (WMG).

[189] The settling parties were: NMPA, NSAI, HFA, UMG, and WMG. As part of the settlement agreement, UMG and WMG withdrew from further participation in this proceeding.

[190] *See* 81 FR 48371 (Jul. 25, 2016).

[191] Three parties filed comments. American Association of Independent Music (A2IM), Sony Music Entertainment (Sony), and George Johnson dba GEO Music Group (GEO). A2IM urged adoption of the settlement and Sony approved of all but one provision of the settlement. GEO objected to the settlement.

[192] *See* 82 FR 15297 (Mar. 28, 2017).

[193] By stipulation of the participants, the Judges also accepted and considered written testimony from six additional witnesses who did not appear. Amazon designated and other participants counterdesignated testimony from the *Phonorecords I* proceeding, which was admitted as Exhibits 321 and 322.

Proposed Findings of Fact (PFF) and Proposed Conclusions of Law (PCL) on May 12, 2017, and Replies to those filings on May 26, 2017. On June 7, 2017, counsel for the parties made their closing arguments.

Under 37 CFR 351.4(b)(3), a participant may amend its rate proposal at any time up to and including the time it files proposed findings and conclusions.[194] In this proceeding, Copyright Owners, Google, Pandora and Spotify each filed an amended rate proposal with its filing of a PFF and PCOL.

The parties delivered closing arguments on June 7, 2017.

C. Overview of the Licensing Parties

1. The Licensees: The Streaming Services

Many diverse enterprises have launched new music streaming services to meet growing consumer demand for streaming. Currently, there are at least 31 music streaming services available from 20 identifiable providers. Some of the well-known of these include: Amazon, Apple, Google (and its recently acquired YouTube), Deezer (partnered with Cricket/AT&T), iHeartRadio, Napster, Pandora, SoundCloud, Spotify, and Tidal (partnered with Sprint). *Written Rebuttal Testimony of Jim Timmins,* Trial Ex. 3036, ¶ 20 (Timmins WRT). Most of the companies entering the on-demand streaming music market have done so recently. *Id.* ¶ 21. In the last five years, new entrants to the market have initiated at least five interactive streaming services, joining Spotify which launched in the United States in 2011. *Id.* ¶ 22.

By one estimate, as of 2016 there were [REDACTED] million United States on-demand subscribers: Spotify accounted for [REDACTED] million, [REDACTED] Apple Music (4 million), Rhapsody and Tidal (2 million each), and all others accounting for the remaining 4 million. *Written Testimony of Michael L. Katz (On behalf of Pandora Media, Inc.)* ¶ 34, Table 1 (Katz WDT). According to Spotify, as of June 2016, it had approximately [REDACTED] million monthly average users (MAU) in the United States, of which [REDACTED] million were subscribers, with apparently [REDACTED] million users of Spotify's ad-supported service. *Written Direct Testimony of Barry McCarthy (On behalf of Spotify USA Inc.)* ¶ 6 (McCarthy WDT).

Some of the services that offer music streaming are pure-play music providers, such as Spotify and Pandora.[195] Others, such as Amazon, Apple Music, and Google Play Music, are part of wider economic ''ecosystems,'' in which a music service is one part of a multi-product, multi-service aggregation of activities, including some that are also related to the provision of a retail distribution channel for music. For example, Amazon is a multi-faceted internet retail business. Amazon offers a buyers' program for an annual fee (Amazon Prime) that affords loyalty benefits to members, such as free or reduced rate shipping or faster delivery on the products it markets. For its music service, Amazon bundles interactive streaming at no additional cost with its Prime Membership, [REDACTED].[196] In addition to the Prime Music service, Amazon's U.S.-based business also includes an online store to purchase CDS and vinyl records, a digital download store, a purchased content locker service, Amazon Music Unlimited (a full-catalog subscription music service), and Amazon Music Unlimited for Echo (a full-catalog subscription service available through a single Wi-Fi enabled Amazon Echo device).[197] In launching Prime Music, Amazon relied on the Section 115 license as it did for Amazon Music Unlimited and Amazon Music Unlimited for Echo.[198]

Google describes its Google Play offerings as its ''one-stop-shop'' for the purchase of Android apps. The Google Play Store allows users to browse, purchase, and download content, including music. Google Play Music is Google Play's entire suite of music services. Google Play Music, launched in 2011, is bundled with the YouTube Red video service subscription.[199] *See Expert Report of Jui Ramaprasad November 1, 2016* at Table 2, and ¶ 62, n.105 (Ramaprasad WDT). It includes several functionalities: (1) Music Store; (2) a cloud-based locker service; (3) an on-demand digital music streaming service; and (4) a Section 114 compliant non-interactive digital radio service (in the U.S.). *Written Direct Testimony of Zahavah Levine,* Trial Ex. 692, ¶ 43 (Levine WDT).

The largest services entered direct agreements with publishers to license their musical works. The terms of those licensing agreements varied. For example, Apple agreed to [REDACTED] with the major publishers that includes a minimum [REDACTED]. *Expert Report of Jeffrey A. Eisenach, Ph.D.* ¶¶ 84–92 (Eisenach WDT). In these agreements, [REDACTED]. *Id.* ¶ 87 n.79.

Google's practice is to [REDACTED]. Levine WDT ¶¶ 51–52.[200]

There is conflicting evidence about whether the market for streaming services is faring poorly financially or performing about the same as other emerging industries. *See, e.g.,* Timmins WRT ¶¶ 16–17; Levine WDT ¶ 16 (''streaming music services generally remain unprofitable businesses'' with content acquisition costs (primarily music royalties) being ''the biggest barrier to profitability.'') For example, Spotify, one of the largest pure-play streaming services, has reportedly [REDACTED]. Katz WDT ¶ 65. Nevertheless, some estimates place Spotify's market value at more than $8 billion, suggesting perhaps, investors' expectation of future profits. *Expert Report of Marc Rysman, Ph.D.* ¶ 150 (Rysman WDT).[201]

2. The Licensors: Publishers and Songwriters

The four largest publishers—Sony/ATV ([REDACTED] percent), Warner/Chappell ([REDACTED] percent), Universal Music Publishing Group (UMPG) ([REDACTED] percent), and Kobalt Music Publishing ([REDACTED] percent)—collectively accounted for just over 73 percent of the top 100 radio songs tracked by Billboard as of the second quarter in 2016. Katz WDT ¶ 46. In addition, there are several other significant publishers, including BMG and Songs Music Publishing, and many thousands of smaller music publishers and self-publishing songwriters. *Id.*

Songwriters have three primary sources of ongoing royalty income, which they generally share with music publishers: mechanical royalties,

[194] Nothing in § 351.4 permits the Judges to credit an amended rate proposal that is not adequately supported by the record evidence.

[195] Until late 2016, Pandora operated as a noninteractive streaming service, arguably not subject to the compulsory license for mechanical royalties, but Pandora recently began offering more interactive features, including a full on-demand tier. *Introductory Memorandum to the Written Direct Statement of Pandora Media, Inc.* at 1–2; *Written Direct Testimony of Christopher Phillips* at 8 (Phillips WDT).

[196] Amazon Prime is a $99- per-year service that offers Amazon customers access to a bundle of services including free two-day shipping, video streaming, photo storage and e-books, in addition to Prime Music. *Expert Report of Glenn Hubbard, November 1, 2016* at 15 (Hubbard WDT).

[197] Mirchandani WDT at 5.

[198] 3/15/17 Tr. 1315–16 (Mirchandani).

[199] Google's experience with music licensing dates at least far back as 2006, when it acquired YouTube. Levine WDT at 3. Google's music services were part of Google's Android Division but were recently combined within the YouTube business unit. *Id.* at 3–4.

[200] According to Ms. Levine, labels historically have not passed through mechanical rights to subscription services so the lower percentages are irrelevant. Levine WDT at n.5.

[201] The implications of the different perspectives on industry profit and losses are considered *infra* in this Dissent.

synchronization (''synch'') royalties, and performance royalties.[202] *See* Katz WDT ¶ 41; *Copyright and the Music Marketplace: A Report of the Register of Copyrights* at 69 (Feb. 2015) (*Register's Report*).[203] Songwriters who are also recording artists receive a share of revenues from their record labels for the fixing of the musical work in a sound recording. Sound recording royalties include those from the sale of physical and digital albums and singles, sound recording synchronization, and digital performances. *Id.* Recording artists can also derive income from live performances, sale of merchandise, and other sources. *Id.* at 69–70.

The shift in consumption from physical sales to streaming coincided with a reallocation of publisher revenue sources. In 2012, 30% of U.S. publisher revenues came from performance royalties and 36% from mechanical royalties, with the rest coming from synch royalties and other sources. *See Register's Report* at 70. By 2014, 52% of music publisher revenues came from performance royalties, while 23% came from mechanical royalties, with the remainder coming from synch royalties and other sources. *Id* at 71, n.344. By one estimate, mechanical license revenues from interactive streaming services accounted for only [REDACTED] percent of total music publishing revenues in 2015. Katz WDT ¶ 42.

It is noteworthy that the shift from mechanical royalties to performance royalties coincided with the shift from sales of phonorecords, DPDs, and CDS, for which no performance royalty is required, to the use of interactive streaming, *for which a performance royalty and a mechanical royalty are both required.* Further (as discussed more fully *infra*), the latter is reduced pursuant to an ''All-In'' formula that reflects the perfect complementarity of the performance and mechanical licenses (*i.e.,* neither license has any value to an interactive streaming service without the other). Additionally, noninteractive streaming pays only a performance royalty but no mechanical royalty, providing a further basis for mechanical royalties to be a smaller percentage of the publishers' total revenues, assuming growth in noninteractive streaming. *See Services' Joint Proposed Findings of Fact and Conclusions of Law* ¶¶ 271, 283 (SJPFF).)

Total publishing revenue declined by [REDACTED] percent between 2013 and 2014, but then increased by [REDACTED] percent between 2014 and 2015. Katz WDT ¶ 58. The largest publishers, Sony/ATV, UMPG, and Warner Chappell, [REDACTED], earning a combined $[REDACTED] million from U.S. publishing operations for that year. *Id.* ¶ 59.

D. The Rate-Setting Standards in Section 801(b)(1)

1. The Legal Basis for the Four Itemized Objectives

The Copyright Act requires that the Judges establish ''reasonable'' rates and terms for the Section 115 license. In addition, section 801(b)(1) instructs the Judges to set these rates ''to achieve the following objectives'':

> Factor A: To maximize the availability of creative works to the public;
>
> Factor 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;
>
> Factor C: To reflect 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; and
>
> Factor D: To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

17 U.S.C. 115(c) and 17 U.S.C. 801(b)(1).[204]

In the *1981 Phonorecords Appeal,* the D.C. Circuit noted the interplay among these four objectives:

> [T]he statutory factors pull in opposing directions, and reconciliation of these objectives is committed to the Tribunal as part of its mandate to determine ''reasonable'' ' royalty rates . . . . [T]he Tribunal was not told which factors should receive higher priorities. To the extent that the statutory objectives determine a range of reasonable royalty rates that would serve all these objectives adequately but to differing degrees, the Tribunal is free to choose among those rates, and courts are without authority to set aside the particular rate chosen by the Tribunal if it lies within a ''zone of reasonableness.''

Id. at 9.

When applying the foregoing standards, the Judges are not required to establish rates that are mathematically precise, given the nature of the statutory task and the controlling legal precedents. *Nat'l Cable Television Ass'n* v. *Copyright Royalty Tribunal,* 724 F.2d 176, 182 (D.C. Cir. 1983) (''Ratemaking generally is an intensely practical affair. . . . The Tribunal's work particularly, in both ratemaking and royalty distribution, necessarily involves estimates and approximations. There has never been any pretense that the CRT's rulings rest on precise mathematical calculations; it suffices that they lie within a 'zone of reasonableness.' '') (citations omitted).

The Judges also have discretion as to whether and how they choose to integrate their application of the ''reasonable rate'' standard with their analysis of the four itemized factors in section 801(b)(1). They may: (1) establish a ''reasonable rate'' as an initial step, and *then* apply the four itemized factors; *or* (2) integrate their analysis of the four itemized factors into a single ''reasonable rate'' approach—even *beginning* that approach with a consideration of the four factors. *Compare Recording Industry Ass'n of America, Inc.* v. *Librarian of Congress,* 176 F.3d 528, 533 (D.C. Cir. 1999) (approving of the latter approach) *with Phonorecords I* (applying the former approach, explaining that ''the issue at hand in analyzing the section 801(b) factors is whether these [four] policy objectives weigh in favor of divergence from the results indicated by the benchmark marketplace evidence.'') 73 FR at 4094 (Jan. 24, 2008) (quoting *SDARS I*).[205]

2. The Economic Basis for the Four Itemized Objectives

The legal and regulatory process of setting statutory royalty rates and terms has long been informed by economics. *See, e.g.,* W. Blaisdell, Study No. 6, *The Economic Aspects of the Compulsory License, U.S. Senate Subcommittee on Patents, Trademarks and Copyrights* (October 1958) (Senate Study). This is certainly true with regard to the establishment of the standards set forth in section 801(b)(1). The legislative history in the long build-up to the adoption of these standards is highlighted by dueling economic

[202] Another revenue source is folio licenses, lyrics, and musical notations in written form. Katz WDT at 31.

[203] References to the *Register's Report* are incorporated herein to provide background information. This Dissent is not based on factual information or opinion contained therein, as that document is not record evidence in this proceeding.

[204] The 1976 Act applied section 801(b)(1) and its four-factor test to new licenses. The mechanical license at issue in this proceeding is the lone existing statutory license carried forward into the 1976 Act from the 1909 Copyright Act and made subject to the 801(b)(1) standards.

[205] In the present proceeding, the parties' arguments combine both approaches. For example, as discussed *infra,* the issue of ''rate structure'' is analyzed by the parties as a marketplace issue, which places it in the analytical ''reasonable rate'' box, and also as a Factor B and Factor C issue, affecting the analysis of ''fair'' return and income and the ''relative roles'' of the parties. Thus, in this Dissent, I shall also on occasion apply the same analyses to certain ''reasonable rate'' and ''itemized factor'' issues.

positions taken in Congressional testimony in 1967 by the licensors, through the NMPA and its economic witness, Robert R. Nathan, and by the licensees, the 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 expressed incredulity that the songwriting industry would even be subject to a compulsory mechanical licensing scheme. *Id.* at 382.[206] Mr. Nathan did not see any basis for treating this license 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.*

Thus, in his 1967 testimony, Mr. Nathan advocated that Congress eliminate the compulsory license and the statutory rate. Importantly *for the present proceeding,* he specifically urged Congress (if it did not eliminate the compulsory license) to resist replacing the fixed statutory fee with a regulatory standard to be implemented by a quasi-adjudicatory body, *as one might regulate a public utility.* 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 understood to be a key distinction: Unlike traditional public utilities like ''railroad systems'' or ''streetcar lines,'' the songwriting and publishing industry is ''a creative and non-standardized area,'' and ''[m]onopoly and public utility aspects are just not prevalent in this industry.'' *Id.*

The opposing position of the licensees, 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 [as 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 the setting of the compulsory royalty rate.[207] Second, with regard to the division of the ''rewards'' proposed in Mr. Arnold's testimony, 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.

This 1967 dispute was never resolved. Rather, the issue languished until 1980, when, Congress abandoned the statutorily-fixed rate and substituted a regulatory rate-setting process. However, the post-1967 legislative history did not elucidate how rates set under the new statutory standard were to be related (if at all) to marketplace rates, either as a matter of law or a matter of economic policy. 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).[208]

3. The ''Bargaining Room'' Rate-Setting Theory Under Section 801(b)(1)

a. The Bargaining Room Theory in Historical Context

A corollary to the debate regarding the standard to be established in section 801(b)(1) was another dispute: whether the statutory rates and terms should be set pursuant to what was coined the ''bargaining room theory'' of rate-setting. This theory was summarized by Mr. Nathan: When setting a statutory or regulatory rate, the rate-setter should allow for ''opening up of the bargaining range [with] a higher ceiling so that more bargaining can take place,'' which would ''permit competitive bargaining . . . .'' Senate Hearing at 384, 421. In fact, Mr. Nathan and the NMPA were quite specific as to how the rate-setter should determine the range for bargaining under this theory: ''[T]he rate should be high enough to allow and encourage private negotiation, but not so high as to make the compulsory licensing provision meaningless . . . .'' *Id.* at 417.

Before the Senate Judiciary Committee, the RIAA's attorney, Mr. Arnold, asserted that incorporating the bargaining room theory into the new statute would flaunt the purpose of a compulsory license:

> [T]o set a statutory rate so high as to promote negotiations by a record manufacturer and a publisher below that statutory rate violates and contradicts the very purpose of imposing the compulsory license on the music publisher.

Senate Hearing at 468.

The bargaining room theory would permit different pairings of licensors and licensees to enter into agreements *at varying rates* below the statutory rate. Indeed, a CBS Records witness before the Senate Judiciary Committee acknowledged that ''[a] higher ceiling would permit *wider variation in royalty rates.* . . . '' *Id.* at 417 (emphasis added). Further, Mr. Nathan explained this commercial desire for a variety of rates in somewhat more formal economic terms: ''[A] prudent businessman . . . merely wants to price his goods on the apparent *willingness of the consumer to pay.*'' *Id.* at 419 (emphasis added).

The House Judiciary Committee adopted the bargaining room theory in its report:

> The committee is setting a statutory rate at the high end of a range within which the parties can negotiate, now and in the future, for actual payment of a rate that reflects market values at the time, but one that is not so high as to make it economically impractical for record producers [as licensees] to invoke the compulsory license if negotiations fail.

H.R. Rep. at 21.

Despite movement in the House, in the event, the language in section 801(b)(1) as enacted did not address the bargaining room theory, but rather set forth the aforementioned requirement for the establishment of ''reasonable'' rates and for the achievement of the objectives set forth in Factors A through D. As two attorneys who were involved in the process of crafting section 801(b)(1) wrote in their exhaustive history of the process:

> The most significant elements of the statutory criteria may be what they omit.

[206] This overarching criticism of the *existence* of statutory license was echoed in the present proceeding by NMPA's President, David Israelite. 3/29/17 Tr. 3677 (acknowledging that he ''always disapproved of the compulsory licensing system, ever since [he] knew about it.) (Israelite); *see also Witness Statement of David M. Israelite* ¶ 55 (Israelite WDT) (''I feel it is important . . . to express my view that [the compulsory license] is no longer necessary . . . .'').

[207] The Judges note that this unique ''personal service'' aspect of the business is less economically significant when, as is typical, published songs are collected and owned by large publishing firms, and such firms each price their repertoires jointly through blanket licenses.

[208] The standards apparently were adopted to ensure the constitutionality of the delegation of rate-setting by Congress to an administrative body. *See 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)).

They do not include any explicit mention of the standard . . . adopted by the House Judiciary Committee in 1967 that the statutory rate should be at the high end of a range within which the parties can negotiate . . . for an actual payment of a rate that reflects market values and . . . not so high . . . as to make it economically impractical for record producers to invoke the compulsory license if negotiations fail.

Greenman & Deutsch, *supra,* at 59.

In 1981, the CRT ruled that, *as a matter of la*w, the language in section 801(b)(1) precluded the use the bargaining room approach to rate-setting. *Adjustment of Royalty Payable under Compulsory License for Making and Distributing Phonorecords,* 46 FR 10466, 10478 (1981). On appeal, the D.C. Circuit affirmed the CRT's decision to eschew this approach. *1981 Phonorecords Appeal, supra.* However, the D.C. Circuit's affirmance was not based on the CRT's conclusion that the ''bargaining room'' approach was impermissible *as a matter of law.* Rather, the appellate court held that the CRT had exercised its lawful statutory discretion—in the form of a *policy determination*—to reject the use of the ''bargaining room'' approach. *Id.* at 37. With regard to the legal question as to whether the ''bargaining room'' theory could be applied by the rate-setter, the D.C. Circuit held that ''the statutory criteria . . . do not explicitly address the bargaining room question, and that dispute can only be resolved through the [CRT's] articulation of principles that flesh out the statutory notions of 'reasonable' rates and 'fair' returns.'' *Id.* at 36. As the authors of the historical article noted, this appellate ruling preserved for future litigants the right to advocate for a policy change to allow for an implementation of the ''bargaining room'' approach under section 801(b)(1). Greenman & Deutsch, *supra,* at 64. Those ''future litigants'' have arrived in this proceeding.

b. The Bargaining Room Theory in the Present Proceeding

In the present case, the parties disagree on the issue of whether the Judges should apply the bargaining room theory of rate-setting in this determination. *Compare Copyright Owners' Reply to Services' Joint Proposed Findings of Fact and Conclusions of Law* at 146 (CORPFF–JS) (''Copyright Owners . . . contend that . . . [the] bargaining room theory [is a] quite permissible consideration[ ] under 801(b)(1) analysis . . .'') *with Services' Joint Reply to the Copyright Owners' Proposed Findings of Fact and Conclusions of Law* at 28 (SJRPFF–CO) (''[a] rate creating 'bargaining room' under which copyright users must try to make private deals [is] inconsistent with Section 801(b)(1) . . .''). In further support of their argument in favor of the bargaining room theory, Copyright Owners emphasize the inability of the Judges (or anyone) to identify present market rates precisely, let alone over the five year rate period. *Proposed Conclusions of Law of Copyright Owners* ¶ 89 (COPCOL) (''the compulsory license set by the Judges cannot possibly contemplate every single business model that may develop in the ensuing time.''). Their reasoning is a reprise of the original argument for the bargaining room theory: If the statutory rate is set *below* market rates, then the parties will *never* negotiate upward toward the market rates, because the licensees will always prefer to invoke the right to use the licensed work at the below-market statutory rates. However, if the Judges set the statutory rate *above* what they find to be market rates, different licensees who each have a maximum willingness to pay (WTP) *below* such a statutory rate would seek to negotiate lower rates with the licensors. In response to such requests to negotiate, according to this argument, Copyright Owners would respond by negotiating various lower rates for those licensees, provided lower rates were also in the self-interest of Copyright Owners. 4/3/17 Tr. 4431 (Rysman).

I find, as a matter of *policy,* that the bargaining room theory is not applicable to the setting of rates in the present case. Rather, I agree with the policy decision in *Phonorecords I* that the rate setting policies made explicit in section 801(b)(1) are best discharged if the Judges identify rate structures and rates that reflect the standards set forth in the statutory provision. Indeed, if the Judges were to supplant the statutory factors with a theory leading to rates intentionally designed to substitute discretionary bargaining, the parties would essentially be returned to a purely market-based rate-setting approach. *See* 3/21/17 Tr. 2194 (Hubbard) (adoption of the ''bargaining room theory'' would ''extensively'' shift bargaining power to the Copyright Owners); *see also* 3/13/17 Tr. 569 (Katz) (''the statutory proceeding . . . ''help[s] offset the possible asymmetries'' in bargaining power).

Notably, section 801(b)(1) does not require the Judges even to attempt to set market rates, or to use market rates to establish ''reasonable'' rates under the statute. *Music Choice,* 774 F.3d, *supra,* at 1010. (''Copyright Act permits, *but does not require,* the Judges to use market rates to help determine reasonable rates'') (emphasis added). Moreover, as noted *supra,* the Judges are required to consider not only the reasonableness of the rates, but also how the four itemized factors listed in section 801(b)(1) bear on the reasonableness of the rates, *i.e.,* the maximization of the public ''availability'' of musical works, ''fair'' return, ''fair'' income and ''minimize[d] . . . disruptive impact.'' These are not factors necessarily implicated or fully addressed by a market-based analysis. If the Judges were to adopt wholesale the bargaining room theory, they would eliminate the value of those extra-market factors. Finally, as Dr. Eisenach conceded, adoption of the bargaining room theory would alter the parties' respective ''threat points'' (a/k/a ''disagreement points'') in the ''Nash context,'' increasing Copyright Owners' bargaining power as compared with the non-application of the bargaining room approach. 4/4/17 Tr. 4846–47 (Eisenach).[209]

In addition, an application of the bargaining room theory would be inconsistent with another purpose of statutory licensing—the minimization of transaction costs. If each interactive streaming service were required to negotiate separately with each music publisher, the process would diminish the transaction cost savings, which is an important reason for statutory licensing. *See* 4/6/17 Tr. 5233 (Leonard) (''the point of having this kind of compulsory licensing setting is to reduce transactions cost and to . . . prevent the exercise of market power and prevent disruption in the marketplace.''); 4/13/17 Tr. 5901 (Hubbard) (most listeners demonstrate low WTP such that ''notion of negotiation with [that] entire long tail is a lot of transactions costs . . . which would seem to me to be at odds with the 801(b) factors. . . . [I]t . . . would seem to subvert the very purpose of this hearing to just suggest wholesale private renegotiation.'').

On balance, based on the foregoing, I do not accept and will not apply the bargaining room theory to establish either the rate structure or the zone of reasonable rates.

E. The Present Rate Structure and Rates

Subpart B sets forth mechanical royalty rates in connection with the delivery and offering of interactive streams and/or limited downloads.

[209] A ''threat point'' or ''disagreement point'' is a concept from bargaining (game) theory (specifically, in the Nash bargaining model) representing the value point at which a party will walk away from negotiations—thereby affecting the value of the ultimate bargain. *See SDARS II,* 74 FR 23054, 23056–57 (April 7, 2017) (summarizing the Nash model).

There are three product distinctions within the subpart B rate structure:

(a) Nonportable vs. Portable Services
(b) Unbundled vs. Bundled Services
(c) Subscription vs. Ad-Supported Services

37 CFR 385.13.

Copyright Owners provide a helpful and more specific summary of these categories:

(a) ''standalone non-portable subscription—streaming only'' services (*i.e.,* tethered to a computer);
(b) ''standalone non-portable subscription—mixed'' (*i.e.,* both streaming and limited download) services;
(c) ''standalone portable'' subscription streaming and limited download services (*i.e.,* accessible on mobile or other Internet-enabled devices);
(d) ''bundled subscription services'' which are streaming and limited download services bundled with another product or service; and
(e) ''free [to the end user] nonsubscription/ad-supported services.''

Copyright Owners' Written Direct Statement, Proposed Rates and Terms at B–3 (Copyright Owners' Proposal) (quoting 37 CFR 385.13).

More granularly, the present subpart B rate structure and rates and for interactive streaming and limited downloads, as agreed to by the parties in their 2012 settlement, are set forth in full at 37 CFR 385.12 and 385.13, and are summarized below: [210]

1. Calculate the ''All-In'' Publishing Royalty for the Service Offering

a. maximum of 10.5% of service revenue and the following minimum royalties based on the type of service:

(i) Standalone Non-Portable Subscription, Streaming Only:

—lesser of 22% of service payments for sound recording rights [211] and $0.50 per subscriber per month.

(ii) Standalone Non-Portable Subscription, Mixed Use:

—lesser of 21% of service payments for sound recording rights and $0.50 per subscriber per month.

(iii) Standalone Portable Subscription, Mixed Use:

—lesser of 21% of service payments for sound recording rights and $0.80 per subscriber per month.

(iv) Bundled Subscription Services:

—21% of service payments for sound recording rights.

(v) Free Non-Subscription/Ad-Supported Services:

—22% of service payments for sound recording rights.

2. Subtract Applicable Performance Royalties [the ''All-In'' Calculation] (*i.e.,* subtract from the result in the previous step the ''total amount of royalties for public performance of musical works that has been or will be expensed pursuant to public performance licenses in connection with uses of musical works through such offering.'')

3. Compare the maximum of the result from the previous steps and the following mechanical-only per subscriber royalty floors based on the type of service: [212]

(a) Standalone Non-Portable Subscription, Streaming Only: $0.15 per subscriber per month.

(b) Standalone Non-Portable Subscription, Mixed Use: $0.30 per subscriber per month.

(c) Standalone Portable Subscription, Mixed Use: $0.50 per subscriber per month.

(d) Bundled Subscription Services: $0.25 per active subscriber per month.

(e) Free Non-Subscription/Ad-Supported Services: Not Applicable.[213]

Subpart C of part 385 sets forth the royalty structure and rates for licensing mechanical rights for five categories: limited offerings, mixed service bundles, music bundles, paid locker services, and purchased content locker services. The present subpart C rate structure, established consensually in the 2012 settlement, are set forth at 37 CFR 385.20 through 385.26. As succinctly summarized by Dr. Leonard (*see* Leonard AWDT ¶ 26), the structure and rates are as follows:

1. Calculate the ''All-In'' Publishing Royalty for the Service Offering

a. Maximum of the applicable percentage of service revenue based on the type of service:

(i) Mixed Service Bundle: 11.35% of service revenue.

(ii) Music Bundles: 11.35% of service revenue.

(iii) Limited Offering: 10.5% of service revenue.

(iv) Paid Locker Service: 12% of incremental service revenue.

(v) Purchased Content Locker: 12% of service revenue.

and

b. The applicable ''All-In'' minimum, also based on the type of service:

(i) Mixed Service Bundle: 21% of service payments for sound recording rights.

(ii) Music Bundles: 21% of service payments for sound recording rights.

(iii) Limited Offering: 21% of service payments for sound recording rights (subject to a further minimum payment of $0.18 per subscriber per month).

(iv) Paid Locker Service: 20.65% of service payments for sound recording rights (subject to a further minimum payment of $0.17 per subscriber per month).

(v) Purchased Content Locker: 22% of any incremental service payments to record companies for sound recording rights (above the otherwise applicable payments for permanent digital downloads and ringtones).

2. Subtract Applicable Performance Royalties

Subtract from the result in the previous step the ''total amount of royalties for public performance of musical works that has been or will be expensed pursuant to public performance licenses in connection with uses of musical works through such subpart C offering.'' [214]

At the time of the hearing, the services paid the following subpart B mechanical rates: [215]

[210] This summary is set forth in the Amended Expert Witness Statement of Dr. Gregory Leonard, Google's economic expert witness. *See Amended Expert Witness Statement of Dr. Gregory K. Leonard* ¶ 25 (Leonard AWDT). I find Dr. Leonard's format to be particularly useful, but I note that all the parties clearly and consistently summarized the existing rate structure. *See also, e.g.,* Israelite WDT ¶ 28.

[211] To be clear, these alternative percentages reflect percent of *payments to record companies for sound recording rights, unregulated and set in the market,* not the percent of revenue received by the interactive streaming services. That is, these are the so-called ''TCC'' rates.

[212] This is the so-called ''Mechanical Floor'' rate, discussed *infra.*

[213] The regulations also describe how the royalty revenue collected shall be allocated among musical works that had been played on the interactive streaming services. That allocation is made on a per play basis, and, under the parties' proposals in this proceeding, that general allocation principle would remain unchanged. *Compare* Copyright Owners' Proposal at B–14–15 *with, e.g., Second Amended Proposed Rates and Terms of Spotify USA Inc.* at 12–13 (Spotify's Proposal).

[214] As under subpart B, collected royalties under subpart C are allocated on a per play basis. The Services, and Apple, do not propose a change in this regard. Copyright Owners, given their proposal that subpart C be eliminated, would utilize the subpart B allocation methodology for the service offerings now in subpart C.

[215] Pandora had not begun its interactive streaming service at the time of the hearing. However, since November 2015, Pandora asserts that it has entered into direct licenses with thousands of music publishers that cover the mechanical rights that are at issue in this proceeding. *Written Direct Testimony of Michael Herring* ¶ 49 (Herring WDT). *See, e.g.,* PAN Dir. Exs. 6–7. Many of those deals bundle interactive streaming (for which mechanical and performance rights are required) and noninteractive streaming (for which, arguably, no mechanical license is required). Katz WDT ¶ 105.

Licensee/service	Rate prong	Rate	Reg or direct contract	Source
Amazon Unlimited for Echo	[REDACTED]	$[REDACTED]	§ [REDACTED]	Brost WDT,[216] Ex. 18 (HX 20).
Amazon Prime	[REDACTED]	$[REDACTED]	§ [REDACTED]	Marx[217] WRT ¶ 40.
Apple Music	Not Applicable	[REDACTED]	Direct contracts	Wheeler[218] WDT ¶¶ 10, 12; HX 1432, HX 1434, HX 1435.
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Leonard AWDT ¶ 52 *et seq.*
Spotify/Ad-Supported	[REDACTED]	[REDACTED]	§ [REDACTED] § [REDACTED]	Marx WDT[219] ¶ 83.
Spotify Subscription	[REDACTED]	$[REDACTED]	§ [REDACTED]	Marx WDT ¶ 76.

F. The Economic Framework for Analyzing the Rate Structure Issues

The parties' proposals are based on varying explicit and implicit assumptions regarding the economic principles that underlie the licensing of musical works. During the hearing, the parties have urged the Judges to apply certain economic principles, often imploring the Judges to recognize that the economic underpinnings of their arguments can be found in the teachings of a generic introductory ''Economics 101'' course. *See, e.g.,* 3/8/17 Tr. 133 (Copyright Owners' Opening Statement); 3/14/17 Tr. 920 (Herring); 4/13/17 Tr. 5917 (Lane). I generally agree that, particularly with regard to the rate structure, it is helpful to ''begin at the beginning''—*i.e.,* with basic economic principles—so that the subsequent analyses are grounded in some basic concepts.

Basic economic theory teaches that supply and demand determine an equilibrium market price. *See, e.g.,* W. Nicholson & C. Snyder, *Microeconomic Theory* at 10 (10th ed. 2008) (''[D]emand and supply interact to determine the equilibrium price and the quantity that will be traded in the market.''); *see also* Final Rule and Order, *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings,* Docket No. 96–5 CARP DSTRA, 63 FR 25394, 25404 (May 8, 1998) (''*CARP PSS 1998*'') (noting that ''price [is] set in the marketplace according to the laws of supply and demand. . . .''); Eisenach WDT ¶ 34 (''the interplay between supply and demand results in a market price.'')

With regard to the supply of an ''ordinary private good'' in a perfectly competitive market,[220] it is well understood that there is typically a positive correlation between price and quantity (causing the well-known upward slope of a supply curve). *See, e.g.,* C. Byun, *The Economics of the Popular Music Industry* at 74 (2016) (''The firm's supply curve is upward sloping, since the relationship between price and quantity supplied by the firm is positive.'') This positive correlation is the consequence of several factors. Among those factors is the increasing marginal physical cost of inputs required to create the product. Marx WDT ¶ 38 n.39 (''Marginal cost' is defined as the increase in total cost resulting from an additional unit of output.''). The marginal cost of inputs generally increases because, *inter alia,* inputs are scarce and a seller must pay more for each unit of an input as it becomes more scarce, or if additional units are less productive. *See Krugman & Wells, Microeconomics* at 312–13 (2d ed. 2009). Additionally, input sellers must consider the *opportunity cost* of supplying an input to a particular buyer, *i.e.,* any revenue foregone by selling that scarce input to that particular buyer rather than to another buyer who was willing to pay a higher price. *See* E. Mansfield & G. Yohe, *Microeconomics* at 242 (11th ed. 2004) (''opportunity cost'' of an input is ''the value of that input if it were employed in its most valuable alternative use.'').

In this proceeding, the products being licensed by Copyright Owners to the interactive streaming services for distribution are collections (repertoires) of *additional copies* of a song embodied in a sound recording—not the original or first copy of the song or the sound recording. The marginal physical cost of such additional digital copies of a musical work embodied in a sound recording is essentially zero. *See Written Rebuttal Testimony of Marc Rysman, Ph.D.* ¶ 71 (Rysman WRT) (''Intellectual property commonly may have little to no marginal costs to reproduce. . . .''); Marx WDT ¶ 117 (''the marginal costs of providing rights to a particular musical work and streaming it to the consumer are effectively zero); *Written Rebuttal Testimony of Richard Watt (Ph.D.) (On behalf of the NMPA and the NSAI)* ¶ 44 n.48 (Watt WRT) (considering reliable Professor Marx's conclusion that ''[a] marginal cost of zero is a close approximation of true costs of delivery.''); *Expert Rebuttal Report of Glenn Hubbard, February 15, 2017* ¶ 4.20 (Hubbard WRT) (''copyrighted music work . . . has zero marginal production costs''); *Rebuttal Expert Witness Statement of Dr. Gregory K. Leonard* ¶¶ 6, 95 (Leonard WRT) (acknowledging ''the zero marginal cost of a stream''); *Corrected Written Testimony of Michael L. Katz (On behalf of Pandora Media, Inc.)* ¶ 26 (Katz CWRT) (''The creation and distribution of musical works has . . . zero or near-zero marginal costs.''); 3/30/17 Tr. 4085–40866, (Gans) (agreeing that the ''marginal physical cost'' of ''additional electronic versions of sound recordings . . . embody[ing] musical works is zero); *see generally* W. Landes, *Copyright* in R. Towse, A Handbook of Cultural Economics at 100 (2d ed. 2011) (''[T]he cost of reproducing the [copyrighted] work that additional users can be added at a negligible or even zero cost.'') So, there is an important basic distinction between the marginal physical costs associated with creating additional units of ordinary private goods and additional digital copies of songs/sound recordings.

With regard to demand, there is a negative correlation between price and quantity (causing the equally well-known downward slope of a demand curve). *See, e.g., Krugman & Wells, supra,* at 63–64. This negative correlation is also the consequence of several factors. For present purposes, two factors are pertinent. First, a buyer's demand is a function of the benefit the buyer realizes from acquiring the good—what economists term ''utility.'' Second, buyers' ability to satisfy their desire for

[216] *Written Direct Testimony of Kelly Brost.*

[217] *Written Rebuttal Testimony of Leslie M. Marx.*

[218] *Written Direct Testimony of Rob Wheeler.*

[219] *Written Direct Testimony of Leslie M. Marx.*

[220] A ''private good is ''one that is both excludable and rival in consumption,'' *i.e.,* the supplier can prevent non-payers from consuming the good, and each unit of the good cannot be consumed by more than one person simultaneously. P. Krugman & R. Wells, *Microeconomics* at pp. G–2, G–7 (2d ed. 2009). The distinction between a private good and a public good is discussed *infra.*

utility is constrained by their ability to pay—what economists call a ''budget constraint.'' To simplify somewhat, the point where a buyer's utility and ability to pay intersect represents a point on the buyer's demand curve, indicating his or her ''Willingness to Pay'' (WTP).[221] *See Byun, supra* at 26–27 (The demand curve represents a mapping of all such points, reflecting both (1) the ''intuitive'' idea that the more expensive a good, the greater its ''budget'' impact, lowering the quantity demanded; and (2) diminishing marginal ''utility,'' as reflected in the buyer's willingness to pay [(WTP)] for additional units of the good); *see also* Pindyck & Rubinfeld, *supra,* at 83, 140 (''[P]references and budget constraints . . . determine how individual consumers choose how much of each good to buy . . . choos[ing] goods to maximize the satisfaction they can achieve, given the limited budget available to them.'' . . . [C]onsumers' demand curves for a commodity can be derived from information about their tastes . . . and from their budget constraints.'').[222] The market demand curve for an ordinary private good is the horizontal sum of all quantities demanded at each price reflected in the demand curves of all potential buyers. *Byun, supra,* at 27; *Pindyck & Rubinfeld, supra,* at 141.[223]

Importantly for the present proceeding, changes *along the demand curve* (*i.e.,* changes in *quantity demanded* in response to changes in price) must be distinguished from *changes in demand, i.e.,* shifts of the *entire demand curve* representing a different quantity demanded at each price. A movement ''down the demand curve'' would reflect an increase in new buyers whose WTP was equal to the lower price as the demand curve descends, *i.e.,* whose WTP was less than higher prices along the demand curve. By contrast, an upward shift of the entire demand curve can be the consequence of several factors, including a reduction in the price of a competing (substitute) good and a change in consumer tastes. *To reiterate, this distinction between an increase in quantity demanded and an increase in demand is of particular importance in this proceeding, as will be evident as I compare and contrast the parties' economic arguments. See Krugman & Wells, supra,* at 66–67 (''[W]hen you're doing economic analysis, it's important to make the distinction between changes in the quantity demanded, which involve movements along a demand curve, and shifts of the demand curve.'').

It is also important—especially in this proceeding—to distinguish markets vertically. There are two markets implicated in this proceeding. There is the *upstream* market for the sale and purchase of inputs, here, licenses for the collected copies (entire repertoires) of musical works embodied in the streamed sound recordings. There is also the *downstream* market for the sale and purchase of the final product, comprised of both (1) the right to listen to a given sound recording/musical work; and (2) an ''option'' value,'' *i.e.,* a right to *access* a large repertoire of sound recordings/musical works. The dynamics of these two markets are different, yet they are economically intertwined. They are economically *different* in certain obvious ways, in that the upstream market consists of licensors and licensees whereas the downstream market is comprised of streaming services and listeners (subscribers or users) with the markets exhibiting different degrees of (*inter alia*) competition, market power, homogeneity and preferences among the participants in each market. However, they are *interdependent* as well, because the upstream demand of the interactive streaming services for musical works (and the sound recordings in which they are embodied)—known as ''factors'' of production or ''inputs''—is derived from the downstream demand of listeners to and users of the interactive streaming services. This interdependency causes upstream demand to be characterized as ''derived demand.'' *See Krugman & Wells, supra,* at 511 (''[D]emand in a factor market is . . . *derived demand* . . . [t]hat is, demand for the factor is derived from the [downstream] firm's output choice.'').[224]

In perfectly competitive markets for ordinary private goods, prices tend toward an ''equilibrium'' price where there is an intersection between quantity demanded (on the demand curve) and the quantity supplied (on the supply curve). In that market, the positive price equals both marginal cost and marginal benefit.[225] That price would allow for a reasonable estimation of a per unit price that economists would be able to identify, in terms of economic efficiency, as a fair market price. *See, e.g.,* G. Niels, H. Jenkins & J. Kavanagh, *Economics for Competition Lawyers* ¶ 1.4.7 (2d ed. 2016) (The ''equilibrium price'' reflects ''allocative efficiency'' on the demand side and ''productive efficiency'' on the supply side.''); Nicholson & Snyder, *supra* at 469–72 (''[P]erfectly competitive markets lead to efficiency in the relationship between production [supply] and preferences [demand]. . . .'')[226]

This snapshot of a perfectly competitive market for an ordinary private good is described in the typical ''Economics 101'' course. However, because (as noted *supra*) the marginal physical cost of supplying an additional copy of a song/sound recording is essentially zero, at least one key condition for efficient per-unit pricing *does not exist.* A price above zero would not reflect allocative efficiency, because price must equal marginal cost to create such efficiency. However, at a price of zero—that is, equal to marginal cost—no supplier would have an economic incentive to incur the cost of producing the original version of the musical work. As one scholar has summarized:

There is a conflict between the competing goals of ensuring access to intellectual

[221] Thus, it is important to keep in mind that WTP incorporates ''Ability To Pay,'' when evaluating the distinctions among the interactive streaming services' various tier offerings and the issue of price discrimination. *See* C. Sunstein, *Willingness to Pay vs. Welfare,* 1 Harv. L. & Pol. Rev. 303, 310 (2007) (noting the ''need to make a distinction . . . between WTP and ability to pay . . . . When . . . people show a low WTP, it may be because their ability to pay is low [b]ut their low WTP does not demonstrate that they would gain little *in terms of welfare* from receiving the relevant good.'') (emphasis in original).

[222] When discussing consumer demand, economists often leave implicit the distinction between the budget constraint, which reveals an ability (or inability) to pay, and the WTP, by combining both in the WTP phrase. In this Dissent, I shall use the WTP phrase in its combined form, unless distinction is of some importance in this proceeding.

[223] These two aspects of demand are reflected in the present proceeding by the services' attempts to design a ''range of products'' with different ''price points'' (reflecting consumers' varying budget constraint/WTP) and ''features to accommodate preferences'' (reflecting differences in utility). *See, e.g.,* Phillips WDT 16 (describing Pandora's design of its new interactive streaming offerings).

[224] Importantly, this economic interdependency exists as a matter of law as well as economics in this proceeding. Section 801(b)(1)(A) *explicitly* makes the link between the upstream and downstream markets relevant to the setting of upstream rates in this proceeding, by instructing the Judges to set upstream rates that ''maximize the availability of creative works to the public,'' *i.e.,* to the downstream listeners.

[225] If the market is imperfect, i.e., if the seller has some market power, then the positive price will exceed marginal cost.

[226] There are other particular requirements that must be satisfied for a market to be perfectly competitive such that the resulting price reflects these fair market efficiencies. *See Mansfield & Yohe, supra* at 290–91 (Perfect competition requires: (1) Homogeneous products across sellers; (2) no seller or buyer is so large as to affect the product price (*i.e.,* all participants are *price-takers* rather than *price-makers*; (3) all resources are completely mobile across markets, *i.e.,* they can freely enter or exit the market); and (4) all market participants (consumers, producers and input suppliers) have ''perfect knowledge'' of all relevant information.

property at a price equal to marginal cost and providing incentives for the production of information. Finding the balance between access and incentives arising from the free access and exclusive rights norms is characterized as the static/dynamic dilemma or the short-run/long-run dilemma.

D. Barnes, *The Incentive/Access Tradeoff,* 9 Nw. J. Tech. & Intell. Prop. 96, 96 (2010).

The distinction between normal private goods and intellectual property applies specifically in the markets for musical works and sound recordings. As a Canadian scholar recently explained:

For normal goods and services, the optimal level of consumption is generally considered to be the level achieved when the price of the good is equal to its marginal production cost. . . . This level corresponds to what economists call a first-best optimum, which requires that fixed costs be covered one way or another. A competitive market is generally the preferred mechanism for defining and achieving an optimal level of production and consumption for normal goods.

With information goods or assets, the problem is somewhat more difficult since the same unit . . . think of a musical work or sound recording . . . can be listened to and enjoyed many times by many different users or consumers now and in the future as consumption does not destroy or alter the unit in question.

M. Boyer, *The Competitive Market Value of Copyright in Music: A Digital Gordian Knot,* Toulouse School of Economics Working Paper at 18 (Sept. 2017) (emphasis added).[227]

Economists have analyzed and modeled this conundrum, utilizing approaches beyond those in a basic ''Economics 101'' classroom. *See* P. Samuelson, *Aspects of Public Expenditure Theories,* 40 The Rev. of Econ. & Statistics, 332, 336 (1958) (when attempting to price additional copies of public goods with marginal costs approximating zero ''the easy formulas of classical economics no longer light our way.'').

Copies of intellectual property goods, including especially electronic copies, are understood not to be ''private'' goods as in the simple model sketched *supra,* but rather are ''quasi- public goods.'' A ''public good'' has two characteristics. First, it has a zero marginal production cost (formally, they are ''non-rivalrous in consumption,'' because consumption of one unit does not prevent another unit from being consumed). Second, the provider of the public good cannot prevent consumption of the good by non-payers (formally, ''non-excludability''). *See Nicholson & Snyder, supra,* at 679. A ''quasi-public good'' (sometimes called an ''impure public good'' or a ''mixed good'') possesses only one of these two public goods characteristics. *See, e.g.,* G. Dosi & J. Stiglitz, *The Role of Intellectual Property Rights in the Development Process, with Some Lessons from Developed Countries: An Introduction* at 6, Inst. of Economics, Laboratory of Economics and Management, Working Paper 2013/23 (Nov. 2013) (defining a quasi-public good as one where either ''it is . . . hard to exclude others'' or, ''even if it were possible, it is inefficient to do so.''). In the market at issue in this proceeding, one person's accessing of a streamed copy of sound recording (and the musical work embodied within it) on an interactive streaming service is not in rivalry with another person's listening to a copy of the same sound recording/song (*i.e.,* one person's listening does not cause a marginal increase in physical cost to the licensors),[228] but the licensors can *exclude* any person from listening who does not subscribe to or register with the interactive streaming service. When piracy is uncontrolled, copies of sound recordings (and the musical works embodied therein) resemble pure public goods. When piracy is reduced, these reproductions are more in the nature of quasi-public goods, because they are still not rivalrous in consumption.

An additional complexity: The products supplied in the market (upstream and downstream) in this proceeding are not simply *individual* copies of discrete musical works. Rather, the product is the *collection* of repertoires of musical works, collectivized (through ownership, administration and distribution) by the music publishers and, in final (downstream) delivery), through the major record companies (and a constellation of smaller publishers).

These collective activities are highly concentrated among only a few such publishers. As noted *supra,* the four largest publishers—Sony/ATV ([REDACTED] percent), Warner/Chappell ([REDACTED] percent), Universal Music Publishing Group (UMPG) ([REDACTED] percent), and Kobalt Music Publishing ([REDACTED] percent)—collectively accounted for just over 73 percent of the top 100 radio songs tracked by Billboard[229] as of the second quarter in 2016. Katz WDT ¶ 46. The collective nature of the principal music publishers is further made clear from the testimony of their witnesses in this proceeding. *See Witness Statement of Peter Brodsky* ¶ 5 (Brodsky WDT) (Sony/ATV Music Publishing owns and administers ''the largest catalog of musical compositions in the world, with over [REDACTED] songs written by [REDACTED] of songwriters''); *Witness Statement of David Kokakis* ¶ 10 (Kokakis WDT) (UMPG owns and administers [REDACTED] compositions); *Witness Statement of Gregg Barron* ¶ 5 (BMG owns and administers [REDACTED] compositions); *Witness Statement of Annette Yocum* ¶ 8 (Warner/Chappell owns and administers [REDACTED] compositions).[230]

The mechanical license thus is in the nature of a blanket license (notwithstanding that the interactive streaming service must first serve a Notice of Intention (NOI) on the copyright owner in order to utilize the statutory mechanical license in connection with each individual song). 17 U.S.C. 115(b); 37 CFR 201.18). Much of the economic value of a collection of millions of copyrights within one publishing umbrella lies in the economizing on transaction costs—allowing large entities to administer the copyrights. *See generally* S. Besen, S. Kirby and S. Salop, *An Economic Analysis of Copyright Collectives,* 78 Va.L.Rev. 383 (1992); R. Watt, *Copyright Collectives: Some Basic Economic Theory,* reprinted in R. Watt (ed.),

[227] This point highlights a particular distinction between private goods and products with public good characteristics (discussed *infra*), upending the ''economic efficiency'' principles of for private goods markets taught in an ''Economics 101'' class. *See* C. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation,*'' 155 U. Pa .L. Rev. 635, 638 (2007) (There is ''an interesting inversion of the conditions for the efficient allocation of private goods. For private goods, consumers pay the *same price* and signal the different valuations that they place on the good by purchasing *different quantities.* For pure public goods, consumers consume the *same quantity* of production and signal the intensity of preferences by their willingness to pay *different prices.*''). This principle is particularly applicable in response to the argument that economic efficiency is fostered by per-unit pricing in the market at issue in this proceeding.

[228] This non-rival aspect of streamed music is not only a theoretical underpinning of the interactive markets, but also is the crucial basis for the services' plans (discussed *infra*) to achieve ''scale'' and, ultimately, profitability, as discussed *infra. See generally* J. Haskel & S. Westlake, *Capitalism without Capital* at 66 (2017) (''From an economic point of view, scalability derives from . . . what economists call 'non-rivalry.' '').

[229] This Billboard measure tracks songs played on AM–FM terrestrial radio broadcasters, which are not required to license the works or the sound recordings they play.

[230] The sound recording market is also highly concentrated. *See* Marx WDT ¶ 149 (''The three major labels, Sony Music Entertainment, Inc., Warner Music Group, and Universal Music Group ('UMG'), account for roughly 65% of US recording industry revenue.''). Also, the performance rights collectives are highly concentrated, with ASCAP and BMI representing over 90% of the songs available for licensing in the United States. *See Register's Report* at 20.

Handbook on the Economics of Copyright at 168–170 (2014).[231]

However, along with the efficiencies of collective ownership comes the market power of the collective. As has been noted:

> In so much as copyright law establishes a . . . monopoly of each copyright holder in his or her own item of intellectual property, copyright collectives imply an even larger monopoly situation for entire specific types of intellectual property in general. Exactly how this monopoly power affects social welfare is a natural point of discussion. . . . [T]here are social costs involved when a natural monopoly[232] is run by only one firm, since that firm will not sell its output at the socially optimal price, but rather at the pure profit maximizing price. It is for this reason that most natural monopolies are subject to heavy regulation. . . . The administration and marketing of intellectual property has many aspects of a natural monopoly. . . . The fact that unregulated copyright collectives do not achieve a social optimum establishes strong theoretical foundations for arguing that such collectives should be regulated.

R. Watt, *Copyright and Economic Theory: Friends or Foes* at 163, 190 (2000); *see also* C. Handke, *The Economics of Collective Copyright Management* at 9, reprinted in Watt, *Handbook of the Economics of Copyright, supra* (entities controlling a collection of copyrights are natural monopolies).

Thus, the ''product'' that is licensed to interactive streaming services can be modeled not merely as the individual musical work or sound recording, but also as *access* to copies of a large repertoire of songs. Such access can be offered through various delivery channels, such as interactive streaming, noninteractive streaming and satellite radio.

At this point of analysis, therefore, the concept of ''opportunity cost'' is of particular importance.[233] When a collective sets the royalty rate to be paid by a distribution channel to provide such downstream access, in order to maximize profits, it must: (1) Consider potential royalty revenue from the various distribution channels; (2) determine whether these distribution channels/licensees serve overlapping downstream listeners; (3) minimize opportunity costs by attempting to equalize (on the margin) royalty revenue paid by such overlapping licensees; (4) refuse licenses to distributor categories that would ''cannibalize'' higher royalty revenues from other distribution channels; and (5) identify the distribution channels that provide access to listeners who would not otherwise pay for a higher-priced distribution channel because of their low WTP (*i.e.,* distribution channels and listeners that do not cause ''substitution'' or ''cannibalization'').

For the category of services that fall in number (5) above, licensors would negotiate a royalty without regard to opportunity cost (*i.e.,* without fear of ''substitution'' or ''cannibalization''), because *no such opportunity costs would be present. Compare Expert Report of Joshua Gans on Behalf of Copyright Owners* ¶ 50 (Gans WDT) (''The opportunity cost of licensing musical works to a given interactive streaming service depends on the royalty income lost as a result of doing so. There are numerous potential sources of that lost royalty income, including lost revenue from another interactive streaming service (that may pay higher rates), as well as lost physical sales, downloads and radio/webcasting revenue.'') *with* Hubbard WRT ¶ 4.3 (''a songwriter's opportunity cost of licensing to a service that is both market expanding and that does not ''cannibalize'' users from other services is relatively low.'').

Thus, the simple ''Economics 101'' model—which *suggests* a simple single per-unit price—is not applicable. (''We are not in Kansas anymore,'' or, to repeat Professor Samuelson's elegant phraseology, ''the easy formulas of classical economics no longer light our way.''). Accordingly, to analyze the parties' proposed rate structures, the Judges must consider economic models informed by the economic principles that reflect these market realities. Fortunately, the Judges hardly are operating in a vacuum, either in a theoretical or practical sense, given the testimony provided by the economic witnesses in this proceeding.

One analytical approach to the issues raised by the economics of copyrights involves the application of concepts from the sub-field of ''welfare economics.'' As one of Copyright Owners' economist-experts noted, the pricing issue raised in this proceeding invokes principles from the branch of this sub-discipline. 3/27/17 Tr. 3032 (Watt) (defining ''welfare economics'' informally as ''what economists use when we talk about efficiency and we talk about producer/consumer surplus and things like that.'')[234]; *see also* Pindyck & Rubinfeld, *supra,* at 590 (defining ''welfare economics as the ''normative evaluation of markets and economic policy.''). A core principle of welfare economics, and thus of economics *writ large,* is the ''theory of the second best.''[235] Simply stated—and in a manner applicable here—the theory provides: ''When it is not possible to obtain the most desirable economic outcome in a situation—*marginal cost pricing in this case*—society has to compromise and accept the next most desirable outcome.'' A. Schotter, *Microeconomics: A Modern Approach* at 427–428 (2009) (emphasis added).[236] It is accurate to state that the Judges' practical task in this case is to determine a rate structure and rates that are economically ''second best'' in this economic context and satisfy the *legal* requirements of section 801(b)(1).

Because the theory of the second best by its very nature does not provide for a single ''first best'' outcome, it provides ammunition for all economic experts in this proceeding to use to take pot shots at the models and proposals put forth by their adversaries. If no alternative is ''first best,'' then each suffers from *some* imperfection or market distortion compared with the unattainable ''first best'' outcome in a perfectly competitive market. But because the ''first best' solution is unattainable, levying such criticisms is akin to shooting fish in a barrel.

The salient criticisms, and the difficult task for this tribunal, involve

[231] The economic concept of a collective organization is broader than the more common and narrow conception of ''collection societies'' as limited to PROs. *See* A. Katz, *Copyright Collectives: Good Solution, But for Which Problem,* at 2, n.7, *reprinted in* R. Dreyfuss & D. Zimmerman (eds.) *Working Within the Boundaries of Intellectual Property Law* (2010) (''The term 'copyright collectives' encompasses various types of organizations, with different mandates, structures, forms of governance and regulatory oversight.'').

[232] When large publishing houses or major record labels control large swaths of the market, and their products are ''must haves,'' they are ''complementary oligopolists'' rather than monopolists, a difference that leads to supranormal pricing and greater inefficiencies than arise from monopoly. *See Web IV,* 81 FR 26316, 26348 (May 2, 2016).

[233] To repeat, the ''opportunity cost'' of using an input is the foregone value of the most highly-valued *alternative* use of that input. *See generally Pindyck & Rubinfeld, supra,* at 689 (defining ''opportunity cost'' as the ''[c]ost associated with opportunities that are foregone when a firm's resources are not put to their best alternative use.'').

[234] It should be noted that Professor Watt decidedly rejects the applicability of welfare economics as a tool with regard to Factor A of section 801(b)(1)—unless ''availability'' were to be equated with ''use'' of copyrighted musical works. *See id.* at 3033.

[235] The ''Theory of the Second Best'' was originally developed more than sixty years ago. *See R. G. Lipsey and K. Lancaster, The General Theory of Second Best,* 24 Rev. Econ. Stud. 11 (1956–1957).

[236] As Professor Marx notes, the first theorem of welfare economics provides ''that the allocation of resources is efficient in a general equilibrium with perfect competition, and in a perfectly competitive market, price equals firms' marginal cost. Marx WDT ¶ 116 n.129 (citing B. Douglas Bernheim and Michael D. Whinston, *Microeconomics* 561–62, 601–02).

weighing various ''second best'' alternatives, as presented through—*and limited by*—the record, to identify the rate structure that better satisfies the statutory criteria, as construed by the D.C. Circuit and prior applicable determinations and decisions by the Judges, their predecessors, the Librarian and the Register. *See* 17 U.S.C. 803(a)(1).

At the theoretical extremes are two unacceptable approaches to rate-setting: (1) setting price equal to the marginal physical cost of copying, which is zero; and (2) setting price on a per unit basis that exceeds marginal physical cost. In the chasm between these two inadequate approaches exist many alternative rate structures with varying rates for various segments of the market. In general terms, these alternative rate-setting structures are forms of ''price discrimination,'' which, in the broadest sense, means simply a departure from a single, per-unit price. *See, e.g.,* H. Varian, *Intermediate Microeconomics: A Modern Approach* 462 (2010) (defining ''price discrimination'' as''[s]elling different units of output at different prices''). For example, rates based on a percent-of-revenue (even without any alternative rate prongs) are themselves a blunt form of price discrimination. J. Cirace, *CBS* v. *ASCAP: An Economic Analysis of a Political Problem,* 47 Ford. Rev. 277, 288 (1978) (''A license fee based upon a percentage of gross revenue is discriminatory in that it grants the same number of rights to different licensees for different total dollar amounts, depending upon their ability to pay [and] [t]he effectiveness of price discrimination is significantly enhanced by the all-or-nothing blanket license.''); W.R. Johnson, *Creative Pricing in Markets for Intellectual Property,* 2 Rev. Econ. Rsch. Copyrt. Issues 39, 40–41 (2005) (identifying revenue sharing licenses as a form of price discrimination).[237]

The Judges have utilized a price discriminatory approach previously to reflect a segmented marketplace. In *Web IV,* the Judges set three *different* per play royalty rates for sound recording licenses for noninteractive services pursuant to section 114; one rate for ad-supported services; a higher rate for subscription services; and a lower rate for educational broadcasters. *See Web IV, supra,* 81 FR at 26346, 26405, Likewise, in the rate court, the royalty rate paid to songwriters for performances on noninteractive services is lower than the rate paid for performances on interactive services. *See In re Pandora Media,* 6 F.Supp.2d 317, 360 (S.D.N.Y. 2014), *aff'd sub nom Pandora Media, Inc.* v. *ASCAP,* 785 F.3d 73 (2d Cir. 2015) (setting noninteractive performance royalties paid by noninteractive services below the rate by interactive services, and noting that ''[i]f there was one principle regarding rate structure on which the parties agreed at trial it was that the rate for customized radio should be set below the rate for on-demand interactive services.'').

Perfect price discrimination (*i.e.,* ''first-degree'' price discrimination) is essentially not possible. (For example, a senior discount may be afforded to a millionaire who has a WTP, based in part on income, far above the price imputed in his or her senior discount.) *See generally Nicholson & Snyder, supra,* at 505 (''First-degree price discrimination poses a considerable information burden for the monopoly—it must know the demand function for each potential buyer.''). However, the existence of any imperfection, whether in a price discriminatory royalty or any royalty, is not indicative of the unacceptability of the price structure as an appropriate benchmark or statutory rate structure. Rather, such imperfections must be weighed against the imperfections in any other proffered pricing structure. Thus, when a regulator is tasked with rate-setting, the process inescapably requires the use of informed judgment in order to consider the competing benefits and costs of any proposed rate structures and levels. *See generally* 1 A. Kahn, *The Economics of Regulation* 198 (1970) (''The decision about what kinds of modifications second-best considerations recommend can be made only by looking at the facts in each individual case. No set of economic principles can substitute for the use of judgment in their application.''). In the present context, that judgment is informed through the adjudicatory process that places the economic experts of the licensors and licensees in an adversarial proceeding, revealing the strengths and weaknesses of their approaches, through direct and rebuttal written testimony, direct and cross-examination, and inquiries from the Judges.[238]

I consider these various approaches in the context of the foregoing economic principles.

G. The Parties' Proposals

1. The Services (*i.e.*, excluding Apple)

The Services propose respective rates and rate structures that—while varying in their particulars—share a number of common elements. Broadly, the Services propose a rate structure that in the main continues the current rate structure. More particularly, the Services' proposals share the following core elements:

(1) the rate should *continue* be set as an ''*All-In*'' rate for musical works licenses, *i.e.,* a mechanical rate that permits all services to deduct royalties paid to the same rights holders and their agents for performing rights;

(2) the rate should *continue* to be structured as a percentage of revenue, subject to certain minima; and

(3) the ''*All-In*'' headline rates should continue, with the subpart B headline rate maintained at 10.5% of revenue.

However, the Services propose that the ''Mechanical Floor'' in the existing rate structure be *discontinued.*

The principle additional and differing particulars of the rate structures proposed by each Service are set forth below.

a. Amazon

In its May 11, 2017 ''Proposed Rates and Terms'' (*Amazon Proposal*), Amazon proposes that the rate structure as currently set forth in the applicable regulations should rollover into the 2018–2022 rate period, except as otherwise proposed by Amazon. *Amazon Proposal* at 1. In that regard, the following elements comprise the core structure of Amazon's proposed

[237] Even in the case of an ordinary private good with increasing marginal costs, sellers will prefer to price discriminate, increasing the ''producer surplus'' and shrinking the ''consumer surplus,'' if they can identify the WTP of different segments of the demand curve and can avoid after-market arbitrage (*i.e.,* avoiding low WTP buyers re-selling to higher WTP buyers and thus depriving sellers of the benefits of price discrimination). *See Nicholson & Snyder, supra,* at 503 (''whether a price discrimination strategy is feasible depends crucially on the inability of buyers of the good to practice arbitrage.''). Further, sellers of cultural goods generally use price discrimination when they have excess supply and temporally-limited demand. *See* W. Baumol, *Applied Welfare Economics,* in R. Towse, *A Handbook of Cultural Economics* at 26 (1st ed. 2003) (noting that for theatres ''[s]olvency generally requires price discrimination,'' thereby avoiding the economic loss arising from ''half-empty theatres''). Moreover, even sellers of all sorts of goods, and *even in a competitive market,* will find it rational to attempt to use price discrimination whenever it becomes apparent that marginal sales at lower prices to low WTP buyers will at least cover some fixed costs. *See* W. Baumol, *Regulation Misread by Misread Theory: Perfect Competition and Competition-Imposed Price Discrimination* at 6 (2005) (''[U]nder competitive conditions the firm will normally be forced to adopt discriminatory pricing wherever . . . feasible. . . . [U]niform pricing is not to be taken as the normal characteristic of equilibrium of the competitive firm.''). Thus, the ''general'' per-unit pricing presented in Economics 101 may not be quite so ubiquitous, placing any per-unit pricing proposal in this proceeding on even more tenuous grounds.

[238] Thus, in contrast with the Majority Opinion, this Dissent does not attempt to arbitrarily select disparate elements from the record to create, post-hearing, *a rate structure that was not subject to this adversarial process.*

rate structure that would constitute changes in the current regulations:

- The per subscriber minimum and/or subscriber-based royalty floors for a ''family account'' should equal 150% of the per subscriber minimum and/or subscriber-based royalty floor for an individual account.
- A student subscription account discount of 50% should be included in the regulations to the per subscriber minimum and subscriber-based royalty floor that would otherwise apply under the current regulations.
- A discount for annual subscriptions equal to 16.67% of the minimum royalty rate (or rates) and subscriber-based royalty floor (or floors) that would otherwise apply under § 385.13.
- A 15% discount to the minimum royalty rate (or rates) and subscriber-based royalty floor (or floors) to reflect a service's actual ''app store'' and carrier billing costs, not to exceed 15% for each.

Amazon Proposal at 1–2.

b. Google

As noted *supra,* in its May 11, 2017 ''Amended Proposed Rates and Terms'' (*Google Amended Proposal*),[239] Google proposes a rate structure that combines certain elements, eliminates other elements and uses specific rates, together *in a combination that was not presented at the hearing.*[240] Specifically, the *Google Amended Proposal* set forth a rate structure that ''eliminat[es] . . . different service categories'' and replaces them with ''a single, greater-of rate structure between 10.5% of net service revenue and an uncapped 15-percent TCC component.'' *Id.* at 1.[241] Similar to one of Amazon's proposals, Google also seeks a discount in rates for ''carrier billing costs'' and ''app store commissions,'' plus ''credit card commissions'' and '''similar payment process charges,'' all not to exceed 15%. *Id.* at 6 (for subpart B); 26 (for subpart C).[242]

Google also proposed a new rate of 13% of the record company's total wholesale revenue from the music bundle in accordance with GAAP for the provision of music bundles under subpart C, where the record company is the licensee. *Google Amended Proposal* at 33–34. Additionally, Google proposed a new royalty of 15% ''of the applicable consideration expensed by the service, if any . . . incremental to the applicable consideration expensed for the right to make the relevant permanent digital downloads and ringtones.'' *Id.* at 34.[243]

However, Google is in favor of the general elements of the Services' proposal, set forth *supra,* if the Judges were to: (a) reject its amended proposal *in toto, see Google's Proposed Findings of Fact and Conclusions of Law* ¶ 8 (Google PFF); or (b) adopt Google's amended proposal but incorporate a TCC rate greater than the 15% proposed by Google. *See id.* ¶ 47.

c. Pandora

In its May 11, 2017 ''Proposed Rates and Terms (As Amended)'' (*Pandora Amended Proposal*),[244] Pandora seeks the following changes from the current regulations:

- Elimination of the alternative computation of subminimums I and II now in § 385.13 and in § 385.23 (for subparts B and C respectively) ''in cases in which the record company is the Section 115 licensee.''
- A broadening of the present ''not to exceed 15%'' reduction of ''Service Revenues'' in § 385.11 to reflect, *in toto,* an exclusion of costs attributable to ''obtaining'' revenue, ''including [but not expressly limited to] credit card commissions, app store commissions, and similar payment process charges.''[245]
- A discount on minimum royalties for student plans ''not to exceed 50%'' off minimum royalty rates set forth in § 385.13.

Id. at 1, 7.

d. Spotify

In its May 11, 2017 ''Second Amended Proposed Rates and Terms'' (*Spotify's Second Amended Proposal*), Spotify seeks the following changes from the current regulations:

- For all licensed activity, the ''mechanical-only'' royalty floor should be removed, *i.e.,* removed from §§ 385.12(b)(3)(ii) and 385.13(a)(1) & (3) for: (a) standalone non-portable subscription-streaming only; and (b) standalone portable subscriptions service.
- A broadening of the present ''not to exceed 15%'' reduction of ''Service Revenues'' in § 385.11 to reflect, *in toto,* an exclusion of the actual costs attributable to ''obtaining'' revenue, ''including [but not expressly limited to] credit card commissions, app store commissions similar payment process charges, and actual carrier billing cost.''

2. Apple

Apple proposed that the Services pay or $0.00091 for each non-fraudulent stream of a copyrighted musical work lasting 30 seconds or more. *Apple Inc. Proposed Rates and Terms* (as amended) at 3–4. Apple proposed defining a use as any play of a sound recording or a copyrighted work lasting 30 seconds or more. Additionally, Apple proposed an exemption for a ''fraudulent stream,'' which it proposes be defined as ''a stream that a service reasonably and in good-faith determines to be fraudulent.'' *Id.* at 2.

For paid locker services, Apple proposes a $0.17 per subscriber fee, also as a component of an ''All-In'' musical works royalty rate that would include the ''Subpart C'' royalty, the mechanical royalty, and the public performance royalty. *Id.* at 7–8. For purchased content locker services, Apple proposes a zero royalty fee. *Id.* at 7.

3. Copyright Owners

The Copyright Owners proposed that the Judges adopt a unitary greater-of rate structure for all interactive streaming and limited downloads that are currently covered by Subparts B and C.[246] Copyright Owners' Amended Proposed Rates and Terms, at 3 (May 11, 2017) (Copyright Owners' Amended Proposal). The proposal was structured as the greater of a usage charge and a per-user charge. Specifically, each month the licensee would pay the greater of (a) a per-play fee ($0.0015) multiplied by the number of interactive streams or limited downloads during the month and (b) a per-end user[247] fee

[239] The *Google Amended Proposal* amended its original proposal filed on November 1, 2016. Google originally proposed a subpart B rate structure that generally followed the existing structure. *Google Written Direct Statement, Introductory Memorandum* at 3 (Nov. 1, 2016).

[240] Google's post-hearing proposal appears to have been an impetus for the majority to invent its own post-hearing structure of rates, albeit different in its particulars even from Google's post-hearing proposal.

[241] As noted *supra,* ''TCC'' is an industry acronym for ''Total Content Cost.''

[242] Google describes this proposed change as a change in the definition of ''Service *Revenue,*'' unlike Amazon, which described its proposed 15% discount as a change in *rates.* The difference is mathematically irrelevant, and, for the sake of completeness and consistency, these 15% discount proposals are treated here as proposed changes in *rates.*

[243] Google's proposed single 10.5% TCC rate does not include the ''Mechanical-Only Floor'' that Pandora and Spotify expressly seek to eliminate. The ''Mechanical-Only'' Floor, found in 37 CFR 385.15, ensures that music publishers and songwriters will receive no less than a fixed per-subscriber amount of between $0.25 and $0.50, regardless of the amount that remains after deduction of musical works performance royalties from the ''All-In'' rate.

[244] The *Pandora Amended Proposal* superseded its original proposal filed on November 1, 2016, by adding definitions (for ''fraudulent streams'' and ''play'') that do not *directly* relate to the royalty rates. *See Pandora Media, Inc.'s Proposed Findings of Fact and Conclusions of Law* Appx. C (Pandora PFFCOL).

[245] Pandora does not expressly describe this change as a change in rates *per se.*

[246] The Copyright Owners' rate proposal would apply the subpart A rates to so-called ''music bundles'' (''offerings of two or more Subpart A products to end users as part of one transaction'') which are currently covered by subpart C. Id. at 3 nn. 2 & 4.

[247] Copyright Owners' original proposal defined ''end user'' as any person who ''had access'' to a standalone music service. *Id.* at 8–9. However, Copyright Owners narrowed their proposed definition of ''end user'' to include any person who (a) pays a fee for access to a standalone music

Continued

($1.06) multiplied by the number of end users during the month. *Id.* at 8. The license fee would be for mechanical rights only, and would not be offset by any performance royalties that the licensee paid for the same activity (*i.e.,* the existing ''All-In'' aspect of the rate structure would be eliminated). *Id.*

H. The Structure of the Rates for the Forthcoming Rate Period

1. Per-Play or Percent of Revenue (with Minima)

a. Copyright Owners'/Apple's Argument for a Per-Unit Rate [248]

Copyright Owners and Apple emphasize that a per play royalty rate structure, as compared with a percent of revenue-based structure, provides transparency and simplicity in reporting to songwriters and publishers, because it requires only one metric besides the rate itself—the number of plays, making it much easier to calculate and report, and for songwriter/licensors to understand. *See, e.g.,* Rysman WDT ¶ 56; Wheeler WDT ¶ 19; *Expert Report of Anindya Ghose November 1, 2016* ¶¶ 83–84 (Ghose WDT); Ramaprasad WDT ¶ 41; Brodsky WDT ¶ 76; 3/22/17 Tr. 2476–78 (Dorn); 3/22/17 Tr. 2855–56 (Ghose). Relatedly, Copyright Owners argue that a transparent metric tied to actual usage is superior because, under the alternative percent-of-revenue approach, services can manipulate revenue through bundling, discounting, and accounting techniques. Licensors also note that licensees' might defer service revenues and emphasize increasing market share rather than profits. Rysman WDT ¶¶ 43–45.

Copyright Owners and Apple contrast their proposed per play approaches with the current rate structure, which they characterize as cumbersome and convoluted. They emphasize that under the current rate structure, the services must perform a series of different greater of and lesser of calculations, depending on a service's business model, to determine which prong of the rate structure is operative. *Proposed Findings of Fact of Copyright Owners* ¶ 16 (COPFF) (and record citation therein). Copyright Owners assert that because of this complexity, publishers and songwriters cannot easily verify the accuracy of data the services input when calculating royalty payments. *See* Brodsky WDT ¶ 76; Ghose WDT ¶¶ 80, 81, 82; Ramaprasad WDT ¶¶ 4, 38, 42–44; Rysman WDT ¶ 57; 3/23/17 Tr. 2865 (Ghose); 3/22/17 Tr. 2477–78 (Dorn).

Beyond the issue of complexity, Copyright Owners and Apple argue that interactive streaming services do not need the present *upstream* rate structure in order to adopt any particular *downstream* business model. Rather, Copyright Owners and Apple assert that a per-play structure would establish a level of equality in the royalty rates across these services, without regard to business models, and the services could price downstream in whatever manner they choose. But regardless of the downstream pricing structure, songwriters and publishers would be paid on the same transparent, fixed amount—without advantaging any one business model over another. *See, e.g.,* 3/23/17 Tr. 2849, 2863 (Ghose)

Thus, Copyright Owners and Apple maintain that a royalty based on the number of *plays* aligns the compensation paid to the creators of the content with the *actual demand* for and consumption of their content. Ghose WDT ¶ 84; Rysman WDT ¶¶ 9, 58; *Testimony of David Dorn* ¶ 33 (Dorn WDT).

Copyright Owners further argue that the present rate structure's failure to measure royalties based on per play consumption is counterintuitive, because it permits a decreasing *effective* per play rate even as the quantity of songs that listeners ''consume'' via interactive streaming is increasing. Israelite WDT ¶ 39. Copyright Owners note, for example, that listening to [REDACTED] increased from [REDACTED] streams in July 2014 to [REDACTED] streams in December 2016, a *fifteen-fold increase in the number of streams.* Hubbard WRT, Ex. 1; *id.* at WRT ¶ 2.22; 4/13/17 Tr. 5971–72 (Hubbard). However, contemporaneously [REDACTED] *mechanical royalty payments to the Copyright Owners only increased* [REDACTED]. (Hubbard WRT ¶ 3.9; 4/13/17 Tr. 5971–73 (Hubbard). The upshot, Copyright Owners assert, is that, as streaming consumption increased dramatically from 2014 to 2016, the effective per stream mechanical royalties paid by [REDACTED] to Copyright Owners decreased from [REDACTED]to [REDACTED]. 4/13/17 Tr. 5972–73 (Hubbard).

Finally, Copyright Owners assert that a per-unit rate is appropriate because a musical work has an ''inherent value.'' *See, e.g.,* Israelite WDT at 10; ¶¶ 29(B), 30, 31(C); Brodsky WDT ¶ 68 At the hearing, NMPA's president, Mr. Israelite explained how he construes the ''inherent value'' of a musical work: ''[W]homever owns an individual copyright is the one to define it. I think that would be the most appropriate definition of it. What someone is willing to license it for would be that inherent value to that owner. That would be my view. . . . That would be the market value.'' 3/29/17 Tr. 3707 (Israelite).

b. The Services' Arguments in Opposition to a Per-Play Rate Structure

The Services make several arguments in opposition to the use of a proposed per-play royalty rate. The overarching theme of these arguments is that an inflexible ''one size fits all'' rate structure would be ''bad for services, consumers, and the copyright owners alike.'' *Services' Joint Proposed Findings of Fact and Conclusions of Law* at p. 89 (SJPFF).

First, they argue that an upstream per-play rate would not align with the downstream demand for ''all-you-can-eat'' streaming services. As Professor Marx testified, a per stream fee introduces a number of distortions and inefficiencies, encouraging a capping of downstream plays and reduces incentives for services to meet the demand of consumers ''who are going to stream a lot of music.'' Marx WDT ¶¶ 130–131. In this vein, Pandora's then president, Michael Herring, noted that a per-play consumption-based model where the revenue is fixed per user creates uncertainty and volatility around prospective margins, and the uncertainty discourages investment and hampers profitability. 3/14/17 Tr. 894–95 (Herring). Mr. Herring notes that this a general economic problem that occurs when a retail subscription business has fixed subscription revenues per customer but costs that are variable and unpredictable because the downstream quantity of units accessed are themselves variable and unpredictable. *Written Rebuttal Testimony of Michael Herring* ¶ 17 (Herring WRT); 3/14/17 Tr. 894–98 (Herring). *See also* Mirchandani WDT ¶ 39 (one-size-fits-all rate is not ''offering agnostic'' as Copyright Owners claim, but rather is ''offering determinative.'')

Second, the Services argue that there is no ''revealed preference'' in the marketplace for musical works and sound recordings for a per-play royalty, as opposed to a percent of revenue royalty (with minima). In particular, they point out that mechanical royalties have never been set on a per play basis. *See* Herring WRT ¶ 19. The Services

service offering licensed activity during the relevant accounting period, or (b) makes at least one play of licensed activity during the relevant accounting period. This would apparently have the effect of, for example, excluding as an ''end user'' any Amazon Prime member or listener to Spotify's ad-supported service who did not listen to any song in the accounting period. *Copyright Owners' Amended Proposal* at 8.

[248] Copyright Owners' per-unit proposal contains two prongs in a greater-of structure. The first is a per-play prong, and the second is a per-user prong. The greater-of proposal is considered *infra.*

also point to the direct licenses interactive services regularly enter into with music publishers, PROs and record companies—[REDACTED]. SJPFF ¶¶ 174–75 (and record citations therein). They acknowledge that some of the agreements with record companies contain alternative *per-user* prongs, *id.*¶ 175, but they note that this is consistent with the existing rate structure which already contains a per subscriber minima, but not a per play prong. Further, the Services note that [REDACTED]. *See* 3/23/17 Tr. 2857 (Ghose); *see also* 3/22/17 Tr. 2479 (Dorn) (Apple paying [REDACTED] rate under direct licenses with publishers).

Third, the Services discount the argument that Copyright Owners' proposed rate structure is superior to the present rate structure because the latter is too complicated or cumbersome. They characterize this criticism as ''overblown,'' and further take note that the detailed nature of the structure is designed to ameliorate any problems associated with the use or calculation of a revenue-based headline rate, by the inclusion of per subscriber and TCC minima. SJPFF ¶ 174. They further note that section 801(b)(1) does not list as a criteria or objective that the rates must be simple or easy for songwriters to understand, or otherwise ''transparent.'' *Services' Joint Reply to Apple Inc.'s Findings of Fact and Conclusions of Law* at 34, 36 (SJRPFF–A). Thus, they argue, the Judges cannot jettison an otherwise appropriate rate structure because some unquantified segment of the songwriting community might be uncertain as to how their royalties were computed.

Finally, separate from these arguments against per-play rate proposals, the Services note a vexing problem related to Apple's specific proposal: How to convert the typical percent-of-revenue *performance royalty* into a per play rate in order to subtract it from Apple's proposed per play mechanical rate, so as to calculate the ''All-In'' rate? (This problem is irrelevant to Copyright Owners' proposal, because they propose the elimination of the ''All-In'' provision in the rate structure.) The Services note that Apple Music's Senior Director, David Dorn, was unable to explain how this calculation would be made. *See* 3/22/17 Tr. 2508–09 (Dorn). Thus, the Services assert that Apple's proposal would introduce ''more complexity, not less.'' SJRPFF–A at 34.

2. An Issue within the Per-Unit Approach: Copyright Owners' ''Greater-Of'' Rate Proposal

Copyright Owners propose a ''greater of'' per-unit structure, whereby the royalty would equal the greater of $.0015 per play and $1.06 per-end user per month. In support of this approach, Copyright Owners assert that it establishes a value for each copy that is independent of the services' business models and pricing strategies. Rysman WDT ¶ 89. They argue that the greater of structure is not any more complicated than a per play rate alone—and much less complicated than the 2012 rate structure—because adding a per-user royalty rate to the structure requires only one additional metric for royalty calculation—the number of users. Brodsky WDT ¶ 76. Copyright Owners also assert that their greater-of structure is a usage-based approach, aligned with the value of the licensed copies because each rate tier is tied to a ''particular use,'' as it couples rates with usage and consumption. CORPFF–JS at p. 22. Finally, Copyright Owners note that in music licensing agreements it is not uncommon to find royalty rates set in a greater of formula that includes a per user and a per play prong (as well a percent-of-revenue prong). *See* CORPFF–JS at p. 97 (and record citations therein).

The services (*i.e.,* including Apple) assert that the greater-of aspect of Copyright Owners' rate proposal would lead to absurd and inequitable results, well above the rates established under Copyright Owners' per-play rate prong. This point is explained in detail by Professor Ghose, one of Apple's economic expert witnesses. Professor Ghose explains that under Copyright Owners' greater of structure, interactive streaming services would pay under the per-user prong if the average number of monthly streams per user was less than 707. 4/12/17 Tr. 5686–5687 (Ghose). Thus, such a service would be required to pay the $1.06 per user rather than $0.0015 per stream. *Id.* at 5687. As an example, Professor Ghose used a hypothetical scenario in which a service had one user who listened to 300 streams in a given month. Under Copyright Owners' $0.0015 *per play* prong, the service would pay $ 0.0015 × 300, equal to $.45 in royalties. Under its *per user* prong, the service would pay a royalty of $1.06 for the one user, which is an *effective* per play rate of 1.06 ÷ 300, which equals effectively $ 0.0035 per play, more than two times the $0.0015 rate under the stated per play prong. 4/12 Tr. 5687 (Ghose).

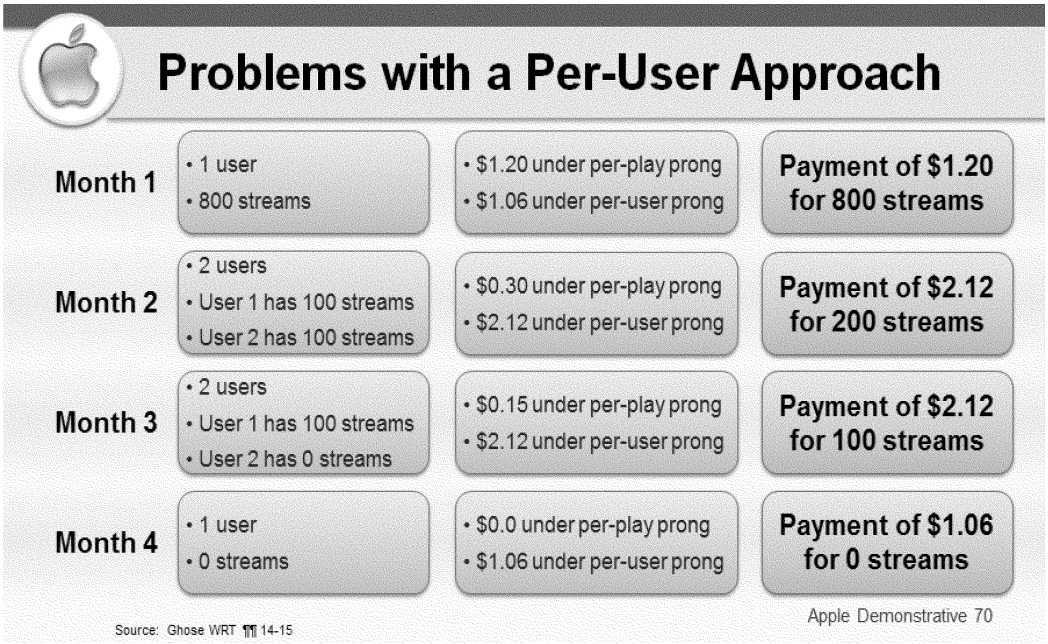
Importantly, Apple argues from the record evidence that Professor Ghose's example is representative, because services monthly streams have historically been less than 707. More granularly, relying on data in Dr. Leonard's written rebuttal testimony, Apple contends that the annual weighted average number of streams per-month per-user across current Subpart B and Subpart C services has always been below [REDACTED] in each year from 2012 to 2016. *See* Leonard WRT Ex. 3b. More particularly, the number of monthly per user streams for each of those five years was [REDACTED] (in 2012), [REDACTED] (in 2013), [REDACTED] (in 2014), [REDACTED] (in 2015) and [REDACTED] (in 2016). *Id.* Additionally, the average number of streams per-month per-user has exceeded 707 (which would trigger the per play prong) [REDACTED] according to the service-by-service data. *Id.* (Deezer averaged [REDACTED] streams in 2014 and Tidal averaged [REDACTED] streams in 2016. *Id.*) Apple argues that this historical data indicates that the services would consistently pay more than the $0.0015 per play rate. *See Apple Inc.'s Findings of Fact and Conclusions of Law ¶* F284 (Apple PFF).[249]

According to Apple, even Copyright Owners' own expert, using different data, found that [REDACTED] services he reviewed would have been required to pay under the per-user prong in December 2015, if the Copyright Owners' proposal had been in effect. Rysman WRT ¶ 87, Table 1. In like fashion, Professor Rysman's data for December 2014 data indicated that [REDACTED] services would have been required to pay under the per-user prong. *Id.* at Table 2.

Professor Ghose expands the hypothetical scenarios in an attempt to

[249] This analysis also underscores the inaccuracy of Copyright Owners' claim that each stream of a musical work has ''inherent value.'' *See,* e.g., Israelite WDT ¶ 39 (It ''makes no sense'' if ''[e]ach service effectively pays to the publisher and songwriter a different per-play royalty.'') But in reality, Copyright Owners understand that each musical work also contributes to a different value—access value (what economists call ''option value'')—when the musical works are collectivized and offered through an interactive streaming service, resulting in different effective per play rates paid by services if the per user prong is triggered. To explain this inconsistency, Copyright Owners note the existence of a second ''inherent value''—the access or option value noted above—not created by the songwriter in his or her composition—but rather created by the publisher to provide a separate value for the user—who inherently values access to a full repertoire. But these two purportedly ''inherent'' values are inconsistent (which is why there are two prongs in the proposal) and, given the heterogeneity of listeners, neither value is homogeneous throughout the market.

demonstrate what he considers to be the absurdity of Copyright Owners' greater-of approach, as depicted in his chart, reproduced below:



See 4/12/17 Tr. 5681-83 (Ghose).

Copyright Owners do not dispute these analyses. Rather, they make two points. First, they claim that the binding nature of the per user prong is not problematic, because the [REDACTED]. *See Copyright Owners' Reply to Apple's Proposed Findings of Fact and Conclusions of Law* at 104 (CORPFF–A). I find this argument to be a *non-sequitur,* because sound recording rates in this context certainly have no bearing on the present issue, and Copyright Owners also do not indicate which prong would otherwise apply in those sound recording licenses. In fact, a review of the citations in CORPFF–A at 104 reveals that [REDACTED]. *See* COPFF ¶ ¶ 72, 91–92, 95.

Second, as noted *supra,* Copyright Owners attempt to support what appear to be absurd effective per play rates by explaining that the per user rates reflect the value of *access* to the repertoires, as opposed to the value of an individual stream—again, what economists refer to as an ''option price. *See* CORPFF–A at 104–105 (and citations therein). I agree that this access or option value is real. However, when such a value is inserted into a greater-of rate formula—where the access value is supplanted by the per play value, and vice versa– the pricing resembles a game of ''heads I win, tails you lose.'' Moreover, as noted *supra,* the marginal physical cost of an additional stream is zero, so it is economically inefficient to marry a per play fee to a per user fee in a *greater of* approach. *Cf.* Leonard 3/15/17 Tr. 1122–23 (Leonard) (efficient pricing would utilize an up-front fee and a zero per play fee thereafter).

None of the parties presented any economic or policy analysis of such a ''greater-of'' formula aside from its witnesses' own testimonies. Further, I did not identify any such academic or industry analyses of this ''greater-of'' approach. However, the Copyright Board of Canada has criticized this type of rate structure in the following manner, which I find persuasive:

> [A] ''greater-of'' tariff [*i.e.,* rate] would not be fair and equitable, because it would provide an undue advantage to [licensors] on two counts. To be fair and equitable, a tariff should neither overcompensate nor undercompensate rights owners. If set correctly, neither a per-play rate nor a percentage-of-revenue rate will tend to do so, to the extent that each captures a (different) measure of usage. On the other hand, a tariff set at the greater of those two rates is hedged in favor of the collective. It may prevent undercompensation if a service has low revenues; it does not prevent overcompensation in the case of a high-revenue service that uses few sound recordings. A greater-of formulation also burdens users with an unfair share of risks. [Licensors] benefit[ ] if there are high revenues and a large number of plays, if there are high revenues and a small number of plays, and if there are low revenues and a large number of plays. Only if there are low revenues and a small number of plays does the user benefit. By contrast, either a per-play or a percentage-of-revenue tariff, with or without a minimum fee, allocates risk between [licensors] and the users more evenly.

Copyright Board of Canada, *Statement of Royalties . . . Re:Sound Tariff 8—Non-interactive and Semi-interactive Webcasts 2009–2012,* Decision of the Board at 27–28 (May 16, 2014).

I recognize that the 2012 rate structure also contains a greater-of formula. Importantly, though, the alternative prong is not a per play prong, avoiding the unfairness identified in the Canadian Judges' opinion. Also, the 2012 greater-of structure was a *negotiated bargain,* indicating a revealed preference among all potential alternatives. Moreover, the alternative to the percent-of-revenue prong is itself a ''lesser-of'' formulation, dampening the impact of the ''greater-''of'' structure. Thus, the 2012 rate structure has the effect of moderating the negative impact of a greater of formulation such as proposed by Copyright Owners by keeping rates, calculated on either prong, on bases and at levels the parties agreed were acceptable.

In sum and as explained *supra,* many economic trade-offs must be weighed in

establishing pricing in this second-best scenario. Some rate structures tend to balance the several factors and thus are reasonable, whereas others may tend to favor one side of the transaction over the other and do not meet the standard of reasonableness. Copyright Owners' greater-of approach represents such a one-sided structure, and accordingly I would reject this structure.

3. The Services' Argument for a Percent-of-Revenue Structure (with Minima)

a. The Services' General Benchmark

Returning to the issue of per-unit pricing vs. percent-of-revenue pricing (with minima), the Services propose a rate structure for Subparts B and C that generally follows the structure set forth in the existing regulations adopted after the Judges approved the parties' 2012 settlement.[250] The Services emphasize that they are not simply advocating that the basics of the 2012 rate structure should be preserved merely because there is a benefit in preserving the *status quo*. *See* 3/13/17 Tr. 564 (Katz) (relying on the 2012 structure as an excellent benchmark, ''not because it's the *status quo*.'').

Rather, the Services, through their economic experts, put forth the 2012 rate structure (*sans* Mechanical Floor) *as an appropriate benchmark*—for the Judges to weigh, consider, adjust (if appropriate) and apply or reject—as they would with any proffered benchmark. *See* SJRPFF–CO at pp. 803–04 (and case law and record citations therein). The Services note that considering the current rate structure as a benchmark (rather than as a mere attempt to preserve aspects of the *status quo*) is instructive because it allows for an identification of market value *by analogy*—through the examination of a comparable circumstance, rather than requiring the experts and the Judges to build a theoretical model from the ''ground up'' to represent the industry at issue, and without requiring the Judges to substitute their analysis and judgment as to why terms were included within the benchmarks. *See* 3/13/17 Tr. 691–2 (Katz) (''[My overall approach has been just ask the question [if] we take this as a benchmark . . . [i]s it reasonable to take the [2012] structure? . . . . [I]n trying to rely on the benchmark, I am trying to say, okay, well, the industry decided this, let me ask, is it working overall? . . . '' *[T]hat's what I would tend to do with any benchmark.* I am using it as a benchmark to avoid having to model things and build it from the ground up.'') (emphasis added).

The Services' experts opine that, for a number of reasons, the 2012 rate structure is not only *a* benchmark, but also that it is a *highly appropriate ben*chmark. First, they note that the 2012 rate structure embodies characteristics that the Judges have consistently identified as part and parcel of an appropriate benchmark. That is, the 2012 rate structure applies to: (a) the same rights; (b) the same uses; and (c) the same types of market participants. *See* 3/15/17 Tr. 1082–83 (Leonard); 3/13/17 Tr. 551, 566–7 (Katz).

Additionally, because the 2012 rate structure was the product of a settlement between and among market participants, the Services maintain that it reflects market forces, including an implicit consensus as to the effects of the structure on piracy and potential substitution across platforms. *See* 3/13/17 Tr. 580, 722 (Katz). More broadly, they argue that because the 2012 rate structure was agreed to by market participants who had assumedly weighed the costs and benefits of their agreement, it therefore demonstrates the ''revealed preferences'' of these economic actors. *See* 3/15/17 Tr. 1095 (Leonard); *see also* Leonard AWDT ¶ 74 (direct license agreements that track the regulatory rate structure are further evidence of a ''revealed preference'' for that structure).

Another Service expert notes that—because the Services have different tiers of listeners paying at different levels—their economic incentives are aligned with Copyright Owners—to avoid substitution of their higher priced services by their lower priced services (*i.e.,* to avoid opportunity costs). *Thus, the incentives that existed when the 2012 rate structure was first implemented remain in effect. See 3*/21/17 Tr. 2192 (Hubbard) (testifying that there continues to be a ''substantial heterogeneity on the consume side of the market.'').[251] Finally, the Services assert that the 2012 benchmark is relevant and helpful because, although it was entered into five years ago, it is nonetheless a relatively recent agreement, covering the current rate period and serving as a template for current agreements. *See* Katz WDT ¶¶ 6, 71; 3/13/17 Tr. 608–09 (Katz); Leonard AWDT ¶ 47 *et seq.* (noting that ''existing agreements'' regularly track the section 115 provisions); 3/15/17 Tr. 1082 (Leonard). As noted by Amazon's Head of Content Acquisition, Mr. Mirchandani, the 2012 rate structure has been demonstrated to be ''workable,'' even if ''imperfect.'' Mirchandani WDT ¶ 7.

The Services' experts further emphasize that the structure of current rates satisfactorily reflects the economic *market* conditions in which the mechanical license for interactive streaming is used. *See* 4/13/17 Tr. 5943 (Hubbard) (acknowledging a ''love'' of competitive markets, and recognizing that there are supply and demand considerations in this market that require the more flexible pricing structure generally provided in the current regulations). (I understand Professor Hubbard's reference to the particularities of ''this market'' to relate to the quasi-public good nature of the copies of musical works/sound recordings, as discussed in this Dissent, *supra.*)

The Services' experts candidly acknowledge that the rate structure they advocate is not necessarily the ''best'' approach to pricing in this market. *See* 4/7/17 Tr. 5574–6 (Marx); *see also* Mirchandani WDT, *supra.* Rather, the Services' link the fact that the marginal physical cost of streaming is zero to the need for a flexible rate structure such as now exists. Professor Hubbard links the zero marginal physical cost characteristic to the setting of royalty rates by noting that, because ''[t]he marginal production cost at issue here is—is zero. . . . it's not clear why it's not better to bring new customers into the market on which royalties would be paid and, of course, zero marginal cost incurred.'' 4/13/17 Tr. 5917–18 (Hubbard). *See also* Marx WDT ¶ 97 (''Setting the price of marginal downstream listening at its marginal cost of zero induces more music consumption and variety than per-song or per-album pricing.''). I understand this testimony to be consistent with the economic point, discussed *supra,* that, in the ''second-best world'' created by the characteristics of this market, no one can claim that any given rate structure is the ''best.''

Professor Katz notes that the existing rate structure captures important specific aspects of the economics of the interactive streaming market, accounting for: (1) the variable WTP among listeners; and (2) the corollary

[250] *Except when they do not. As noted supra,* the Services seek the elimination of the ''Mechanical Floor,'' a significant departure from the existing structure. I discuss that issue elsewhere in this Dissent.

[251] Professor Hubbard further notes that he identified no empirical evidence in the record of any opportunity costs incurred by Copyright Owners as a consequence of the extant rate structure, and that the survey results obtained by the Klein Survey support his claim that substitution/cannibalization is *not* a material economic factor. 4/13/17 Tr. 5918 (Hubbard). This issue is discussed in greater detail *infra.*

variable demand for streaming services. *See* 313/17 Tr. 586–87 (Katz); *see also* Marx WRT ¶ 239 *et seq.;* 4/7/17 Tr. 5568 (Marx) (noting that the present structure serves differentiated products offered to customer segments with a variety of preferences and WTP). In more formal economic terms, Professor Katz notes that the present structure enhances variable pricing that allows streaming services ''to work[][their]way down the demand curve,'' *i.e.,* to engage in price discrimination that expands the market, providing increased revenue to the Copyright Owners as well as the Services. 3/13/17 Tr. 701 (Katz).[252] I understand this testimony to be consistent with the economic point, made *supra,* that a price discriminatory rate structure is appropriate in markets with zero marginal physical cost, varying WTP and the absence of arbitrage.

Professor Hubbard attempts to capture the interrelationship between the economics of this market and the existing rate structure as follows:

> [F]rom an economic perspective, you can think of this market and this industry as being composed of different customer segments by tastes and preferences and willingness to pay. And so no rate structure can really work without understanding that, and no business model can really work without understanding that.
>
> [I]n terms of rate structures, the Phonorecords II framework from the previous proceeding does offer a benchmark to start because it provides for differences in distinct product categories in terms of music service offerings, pricing possibilities, and so on. And it has encouraged a very diverse digital music offering set from actual competitors.

3/21/17 Tr. 2175–76 (Hubbard).[253] Moreover, Professor Hubbard perceives a link between the existing rate structure and the ''growth in the number of consumers, number of streams, entry, the number of companies providing the streaming services, and the identity of the companies providing those services . . . .'' 4/13/17 Tr. 5978 (Hubbard); *see also* Hubbard WDT ¶ 4.7 ([REDACTED]).[254] *See also* 3/15/17 Tr. 1176 (Leonard) (noting that notwithstanding the changes and growth in the streaming marketplace over the current rate period, the underlying economic structure of the marketplace—that made a percent-of-revenue based royalty appropriate—has not changed).

The Services' experts further assert that the multiple pricing structures necessary to satisfy the WTP and the differentiated quality preferences of downstream listeners relate directly to the upstream rate structure to be established in this proceeding. For example, Professor Marx opines that the appropriate *upstream* rate structure is derived from the characteristics of downstream demand. 3/20/17 Tr. 1967 (Marx) (agreeing that the rate structure upstream should be derived from the need to exploit the willingness to pay of various users downstream via a percentage of revenue because downstream listeners have varying willingness to pay that should be exploited for the mutual benefit of copyright licensees and licensors). Professor Marx further acknowledged that this upstream:downstream consonance in rate structures represents an application of the concept of ''derived demand,'' whereby the demand upstream for inputs is dependent upon the demand for the final product downstream. *Id.* Moreover, Dr. Leonard notes that ''the downstream company is going to have a lot more information about . . . the business, about what makes sense,'' 4/6/17 Tr. 5238 (Leonard).

The Services also note that the existing rate structure has produced generally positive practical consequences in the marketplace. Their joint accounting expert, Professor Mark Zmijewski, testified that the decrease in publishing royalties from the sale of product under Subpart A since 2014 has been offset by an increase in music publisher royalties (mechanical + performance royalties) over the same period. *Expert Report of Mark E. Zmijewski February 15, 2017* ¶¶ 38, 40 (Zmijewski WRT); 4/12/17 Tr. 5783 (Zmijewski); *see also* 4/13/17 Tr. 5897 (Hubbard) (''the evidence that I reviewed suggests that the copyright holders have actually benefitted from this structure . . . .'').

More particularly, Professor Zmijewski testified that:

1. Total revenues reported by the NMPA for NMPA members from all royalty sources[255] [REDACTED] from approximately $ [REDACTED] in 2014 to $ [REDACTED] in 2015, a [REDACTED] in royalty revenue. *Id.* ¶ 41.
2. The [REDACTED] in (1) above includes an [REDACTED] in mechanical royalties from streaming from $ [REDACTED] in 2014 to $ [REDACTED] in 2015, a [REDACTED] in royalty revenue derived from the mechanical license. *Id.*
3. The [REDACTED] in (1) above includes an [REDACTED] in performance royalties from streaming from 4 [REDACTED] in 2014 to $ [REDACTED] in 2015, a [REDACTED]. *Id.*
4. Mechanical royalty revenue for the sale of downloads and physical phonorecords [REDACTED] in 2014 to $ [REDACTED] in 2015 (a [REDACTED] of $ [REDACTED]), while the combination of mechanical and performance royalty revenue royalty from streaming [REDACTED] from $ [REDACTED] in 2014 to $ [REDACTED] (an [REDACTED] of $ [REDACTED]). Thus, the [REDACTED] in royalty revenue from streaming outstripped the [REDACTED] from the sale of downloads and physical phonorecords by $ [REDACTED]. *Id.* ¶ 38.[256]

Moving to a comparison of revenue growth to streaming growth, Professor Hubbard dismisses as economically ''meaningless'' the argument that Copyright Owners have suffered *relative* economic injury under the current rate structure simply because the increase in their revenues from interactive streaming has been proportionately less than the growth in the number of interactive streams—leading mathematically—to a lower implicit or effective per stream royalty rate. 4/13/17 Tr. 5971–73 (Hubbard). That is, there is no evidence that, if the price of the services available to these low to zero WTP listeners had been increased, they would have paid the higher price, rather than declined to utilize a royalty-bearing interactive streaming service. In fact, the only survey evidence in the record (the Klein Survey, discussed *infra*) suggests that listeners to

[252] A Copyright Owner economic expert, Professor Rysman, acknowledges that—*under the current rate regime*—revenues may be increasing because of movements ''down the demand curve'' (*i.e.,* changes in quantity demanded in response to lower prices), rather than because of—or in addition to—an outward shift of the demand curve (*i.e.,* an increase in demand at every price). 4/3/17 Tr. 4373–74 (Rysman).

[253] Professor Hubbard's point that the variety of business models in the industry is a consequence of the various customer characteristics is noteworthy as a distinguishing counterpoint to the simple cliché that the Judges should be ''business model neutral.'' 3/21/17 Tr. 2175–76 (Hubbard).

[254] The Copyright Owners sought to rebut Professor Hubbard's argument by confronting him with the offerings of Tidal, a streaming service that does not compete by offering a low-cost service. Eisenach WDT ¶¶ 49–50. However, Tidal's offering of a higher priced subscription service that provides enhanced features such as hi-fidelity sound quality actually proves the point that Professor Hubbard and the other Service economists are making: There is a segmentation of demand across product characteristic and WTP that permits differential pricing in this industry.

[255] All royalty sources include mechanical royalties from physical phonorecords, digital downloads and streaming; performance royalties from streaming and non-streaming; and synchronization. Zmijewski WRT ¶ 41.

[256] By contrast, looking only at mechanical royalty revenue, for the sale of digital downloads and physical phonorecords mechanical royalty revenue [REDACTED] from $ [REDACTED] in 2014 to $ [REDACTED] (as noted in (4) above, whereas mechanical royalty from streaming [REDACTED] from $ [REDACTED] in 2014 to $ [REDACTED] in 2015. Thus, the $ [REDACTED] in mechanical royalty revenue from streaming [REDACTED] in mechanical royalty revenue from the sale of digital and physical phonorecords. This comparison is the metric from Professor Zmijewski's analysis that *Copyright Owners* assert is most relevant.

streaming services have a highly elastic demand, *i.e.,* they are highly sensitive to price increases. I understand Professor Hubbard's point to be highlighting the distinction, also discussed in the economics overview, *supra,* between an ''increase in demand'' and an ''increase in quantity demanded.''

On the *licensee* (interactive streaming service) side of the ledger, Professor Katz identifies the entry of new interactive streaming services (including Pandora) and new investment in existing interactive streaming services during the present rate period as evidence that the present rate structure is ''working.'' 3/13/17 Tr. 667 (Katz). In fact, he notes the *ubiquity* of percentage-of-revenue based royalty structures in the music industry, indicating (as a matter of revealed preference) the *practicality* of such a revenue-based royalty system. *See* 3/13/17 Tr. 766–67 (Katz); *see also* 4/5/17 Tr. 5166–67 (Leonard) (''[I]n the area of intellectual property licensing . . . percentage-of-revenue is not exactly surprising. In fact, I would say it is probably the most common approach that you see as a general matter. . . . [N]arrowing into the area we're talking about here of interactive streaming, it is pretty common here, too. . . .'').

In sum, given ''how the industry has performed'' under the current rate structure, the Services conclude that it is therefore appropriate to continue that basic structure going forward. 3/13/17 Tr. 565 (Katz).

The Services' economic experts do not ignore the fact that there may be revenue attribution problems when interactive streaming is combined with other products or services. They acknowledge that, even absent any wrongful intent with regard to the identification and measurement of revenue, attribution of revenue across product/service lines of various services can be difficult and imprecise. *See, e.g.,* 4/5/17 Tr. 5000 (Katz) (the problem of measuring revenue is ''certainly a factor that goes into thinking about reasonableness.'').[257]

However, Professor Katz testified that the existing rate structure agreed to by the parties accommodates these bundling, deferral and displacement issues via the use of a second rate prong that would be triggered if the royalty revenue resulting from the headline rate of 10.5% of streaming revenue fell below the royalty revenue generated by that second prong. Katz WDT ¶¶ 82–83; 3/13/17 Tr. 670 (Katz). Moreover, Professor Katz concluded that, because the marketplace appears to be functioning (in the sense that publishers are earning profits and new and existing interactive streaming services continue to operate despite accounting losses), these revenue-measurement issues are being adequately handled by the alternative rate prong, even if an altered second prong might work better. *Id.* at 738; 4/5/17 Tr. 5055–57 (Katz) (also noting that ''ecosystem'' entities in the mold of Amazon, Apple and Google, such as Yahoo, were in the marketplace when the existing rate structure was formulated). In similar fashion, Dr. Leonard opined that the 2012 rate structure created a number of ''buckets'' to deal with problems of this sort. 3/15/17 Tr. 1227–28 (Leonard).

More broadly, the Services' position regarding the use of the two prongs and their alternate rates to ameliorate the revenue-measurement problems is summed up by Professor Katz as follows:

> [T]he primary reason [for the two rate prongs] . . . is because of the measurement issues that can come up when having royalties based on a . . . percentage of revenues because there can be issues about how to appropriately assign revenues to a service. And so I think the minim[a] can play an important role when those—you know, when those measurement problems are severe, you can turn to the minimum instead. . . . [W]hat I have in mind, right, is that what would happen if you could imagine an entrepreneur coming along and saying we want to have a service and have some incredibly low price and not a very good monetization model, where a copyright owner would say—in an effectively competitive market, would say, wait a minute, I don't want to license to you on those terms. It's—I just think the possibility of getting a return is so low, I'm not going to do it, even though you, as an entrepreneur, are willing to try this. I as the copyright owner want some sort of, you know, return on it. And that's what the minimum also helps to do.

3/13/17 Tr. 599 (Katz.); *see also* 3/20/17 Tr. 1900–01 (Marx) (minima protect against revenue measurement problems); 4/7/17 Tr. 5584 (Marx) (noting that the statutory minima play ''two roles''—*protecting the Copyright Owners* from ''revenue mismeasurement'' by creating the ''greater of'' prong, '' but incorporating the per subscriber rate prong in the ''lesser of'' component *to protect the services* from ''manipulation of the sound recording royalties'' on which the TCC prong is calculated).

Another particular issue raised by the existing structure relates to the significant percentage of listeners to interactive streaming services that are ''free'' to the user. For example, as of August 2016, Spotify had [REDACTED] million average monthly users on its ad-supported service, compared with [REDACTED] million subscribers to its subscription service. Marx WDT ¶ 49 n.62 & Fig. 7; Hubbard WDT ¶ 3.14 and Ex. 4 ([REDACTED]. Accordingly, the treatment of such services in the rate structure is of particular importance. The majority of the listeners to the ad-supported format use Spotify's ad-supported service, although there are other such services available in the market, including SoundCloud and Deezer. *See* COPFF ¶ 341 (and record citations therein). (The arguments regarding the appropriate rate structure pertaining to ''free to the user'' services overlaps to an extent with the argument regarding ad-supported services, and I consider them jointly.)

The Services assert that they offer ad-supported or other free-to-the-user interactive streaming tiers to meet the demand of a large cohort of the listening population that does not have a positive WTP for streamed music. [REDACTED]. 3/21/17 Tr. 2179–83 (Hubbard); *see also* Marx WDT ¶¶ 53–54; Katz WDT ¶ 86. [REDACTED]. 4/13/17 Tr. 5906 (Hubbard) (''[REDACTED]'') *see also* 4/5/17 Tr. 5231 (Leonard) (''the funneling is itself a mechanism to separate out the people who really value music and want to just be able to listen to what they want to listen to, versus people who . . . are not willing to pay that amount of money . . . .''). In this regard, Spotify most aggressively markets itself as an ''up-seller''—providing its ad-supported service as a funnel to convert low WTP listeners into subscribers. Spotify's strategy, as explained by its in-house economist, is as follows:

> One of Spotify's key beliefs in its commercial strategy is that moving someone from piracy to a legal music service needs to be frictionless—otherwise, they won't come. Often a Spotify user's journey begins in our free-to-users ad-supported tier, and upgrades to a paid (or premium) subscription as he or she becomes more familiar with the enhanced paid-only features through trial promotions and/or marketing efforts. . . . This presents a ''you help me today and I'll help you tomorrow'' licensing proposition: as rightsholders allow Spotify to use their content, Spotify in turn helps rightsholders, by first taking users from free options that pay little to no royalties—such as piracy, or even AM/FM radio—to an ad-supported service that generates higher royalties, and then further taking these users to a paid service . . . .

Written Direct Testimony of Will Page (On behalf of Spotify USA Inc.) (Page WDT) ¶¶ 13–14.

Mr. Page notes the success of Spotify in growing the overall ''royalty pie'' in its home country of Sweden, where

[257] This Dissent considers the specific deferral and displacement arguments in more detail *infra.*

''[w]hat wasn't understood [in 2009], but is appreciated now, is that the vast majority of the adult population in *all* key markets spends *zero* on music. Spotify's core commercial proposition was to grow the business by growing the average revenue per person across the entire population, not by holding onto a shrinking minority of people buying albums or PDDs.'' *Id.* ¶ 24.

To avoid substitution (*i.e.,* cannibalization) that would reduce revenues to the services and the rightsholders alike, the services differentiate such ''funneling'' products by intentionally structuring them as inferior in quality compared to subscription tiers, for example by interspersing songs with ads (as in the Spotify ''free'' tier) and by offering a more limited repertoire of songs (as with Amazon Prime Music). As Professor Hubbard explains, ''free-to-the listener'' tiers must be inferior in some manner of quality in order to sort out listeners who have a WTP sufficient to pay for the higher-priced (*i.e.,* subscription) tier. He elucidates this point by analogizing to the discriminatory pricing of airline seating, whereby different classes of seating combine varying amenity packages with higher prices (*i.e.,* first class, business class and coach). Hubbard WDT ¶ 3.15.[258]

The use of an ad-supported service as a ''freemium'' model thus serves a dual purpose: First, it is an efficient means of marketing—segregating listeners according to WTP—allowing them to ''experience'' interactive streaming, *while, second, still providing royalties to Copyright Owners.* (If Spotify substituted self-advertising in other media as a marketing tool instead of offering an ad supported service, Copyright Owners would realize zero royalties until such self-advertising resulted in new subscribers.)[259]

With regard to the tangible economic benefits of such downstream products to the upstream Copyright Owners, Professor Marx notes that an ad-supported service is in the nature of a multi-party ''platform,'' creating an intersection among streaming services, listeners and advertisers. 3/21/17 Tr. 2013 (Marx). This is why she emphasizes, as did Mr. Page, *supra,* that ''Spotify's ad-supported service is monetizing . . . low-willingness-to-pay listeners better than [REDACTED], terrestrial radio, and, of course, piracy.'' 4/7/17 Tr. 5503 (Marx); *see also* Marx WRT at 14, Fig. 7 (comparing ''musical works royalties per user-hour across these alternatives).

Professor Marx also noted that it is inappropriate to consider the royalty rates paid by higher-priced interactive streaming services, such as Tidal, as evidence supporting a finding that ad-supported or other ''free to the listener'' services pay too little in royalties. She notes that the ad-supported and other ''free to the listener'' tiers represent the exploitation of the low WTP segment of the demand curve, whereas other services seek to exploit the *higher end* of the demand curve. For example, and as noted *supra,* Tidal offers a $20 per month subscription tier that can generate higher royalties, but does so by offering a differentiated product of higher quality via a premium high-fidelity. 3/21/17 Tr. 5601–02 (Marx).

4. Copyright Owners' Argument against the 2012 Percent-of-Revenue Structure (with Minima) and Judicial Analysis of that Argument

a. The Allegedly Limited Evidentiary Value of Settlement Rates

Copyright Owners criticize the relevancy of the 2012 settlement-based rate structure. First, they note that, as terms in a settlement, the elements of the rate structure do not reflect the structure the market would set, but rather reflect only the parties' own prediction of how the Judges would rule in the absence of a settlement. *See* 4/4/17 Tr. 4591 (Eisenach).

Second, Copyright Owners dismiss any relevancy in the fact that they agreed in the 2012 settlement to maintain virtually unchanged the Subpart B rate structure and rates set forth in the 2008 settlement. They claim that this essential *status quo* was maintained because there had been only a two-year window between the *Phonorecords I* settlement and the commencement of proceedings in *Phonorecords II,* and that no meaningful market changes occurred in that short time period. However, the Services dispute the substantive assertion that there was no significant market development by the time of *Phonorecords II. Written Rebuttal Statement of Zahavah Levine (On behalf of Google, Inc.)* ¶¶ 5–6 (Levine WRT); 3/8/17 Tr. 171–172; 270–272 (Levine). Numerous services, including the more recent large new entrants, had already entered the market, with some realizing significant subscriber numbers. *Id.* at 155–157 (Levine). Ms. Levine further testified that the Subpart B rates could not reasonably be construed as ''experimental'' during the *Phonorecords II* negotiations, and by the time of the *Phonorecords II* settlement, other significant market changes had occurred in the music delivery market. *Id.* ¶ 5. For example, she notes that Rhapsody had already been in the market for approximately ten years and had approximately one million paying listeners. *Id.* ¶¶ 5–6.

Third, Copyright Owners assert that [REDACTED]. *Rebuttal Witness Statement of David M. Israelite* ¶ 28 (Israelite WRT); 3/29/17 Tr. 3649–3652 (Israelite). However, the Services respond by noting that there is no evidence to support Mr. Israelite's testimony regarding the [REDACTED]. And, notwithstanding his testimony regarding [REDACTED], the Services note that the NMPA incurred the expense of a year-long negotiation with the Services to seek higher rates, create new service categories in Subpart C, and changes to the TCC calculations. *Id.* at 159, 161–164; 3/29/17 Tr. 3856 (Israelite).

Fourth, Copyright Owners assert, assuming *arguendo* that the current rate structure can be used for benchmarking purposes, that the Services have not presented competent evidence or testimony as to the intentions of the settling parties who had negotiated the

[258] Professor Hubbard's example parallels the insight of the 19th century French economist, Jules Dupuit, one of the first economists to explain the economics of price discrimination. Dupuit examined the pricing of several classes of seating on railway carriages. As he noted: ''[A] good many . . . travelers in third class, travel[ ] without a roof over the carriage, on poorly upholstered seats . . . . It would cost very little . . . to put some meters of leather and kilos of horse-hair [on the seats], and it is beyond greed to withhold them. It is not because of the several thousand francs which they would have to spend to cover the third class wagons or to upholster the benches that a particular railway has uncovered carriages and wooden benches; it would happily sacrifice this for the sake of its popularity. Its goal is to stop the traveler who can pay for the second class trip from going third class. It hurts the poor not because it wants them to personally suffer, but to scare the rich. The comfort in third class is deliberately reduced to dissuade travelers who are ready to pay for higher levels of comfort from traveling at the cheaper fares.'' Jules Dupuit, *De l.infuence des péages sur l'utilité des voies de communication,* Annales des Ponts et Chaussées, 17, mémoires et documents 207 (1849), *quoted in* T. Randolph Beard & Robert B. Ekelund, Jr., *Quality Choice and Price Discrimination: A Note on Dupuit's Conjecture,* 57 So. Econ. J. 1155, 1156–57 (1991).

[259] The interactive streaming of music is an ''experiential'' good. *See Byun, supra,* at 23 (''Music is a specific type of good, known as an experiential good, meaning that it must be experienced or sampled before the customer can assess . . . quality . . . and . . . utility.'') Thus, the provision of a monetarily ''free-to-the user'' service is a reasonable marketing tool, and the Judges are loath to second-guess the business model incorporating that marketing approach, especially after it has proven successful while still providing royalties to rights owners. *See* Page WDT ¶ 27 (Spotify's freemium model monetizes through subscriptions more successfully than the sale of downloads and CDs, as well as terrestrial radio and, of course, piracy). Also, the Judges do not find it relevant that many other interactive streaming services have not utilized an ad-supported service, absent record evidence as to why they have ceded that significant market (and marketing) niche principally to Spotify.

2012 settlement, or, for that matter, the 2008 settlement that preceded it. Specifically, Copyright Owners claim that the witnesses who were called by the Services to testify in this regard did not negotiate directly with the Copyright Owners in connection with these settlements. 3/29/17 Tr. 3621–22 (Israelite). More particularly, the two Services' witnesses who provided testimony in this regard, Adam Parness and Zahavah Levine, acknowledged they had no *direct* involvement in the *Phonorecords I* negotiations, and Ms. Levine did not engage in direct negotiations with regard to the *Phonorecords II* settlement either. 3/9/17 Tr. 339–40 (Parness); 3/29/17 Tr. 3885–86 (Israelite); *see also* Israelite WRT ¶ 14 (indicating that Ms. Levine had left Real Networks in 2006, before her former subordinate was negotiating the 2008 settlement).

However, the evidence indicates that Ms. Levine and Mr. Parness were involved in the contemporaneous internal discussions of negotiation strategy on behalf of the Services, which makes their testimony relevant as to the intentions of the Services involved in those earlier negotiations. More particularly, Ms. Levine was employed by Google/You Tube when the 2012 settlement was negotiated and finalized. At that time, Google was a member of DiMA, the trade association representing the interests of actual and potential interactive streaming services. *See Phonorecords II, DiMA Petition to Participate.* Thus, Ms. Levine was competent to give testimony as to the parties' positions in the negotiations.

Mr. Parness testified, at the time of the *Phonorecords I* settlement, he was Director of Musical Licensing for RealNetworks, Inc., an interactive streaming service and a member of DiMA, its bargaining representative. In that capacity, Mr. Parness was ''actively involved'' on behalf of Real Networks. *Written Direct Testimony of Adam Parness (on behalf of Pandora Media, Inc.)* ¶ 5 (Parness WDT). Mr. Parness understood that the important aspects of the *Phonorecords I* negotiations and settlement were: (1) an agreement that noninteractive services did not need a mechanical license; (2) the interactive mechanical license would be calculated on an ''All-In'' basis; (3) the rate would be structured as a percent-on-revenue with certain minima; and the headline rate would be 10.5%. Parness WDT ¶ 7. He noted that the rate minima were included at the behest of Copyright Owners, who were concerned that a purely revenue-based rate might result in too little revenue. *Id.* ¶ 8. Mr. Parness further testified, with regard to the 2012 negotiations, that he *directly* negotiated with Mr. Israelite and the general counsel for the NMPA, negotiations that led to the parties' agreement essentially to maintain the Subpart B structure and to create what became the new Subpart C rate structure. *Id.* at 11; *see also* 3/9/17 Tr. 325–27 (Parness).

Ms. Levine testified that in the *Phonorecords II* negotiations, Copyright Owners sought an increase in the Subpart B rates, the services refused, and Copyright Owners ultimately withdrew that demand. Levine WRT ¶ 2. The implication from this testimony is that the stability of the rate structure is not indicative of the absence of negotiations, but, at least according to Ms. Levine, that rate structure stability was a by-product of the negotiating process.

b. The Settlement Rates are Anachronistic

On behalf of Copyright Owners, Mr. Israelite described their willingness to continue the 2008 rate structure through 2017 (ten years in total) as reflective of their understanding that the interactive streaming market was still not ''mature,'' Israelite WDT ¶ 108; WRT ¶ 26, and thus the ten year rate structure remained ''experimental.'' Israelite WDT ¶ ¶ 81, 103; Israelite WRT ¶ ¶ 4, 19, 26, 32. This issue is discussed in more detail *infra.*[260]

More particularly, Copyright Owners maintain that the current rate structure was ''experimental'' because there had been no data to evaluate the interactive streaming business, and Copyright Owners lacked knowledge as to the future development of the interactive market. Israelite WDT ¶¶ 33, 81, 95); Israelite WRT ¶¶ 4, 17, 18, 19, 29; 3/29/17 Tr. 3631–32, 3754, 3764–65 (Israelite); *see also* COPFF ¶ 421 (and record citations therein).

Whether experimental or otherwise, [REDACTED]. *Id.* at 3636–38.

In response, the Services assert that there is no record evidence, beyond Mr. Israelite's testimony, that the existing rate structure was, or remains, experimental. They further note (as referenced *supra*) that by 2012, when this rate structure was renewed, consumer adoption of streaming was obvious, contrary to Copyright Owners' allegations. Levine WRT ¶ 5. The Services also assert that numerous services, including those backed by large companies, such as Yahoo and Microsoft, had already entered the market, and some of those services had achieved significant subscriber numbers. 3/8/17 Tr. 155:14–157:12 (Levine); *see also* Parness WDT ¶ 12.

c. Alleged Displacement and Deferral of Revenue

Copyright Owners criticize the 2012 rate structure because its reliance on a revenue-based structure creates problems regarding the measurement of revenue. Specifically, Copyright Owners allege that services can *displace* revenue properly attributable to streaming and allocate it to other products within the owners' broader economic ''ecosystem.'' Also, they allege that services can and do *defer* revenue from the present into the future, foregoing present profits in order to grow their customer base to achieve a market share that allows for long-term profits.[261] *See* Rysman WDT ¶ 13.

The problems associated with revenue measurement and attribution arise in various contexts. First, the Services may focus on *long-term* profit or revenue maximization, thereby possibly *deferring* shorter-term profits through temporarily lower downstream pricing (*i.e.,* revenue deferral) in a manner that suppresses revenue over that shorter-term. Second, the services may use music as a ''loss leader,'' *displacing* streaming revenue and encouraging consumers to enter into the so-called economic ''ecosystem'' of the streaming services, especially the multi-product/service firms in this proceeding—Amazon, Apple and Google—within which consumers can be exposed to other goods and services available for purchase. Third, the interactive streaming services may *obscure* royalty-based streaming revenue by offering product *bundles* that include their music services with other goods and services, rendering it difficult to parse out the bundled revenue as between the royalty-bearing revenue (from the interactive service) and the revenue attributable to the other items in the bundle.

i. Deferral

With regard to revenue *deferral,* Copyright Owners argue that the services' focus on future growth, not

[260] In an attempt to dig deeper into why Copyright Owners agreed to particulars in the settlements regarding the TCC prong, the Judges asked Dr. Eisenach if Copyright Owners had provided him with information regarding the 2012 settlement. He responded by stating that ''[w]hen I've asked the question, I've found people chuckle . . . when I ask the question, people say: 'Nobody really knows.' . . . . Someone may know, but that's what I've been told.'' 4/4/17 Tr. 4611 (Eisenach). I am perplexed by the response provided to Dr. Eisenach, because the history of the present rates would seem to be of great relevance, ascertainable and not subject to being laughed off when a party's own expert seeks such information.

[261] This strategy is referred to as ''scaling,'' and is discussed in more detail *infra.*

current revenues. *See* [REDACTED] ([REDACTED]). By way of example, Copyright Owners highlight a particular aspect of [REDACTED] business model: [REDACTED]. *Id.* at 2168–69 ([REDACTED]). The economic upshot of such a focus on the long-run rather than on present revenues, according to Copyright Owners, has caused revenues to grow annually by *only* 31% from 2013 to 2014, and by *only* 34% from 2014 to 2015, even as the number of streams over these two periods has grown by 63% and 101% respectively. Ghose WDT ¶ 74.

The Services respond by noting that Copyright Owners did not conduct an empirical analysis to confirm the extent to which to which interactive streaming services actually engage in revenue deferral, and that their expert was therefore compelled to qualify his conclusions by conceding only that such revenue deferral ''may'' occur. *See* 4/3/17 Tr. 4344–43, 4347, 4349 (Rysman). Additionally, the Services assert that the primary industry pricing model—$9.99 per month for unlimited access—has existed since the early 2000's, belying Copyright Owners' assertion that there has been a change in pricing in the current rate period intended to build market share. *See* Levine WRT ¶ 6 (describing how Rhapsody ''pioneered'' the subscription on-demand model in the early 2000's and how the $9.99 model was adopted by, *e.g.,* MOG, Rdio and Rara).

[REDACTED]

The Services also argue that Copyright Owners misunderstand the services' emphasis on [REDACTED]. However, as noted *supra,* the Services do acknowledge that they focus broadly on [REDACTED]. *Id.* at 2082, 2141 ([REDACTED]).

The Services also disagree with Copyright Owners' assertion that [REDACTED], 4/7/2017 Tr. 5498 (Marx); 3/21/17 Tr. 2169 (McCarthy); and [REDACTED]. 4/6/2017 Tr. 5327 (Vogel). Thus, the business model, they argue, is reflective of the fundamental structure of market demand, rather than evidence of revenue deferment.

I find that the record indicates that the services do seek to engage to some extent in revenue deferral in order to promote their long-term growth strategy. A long-term strategy that emphasizes scale over current revenue can be rational, especially when a critical input is a quasi-public good—because growth in market share and revenues is not matched by a commensurate increase in the cost of such inputs, whose marginal cost of production (*reproduction,* actually, because they are copies of sound recordings/musical works) is zero. This is the success-through-scalability discussed *infra. See generally* Haskel & Westlake, *supra,* at 65–66 (profitability through scaling is enhanced by the use of inputs with zero marginal costs).

It appears that the nature of the downstream interactive streaming market, and its reliance on scaling for success, results necessarily in a competition *for the market* rather than simply competition *in the market.* This is the form of dynamic competition known as Schumpeterian competition (named after the economist Joseph Schumpeter). Such competition emphasizes the importance of the dynamic creation of new markets and ''new demand curves,'' recognizing that short-term profit or revenue maximization may be inconsistent with rational competition *for* the market. That is, this form of competition recognizes that businesses and investors do not simply seek out commercial activities that will merely earn returns available elsewhere in the economy, but rather seek out longer-term supranormal profits, investing in businesses that appear able to satisfy consumer demand and capture large swaths of market share—a dynamic and enduring process that creates and ultimately destroys various business entities and markets in the process (which Schumpeter coined as ''creative destruction.'') *See* J. Sidak & D. Teese, *Dynamic Competition in Antitrust Law,* 5J. Comp. L. & Econ.5, 581 (2009). Indeed, Amazon's economic expert witness, Professor Hubbard, acknowledged that ''[t]he music industry exemplifies this process'' of Schumpeterian ''creative destruction.'' Hubbard WDT ¶ 2.1 & n. 1.

Of course, when royalties are paid as a percent of *current* revenue, the input supplier, *i.e.,* Copyright Owners in the present case, are likewise deferring some revenue to a later time period (and also assuming some risk as to the ultimate existence of that future revenue). One way the input supplier can avoid this impact is to refuse to accept a percent of revenue form of payment and move to a fixed per-unit input price. This is what Copyright Owners seek in this proceeding, subject to a bargaining room approach by which they could switch back to the old approach (or any other approach) through purely market-based negotiations, but free from the statutory standards of section 801(b)(1). However, another way in which the input supplier can mitigate the effect of such revenue deferrals is to establish a pricing structure that provides alternate rate prongs and floors, below which the royalty revenue cannot fall. This is precisely the bargain struck between Copyright Owners and services in 2008 and 2012, and that has been ongoing through the present day.

Are there even better ways to address this issue? Perhaps, but by the very nature of this adversarial proceeding, the Judges cannot identify the theoretically optimal manner by which the revenue deferral phenomenon should be addressed. Rather, the choices before the Judges are stark: the per-unit pricing proposals submitted by Copyright Owners and Apple, and the tiered rate structure now in existence and generally (but not uniformly) presented by the Services as the appropriate benchmark.[262] As discussed *infra,* I have identified the 2012 rate structure as the best benchmark *from among these proposals.* The revenue deferral phenomenon indicates the need for Copyright Owners to protect themselves, but it does not indicate that, on balance, the issue is better resolved by the unacceptable per unit pricing proposals submitted in this proceeding. Accordingly, I do not find the revenue deferral issue to be a sufficient basis to reject the 2012 benchmark in favor of Copyright Owners' or Apple's per-unit rate proposals.[263]

ii. Displacement through Bundling

Copyright Owners argue that services also *displace* revenue by engaging in ''cross-selling'' by which they sell access to musical works/sound recordings through the *bundling* of that

[262] As I note in this Dissent, there is no sufficient evidence to allow the Judges to mold their unique rate structure, and the majority has erred in its attempt to do so.

[263] Looked at from a different perspective, this issue pits the *music publishing business model* against the *interactive streaming business model.* Music publishers must maximize revenues (subject to any cost constraints) over *some* time horizon, and their argument in this proceeding indicates that they seek to maximize royalty revenue over the short-run, so that *current* songwriters receive royalties based on *current* revenue that is not deferred because of the interactive streaming services' long-term business model. *See* Rysman WDT ¶ 50. The music publishers could instead pay royalties to songwriters based (at least in part) on an index of several years of revenue to be consistent with the long-term business models of the interactive streaming entities. *See* Leonard WRT ¶ 60 (noting that advances from publishers to songwriters are examples of such a long-run ''smoothing'' of royalty revenues). Or, as Copyright Owners urge, the Judges could require the interactive streaming services to abandon the revenue-based royalty structure (with protective alternate prongs and floors) and to accept inefficient per-unit rates, thereby compromising their downstream businesses. In keeping with the Judges' long-standing position, I believe the Judges should remain *business model neutral,* and decline to favor one challenged business model over another. *Instead, I would adopt the 2012 rate structure that embodies a negotiated compromise by the parties that has adequately addressed this revenue deferral issue.*

access with other goods or services, allocating too much revenue to the non-music portion of the bundle, rather than attributing the correct amount to the music service and thus, to the revenue base. *Written Rebuttal Testimony of Christopher C. Barry, CPA, CFF (on behalf of Copyright Owners)* ¶ 7. Copyright Owners argue that the services *manipulate* revenue calculations in their favor, allegedly defining revenue in *opportunistic* ways. *See* Rysman WDT ¶ 44; Rysman WRT ¶ 15; Ghose WDT ¶¶ 62–81. They maintain that they cannot discern such manipulation and opportunism as it occurs, because the booking of revenue among lines of business is ''opaque to publishers''—especially in comparison to the identification of the number of consumers or the number of streams. Rysman WDT ¶ 43; Rysman WRT ¶ 15; Ghose WDT ¶¶ 80–81.

In response, the Services assert there is no evidentiary support for this overall and conclusory assertion. JSRPFF at p. 308. In connection with the assertion of displacement-through-bundling, both parties examine—essentially as an emblematic case study—Amazon's pricing of interactive music in a bundle with one of its products. That study is addressed below.

Amazon Products and Pricing: A Case Study

[REDACTED]

Survey Results

[REDACTED]. [264]

Other Potential Displacements from Bundling

With regard to other bundled offerings that Copyright Owners claim to improperly diminish revenue and hence the royalty base, the evidence is more descriptive than statistical. With regard to Google Play Music, Copyright Owners point to evidence suggesting that Google ''leverages its music business to drive revenue elsewhere within its enterprise.'' COPFF ¶ 482A *et seq.* (and record citations therein). Google, in response, argues that this argument is preposterous because ''Google's other products already reach literally hundreds of millions of people in the U.S. [and] [t]he idea that Google is intentionally driving down the price of Google Play Music in order to ''grow a base of customers'' who will then be more likely to use Search or Gmail or Google Maps simply strains credulity. . . . . The value proposition flows in the opposite direction.'' Levine WRT ¶¶ 8–9.

With regard to Pandora, Copyright Owners note that it has expanded beyond its ''pureplay'' origins by acquiring Ticketfly, a fan-to-fan live concert ticket exchange business. 3/9/17 Tr. 408–410 (Phillips). According to Copyright Owners, in the future, Pandora *may* generate revenue from this ancillary business—revenue that arguably should be included as ''service revenue'' in a revenue based rate structure. Rysman WRT ¶ 34. However, Pandora notes that Ticketfly is a small operation relative to Pandora's overall business and, as Copyright Owners acknowledge, any use by Pandora of resources it obtained through streaming music to benefit Ticketfly would be realized in the future, making such a link speculative at this time. Moreover, Pandora argues that, if and when Pandora may drive incremental attendance at concerts and other live events through Ticketfly, music publishers and songwriters would benefit directly from such attendance. *See* Herring WRT ¶ 34.

[REDACTED]. It has announced an offering of a subscription together with a subscription to *The New York Times, i.e.,* a separate entity offering a separate product. According to Copyright Owners, Rysman WRT ¶ 36. However, [REDACTED]. SJRPFF at p. 868.

Finally, with regard to Apple, Copyright Owners note that the various music and other services and products are available through Apple, including iTunes download purchases, Beats music service and, of course, Apple's ubiquitous non-music products. *See* COPFF ¶¶ 523–527. Although Copyright Owners do not identify any specific bundling or product-to-product displacement, they note more broadly that ''Apple's interactive streaming service can operate as a gateway into the iTunes ecosystem, which Apple uses to sell iPhones, apps, and other products.'' Kokakis WDT ¶ 60.

Findings Regarding Displacement, Discounts and Bundling

I find the parties' back-and-forth on these bundling, discounting and displacement issues (absent a separate analysis of any given bundle/discount, such as presented by Amazon with regard to the bundled $7.99 price for Echo for Prime members) to be indeterminate—and for good reason. As the Judges have found previously, all such bundling, and associated discounts, constitute forms of price discrimination, whereby a seller can increase total revenues for the bundle and through a discount beyond the revenue realized if each item was sold at its separate or undiscounted price. *See SDARS I Underpayment Ruling* at 18–19. The parties in the present proceeding do not so much dispute this point as they argue whether the bundles discounts and alleged displacements tend, on balance, to increase the revenue base (by adding new subscribers) or to decrease the revenue base (by reducing per subscriber revenue). I agree with Copyright Owners that the services *may* be using bundling and associated discounts in a manner that is inconsistent with short-run maximization of revenues, or even profits, but they may also be growing the revenue base.

The import of this dispute in the present case is how the presence of bundling and discounting bears, initially, on the rate structure and, then, on the rates within that structure. With regard to the rate structure, the rate prongs in the 2012 benchmark that the Services are urging the Judges to adopt deal with these revenue measurement and attribution issues by the use of a greater-of rate structure, whereby—if the revenue-based royalty is lower than the other prong (typically a per-subscriber, a TCC prong or the Mechanical Floor)—then one of the latter prongs becomes applicable. By contrast, Copyright Owners' proposal provides for a greater-of per unit/per-user royalty that does not contain any features pertaining to bundling. As between these two alternatives, I find that the 2012 rate structure is clearly more consonant with the marketplace reality of varying WTP, through the use of price discrimination through bundling and, indeed, has accommodated such bundling for a decade.

I acknowledge Copyright Owners' argument that the bundling they anticipated may well have been of a different nature (*e.g.,* bundling interactive streaming with cell phone or internet service) when they agreed to the bundle provisions in the 2012 settlement, and that they had not contemplated the myriad ways in which bundling would occur going forward, especially with the entry of large multi-product ''ecosystem'' firms such as Amazon, Apple and Google. However, what that possible difference between anticipated and actual bundling indicates to me is that, *hypothetically,* perhaps a different bundling structure, or different rates within the structure, might be more appropriate than the 2012 rate structure in this regard. But the Judges cannot deal in hypothetical rate structures and rates: Copyright Owners (and Apple) did not propose such an alternative structure; instead, so

[264] With regard to this topic, see the discussion of ''cannibalization,'' *infra.*

to speak, they threw out the baby with the bath water, *rejecting any price discriminatory rate structure* (and bundling is a form of price discrimination)—proposing instead to replace such a structure with a non-discriminatory rate that fails to address the varying WTP among listeners from which upstream demand by the interactive streaming services is derived.

In these proceedings, the Judges are bound by the parties' proposals, unless there are record facts that permit the Judges to mold a rate structure or rates that vary from the proposals.[265] Here, with regard to the impact of bundling and other price discriminatory elements of the rate structure, the choices are stark. Only the 2012 benchmark proposed by the Services addresses these issues, and in a manner that has existed in the market for a decade.[266]

d. Cannibalization

Copyright Owners assert that the Services' benchmarking approach fails to account for the ''cannibalization'' of digital download and physical sales, through listeners' substitution of interactive streaming for the purchase of digital downloads and physical products, mainly CDs. In support of this argument, Copyright Owners point to the contemporaneous increase in interactive streaming and the decrease in the sales of digital downloads and CDs. They note that the sale of digital albums and digital tracks decreased by 9.4% and 12.5%, respectively from 2013 to 2014, and by an additional 2.9% and 12.5%, respectively, from 2014 to 2015. *See* Israelite WDT ¶ 70; Ex. 2773 (2014 Nielsen Report), at 2; Ex. 2780 (2015 Nielsen Report), at 7, 8. Thus, they argue that the royalty structure (and rates) must account for this substitution effect through an increase in the royalties on interactive streaming. *See* COPFF ¶¶ 575–586 (and record citations therein).

The Services do not dispute these statistics. However, the Services argue that Copyright Owners have not presented any evidence that would support the claim that declining physical and download sales have been *caused* by increases in interactive streaming. Thus, in the absence of such evidence, the Services argue that Copyright Owners have merely assumed causation from correlation. *See* JSRPFF at p. 380 (and record citations therein).

In fact, they point to the testimony of NMPA's own witness, Bart Herbison, Executive Director of Copyright Owner participant NSAI. Mr. Herbison testified that he did not ''blam[e] the loss of songwriters on streaming,'' acknowledging that piracy and disaggregation of the album were major problems for songwriters prior to the popularity of streaming, and therefore, overall, he was ''not ascribing any large percentage of [lower mechanical royalties] to streaming.'' 3/23/17 Tr. 2940–41, 2945, 2955–56 (Herbison).

Moreover, not only do the Services note the absence of proof that these changes were caused by interactive streaming, they note that the changes can just as easily be attributed to changing ''consumer preferences,'' for which the interactive streaming services should not be penalized. *See* 3/21/17 Tr. 2227–28 (Hubbard) (such changes do not reflect cannibalization, but rather how the industry has evolved to satisfy ''contemporary consumers' preferences'' and to ''respond to consumer demand.'').

I find that there is no sufficient evidence to indicate that interactive streaming has caused the decline of the sale of physical and digital sound recordings. Moreover, even assuming *arguendo* any sales of digital downloads and physical product was caused by the listeners' preference for interactive streaming, the effect of such a phenomenon on songwriter royalties is unclear. Record companies, as licensees, pay royalties to music publishers, under subpart A, for the musical works embodied by record companies in digital downloads and physical product. Assuming a portion of that royalty revenue is lost (''cannibalized'') by interactive streaming, the services that utilize the musical works in those streams pay both a mechanical royalty and a performance royalty in exchange for the licenses to use the musical works. There is insufficient evidence in the record to conclude that, on balance, there is a net substitution effect that results in lower royalties paid for musical works.

Further, I agree with the Services that Copyright Owners' attempt to compare sales of downloads and physical product (which generate mechanical royalties under subpart A) with revenues from interactive streaming (that generate mechanical royalties under subparts B and C, and performance royalties) is inconsistent with Copyright Owners' (persuasive) argument, discussed *infra,* that there is no sufficient evidence to correlate listening across purchases and streaming services. The Services correctly note that the sale of a download or a CD (or a vinyl record) allows the purchaser to ''access'' that purchase an indefinite number of times, whereas access through a streaming service likewise allows for listening (to various songs) for an indeterminate number of times. In this regard, Copyright Owners' proposed per-unit royalty rate for streaming is simply not consistent with pricing per unit sold under subpart B, because the items purchased are themselves inconsistent in nature—as Copyright Owners (again, persuasively) argue in opposition to the use of commercial and academic conversion ratios to correlate the number of times a consumer listens to a song in the purchased product and streaming spheres.

e. The ''Shadow'' of the Statutory License

Copyright Owners assert that any benchmark, including the Services' proffered benchmarks, based on rates set for a compulsory license, are inherently suspect, because they are distorted by the so-called ''shadow'' of the statutory license. This is a recurring criticism. *See, e.g., Web IV* 81 FR at 26329–31.

More particularly, Copyright Owners argue: ''The royalty rate contained in virtually any agreement made by a music publisher or songwriter with a license for rights subject to the compulsory license will be depressed by the availability of the compulsory license.'' COPFF ¶ 708 (and record citations therein). In summary, this alleged shadow purportedly diminishes the value of a rate that was formed by private actors who negotiated while understanding that either party could refuse to consummate a contract and instead participate in a proceeding before the Judges to establish a rate. Thus, neither side can utilize any bargaining power to threaten to actually ''walk away'' from negotiations and refuse to enter into a license. In that sense, therefore, any bargain they struck would be subject to the so-called ''shadow'' of the regulatory proceeding.

The argument that the shadow taints the use of statutory rates, and direct agreements otherwise subject to the statutory license is undercut, however, by section 115 of the Copyright Act,

[265] As noted *supra,* the Judges may also find that the existing rate structure and rates are appropriate, if the benchmarks proffered by all the parties are insufficient. *See Music Choice, supra.* Thus, the 2012 rate structure would have been an appropriate structure for the forthcoming rate period even if it had not been affirmatively advocated as a benchmark by the Services.

[266] I note an important difference between the bundling issue in the SDARS context and that issue here. For the SDARS, the issue was how to measure revenue where only a pure revenue-based rate structure exists, and the Judges noted the difficulty in assigning value to different elements of the bundle. Here, the 2012 benchmark (the parties' agreement) addresses this indeterminacy by adopting alternative royalty prongs, which, as noted in the text, *supra,* is one way to resolve the indeterminacy problem.

which provides that in addition to the objectives set forth in section 801(b)(1), in establishing such rates and terms, the Copyright Royalty Judges may consider rates and terms under voluntary license agreements described in subparagraphs (B) and (C). 17 U.S.C. 115(c)(3)(D). The two subparagraphs referenced therein, subparagraphs (B) and (C), respectively, refer to agreements on ''the terms and rates of royalty payments under this section'' by ''persons entitled to obtain a compulsory license under [17 U.S.C. 115](a)(1)]; and ''licenses'' covering ''digital phonorecord deliveries.'' *Id.* Thus, it is beyond dispute that Congress has authorized the Judges, in their discretion, to consider such agreements as evidence, irrespective of—*or perhaps because of*—the shadow cast by the compulsory license.

Additionally, as noted *supra,* the Judges may consider the existing statutory rates themselves as evidence of the appropriate rate for the forthcoming rate period, *even when those rates were not the product of a settlement.* Indeed, the Judges may consider existing rates as the starting point and the end point of their analysis. *Music Choice, supra,* 774 F.3d at 1012 (the Judges may ''use[ ] the prevailing rate as the starting point of their Section 801(b) analysis'' and may ultimately find that ''the prevailing rate was reasonable given the Section 801(b) factors.'').

Of course, the fact that the Copyright Act and the D.C. Circuit grant the Judges statutory authority to consider and rely on statutory rates and related settlement agreements as evidence does not instruct the Judges as to *how much weight* to afford such agreements. The exercise of that judicial discretion remains with the Judges.

But with regard to the particular issue of the so-called shadow of the statutory rate, there is no reason to find such benchmark agreements *per se* inferior to other marketplace benchmark agreements that may be unaffected by the shadow, because those other benchmarks may be subject to *their own imperfections and incompatibilities* with the target market. Thus, the Judges must not only consider (i) the importance, *vel non,* of any potential ''shadow-based'' differences between the *regulated* benchmark market and an *unregulated* market that might impact the probative value of the former, but also (ii) how those differences (if any) compare to the differences (if any) between the unregulated market and the target market (*e.g.,* differences based on complementary oligopoly power, bargaining constraints and product differentiation).[267] In the present case, because Copyright Owners' and Apple's proposals are structured as per-unit rates, they suffer from deficiencies that dwarf any alleged problems associated by the alleged shadow of the 2012 statutory benchmark; that is, assuming *arguendo* that the shadow on balance is problematic rather than beneficial.

In the present proceeding, the parties weigh-in on the shadow issue with several, more particular, arguments. Copyright Owners emphasize that the purpose of their benchmarking approach is to avoid the distortions of the shadow, by utilizing the unregulated sound recording agreements between labels and interactive streaming services and then applying a ratio of sound recording: musical works royalties, (the latter also in unregulated contexts), to develop a benchmark wholly free of the shadow cast by the statute. 4/4/17 Tr. 4191 (Eisenach) (''[T]he underlying problem with looking at an agreement negotiated under the shadow of a license [is that][i]t shifts bargaining power from the compelled party to the uncompelled party by the very nature of the exercise.'').

The Services' experts discount the foregoing shadow criticism. Indeed, what Copyright Owners considered vice, the Services laud as virtue. That is, the shift in bargaining power is precisely what makes any shadow effect of the statutory license tolerable. Professor Katz points out that rates set voluntarily by the parties in a settlement under the ''shadow'' provide two important benefits. 3/13/17 Tr. 661 (Katz). First, with a statutory rate-setting proceeding as a backstop, large licensors cannot credibly threaten to ''hold out'' and ''walk away'' from the negotiations without an agreement, thereby negating their ability to use their ''must have'' status as a cudgel to obtain rates that can exceed even monopoly-level rates. Second, when such negotiations are conducted with *all the parties* at the figurative table (including perhaps trade associations), no single party, whether licensor or licensee, has disproportionate market power in the negotiations.

I agree with Professor Katz that settlement agreements reached in the shadow are useful. Because the statutory proceeding is the backstop, the power of any entity simply to refuse to strike a deal except on its own unilateral terms is effectively negated. Thus, such settlement agreements tend to eliminate complementary oligopoly inefficiencies, and provide guidance as to an effectively competitive rate. Indeed, this argument is consistent with the Judges' ''shadow'' analysis in *Web IV, supra,* at 26330–31 (noting the counterbalancing effect of the statutory license in establishing effectively competitive rates). Further, when such settlement agreements are industrywide, they tend to eliminate disproportionate market power, and the resulting rates thus may be evidence of a rate that is fair and thus consonant with Factor B of section 801(b)(1). (This issue is discussed in further detail in connection with the Factors B and C analysis, *infra.*) Although Copyright Owners are theoretically correct in noting that some licenses might have otherwise been negotiated at rates higher than the settlement rate that was affected by the shadow, that is simply the tradeoff that the statutory scheme makes in its identification of settlement rates as evidentiary benchmarks. That is, such a theoretical problem needs to be weighed against the salutary aspects of settlement rate structures and rates, discussed *supra.* I find that the benefits of the settlement process, in this proceeding, easily outweigh the loss of any hypothetical deals that may have been reached above the settlement rates, especially because, in the absence of the shadow, rates higher than the settlement rate would be a function, in part, of the Copyright Owners' complementary oligopoly and other market power, which compulsory statutory licensing has been designed to mitigate.

Although I recognize the market-based value of a benchmark agreement reached under the shadow of the statutory license, (indeed, economic actors' settlement agreements are part and parcel *of* the market[268]), I cannot

[267] The Judges note that one of the two benchmarking methods relied upon by Copyright Owners subtracts the *statutory* rate set in *Web III* for noninteractive streaming from a royalty rate derived from the unregulated market for sound recording licenses between labels and interactive streaming services. This would seem to violate the Copyright Owners' own assertion that statutorily set rates are tainted by a regulatory shadow and thus cannot be used to establish reasonable rates. However, Copyright Owners' expert testified that, in his opinion, the Judges in *Web III* accurately identified the market rate for noninteractive streaming, so that rate could be utilized as if it were set in the market. 4/4/17 Tr. 4643 (Eisenach). This assertion proves too much. If one expert on behalf of a party may equate a rate set by the Judges with the market rate, why cannot the Judges, or any other party's expert, do the same with regard to a different statutory rate? The end result of such an approach takes us back to the point the Judges made at the outset in this section: any rate set by the Judges or influenced by the Judges' rate-setting process must be considered on its own merits.

[268] For example, the Judges regularly assume in a benchmarking approach that the contracting parties have ''baked-in'' the values of discrete items in their agreement. *See, e.g., Web IV, supra,* at 26366.

defer to any implicit ''mindreading'' by contracting parties as to the Judges' application of the all the non-market elements of section 801(b)(1). Rather, the Judges have a duty to independently apply the itemized factors listed in the statute. Accordingly, I reject the idea that rates and terms reached through a settlement must be understood to supersede—or can be *assumed* to embody—the Judges' application of the statutory elements set forth in section 801(b)(1). However, if on further analysis, the Judges find that provisions arising from an agreement in fact do reflect the statutory principles set forth in section 801(b)(1), then the Judges may adopt the provisions of that settlement *in toto,* again, if those provisions are superior to the evidence submitted in support of alternative rates and terms.

5. The ''All-In'' Rate Structure and the ''Mechanical Floor''

a. The ''All-In'' Rate Structure

The current mechanical royalty rate is calculated as a so-called ''All-In'' rate. Simply put, the last step when calculating the mechanical rate is to subtract from the intermediate figure the rate paid by the interactive streaming services to performing rights organizations (PROs) for the ''public performance'' right. All five services (*i.e.,* including Apple) urge the Judges to establish a statutory rate structure for the forthcoming rate period that contains this ''All-In'' feature, whereas Copyright Owners request that the rate for the forthcoming rate period be set without regard to the royalty rate paid by the services to the PROs for the performance rights. I examine the parties' arguments seriatim below.

i. The Services' Position (including Apple's Position)

According to the services, a key aspect of the 2008 and 2012 settlements was that the rates paid by services for mechanical royalties would allow for a deduction of expenses for public performance royalties, *i.e.,* the top-line rate paid under the Section 115 license would be ''All-In'' from the services' point of view. Levine WDT ¶ 35; Parness WDT ¶ 7; 3/8/17 Tr. 298–99 (Parness). In this regard, a Google fact witness, Zahavah Levine, testified that as far back as 2001, the streaming services wanted to avoid what she described as a ''double dip'' problem, whereby a service might need to conduct separate negotiations with PROs and with music publishers in order to obtain *usable* musical works license rights. 3/8/17 Tr. 147–148 (Levine). In fact, prior to settlement, some members of the streaming community expressed a view that the value of any mechanical right implicated by interactive streaming is essentially zero, because the Copyright Owners are already compensated through performance payments to the PROs. 3/29/17 Tr. 3645–47 (Israelite). According to Apple, the absence of any separate value in the mechanical rate (when separated from the performance rate) is underscored by the fact that interactive streaming is the only distribution channel that pays *both* a performance royalty and a mechanical royalty. *Rebuttal Testimony of David Dorn* ¶ 10 (Dorn WRT).

Thus, according to the services, a determining factor in the 2008 settlement was Copyright Owners' agreement to a deduction of performance fees, via the acceptance of an ''All-In'' rate. 3/8/17 Tr. 298–301 (Parness); Parness WDT ¶ 7; 3/8/17 Tr. 170–71 (Levine) (explaining benefits of ''All-In'' rate structure). In fact, for the services, according to one of its witnesses, the ''All-In'' nature of the rate was a determining factor in the parties reaching a settlement. 3/8/17 Tr. 300–301 (Parness).

Accordingly, the services argue that this ''All-In'' rate structure is consistent with the parties' expectations in settling *Phonorecords I* and *II. See* SJPFF ¶ 112. Additionally, the Services point out that many direct licenses between musical works copyright owners and streaming services incorporate the ''All-In'' feature of the existing section 115 license. *See* JSPFFCOL ¶¶ 143–145 (and record citations therein). The services also emphasize that the Copyright Owners' recent settlement of the Subpart A rates—approved by the Judges—implies an ''All-In'' feature. Specifically, one of the services' expert economic witnesses, Dr. Leonard, testified that, expressed as a percentage of payments to the record labels (not as a percentage of total streaming service revenue), the subpart A settlement reflects a payment of 15.8% of ''All-In'' sound recording royalties in 2006, and of 14.2% of ''All-In'' sound recording royalties, when compared to payments to record labels in 2015. Leonard AWDT ¶ 46 (noting that ''these ratios are lower than the current ratios of musical works-to-sound recordings royalties contained in Section 385, Subparts B and C (*e.g.,* musical works royalties are between 17.36% and 21% of the service payment to record companies for sound recordings for Standalone Portable Subscription, Mixed Use services covered under Subpart B.'')).[269]

Finally in this regard, the services assert that the Judges have made similar determinations for analogous sets of rights in other proceedings. For instance, they note that the Judges effectively set an ''All-In'' licensing rate for reproductions of sound recordings and performances of sound recordings under 17 U.S.C. 112 and 114. The services analogize the relationship of the performance right and the mechanical right, on the one hand, with the sound recording ephemeral right and the sound recording performance right on the other, characterizing both pairs of rights as ''perfect complements.'' *See* SJPFFCOL ¶ 114 (citing *Web IV,* 81 FR at 26397–98 (discussing bundling of Secs. 112 and 114 rights and noting that licensees ''would be agnostic with respect to the allocation of those rates to the Section 112 and 114 license holders.'').

Separately, as noted *supra,* Apple concurs with the adoption of an ''All-In'' rate in the forthcoming rate period. According to Apple, the Judges should adopt an ''All-In'' rate for interactive streaming because (1) mechanical and performance royalties are *complementary rights* that must be considered together in order to prevent exorbitant costs; (2) the current statute uses an ''All-In'' rate; (3) ''All-In'' rates provide greater predictability for businesses; and (4) recent fragmentation and uncertainty with respect to performance licenses threaten to exacerbate the problems of high costs and uncertainty already present in the industry.'' APFF ¶ 138 *et seq.* (and record citations therein). As a policy matter, Apple maintains that an ''All-In'' rate helps maintain royalties at an economically efficient level because it sets a single value for all of the rights that interactive streaming services must obtain from publishers and songwriters. *See* 3/23/17 Tr. (Ramaprasad) 2667-2669, 2670 (a mechanical-only rate could cause ''exorbitant'' rates, but an ''All-In'' rate would not); *Expert Rebuttal Report of Professor Jui Ramaprasad February 15, 2017* ¶ 13 (Ramaprasad WRT) (a mechanical-only royalty could lead to ''unreasonably high combined royalties for publishers and songwriters''); *see also* Leonard AWDT ¶ 58; Katz WDT ¶ 94; Herring WDT ¶ 59. Accordingly, Apple asserts that, by adoption of an ''All-In'' rate, the streaming services avoid two separate

[269] Of course, the subpart A rates are implicitly ''All-In'' because record companies do not pay performance royalties. I consider further, *infra,* the evidentiary value of the subpart A settlement and rates.

negotiations for the performance right and the mechanical right—ensuring that these two complementary rights are considered in tandem, with the cost of one impacting the cost of the other. *See* Dorn WRT ¶ 15; *see also* 3/13/17 Tr. 587–588 (Katz); 3/15/17 Tr. 1191–1192 (Leonard); Herring WDT ¶ 59.

Further in this regard, Apple maintains, if a full mechanical-only rate were adopted in lieu of an ''All-In'' rate, interactive streaming services would need to pay for mechanical rights pursuant to the statute and then engage in an entirely separate negotiation for the performance right. Dorn WRT ¶¶ 14–15; Ramaprasad WRT ¶ 13. This could lead to an undeserved windfall for publishers and songwriters as, after this negotiation, total royalty payments that interactive streaming services pay for musical works could be exponentially higher than whatever mechanical-only rate the Judges adopt. Dorn WRT ¶¶ 14–15; Ramaprasad WRT ¶ 13. Apple avers that this would be unfair—because the royalty payments are all made to the same entities, *i.e.,* the publishers and songwriters. Dorn WRT ¶¶ 15–16; *see also* Herring WDT ¶ 59.[270]

As noted *supra,* Apple, consistent with the other Services, argues that the ''All-In'' rate structure is particularly important because of relatively recent industry developments. Specifically, Apple takes note of the recent ''fragmentation'' [271] and uncertainty in performance rights licensing that the services all claim to threaten an exacerbation of the existing uncertainty over royalty costs. *See* Dorn WRT ¶¶ 17–18; Ramaprasad WRT ¶¶ 13, 63; Parness WDT ¶¶ 16–20; Katz WDT ¶¶ 87–94; Tr. 3/13/17 Tr. 602–604 (Katz). Apple notes that this problem may be exacerbated because of the emergence of a fourth PRO, Global Music Rights (GMR), in addition to ASCAP and BMI, as well as SESAC which (like GMR, and unlike ASCP and BMI) is not subject to a consent decree and rate court review (as discussed *infra*). Parness WDT ¶ 18; Katz WDT ¶ 91. *See* 3/9/17 Tr. 382–83 (Parness); 3/13/17 Tr. (Katz) 602–604.

In addition to the problems created by potential fragmentation, the services also raise the specter of future ''withdrawals'' by music publishers from one or more PROs. As Apple notes, in the past few years, publishers have taken steps to effectuate such withdrawals, especially from PROs that are governed by consent decrees. Dorn WRT ¶ 18; Ramaprasad WRT ¶¶ 13, 63; Parness WDT ¶ 17; Katz WDT ¶ 91. Apple points to the example of one large publisher, UMPG, which moved a portion of its catalog from ASCAP, a PRO governed by a consent decree, to SESAC, which is not. 3/27/17 Tr. 3207 (Kokakis). Apple also notes that UMPG also fully withdrew from BMI for a brief period in June 2014. 3/27/17 Tr. 3204 (Kokakis). Moreover, Apple maintains that, even when publishers have not actually withdrawn, ''[s]everal publishers of significant commercial importance have threatened [to withdraw entirely from ASCAP and BMI].'' 3/9/17 Tr. 376–81(Parness); *see also* Parness WDT ¶ 17; 3/27/17 Tr. 3206 (Kokakis) (UMPG executive confirming that he and the services ''had discussed at times the possibility of Universal withdrawing'' fully from a PRO); 3/28/17 Tr. 3310–3313 (Kokakis) ([REDACTED]). Apple maintains that these events and threats of withdrawal create uncertainty in the performance rights marketplace and portend a potential increase in performance royalty costs for interactive streaming, which could not be ameliorated in the absence of an ''All-In'' rate. *See* Ramaprasad WRT ¶ 63 (the only certain result of publishers withdrawing is that performance royalties ''will increase''); 3/8/17 Tr. 256–57, 262–63(Levine); 3/13/17 Tr. 602–04 (Katz) (fragmentation leads to higher performance rights costs).

ii. Copyright Owners' Position Regarding an ''All-In'' Royalty Rate

Copyright Owners initial argument is jurisdictional in nature; they emphasize that this is a proceeding to set rates and terms for the Section 115 compulsory *mechanical* license to make and distribute phonorecords, *not* to *perform* works. 17 U.S.C. 115, 801(b)(1). More particularly, they note that, whereas the Section 115 compulsory license explicitly applies solely to ''the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of [nondramatic musical] works,'' it does apply to the exclusive right provided by clause (4) to perform the work publicly. 17 U.S.C. 106, 115. Thus, Copyright Owners argue, the public performance right provided by 17 U.S.C. 106(4) is an entirely separate and divisible right from the mechanical right at issue in this proceeding and is not subject to the Section 115 license. *See* COPCOL ¶ 314 (citing 17 U.S.C. 106, 115, 201(d); Ex. 920 at 16; 2 *Nimmer on Copyright* Sec. 8.04[B] (''[T]he compulsory license does not convey the right to publicly perform the nondramatic musical work contained in the phonorecords made under that license. Similarly, a grant of performing rights does not, in itself, confer the right to make phonorecords of the work.'')).

Copyright Owners further note that performance royalties are set in negotiations between licensors and licensees, subject to challenge in a ''rate court'' proceeding, and conclude that the Judges cannot set an ''All-In'' rate because they have ''not been vested with the authority to set rates for performance rights because they are not covered by Section 115.'' COPCOL ¶ 315.[272]

Copyright Owners also argue in this regard that the services have not provided evidence in this proceeding to justify and support an ''All-In'' rate, such as evidence showing the rates and terms in existing performance licenses; the duration of such licenses; benchmarks for performance rights licenses; and the impact of interactive streaming on other sources of performance income, including non-interactive streaming, terrestrial radio and satellite radio income. Further, Copyright Owners point out that the PROs and/or all music publishers are all necessary parties for any such determination, but they were not proffered by the services. *See* COPCOL ¶ 319.

For these reasons, Copyright Owners decry as mere ''sophistry'' the services' argument that they are not asking the Judges to set performance rates, but rather only to ''set'' a ''mechanical'' rate that permits them to deduct what they pay as a performance royalty. More particularly, they argue that this approach, if adopted, would leave the mechanical rate indeterminate, subject to whatever is decided in negotiations or judicial action regarding the mechanical rate. *See* COPCOL ¶ 320. Indeed, Copyright Owners note, under the Services' ''All-In'' proposal, the mechanical rate could be zero (if performance royalties are agreed to or set by the rate courts at a rate that is

[270] Pandora and Google separately make the same arguments as Apple in this regard. *See* Pandora PFFCOL ¶¶ 35–36 (and record citations therein); Google PFF ¶ 29 (and record citations therein).

[271] ''Fragmentation'' refers to the existence of more than one owner of copyrights to a musical work, requiring an interactive streaming service to engage in a costly and uncertain attempt to locate each owner and provide it with a separate Notice of Intent and to bear the risk of a potential infringement action if one or more copyright owners is not located. SJPFF ¶¶ 162–63 (and record citations therein).

[272] Copyright Owners note that performance royalties are set directly in negotiations between licensors and licensees, but if the either of the two largest PROs (ASCAP and BMI) and licensees are unable to enter into consensual agreements, they rates are set in a federal court action in the Southern District of New York (before a designated ''rate court'' judge), pursuant to existing Consent Decrees. *See* COPCOL ¶ 316; *Register's Report* at 20, 34, 37, 41.

greater than or equal to the ''All-In'' rate proposed by the Services here)—and, they argue, ''a mechanical royalty rate of zero ''is anything but reasonable.'' COPCOL ¶ 322.

In an evidentiary attack, Copyright Owners demonstrate that the only percipient witness who engaged directly in the 2008 negotiations involving the ''All-In'' rate (or any other matter) was the NMPA president, David Israelite, and that, by contrast, the services' two witnesses, Mr. Parness and Ms. Levine, did not participate directly in those negotiations. *See* CORPFF–JS at 58. Thus, Copyright Owners assert that the services cannot credibly argue based on what the negotiating parties actually intended with regard to, *inter alia,* the ''All-In'' rate.[273]

Copyright Owners also take aim at the services' argument that it matters not whether they pay royalties designated as ''performance'' or ''mechanical,'' because the same rights owners are also receiving performance royalties. According to Copyright Owners, this argument: (1) ignores the fact that the Copyright Act creates separate and distinct mechanical and performance rights, and made only the former subject to compulsory licensing under Section 115; (2) ignores the fact that the rates for the use of those two rights, to the extent not agreed, are set in different jurisdictions; and (3) ignores the disruption that would be caused by eliminating mechanical royalties—disruptions arising from (a) the fact that mechanical royalties are the most significant source of recoupment of advances to songwriters; and (b) songwriters receive a greater share of mechanical royalties than they do of performance royalties (both because of the standard splits in songwriter agreements and the fact that performance income, unlike mechanical income, is diminished by PRO commissions). COPCOL ¶ 323; COPFF ¶ 640.[274] *See also Witness Statement of Thomas Kelly* ¶ 66; *Witness Statement of Michael Sammis* ¶ 27; Yocum WDT ¶ 23; Israelite WDT ¶ 71 (all asserting that combining mechanical royalties and performance income in a single ''All-In'' payment will diminish payments to songwriters, and will negatively impact the publishers' ability to recoup advances, which will, in turn, negatively impact the size and number of future advances).

Copyright Owners further assert that the Services' claim that increasing ''fractionalization'' of licenses justifies an ''All-In'' rate is a red herring. Specifically, they argue that there has *always* been fractional licensing of performance rights by the PROs, because there typically are multiple songwriters and publishers with ownership rights in a song and they may not all be affiliated with the same PRO, and there is no legal basis on which any one PRO has the right to license rights that it does not have. Israelite WRT ¶¶ 65–66; 3/29/17 Tr. 3662–63 (Israelite); HX–327; 3/9/17 Tr. 372–73 (Parness). Moreover, they claim that, contrary to the Services' assertions, the presence of GMR has not altered the extent of fragmentation in any manner, let alone increased the degree of fragmentation in the marketplace. In particular, Copyright Owners point out that the Services admitted that GMR represents fewer than 100 songwriters and has a meager market share of roughly 3 percent of the performance market. 3/9/17 Tr. 365–67 (Parness); *see also* Israelite WRT ¶ 59. Copyright Owners also note that the Services presented no evidence either that there has been an increase in performance rates in licenses issued by GMR, or, more generally, of any actual or potential impact of this alleged ''fragmentation'' of the performance rights marketplace on their interactive streaming businesses. 3/9/17 Tr. 381 (Parness).

Next, Copyright Owners note that the issue of publisher withdrawals from PROs—if it ever was a justification for an ''All-In'' rate—has been overtaken by events. Specifically, they note that the ASCAP and BMI rate courts in the Southern District of New York, the Second Circuit and the Department of Justice have determined that partial withdrawals by publishers are not permitted. Ex. 876, at 4; Israelite WRT ¶¶ 62–63, *citing In re Pandora Media, Inc., supra,* 1.

b. The ''Mechanical Floor''

i. Copyright Owners' Position

Copyright Owners urge the Judges to retain the Mechanical Floor.[275] They emphasize that the Mechanical Floor establishes a minimum value protecting the mechanical right, in that it cannot be reduced by subtracting the performance royalty as occurs under the ''All-In'' rate. *See* Israelite WRT ¶¶ 19–22, 29, 81; 3/29/17 Tr. 3632, 3634–3636, 3638, 3754, 3764–3765 (Israelite); 3/8/17 Tr. 259 (Levine).

They also note that the revenue displacement and deferral problems they allege to exist under a percentage of revenue ''do not exist'' with the Mechanical Floor because that rate is expressed on a per subscriber basis. COPFF ¶¶ 639–40. [REDACTED]. In this regard, Copyright Owners maintain that the Services' desire to eliminate the Mechanical Floor is nothing other than a ''thinly veiled effort to sharply reduce the already unfairly low mechanical royalties.'' COPFF ¶ 644. The import of the Mechanical Floor is underscored by Dr. Eisenach who testifies that, in 2015, [REDACTED]. *Written Rebuttal Testimony of Jeffrey A. Eisenach, Ph.D.* ¶ 115 (Eisenach WRT).

Copyright Owners further argue that the Mechanical Floor is necessary to preserve a source of royalty revenue for the payment of advances to songwriters and the funding of recoupments of prior advances paid by publishers to songwriters. COPFF ¶ 640 (and record citations therein). They also point out that songwriters benefit more from publishing agreements than from agreements with PROs, because, under current publishing agreements, songwriters typically receive 75% or more of mechanical income whereas the PRO's split performance income 50/50 between publishers and songwriters. *Id.* Finally, Copyright Owners note that the PROs charge songwriters a fee, further reducing the value of the performance income relative to income. *Id.*

ii. The Services' and Apple's Arguments for Eliminating the Mechanical Floor

Despite their trumpeting of the 2012 settlement as an appropriate benchmark, the Services (and Apple, which does not rely on the 2012 structure) propose the elimination from that benchmark of the Mechanical Floor in the forthcoming

[273] Copyright Owners take this argument one step further—maintaining that consequently the Services ''have presented no competent evidence that an ''All-In'' rate structure ''is consistent with the parties' expectations in settling *Phonorecords I* and *II.*'' CORSJPCL ¶ 112. It is difficult to conclude that this fundamental rate structure, agreed to in two separate settlements between the parties, was not consonant with their ''expectations.''

[274] Copyright Owners note that, in *Phonorecords I,* Judge Sledge voiced a similar sentiment from the bench, referring to consideration of the performance royalty as a ''waste of time.'' COPFF ¶ 597 (and record citations therein). The Judges are not bound by any prior statement by a Judge that is not a part of a prior determination. Moreover, the Judges note that they are not in this proceeding ''setting'' the performance royalty rate, but rather considering whether that royalty payment should be a deduction in the formula for calculating the mechanical license.

[275] The Mechanical Floor refers to the step in the rate calculation after the ''All-In'' rate has been calculated. If that calculation would result in a dollar royalty payment below the stated Mechanical Floor rate, then the Mechanical Floor rate would bind.

rate period. In support of this position, they make the following arguments:

• When negotiating both the *Phonorecords I* and *Phonorecords II* settlements, the services acquiesced to the Copyright Owners' insistence that this Mechanical Floor be included in the rate structure, because the services believed that the Mechanical Floor was ''illusory,'' *i.e.,* that it was ''highly unlikely to ever be triggered . . . .'' SJPFF ¶¶ 127, 160 (and record citations therein). *See also* Apple PFF ¶¶ 85, 165 (arguing that the Mechanical Floor in the current rate structure adds uncertainty and leads to services paying ''windfall'' royalties to the Copyright Owners well above the ''All-In'' amount); Google PCOL ¶ 22 (asserting that the triggering of the Mechanical Floor in some circumstances has been caused by Copyright Owners leveraging market power). In this regard, the Services assert that the parties who negotiated the *Phonorecords* settlements did not expect a Mechanical Floor to bind, due to longstanding, stable public performance rates. 3/8/17 Tr. 309 (Parness); Parness WDT ¶¶ 9, 21; Levine WDT ¶ 35; 3/8/17 Tr. 254:24–256:8 (Levine).

• Past and potential future fragmentation of the licensing of public performance rights, threatened withdrawals by music publishers from PROs and the advent of new PROs, all combine to increase the likelihood that the Mechanical Floor will be triggered. Katz WDT ¶¶ 87, 91.

• Because mechanical rights and public performance rights are ''perfect complements'' from the perspective of an interactive streaming service, there is no economic rationale for setting the two rates separately from one another. *Id.* ¶ 88. *See also* Leonard AWDT ¶¶ 56, 82–83 (relying on the ''perfect complements'' argument to advocate for an elimination of the Mechanical Floor). Marx WDT ¶¶ 135, 165 (''Economic efficiency would be improved by removing the $0.50 per-subscriber fee floor from the paid subscriber mechanical royalty formula'' and ''[REDACTED]'').

• [REDACTED] *Id.*

• Triggering of the Mechanical Floor would not reflect an increase in the value of performance rights or mechanical rights, but rather would reflect the ability of copyright holders to exert market power over interactive services in the form of supra-competitive performance rights license fees. *Id.* 94.

• A Mechanical Floor defeats the benefits of an ''All-In'' rate. Apple PFF ¶¶ 164–167. (and record citations therein).

• It is incorrect that Copyright Owners ''had no control over'' public performance rates. The Services note that the same publishers that are members of the NMPA board, controlling its policy and strategy, are also member of the board of ASCAP, the largest PRO. SJRPFF–CO at p. 284 (citing *In re Pandora Media, Inc.,* 6 F. Supp. 3d 317, 341 (S.D.N.Y 2014) (describing how representatives of UMPG, Sony/ATV, and BMG all work with each other as ASCAP board members and work with David Israelite of the NMPA).

[REDACTED]

c. Findings Regarding the ''All-In'' Rate and the Mechanical Floor

I find that the ''All-In'' rate is a necessary and proper element of the 2012 benchmark, and must remain in the rate structure for the forthcoming rate period. As an initial matter, I reject Copyright Owners' argument that the ''All-In'' feature is unlawful because the Judges do not regulate performance rates. The ''All-In'' feature does not constitute a regulation of the performance rate, but rather represents a *cost exclusion* (or *deduction*) from the mechanical rate. I recognize, as do the parties, that the royalties otherwise due under a revenue-based format may exclude certain costs. *See* 73 CFR 385.11(Definition of ''Service Revenue,'' paragraph (3) therein).[276]

The exclusion of performance royalties in the ''All-In'' calculation is also necessary, because—as all parties and economists agree—mechanical rights and performance rights are perfect complements. That is, each right is worthless without the other. *See generally, Varian, supra,* at 40 (''Perfect complements are goods that are always consumed together in fixed proportions . . . A nice example is that of right and left shoes. . . . Having only one out of a pair of shoes doesn't do the consumer a bit of good.'').

Accordingly, if the mechanical rate was set in this proceeding without a credit for the performance rate, the perfect complementarity of the two licenses would be ignored, and the interactive streaming services would pay two times for the same economic right—the right to stream the musical work embodied in the sound recording. Further, as the Services note, there is a substantial overlap not only in the songwriters who receive royalties from both licenses, but also in the entities that negotiate these rates on their behalf. Thus, it is appropriate to continue to recognize the economic and bargaining-entity overlaps by continuing to exclude the performance rate through the ''All-In'' rate structure. In this regard, I agree with the Services and Apple that the Judges' treatment of the ephemeral license as embodied within the sound recording license in combined section 112 and 114 proceedings is implicitly an acknowledgment that the royalties for licenses which are perfectly complementary can be calculated in a manner that reduces one royalty to reflect another royalty *i.e.,* the sound recording license is reduced by the value of the ephemeral license. *See Web IV,* 81 FR, *supra,* at 26398 (''The Judges . . . find that the minimum fee for the [s]ection 112 license should be subsumed under the minimum fee for the [s]ection 114 license, 5% of which shall be allocable to the [s]ection 112 license holders, with the remaining 95% allocated to the [s]ection 114 license holders.''). Of particular importance for this Dissent is the fact that the subsuming of the section 112 ephemeral license fee within the section 114 license was done *at the behest of the parties,* and in fact dates back to the parties' agreement as to that issue since *Web I. See Web IV, supra,* 81 FR at 26396–97 (''The current $500 minimum fee for commercial webcasters has been in force for more than a dozen years, and has been voluntarily re-adopted by licensors and licensees.'').[277]

However, the performance license and the mechanical license, while overlapping in important respects, do not overlap in all respects. Consequently, I find that, for several reasons, the Mechanical Floor now in the regulations should also be included in the rate structure for the forthcoming rate period.

First, the fact that the performance right and the mechanical right are necessary complements *to the licensees* does not end the inquiry. As Copyright Owners point out, the mechanical royalties are used by the publishers in part to fund advances to songwriters, and their subsequent recoupment, thus providing an important source of liquidity to songwriters, pending the later payment of royalties. If the ''All-In'' rate substantially reduces or fully eliminates the mechanical portion of the calculation, the pool of funds available for advances and recoupments would be reduced.

Thus, the Services' argument that the mechanical right has no standalone value, while sufficient to support an ''All-In'' rate, is incomplete and, to an extent, self-serving, with regard to the Mechanical Floor issue. To the music publishers and songwriters, the

[276] I recognize that the reduction of the mechanical rate interim calculation by the amount of the performance rate in ''Step 2'' (*see* § 385.12(b)(2)), acts as an exclusion from royalties rather than a deduction from revenue (by analogy, just as a tax credit is a subtraction from taxes, whereas a tax deduction is a subtraction from income). However, there is no statutory or regulatory impediment that prohibits this exclusion from royalties. Also, it is noteworthy that the costs that are excluded under current § 385.12(b)(2) are all costs over which the Judges have no authority.

[277] The consensual nature of the handling of these perfect complements in *Webcasting* proceedings underscores the difference between the appropriateness of adopting an ''All-In'' rate that has been the subject of long-standing agreement in this proceeding (ten years) and the inappropriateness of the majority's binding of the parties in this proceeding to the rates of another perfect complement, the sound recording rate.

mechanical right *does* have a separate value, in the funding of songwriters, a value not provided by the performance royalty. It is essentially a source of royalty revenue that has been designated and created through an arm's length negotiation, by which songwriter advances and recoupments can be funded. The fact that this pool or source of revenue arises from the payment by services for the mechanical right that is a perfect complement (from their perspective) to the performance right is not the point; Copyright Owners have a right to the benefit of the 2012 bargain [278] that identified a floor below which their source of advances/recoupment funds would not fall. By analogy, the cost of any publisher input, not just the cost of providing liquidity to songwriters, such as, for example, the cost of heating the buildings in which songwriters toil, has no direct, standalone value to the services, yet no one would assert that the licensors are not entitled to a pool of royalty revenue sufficient to recover their heating costs. Liquidity funding for songwriters is a necessity, just as heat is a necessity—and the complementary nature of the rights *to the Services* is of no relevance in that regard. (In fact, providing financial liquidity to songwriters, like providing them with a heated building, of course indirectly does benefit the services, because songwriters who are financially illiquid or physically frozen from lack of heat, are equally unable to write the musical works that the services must play.) [279]

In recognition of the importance of advances to songwriters, Professor Katz speculates that the problem of recouping advances could be solved by transferring some of the advancements from the music publishers to the PROs. 3/13/17 Tr. 607 (Katz). However, I am loath to join in speculation that parties over whom the Judges have no jurisdiction will voluntarily change the conduct of their businesses, and then bootstrap those speculative predictions to support their rulings.[280]

Second, although the services assert that they had dismissed the triggering of the Mechanical Floor as ''illusory,'' that dismissal was demonstrably incorrect, as evidenced by the large number and percent of service-months in which the Mechanical Floor has been triggered. Moreover, [REDACTED]. Marx WDT ¶ 76. More generally, the Mechanical Floor provides a form of insurance to Copyright Owners that the mechanical royalty will not be reduced or eliminated if services trigger that rate alternative because of relatively high performance rates.

Third, I am unpersuaded by the Services' argument that the sole reason the Mechanical Floor has been triggered is because the performance royalty rate has increased significantly ''to levels not foreseen when the Mechanical Floor was negotiated.'' SJRPFF–CO at pp. 411–12. I find that criticism puzzling; the *purpose* of the Mechanical Floor is to limit the extent to which the performance royalty rate would diminish the mechanical rate through the ''All-In'' approach. Thus, the services are asserting that the essential nature of the Mechanical Floor is a bug, when in fact it is a defining feature—again, a form of rate insurance for which the music publishers/songwriters bargained, and to which the services acquiesced, when agreeing to the 2008 and 2012 settlements.

Fourth, I do not find that the potential for further fragmentation of musical works licenses and publisher withdrawals is a sufficient reason to consider eliminating the Mechanical Floor. Copyright Owners have convincingly argued that: (1) Services have offered no evidence that the introduction of the new PRO, GMR, will have any impact on the performance royalty rate; (2) partial withdrawals are not permitted by the rate court, the Second Circuit or the Department of Justice; (3) there is no evidence of increasing performance rates (and the rate courts can ensure ''reasonable'' rates charged by the two largest PROs, ASCAP and BMI); and (4) some fractional (a/k/a fragmented) licensing has always been present in the market. *See* CORPFF–JS at pp. 87–90 (and record citations therein).

Fifth, I reject a further complaint, [REDACTED], that the Mechanical Floor is perverse, because lower retail pricing that diminishes revenues will increase the likelihood that the Mechanical Floor will bite. I see this too as a feature of this floor—not a bug. As Pandora's witness, Mr. Parness, explained (*see* 3/9/17 Tr. 354 (Parness)), the Mechanical Floor was made part of the ongoing settlement terms expressly *because* Copyright Owners were fearful that retail pricing would be too low and generate decreased royalties under other prongs.

Finally, I do not agree with the assertion that the presence of the Mechanical Floor rate ''defeats the benefits'' of an ''All-In'' rate. To be sure, the Mechanical Floor *limits* the value of the effective cost reduction embodied in the ''All-In'' rate, but that limitation does not *defeat* the ''All-In'' rate. This critique actually underscores a broader infirmity in the services' arguments in opposition to a continuation of the Mechanical Floor. They maintain that the 2012 settlement, carrying forward essentially the structure of the 2008 settlement, has worked satisfactorily for licensors and licensees alike. I agree, finding that the present rate structure should be continued. However, the Services, contrary to their basic argument, seek to disrupt the status quo that they otherwise recommend, in order to obtain a *better bargain* than contained in that benchmark. To put the point colloquially, the Services cannot have their cake and eat it too.

6. Findings Regarding the Rate Structure

Based on the foregoing, and as detailed further below, I conclude that the 2012 rate structure constitutes a usable objective benchmark in this proceeding.[281] Based on the foregoing, I reject the per-unit rate structure advocated by Copyright Owners. I also reject the services' proposal to eliminate the Mechanical Floor.

[278] I note that the majority maintains the Mechanical Floor. However, the Mechanical Floor was part of the trade-off of consideration within the 2012 benchmark settlement. It is inconsistent for the majority to maintain this vestige of the 2012 benchmark while rejecting its other aspects, in favor of the post-hearing rate structure they have created. This yet another example of how the majority's rate structure—to borrow from Copyright Owners' analogy—picks provisions from columns A, B . . . and now C, when inventing its post-hearing structure.

[279] From a more technical economic perspective, all productive upstream inputs benefit downstream re-sellers.

[280] This is the same principle that leaves me reluctant to rely on *speculation* inherent in the Majority Opinion and in Copyright Owners' ''see-saw'' assertion regarding an assumed willingness by record companies to agree to a decrease in sound recording royalties in response to an increase in mechanical royalties, as discussed *infra.* Also, the point in the accompanying text should be contrasted with the basis for adoption of an ''All-In'' rate: The industry over which the Judges have jurisdiction in this proceeding for ten years has operated under a rate structure (which I find to be a useful benchmark), that incorporates the ''All-In'' adjustment to account for the performance royalties. Thus, the Mechanical Floor and the ''All-In'' structure are both parts of the 2012 benchmark, revealing the parties' longstanding *willingness and ability* to operate under an overall structure in which performance royalties are subject only to *a limited deduction* in the calculation of the mechanical royalty.

[281] I note once again that, separate and apart from its usefulness as a benchmark in this proceeding, the existing rate structure can also constitute a reasonable rate that the Judges may adopt, particularly in the absence of any contrary probative record evidence. *See Music Choice, supra,* 774 F.3d at 1010.

7. The 2012 Benchmark, in its *Entirety,* is a More Useful Benchmark than a Per-Unit Rate Structure or the Services' Modified Version of the 2012 Benchmark

I further find that the discriminatory rate structure in the 2012 benchmark renders it a more useful benchmark than the per-unit proposals set forth by Copyright Owners and Apple. Although the 2012 rate structure is not necessarily the best structure that could have been designed, it possesses the characteristics of a useful and beneficial benchmark. In that regard, I take note of the four classic characteristics of an appropriate benchmark, as identified by the federal rate court:

> In choosing a benchmark and determining how it should be adjusted, a rate court must determine [1] the degree of comparability of the negotiating parties to the parties contending in the rate proceeding, [2] the comparability of the rights in question, and [3] the similarity of the economic circumstances affecting the earlier negotiators and the current litigants, as well as [4] the degree to which the assertedly analogous market under examination reflects an adequate degree of competition to justify reliance on agreements that it has spawned.

In re Pandora Media, supra, at 354.

The 2012 benchmark meets these criteria. First, it pertains to the same rights at issue in this proceeding. Second, the licensors (music publishers) and licensees (interactive streaming services) categories are comparable (if not identical).[282] Third, the economic circumstances are sufficiently similar and the same in crucial respects, *i.e.,* the ongoing differentiated nature of this marketplace and the zero marginal physical cost of the licensed copies, (as discussed *supra*). Fourth, the 2012 benchmark it reflects a rate structure with an adequate degree of competition because, as explained in connection with the discussion of the shadow effects, it is a rate free of complementary oligopoly effects and of an imbalance in market power. Further with regard to this fourth point, the parties have been operating over the past ten years under this basic rate structure, with profits accruing to the licensors and admittedly tolerable losses for the licensees.

More particularly, I re-emphasize that, as a matter of law, section 115 specifically provides that settlements shall constitute evidence of market rates. Therefore, I cannot simply disregard the settlement rates as immaterial evidence. *See* 17 U.S.C. 115(c)(3)(D). Of course (as noted *supra*), the Judges may give whatever weight they think is proper to such evidence, without running afoul of any statutory duty. As explained in further detail below, for a number of reasons, I not only find this benchmark useful, I also accord substantial weight to this benchmark.

First, the record indicates that Copyright Owners have demonstrated (albeit tacitly) their understanding that, if the Judges did not set a price discriminatory rate structure to reflect the varying WTP, *Copyright Owners would have to invent it.* This finding is apparent from a careful reading of their advocacy for the adoption of a bargaining room approach to rate-setting. That approach is explicitly premised on the idea that Copyright Owners would offer to enter into multiple and different price discriminatory agreements with various services, if the high statutory rate set under the bargaining room theory is *too high* for some services to operate. This point is made clear by the testimony of Professor Rysman and Dr. Eisenach. *See, e.g.* 4/3/17 Tr. 4390, 4431 (Rysman) (lauding the bargaining room approach as reflecting the ''economical element of *price discrimination* . . . the [licensor] is picking its price*s* carefully.'') (emphasis added).

> The following colloquy between the Judges and Dr. Eisenach is also instructive:
>
> [THE JUDGES]
>
> Are you familiar with the concept of the bargaining theory of rate setting . . . [t]he idea that rate setters, such as this Board, should set rates that are higher than the market rate for certain users because they can then, as you are testifying to now, can bargain with the licensors for lower rates to use a bargaining concept in the setting of rates?
>
> [DR. EISENACH]
>
> So as you have just stated it, I think that is consistent with my testimony in this matter, which is that the compulsory license serves as a back-stop. It is a guaranteed cap on what anyone would have to pay. The ability to negotiate mutually beneficial bargains below that cap is there for all of the parties. And the incentives to do so are there as well.

4/4/17 Tr. 4845 (Eisenach) (emphasis and underscore added); *see also id.* at 4843–44 (''one thing that I took into account in considering . . . higher mechanical rates . . . is the ability of streaming services to negotiate direct deal*s* with the publishers. . . . We're looking here at an upper and not a lower end. . . . [I]f the Copyright Owners' proposal were adopted, [the services] would have the ability to negotiate direct *agreements* with publishers.'') (emphasis and underscore added).

Professor Rysman, echoed Dr. Eisenach in this regard, when discussing the potential impact on Spotify of Copyright Owners' proposed substantial rate increase:

> [REDACTED]

4/3/17 Tr. 4390, 4431 (Rysman) (emphasis added).

Thus, I find there to be no real dispute as to the need for an upstream discriminatory rate structure. To borrow from a classic story, I perceive that the parties are not in disagreement as to what kind of rate structure is needed in the market, but are rather ''haggling over the price.'' [283] Perhaps more importantly, the parties appear to be in disagreement as to who and what shall be in control of the setting of rates, the Judges and the statute on the one hand, or Copyright Owners and the unregulated market on the other. The answer is—as it must be according to statute—that it is the Judges who set the rates. They are instructed by statute and guided by precedent to set a reasonable rate and to consider several itemized factors, not to cede that authority to any market participant.[284] Further, as Professor Katz testified, the statutory license, and negotiations undertaken under the so-called shadow of that license, incorporate a countervailing power that allows the streaming services a more equal bargaining position. 3/13/17 Tr. 577 (Katz). Under the bargaining room approach, that salutary aspect of the statutory scheme would be eliminated.

Second, and related to the prior point, I find the 2012 rate structure to be a very useful benchmark because it embodies a price discriminatory rate structure that reflects the downstream market's segmentation by WTP. Although Copyright Owners correctly argue that discriminatory upstream rates are not *required* in order to accommodate downstream price discrimination, they do not provide a sufficient counter-argument to the Services' point that the upstream rate should also be price discriminatory in order to *incentivize,*

[282] Copyright Owners assert that the different identities of the licensees, particularly the market entry of Amazon, Apple and Google, and their bundling and discounting of interactive streaming, diminish the comparability of the 2012 benchmark. The Services note that even prior to the entry of these three entities, similar multiproduct firms were licensees—including Yahoo and Microsoft. I discuss the bundling and discounting issues elsewhere in this Dissent.

[283] The provenance of the story in which the quoted phrase is the punch line is uncertain, and has been variously attributed to, *inter alios,* George Bernard Shaw, Winston Churchill, Groucho Marx, Mark Twain, W.C. Fields, and Bertrand Russell.

[284] This point underscores a defect in the Majority Opinion. Under its provisions, participants in a neighboring market, the record companies in the sound recording market, who license their own perfect complement, will have economic control over the mechanical royalty rate, via the TCC prong.

rather than jeopardize, the downstream licensees' satisfaction of the varying WTP among listeners. Absent such a structure, the services are more likely to face the vexing problem of essentially fixed revenues and variable costs, under the ''all-you-can-eat'' model demanded by listeners. Although Copyright Owners may well be correct in their argument that an upstream discriminatory rate structure can be accomplished without resort to a revenue-based rate structure (that is, for example, via different per-play rates), neither Copyright Owners nor Apple proposed such an alternative discriminatory rate or provided evidence by which the Judges could mold such rates (as they did in *Web IV*).

Third, I find insufficient evidence to support Copyright Owners' assertion that the market in 2012 was not yet ''mature''—compared with the market at present—and that the 2012 rate structure was thus ''experimental.'' At a high level, all markets are not ''mature,'' in the sense that they are dynamic and thus subject to change, making all rate structures ''temporary,'' if not ''experimental.'' Moreover, the ongoing creative destruction in the streaming industry has only reinforced the fact that, even since 2012, the interactive streaming services market is still not yet ''mature.'' *See. e.g., Written Direct Testimony of Paul Joyce (on behalf of Google Inc.)* ¶ 17 (Joyce WDT) (describing Google Play Music as ''nascent compared to other participants in the streaming music market.'') [285]

However, even if Copyright Owners' maturity/experimental argument had merit, it does not supersede the convincing economic logic that a price discriminatory rate structure remains appropriate, because the economic fundamentals endure. The cost of producing an additional copy of a musical work remains zero. A market segmented by WTP is efficiently served through price discrimination. Upstream demand for licenses is a derived demand, *see* 3/20/17 Tr. 1967–68 (Marx), and thus a function of the segmented downstream demand, making an upstream discriminatory rate structure more efficient, even if not necessary. I find that, in a second-best world such as the interactive streaming industry, a consonance between upstream and downstream pricing structures enhances efficiency.[286]

Fourth, Copyright Owners argument that the 2012 benchmark, with its attendant multi-pronged rate structure, is inconsistent with the idea that a musical work has (or should have) a single ''inherent'' value, s*ee, e.g.,* Israelite WDT at 10; ¶ ¶ 29(B), 30, 31(C); Brodsky WDT ¶ 68, is actually inconsistent with Copyright Owners' own proposed rate structure. That is, Copyright Owners' proposal, that *the statutory rate automatically should shift* from a per-play rate to a per-user rate if the latter leads to greater royalties, belies their fealty to the ''inherent value'' argument. Rather, their greater-of approach demonstrates their eagerness to jettison this concept if another measurement tool (the per user rate) could result in greater revenue. That is, Copyright Owners' proposal seeks to accommodate two separate values (value-in-use and access (option) value, while denying that *other* marketplace values can exist, even if they reflect varying WTP and varying ability-to-pay).

I recognize that the 2012 benchmark is also a greater-of approach, but it blends into that approach a ''lesser of'' approach (per subscriber or TCC) within one of the ''greater of'' prongs. *Thus, there is no real fundamental dispute between Copyright Owners and the Services as to whether rates may be disconnected from unit pricing.* Rather, the question is whether the disconnect will be made to benefit only Copyright Owners (in a manner that would cause substantial negative impact to Services, (as detailed in Professor Ghose's rebuttal testimony, discussed *supra*), or will be structured to reflect the parties' historical and ongoing bargain that softens and balances the impact of a greater-of structure. *See* 4/7/17 Tr. 5584 (Marx) (noting that Copyright Owners' ''greater-of'' proposal lacks the balance in the 2012 structure that combines a ''greater of'' structure'' with a ''lesser of'' prong). [287]

Fifth, I rely on the 2012 rate structure as an *objective* benchmark. Thus, the absence of more direct testimony regarding what went through the minds of the negotiators of the 2008 and the 2012 settlement does not diminish the objective value of this benchmark. I do not place dispositive weight on the *subjective* reasons why the parties may have entered into the prior settlements. I view the terms of the 2012 settlement as potential *objective* benchmark information. *See, e.g.,* 3/13/17 Tr. 550–51, 566 (Katz) (acknowledging his lack of knowledge as to why the parties negotiated specific provisions of the 2012 settlement, but noting that objectively the results of the settlement demonstrate the satisfactory performances of the market). Further, both Professor Katz and another Services' expert, Professor Hubbard, noted that the current rate structure remains valuable, not based on their consideration of the parties' subjective understandings at the time of settlement, but rather because the market has not since changed in a manner that would create a basis to depart from a multiple-rate upstream rate structure. Katz WDT ¶ 80 (''My analysis has identified no changes in industry conditions since then [2012] that would require changing the fundamental structure of the percentage-of-revenue prong.''); 4/13/17 Tr. 5977–78 (Hubbard) (changes in the market are ''not uncorrelated with the structure that was in place'' in 2012). In this regard, it bears emphasis that Dr. Eisenach, quite properly, relied on several potential benchmarks for his rate analysis, without attempting to examine the parties who negotiated those benchmark agreements. He too was treating potential benchmarks in an objective manner, consistent with my understanding of the long-standing method of using benchmarks for the setting of rates.

Sixth, I do not credit the arguments by Copyright Owners and Apple (and by the majority) that the present rate structure is complex. If some songwriters find their royalty statements confusing, that is a real concern that should be resolved. However, one of the benefits of a collective, be it the publishers themselves, or, the NMPA, the NSAI or a PRO, is that these collectives have the expertise and resources to identify and explain how

[285] In this regard, it is noteworthy that another of Copyright Owners' expert economic witnesses—expressly echoing a prior licensor expert in *Phonorecords I*—opines that the present interactive streaming market is ''unlike a mature business.'' *See* Watt WRT ¶ 40 (''Interactive streaming of music is a relatively new enterprise, made of some relatively new companies and companies new to the space.''). Although Professor Watt was making this point for the purpose of explaining how to identify revenues and costs for inclusion in a Shapley value analysis (discussed *infra*), unlike ''Schrodinger's Cat,'' the interactive streaming market cannot be two contradictory things at once, simultaneously ''mature'' for the purpose of avoiding a discriminatory rate structure and ''not mature'' for Shapley purposes.

[286] Of course, as explained *supra,* all second-best markets are inefficient in the static sense. Thus, under the bargaining room approach that Copyright Owners endorse, they would exchange one ''inefficiency'' (percent of revenue pricing) with another (unit pricing above marginal cost) and then seek to negotiate away the latter inefficiency, outside the ''reasonable rate'' requirement and without regard to itemized statutory factors in section 801(b)(1).

[287] Again, it bears emphasis that the 2012 benchmark provides Copyright Owners with an access (option) value prong, in the form of a per-subscriber rate.

royalties are computed and distributed. There is no good reason why the rate structure that is consonant with the parties' ten year history and with the relevant economic model should be sacrificed on the slender argument that ''simpler is better than complicated.'' I agree that, *ceteris paribus,* the rate structure should be simple but, as Albert Einstein is credited with saying: ''Everything should be made as simple as possible, *but no simpler.*'' The 2012 rate structure meets this criterion.[288]

Accordingly, for the reasons set forth in this Section III of the Dissent, I find the 2012 rate structure, in its entirety, to be the appropriate benchmark for the rate structure in the forthcoming period.

I. THE PARTIES' PROPOSED RATES

Establishing a rate structure resolves only one aspect of the overall rate determination. The next issue to decide is whether the rates *within* the 2012 benchmark are appropriate, whether they need to be changed and, if so, whether the record provides a basis for identifying different rates. Unlike the majority, I hew to the record, and do not attempt to divine from the record brand new post-hearing rates (or rate structures) that were never presented by the parties, and thus never subjected to examination by the parties' counsel and economists.

Copyright Owners have identified per play and per user rates in their rate proposal. Although I have rejected that rate *structure,* I review Copyright Owners' evidence regarding the setting of such rates. If that evidence is informative, and if the record permits, I would attempt to convert Copyright Owners' per-unit rate proposal into a percent of revenue rate with appropriate minima, consistent with the 2012 benchmark rate structure.

On the other side of the ledger, several of the Services' expert economists have asserted that, although the 2012 benchmark sets forth a generally appropriate rate *structure,* and that the rates have been acceptable to the Services, the rates within that structure are in fact too high and should be reduced for the forthcoming rate period. Accordingly, I also examine those lower rates to determine if they should be incorporated into the 20212 benchmark for the forthcoming rate period.

1. The Copyright Owners' Benchmark Rates

a. Overview of Approach

Copyright Owners identified potential rates through an analysis undertaken by one of their economic experts, Dr. Eisenach, of several benchmarks, and of relationships between musical works and sound recording royalties that he identified in various markets. He began by noting that ''an economically valid approach for assessing the value of intellectual property rights which are subject to compulsory licenses is to examine *market-based valuations* of reasonably comparable benchmark rights—that is, fair market valuations determined by voluntary negotiations.'' Eisenach WDT ¶ 8 (emphasis added). In selecting potential benchmarks, Dr. Eisenach identified what he understood to be key characteristics that would make a benchmark useful: ''[U]nderlying market factors . . . ; the term or time period covered by the agreements; factors affecting the relative bargaining power of the parties; and differences in the services being offered.'' *Id.* ¶ 80.

Dr. Eisenach found useful the license terms for the *sound recording rights* utilized by interactive streaming services, because they are negotiated freely between record companies and the interactive streaming services. *Id.* These rates made attractive inputs for his analysis because they: (1) relate to the same composite good—the sound recording that also embodied the musical work; and (2) the interactive streaming service licensees were the same licensees as in this proceeding. Thus, to an important degree, Dr. Eisenach found these agreements to possess characteristics similar to those in the mechanical license market at issue in this proceeding. Moreover, Dr. Eisenach found that ''[d]ata on the royalties paid under these licenses are available and allow . . . estimat[ion of] the rates actually paid by the [interactive] streaming services to the labels for sound recordings on both a per-play and a per-user basis.'' *Id.*

However, as Dr. Eisenach noted, these benchmark agreements related to a different right—the right to a license of *sound recordings*—not the right to license musical works broadly, or to the mechanical license more specifically. Thus, as with any benchmark that does not match-up with the target market in all respects, Dr. Eisenach examined how the rates set forth in the sound recording: interactive streaming benchmark agreements could be utilized. *Id.* More particularly, Dr. Eisenach posited that there may be a relationship—a ratio—between the sound recording royalty rate and the musical works royalty rate. To that end, he ''examine[d] a variety of markets in which sound recording and musical works rights are *both* required in order to ascertain the relative value of the two rights as actually reflected in the marketplace.'' *Id.* (emphasis added).

Through this examination, Dr. Eisenach concluded that these proposed benchmarks ''establish upper and lower bounds for the relative value of sound recording and musical works rights . . . estimate[d] to be between 1:1 and 4.76:1.'' *Id.* To make these ratios more instructive, I note that the inverse of these ratios (*e.g.,* 1:4.76 instead of 4.76:1) can be expressed as a percentage. Thus, the ratio of 1:4.76 is equivalent to a statement that musical works royalties equal 21% of sound recording royalties in agreements struck in the purported benchmark market. More obviously, the 1:1 ratio means that, in agreements within that purported benchmark market, musical works royalties equal 100% of sound recording rates. By converting the ratios into percentages, it becomes apparent that the high end of Dr. Eisenach's benchmark range is almost five times as large as the low end of the range.

b. Economic Relationship between Sound Recording and Musical Works Rights

Dr. Eisenach testified that ''[f]or music users that require both sound recording rights and musical works rights, the two sets of rights can be thought of in economic terms, as *perfect complements* in production: Without both inputs, output is zero.'' *Id.* ¶ 76 (emphasis added). Dr. Eisenach also notes that, ''for interactive streaming services, the two categories of rights [sound recordings and musical works] are further divided into a reproduction license [*i.e.,* the mechanical license] and a performance license. . . .'' *Id.* (Thus, the mechanical license and the performance license likewise are perfect complements with each other and with the sound recording license.)

Dr. Eisenach acknowledges that ''[t]he relative value of sound recording [to] musical works licenses may depend on a variety of factors, and traditionally the relationship has differed across different types of services and situations.'' *Id.* ¶ 78. Dr. Eisenach eschewed unnecessary ''assumptions, complexities and uncertainties associated with theoretical debates'' as to why the particular existing market

[288] I note that Copyright Owners not only voluntarily agreed to this multi-tiered rate structure in 2008, they were the parties who had proposed this structure, and they then ratified its usefulness by adopting it anew in the 2012 settlement. Moreover, Copyright Owners agreed to a similar tiered structure for the new subpart C rates in that 2012 settlement. These facts belie the assertion that Copyright Owners found this rate structure to be too confusing.

ratios existed. *Id.* ¶ 79. Rather, instead of ''put[ting] forward a general theory of relative valuation,'' he found it ''sufficient . . . to assume that the relative values of the two rights should be stable across similar or identical market contexts.'' *Id.*

c. Dr. Eisenach's Potential Benchmarks

Dr. Eisenach considered a variety of benchmark categories in which the licensee was obligated to acquire licenses for musical works and licenses for sound recordings. His selection and consideration of each category of benchmark markets are itemized below.

i. The Current Section 115 Statutory Rates

The current statutory rate structure contains several alternate rates explicitly calculated as a percentage of payments made by interactive streaming services to the record companies for sound recording rights. As noted *supra,* such rates are identified in the industry as the ''TCC'' rates, the acronym for ''Total Content Cost.'' *Id.* ¶ 82. In the Subpart B category, the TCC is 22% for ad-supported services and 21% for portable subscriptions. *Id.*; *see also* 37 CFR 385.13(b)(2) and (c)(2).[289] These percentage figures correspond to sound recording: musical works royalty ratios of 4.55:1 and 4.76:1, respectively.

Dr. Eisenach notes that these statutory rates were not set by the Judges pursuant to a contested hearing, but rather (as noted *supra*) reflect two consecutive settlements (spanning approximately a decade), first in 2008 and again in 2012. *Id.* ¶ 83. Dr. Eisenach discounts the value of these settlement rates for three reasons. First, he notes that they were established prior to the ''marketplace success'' of Spotify in the interactive streaming industry.[290] Second, he notes that the settlements, although voluntary, ''were negotiated under the full shadow of the compulsory license.''[291] Third, he finds that, although the settlement incorporates rate prongs based on a percent of sound recording rates (the TCC prongs), those provisions are part of a ''lesser of'' segment of the rate structure, and thus capped by alternative per subscriber rates. *Id.* & n.70. Thus, Dr. Eisenach concludes: ''In my opinion, the evidence . . . indicates that the relative valuation ratios implied by the current Section 115 compulsory license . . . represent *an upper bound on the relative market valuations* of the sound recording and musical works rights.'' *Id.* ¶ 92 (emphasis added). (As an ''upper bound,'' these ratios would represent the lower bound of the reciprocal percentage of the value musical works rights relative to sound recording rights, again, 21% and 22%.)

The 21% and 22% TCC rates within section 115 identified by Dr. Eisenach imply certain approximate percent-of-revenue rates, *i.e.,* percent of total service revenue (not percent of sound recording revenue). For example, if the sound recording royalty rate for interactive streaming is [REDACTED] %,[292] then, using these section 115 TCC figures, the implied musical work royalty rate would be calculated as [REDACTED][%, or [REDACTED] %. To take the low end of the range, if the sound recording royalty rate is [REDACTED] % then, applying these TCC figures, the implied musical work royalty rate would be calculated as [REDACTED] %, or [REDACTED] %. Again, because Dr. Eisenach opines that these are *upper bounds on the relative market valuations,*'' that is the equivalent of opining that they represent *the lower bound of a percentage-based royalty calculated via this ratio approach.*

ii. Direct Licenses between Parties Potentially Subject to a Section 115 Compulsory License

Dr. Eisenach also examined direct agreements between record companies and interactive streaming services that contain rates for sound recordings and mechanical royalties, respectively. *See, e.g., id.* ¶ ¶ at 84–91. In such cases, the ratio of sound recording:musical works royalties ranged tightly between 4.2:1 to 4.76:1, closely tracking the regulatory ratios implicit in the section 115 TCC. *Id.* ¶ 92. (The 4.2:1 ratio equates to a TCC rate of 23.8%, and the 4.76:1 ratio equates to a mechanical rate of 21%.)

According to Dr. Eisenach, the similarity of these direct contract rate ratios to the statutory ratios reflects the ''shadow of the statutory license,'' by which direct negotiations between parties regarding rights that are subject to a statutory license are influenced by the presence of statutory compulsory rates and/or the prospect of a future rate proceeding. 4/4/17 Tr. 4591 (Eisenach) (''The underlying problem with looking at an agreement negotiated under the shadow of a license'' is that [i]t shifts bargaining power from the compelled party to the uncompelled party by the very nature of the exercise.'').[293]

Given these limitations, Dr. Eisenach concluded, as he did with regard to the actual section 115 rates licenses, that ''[i]n my opinion, the evidence presented . . . indicates that the relative valuation ratios implied by the . . . negotiations under [the statutory] shadow—ranging from 4.2:1 [23.8%%] to 4.76:1[21%]—represent an *upper bound on the relative market valuations of the sound recording and musical works rights.*'' Eisenach WDT ¶ 92 (emphasis added).

iii. Synchronization Agreements

Synchronization (Synch) Agreements are license contracts between audio-video producers, such as movie and television producers, with, respectively, music publishers and record companies, allowing for the use, respectively, of the musical works and the sound recordings in ''timed synchronization'' with the movie or television episode. *See generally* D. Passman, *All you Need to Know about the Music Business* 265 (9th ed. 2015). Dr. Eisenach found these Synch Agreements to be a mixed bag in terms of their value as a benchmark. On the one hand, he recognized that the licenses they conveyed ''do not apply to music streaming services as such'' but, on the other hand, they ''are negotiated completely outside the shadow of the

[289] Lower percentages apply if the record companies' revenue includes revenue to be ''passed through'' by them to pay mechanical license royalties. However, according to Dr. Eisenach, such ''pass throughs'' are not typical. *Id.* ¶ 82 n.67.

[290] Spotify was launched in the United States in the summer of 2011. 3/20/17 Tr.1778 (Page).

[291] I discuss the ''shadow'' argument *supra.*

[292] [REDACTED]; 4/7/2017 Tr. 5509 (Marx) (indicating most recent sound recording royalty payments equaled [REDACTED] % of revenue); Marx WDT ¶ 62 (''In 2015, Spotify paid [REDACTED] % of its US gross revenue for sound recording royalties based on its negotiated rates with record labels summarizing Spotify's rates under various agreements); *see generally* SJPFF ¶ 87 ([REDACTED]).

[293] Again, I discussed the issue of the ''shadow'' of the statutory license *supra.* Suffice it to note here that the ''shadow'' of the statutory license does not ''shift'' bargaining power so much as it eliminates *unequal* bargaining power. Although the interactive services have the legal right to refuse to license at rates set by the Judges (the legal compulsion operates only on the licensors), such refusal of the services to obtain licenses would shut them out of the interactive streaming market in which they have made substantial investments (unless they attempted to engage in piracy which certainly would be quickly shut down). So, it would be absurd for the services not to license at rates set in a section 115 proceeding. And, if they did so refuse, Copyright Owners could then attempt to move the listeners of the erstwhile interactive streaming service to other distribution channels such as purchased downloads and physical products, which they claim are sufficiently profitable for them and, they claim, have been cannibalized by interactive streaming. Or, as Copyright Owners indicate (as discussed *supra*), under the bargaining room approach, if the statutory rate was set too high for some services, Copyright Owners could negotiate lower rates, *free* of the statutory ''reasonableness'' requirement, *without regard* to the four itemized objective in section 801(b)(1), and with the complementary oligopoly *power to* ''*hold out*'' *and* ''*walk away, or to threaten to do so,* to obtain a higher rate than would be set under the statute.

compulsory license. . . . '' *Id.* ¶ 93. Dr. Eisenach notes, from his review of other testimony and an industry treatise, that these freely negotiated market agreements grant the musical composition royalty payments equal to the corresponding royalty paid for the sound recording,'' *id.* ¶ ¶ 94–95 & nn.87, 88, which is the equivalent of a 1:1 sound recording:musical works ratio.[294]

Dr. Eisenach finds this 1:1 relationship to be important benchmark evidence, concluding as follows:

> The synch and micro-sync examples confirm that in circumstances in which licensees require both sound recording and musical composition copyrights in order to offer their service, and where that service is not entitled to a compulsory license for either right, the sound recording rights and the musical composition rights are in many cases equally valued, that is, the ratio of the two values is 1:1.

Id. ¶ 98.

iv. YouTube Agreements

Dr. Eisenach also examined licenses between: (1) YouTube (owned by Google) and record companies; and (2) YouTube and music publishers, to determine their potential usefulness as benchmarks. [REDACTED]. For these reasons, Dr. Eisenach concluded that for purposes of assessing the relative value of the sound recording and musical works rights, the YouTube agreements represent reasonably comparable benchmarks. *Id.*

In his original Written Direct Testimony, Dr. Eisenach relied upon seven agreements between YouTube and several music publishers pertaining to [REDACTED]. *Id.* ¶ 101 n.93. [REDACTED]. However, with regard to the revenue received by the record companies, Dr. Eisenach could only speculate based on public reports as to the percent of revenue received by the record companies for the sound recordings embedded in the posted YouTube videos. *Id.* ¶ 102. Thus, he was unable to make an informed argument in his *original* written testimony regarding the ratio of sound recording royalties:music publisher royalties in his YouTube [REDACTED].

However, after the Judges compelled Google to produce in discovery copies of the YouTube agreements with the record companies, Dr. Eisenach filed (with the Judges' approval) Supplemental Written Rebuttal Testimony (SWRT) addressing these agreements. In that testimony, Dr. Eisenach examined [REDACTED]. Eisenach SWRT ¶ 6, and n. 5. Dr. Eisenach identified nine of these licenses specifically in his SWRT, and noted that YouTube paid to [REDACTED]—which Dr. Eisenach found to be the comparable YouTube category—whereas [REDACTED]. *Id.* and Table 1 therein.

As Dr. Eisenach accurately calculated, the [REDACTED] revenue split reflects a ratio of [REDACTED], (a musical works rate equal to [REDACTED] % of the sound recording rate), whereas the [REDACTED] revenue split reflects a ratio of [REDACTED] (a musical works rate equal to [REDACTED] % of the sound recording rate).[295]

v. The Pandora ''Opt-Out'' Deals

Dr. Eisenach also examined certain direct licensing agreements entered into between Pandora and major music publishers covering the period from 2012 through 2018, to determine whether they constituted useful benchmarks in this proceeding. *Id.* ¶ 103. Pandora had negotiated these direct agreements with major publishers for musical works rights after certain publishers had decided to ''opt-out,'' *i.e.,* to withdraw their digital music performance rights from PROs, and asserted the right to negotiate directly with a digital streaming service. As Dr. Eisenach acknowledges, the music publishers' legal right to withdraw these rights remained uncertain during an extended period. Pandora thus negotiated several such ''Opt-Out'' Agreements with an understanding that the rates contained in those direct agreements might not be subject to rate court review.

Given this unique circumstance, and given that the markets and parties involved in the Pandora Opt-Out agreements are somewhat comparable to the markets and parties at issue in this proceeding,[296] Dr. Eisenach concluded that *these agreements provided* ''significant insight into the relative value of the sound recording and musical works rights in this proceeding.'' *Id.* (emphasis added).

Dr. Eisenach compared the musical works rates in these ''Opt-Out'' agreements with the sound recording royalty rates paid by Pandora, which he obtained from the revenue disclosures in Pandora's Form 10K filed with the SEC that provided royalties (''Content Costs'') as a percent of revenue, and he also relied on data contained in prior rate court decisions. Eisenach WDT ¶ 125 & Table 6. With this data, he calculated that the ratio of sound recording: musical works royalties in existing agreements was [REDACTED] for 2018, *i.e.,* the musical works rate equaled [REDACTED]% of sound recording royalties. This [REDACTED]% ratio would correspond to a mechanical rate of [REDACTED]%, assuming, *arguendo,* the sound recording rate is [REDACTED]%, or [REDACTED]% if the sound recording rate is [REDACTED]%.

Dr. Eisenach also made a forecast, by which he linked the passage of time to an assumption that, after the rate court proceedings concluded, the parties, without any further legal uncertainty, would permanently be ''permitted to negotiate freely outside of the control of the rate courts.'' He made this estimation and forecast through a temporal linear regression, extrapolating from the prior [REDACTED] in these Pandora ''opt out'' musical works rates. *See* Eisenach WDT ¶ 129. Dr. Eisenach's linear regression further [REDACTED] the ratio to [REDACTED], which would be equivalent to [REDACTED] the musical works rate, as a percentage of sound recording royalties, from the [REDACTED]% noted above for actual agreements in force in 2018 to [REDACTED]%. almost a [REDACTED] based on the extrapolation alone. *Id.* ¶ ¶ 104; 128 & Table 8, Fig. 13. (This [REDACTED]% ratio would correspond to a musical works rate of [REDACTED]%. assuming the sound recording rate is [REDACTED]% and [REDACTED]% if the sound recording rate was [REDACTED]%.)

d. Dr. Eisenach's Two Methods for Estimating the Mechanical Rate

Having calculated these five benchmarks, Dr. Eisenach applied them in two separate methods to estimate the mechanical rate to be adopted in this proceeding.

i. Method #1

Dr. Eisenach's Method #1 for estimating the mechanical rate is based on the following premises:

[294] Dr. Eisenach finds this 1:1 ratio to be present in the two types of Synch Agreements he identified. One version represents an agreement relating to a specific musical work and sound recording combination. The other version, a ''Micro-Synch'' Agreement, which he describes as ''essentially 'blanket' synch licenses, in that the license grants the right to synchronize not just one particular song . . . but any song in the publisher's catalog (or a significant portion thereof). . . .'' Eisenach WDT ¶ 96.

[295] Although Dr. Eisenach does not emphasize the following point, the actual percentages of revenue reflect that musical works royalties constitute only [REDACTED]% of total revenues in these YouTube agreements, [REDACTED]. Also, these data indicate that YouTube, as licensee, retains [REDACTED]% to [REDACTED]% of the total revenue attributable to these benchmark agreements, [REDACTED].

[296] Pandora was only a noninteractive service at that time, and only paid the performance right royalty, not the mechanical right royalty, for the right to use musical works. Because the parties agree that the performance right and the mechanical right are perfect complements, Pandora's payments for the performance right are relevant and probative.

1.The sound recording royalty paid by *interactive* streaming services is unregulated and thus negotiated in the marketplace. Eisenach WDT ¶ 16.

2.The sound recording royalty paid by noninteractive services is regulated, but Dr, Eisenach find the royalties set by the Judges in *Web III* to reflect a market rate. 4/4/17 Tr. 4643 (Eisenach); *see also* Eisenach WDT ¶ 136 and n.123.

3. The *interactive* streaming services require a mechanical license (the license at issue in this proceeding), whereas the *noninteractive* services are not required to obtain a mechanical licenses.

4. According to Dr. Eisenach, the difference between the rates paid by interactive services and noninteractive services for their respective sound recording licenses equals the value of the remaining license, *i.e.,* the mechanical license. *Id.* ¶ 137 (''[T]he difference between these two rights is akin to a 'mechanical' right for sound recordings, directly paralleling the mechanical right for musical works in this proceeding.'').

5.The mechanical rate implied by this difference in sound recording rates must be ''adjust[ed] for the relative value of sound recordings [to] musical works'' (as discussed *supra*). *Id.* ¶ 140.

Dr. Eisenach combines these steps and expresses his Method #1 in the form of the following algebraic equation:

$$MR_{MW} = (SR_{IS} - SR_{NIS})/RV_{SR/MW},$$

where

MR_{MW} = Mechanical Rate for Musical Works
SR_{IS} = Sound Recording Rate for Interactive Streaming (All In)
SR_{NIS} = Sound Recording Rate for Non-Interactive Streaming (Performance Only)
$RV_{SR/MW}$ = Relative Value of Sound Recording to Musical Works Rights.

Eisenach WDT ¶ 140.

Dr. Eisenach determined the per play rate paid by interactive services by identifying certain services, but [REDACTED], and ''tally[ing] the total payments . . . and divid[ing] by the total number of interactive streams the service reports.'' *Id.* ¶ 148. The average sound recording per play royalty calculated by Dr. Eisenach was $[REDACTED] ([REDACTED]). *Id.* Table 11.

Dr. Eisenach estimated the rate paid by noninteractive services for sound recordings at $0.0020 per play, or $0.20 per 100 plays. He made this estimate by taking note of the various rates paid in 2015 pursuant to the Judges' *Web III* Determination and pursuant to the pureplay rates paid under an earlier settlement. *Id.* ¶ 136 & n.123. However, he candidly acknowledged that he found it ''not possible to know the average amount paid by non-interactive webcasters,'' and he acknowledged that the subsequent *Web IV* Determination had superseded those noninteractive sound recording rates. *Id.* at n. 123.

His final inputs, discussed *supr*a, are the several benchmark ratios of sound recording: musical works royalties in the markets that he had selected.

After Dr. Eisenach inserted the foregoing data into the algebraic expression set forth above, he presented his data in the following tabular form:

MUSICAL WORKS MECHANICAL PER 100 PLAYS RATE CALCULATION

[Method 1]

(1)	(2)	(3)	(4)	(5)
SR_{IS} per 100	SR_{NIS} per 100	Difference	$RV_{SR/MW}$	MR_{MW} per 100
[REDACTED]	$0.20	[REDACTED]	1:1	[REDACTED]
[REDACTED]	0.20	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	0.20	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	0.20	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	0.20	[REDACTED]	4.76:1	[REDACTED]

See id. Table 12.[297] Thus, applying his five potential benchmark ratios, Dr. Eisenach determined that the mechanical works royalty rate to be set in this proceeding ranged from $[REDACTED] per play to $[REDACTED] per play (dividing the figure in column (5) by 100 to reduce the rate from ''per 100'' to ''per play'').

ii. Method #2

Dr. Eisenach describes his Method #2 as an alternative method of deriving a market-derived mechanical royalty. His Method #2 ''derive[s] an all-in musical works value based on the relative value of sound recordings to musical works and then remove[s] the amount of public performance rights paid for musical works, leaving just the mechanical-only rate.'' *Id.* ¶ 142. The algebraic expression for Method #2 is as follows:

$$MR_{MW} = (SR_{IS}/RV_{SR/MW}) - PR_{MW},$$

where PRMW is the public performance royalty rate for musical works, and the other variables are as defined and described in Method #1.

Id.

Dr. Eisenach calculates PR_{MW}, as an average of $[REDACTED] per 100 plays for the licensees that he included in his data analysis. *Id.* ¶ 156, Table 13. Applying all the inputs across the various benchmark ratios, the results from Dr. Eisenach's Method #2 can also be depicted in tabular form, as set forth below:

MUSICAL WORKS MECHANICAL PER 100 PLAYS RATE CALCULATION

[Method 2]

(1)	(2)	(3) = (2) [298] × (1)	(4)	(5)
SR_{IS}	$RV_{SR/MW}$	Ratio Adj.	(Avg.) PR_{MW}	MR_{MW}
[REDACTED]	1:1	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

[297] Dr. Eisenach testified that [REDACTED].

MUSICAL WORKS MECHANICAL PER 100 PLAYS RATE CALCULATION—Continued

[Method 2]

(1) SR_{IS}	(2) $RV_{SR/MW}$	(3) = (2) [298] × (1) Ratio Adj.	(4) (Avg.) PR_{MW}	(5) MR_{MW}
[REDACTED]	4.76:1	[REDACTED]	[REDACTED]	[REDACTED]

See id., Table 14.

In sum, after applying all of his potential benchmarks in both of his methods, Dr. Eisenach opined that ''the YouTube and Pandora [Opt Out] agreements represent the most comparable and reliable benchmarks, implying ratios of [REDACTED] and [REDACTED], respectively, with a mid-point of [REDACTED].'' *Id.* ¶ 130 (I note that converting these end-points and mid-point of his range to TCC percentages results in a range from [REDACTED]% to [REDACTED]% and a mid-point of [REDACTED]%.) [299]

e. Criticisms and Analysis of Dr. Eisenach's Benchmark Methods

i. Dr. Eisenach's Ratio of Sound Recordings: Musical Works

Dr. Eisenach's attempt to identify comparable benchmarks and corresponding ratios of sound recording rates to musical works rates appears to me to be a reasonable first step in seeking to identify usable benchmarks. That is, I find his basic conceptual approach—relying on empirics over abstract theory, *viz.,* assuming that a tightly clustered set of ratios across several markets and discerning a central tendency from among them—could aid in the identification of the statutory rates. (As noted *supra,* Dr. Eisenach eschewed unnecessary ''assumptions, complexities and uncertainties associated with theoretical debates'' as to why the particular existing market ratios existed. *Id.* ¶ 79.) In this regard, I understand that Dr. Eisenach was following a well-acknowledged principle of economic analysis, articulated by the Nobel laureate economist Milton Friedman, who famously eschewed excessive theorizing that failed to match the predictive power of empirical analysis. *See* M. Friedman, *The Methodology of Positive Economics,* reprinted in D. Hausman, *The Philosophy of Economics* at 145, 148–149 (3d ed. 2008).

However, the data available to Dr. Eisenach did not demonstrate a sufficient cluster of similar ratios to establish a predictive ratio across the data set. That is, the problem does not lie in the analysis, but rather in the implications from the data regarding ratios of sound recording royalties to musical works royalties. The Services make this very criticism, noting the instability of the ratio across the several markets in which Dr. Eisenach identified potential benchmarks. *See* SJRPFF–CO at 182 (and record citations therein). Apple finds that the wide range of ratios is unsurprising, because Dr. Eisenach's benchmarks do not relate to the same products and same uses of the two rights. Indeed, Apple's [REDACTED], confirming, according to Apple, that there is no fundamental market ratio that can be applied in this proceeding. Dorn WRT ¶ ¶ 6, 24, 28–29.

To be sure, this point does not go unnoticed by Dr. Eisenach, who focuses more on the royalty ratios arising from two potential benchmarks in the middle of his range—the Pandora ''Opt-Out'' agreements and the YouTube Agreements, *discussed infra.*

The Services assert an additional and fundamental criticism of Dr. Eisenach's approach. They note that his use of sound recording royalties paid by interactive services embeds within his analysis the inefficiently high rates that arise in that unregulated market through the complementary oligopoly structure of the sound recording industry and the Cournot Complements inefficiencies that arise in such a market. *See* Katz CWRT ¶ 56; Marx WRT ¶ ¶ 137–141. I agree with this criticism. Indeed, the Judges explained at length in *Web IV* how the complementary oligopoly nature of the sound recording market compromises the value of rates set therein as useful benchmarks for a market that is ''effectively competitive.'' [300] In *Web IV,* the Judges were provided with evidence of the ability of noninteractive services to steer some performances toward recordings licensed by record companies that agreed to lower rates in exchange for increased plays. Here, the Judges were not presented with such evidence, likely because an interactive streaming service needs to play any particular song whenever the listener seeks to access that song (that is the essence of an *interactive* service compared with a *noninteractive* service). Thus, the Judges have no direct evidence sufficient to apply a discount on the interactive sound recording rate to adjust that potential benchmark in order to fashion an effectively competitive rate.[301]

[298] The ratio in column (2) is converted into its reciprocal percentage and the percentage is multiplied by the corresponding figure in column (1). For example, in the third row, the [REDACTED] ratio equals [REDACTED]%. When $[REDACTED] is multiplied by [REDACTED], the product is $[REDACTED] (rounded).

[299] Dr. Eisenach found these results to confirm the reasonableness of Copyright Owners' per play rate proposal. However, because I reject a per-play rate structure, that point is not relevant to my Dissent. I further note that Dr. Eisenach also calculates a per user rate, using his Method #2. As he explains, ''this is accomplished by calculating all-in publisher royalties on a per user basis and subtracting the average effective per-user performance royalties to publishers, leaving an appropriate rate for mechanical royalties.'' *Id.* ¶ 159. He finds that the sound recording rate per user is $[REDACTED] (the per user analog to [REDACTED] per 100 plays in his per play analysis). Applying the same ratios and utilizing similar market data as in his per play approach, Dr. Eisenach concludes that a ''mechanical rate of between $[REDACTED] and $[REDACTED] per user reflects the range of relative values for sound recordings and musical works . . . .'' *Id.* ¶ 165. Finally, he notes that, at the [REDACTED] ratio (his mid-point of the YouTube and Pandora benchmarks), the ''mechanical only'' rate would be $[REDACTED] per user (even greater than the $1.06 per user rate proposed by Copyright Owners.) *Id.* Because I do not agree that Copyright Owners' per-user proposal is appropriate (for the reasons discussed *supra*), this asserted confirmation of the reasonableness of Copyright Owners' per-user proposal is unhelpful in the context of this Dissent.

[300] In *Web IV,* the Judges noted that, even in the willing buyer/willing seller context of 17 U.S.C. 114(f)(2(B), all relevant authority required that those rates be reasonable, that is, they must reflect a market that is ''effectively competitive'' (*i.e.,* ''workably'' competitive, the economic analog to ''effectively'' competitive.). *See Web IV, supra,* at 26331–34 (noting the legal bases for an equivalence between effectively competitive and reasonable rates). (However, the rates in this proceeding are further subject to potential adjustment by application of the four itemized factors in section 801(b)(1).). As the Judges noted in *Web IV,* ''[a]n effectively competitive market is one in which supercompetitive prices or below-market prices cannot be extracted by sellers or buyers . . . .'' *Id.* at 26331 (citation omitted). Because Dr. Eisenach's approach intentionally incorporates sound recording market-based royalty rates into his ratios, those rates and the ratios in which they are inputs must be reduced to eliminate the supercompetitive effect of complementary oligopoly that is inconsistent with effective competition.

[301] Dr. Eisenach suggests that the entry of large ''ecosystem'' firms, Amazon, Apple and Google into the interactive streaming market has tended to add ''bargaining power'' to the licensee side of the

Continued

Thus, the sound recording royalties relied upon by Dr. Eisenach likely are too high and would need to be adjusted to reflect reasonable rates derived from a market that is effectively competitive. However, because there is no record evidence in this proceeding allowing for an estimate of the adjustment, I can find only that Dr. Eisenach's ratios are too high to the extent they incorporate the royalty rates derived from the sound recording market.

ii. Dr. Eisenach's Specific Benchmarks

Section 115 Benchmark

The Services assert that Dr. Eisenach's calculation of a section 115 ''valuation ratio'' of 4.76:1 is incomplete, because he limited this statutory ratio to the 21% and 22% TCC prongs. They note that under the percentage-of-revenue prong of section 115 (10.5%), this statutorily-derived ratio would have ranged between 5:1 and 6:1, *see* 4/5/17 Tr. 5152 (Leonard), implying a musical works rate equal to only 16.67% to 20% of sound recording royalty rates. I agree that Dr. Eisenach's statutory benchmarks would have been more comprehensive if he had included the ''valuation ratios'' derived from this headline prong of the present royalty rate structure. However, the Services' focus on that lower *implied* TCC fails to recognize the greater-of rate structure (with a lesser-of second prong) to which the parties agree. The purpose of the *explicit* TCC levels was that they could trigger if greater than the 10.5% rate and the implicit TCC that could be derived from that rate. Accordingly, I find that the fact that the existing rate structure, on which the Services rely in this proceeding, includes the potential use of the 21% and 22% prongs, demonstrates the usefulness of this benchmark as a representation of a rate that the licensors have agreed to accept, given the provisions of section 115.

Direct Licenses

The Services disagree with Dr. Eisenach's minimization of the relevance of this benchmark category. They argue that the direct licenses between interactive services and music publishers ''are by far the most directly apposite benchmarks used in Dr. Eisenach's analysis,'' because they, like the section 115 rates and terms themselves, possess the characteristics of a useful benchmark in that they are: (1) voluntary; (2) concern the same licensors/publisher; (3) negotiated in the same market; and (4) pertain to the same rights. *See* Katz WDT ¶ ¶ 97–113; Leonard AWDT ¶ ¶ 51–76.

I find that direct licenses that meet the foregoing criteria are at as least as useful as the section 115 benchmark itself, provided those licenses do not include additional rights whose values have not been adequately isolated from the particular mechanical license at issue in this proceeding.[302] The so-called ''shadow'' of section 115 provides a default rate for the licensing parties, so direct licenses that deviate in some manner from the rates in the statutory license reveal a preference for other rates and terms that, at least marginally, are below the statutory rate. (If in the direct negotiations the licensors insisted on rates above the statutory rates, a licensee would simply reject the demand and default to the statutory rate.) Thus, as the services note, these benchmarks are useful, because ''these agreements . . . were voluntarily entered both in 2008 and 2012, by the very same publishers in the same markets and for the same rights . . . .'' SJPFF ¶ 261 (and record citations therein). More generally, as described *supra,* I find that the so-called ''shadow'' of the statutory license on a benchmark not only does not disqualify that benchmark as useful evidence, but rather serves to eliminate licensor ''hold out'' power, making the resulting rate more reasonable and more reflective of an effectively competitive rate

Synchronization Licenses

The Services also take issue with Dr. Eisenach's inclusion of synchronization licenses in his collection of benchmarks. *See, e.g.,* Leonard WRT ¶ ¶ 37–40 (testifying that synchronization licenses are not comparable for interactive streaming licenses because synchronization differs in important economic respects from streaming); Hubbard WRT ¶ ¶ 6.31–6.32 (testifying on various ''economic characteristics of synch licenses, that render the ratio between sound recording royalties and musical works royalties different between synch and interactive streaming services''); Marx WRT ¶ ¶ 148–151 (''Synch royalty rates are a poor benchmark for streaming royalty rates''). Indeed, even Dr. Eisenach acknowledged that, at best, the low ratio in the synch licenses indicates an unusually high musical works royalty rate among his collection of benchmarks. 4/4/17 Tr. 4671, 4799 (Eisenach); Eisenach WDT App. A–9.

In a prior proceeding, the Judges rejected the synch license benchmark as useful ''[b]ecause of the large degree of its incomparability.'' *See Phonorecords I,* 74 FR at 4519. I find that nothing in the present record supports a departure from that prior finding. The lack of comparability remains present because the synchronization market differs in important economic respects from the streaming market. *See* Leonard WRT ¶ 39. Because synch rights pertain to media such as music used in films or in television episodes,[303] the historically equal valuation of publishing rights and sound recording rights arises from the particular conditions faced in those industries. *Id.* Movie and television producers may have a certain musical work in mind as a good fit for a particular scene in the film. *Id.* However, these producers have the option of making their own sound recording of that musical work, and for this reason, ''cover'' songs are quite common in films. *Id.; see also* Marx WRT ¶ 149 (''Both film and television production companies have the option of recording their own versions of songs, rather than paying royalties to use a pre-recorded song. . . . . This option gives the users of synch rights, such as movie producers, more bargaining power relative to the labels than would be the case with streaming services.''). Thus, the contribution to value of the sound recording is less vis-à-vis the musical work in the synch market. Leonard WRT ¶ 39.

Additionally, in the case of synchronization rights, the marketplace for sound recording rights is more competitive than other music licensing contexts because individual sound

market, obviating any concern over undue licensor power. Eisenach WRT ¶ 77. However, as indicated by the Shapley value analyses of *Copyright Owners'* other economic expert witnesses, Professors Gans and Watt, bargaining power is a function of how many participants exist on one side of the market versus the other. *See* Gans WRT ¶ 55 (noting, *without making any exception for these large entities,* that ''[s]ervices are substitutes for one another, providing rightsholders with a wide array of choices in their licensing decisions [and] this competition reduces individual services' bargaining power.''); Watt WRT ¶ 25 (''[T]he different interactive streaming companies—Spotify, Apple Music, Rhapsody/Napster, Google Play Music, Amazon, etc.—do all compete (and rather fiercely) among themselves, offering very (perhaps perfectly) substitutable services.''). That is, despite the overall size of Apple, Amazon and Google, in a market transaction, all licensors providing complementary ''must have'' inputs will have a bargaining advantage, and they can refuse to license even to these large entities if the latter insist on too low a royalty, licensing instead to other interactive streaming services who can satisfy downstream market demand. In this regard, there is no evidence that [REDACTED].

[302] See the discussion *infra* regarding the importance of this qualifier in connection with Pandora's Direct Licenses.

[303] The Copyright Owners also rely on blanket (''microsynch'') licenses by which publishers grant their entire catalogs for use in synchronized audio-video productions, and they also rely on synch licenses for mobile and video game applications. The Judges' critique of synch licenses as benchmarks is equally applicable to these licenses.

recordings (and thus the musical works within them) compete against one another for inclusion in the final product (*e.g.,* a movie or television episode). By contrast, in the interactive streaming market, services must build a catalog of sound recordings and their included musical works, so that many works can be streamed to listeners. *Id.* That is, in the interactive streaming market, the sound recordings (and their embodied musical works) are ''must have'' complements, not in competition with each other. However, in the synch market the potential sound recordings of any given musical work identified by the movie or television producer is a substitute good, in competition with any other existing or future cover sound recording of the same musical work for inclusion in the movie or television show.

YouTube Agreements

I agree with Copyright Owners that YouTube is a competitor vis-a-vis the interactive streaming services. Indeed, the Services acknowledge this point. [REDACTED]. Page WDT ¶ ¶ 47, 53, 55; *see also* (Eisenach) WRT ¶ 59. In like fashion, Professor Marx testified that [REDACTED]. Marx WDT ¶ 44 n.54. Accordingly, at least one form of YouTube Agreement would likely be somewhat comparable to the interactive streaming market.

As noted *supra,* Dr. Eisenach selected for input into his ratio the YouTube agreements and rates pertaining to [REDACTED]. *See* SJRPFF–CO at 187–89 (and record citations therein).

I agree that the inclusion of a video component in the YouTube product renders less useful as a benchmark the agreements relating to ''User Videos with Commercial Sound Recordings.'' Further, as Dr. Eisenach acknowledges, these YouTube audio/video combinations also provide for synchronization rights, *see* Eisenach WDT ¶ 100, and this addition of yet another right in the licenses further muddies the comparability of a YouTube benchmark.

The Services further maintain that—assuming *arguendo* any YouTube licenses are appropriate benchmarks—Dr. Eisenach should have relied on a different category of YouTube licenses for his benchmark analysis. Specifically, they maintain that the more appropriate YouTube benchmark ratio would compare the contractual provisions between YouTube and publishers, and YouTube and record companies, for [REDACTED].

I agree with the Services in this regard. [REDACTED].[304]

Under the [REDACTED] contract provisions (*i.e.,* the [REDACTED] provisions) governing YouTube's agreements with [REDACTED]. *See* Professor Katz's Supplemental Written Rebuttal (Katz SWRT) ¶ ¶ 13(b) n.26 and 13(e) n. 29 (and contracts referenced therein). [REDACTED], the sound recording copyright owner receives a royalty of [REDACTED]% of revenue, compared with the [REDACTED] received by music publishers. *Id.* ¶ ¶ 13(h) n. 32 and (k) n.35 (and contracts referenced therein).

Thus, under the [REDACTED] deals, the royalty ratio is [REDACTED], which equals 4.76:1. In turn, that ratio implies a TCC musical works rate of [REDACTED]%. Under the [REDACTED] deals, the royalty ratio is [REDACTED], which equals [REDACTED], which implies a TCC musical works rate of [REDACTED]%. I find that these ratios and implied percentages derived from YouTube's [REDACTED] royalty rates to be usable benchmarks in this proceeding.

Pandora ''Opt-Out'' Agreements

Together with his YouTube benchmark, Dr. Eisenach finds the Pandora ''Opt-Out'' agreements to be the most useful among the several potential benchmarks he examined. I agree with Dr. Eisenach that the Pandora ''Opt-Out'' agreements have a degree of comparability sufficient to render them usable as benchmarks.

However, I do not agree with Dr. Eisenach's attempt to extrapolate into the future from the actual rates in those Opt-Out Agreements. Rather, I find that the [REDACTED] ratio that Dr. Eisenach identified for the year 2018 derived from existing agreements is the most useful benchmark derived from the ''Opt-Out'' data. *See* Eisenach WDT ¶ 104. The Services concur with Dr. Eisenach with regard to the existence of this [REDACTED] ratio, and they further note that Pandora's most recent direct license agreements during the ''Opt-Out'' period with the publishers (who control many of the works underlying sound recordings performed by Pandora) provide that publisher royalties will be determined as [REDACTED].[305] Specifically, these agreements resulted in a shift of the sound recording: musical works ratio to [REDACTED], implying a musical works TCC percentage of [REDACTED]%. *See* Katz CWRT ¶ ¶ 101–104; Herring WRT ¶ ¶ 28–29.

I reject Dr. Eisenach's identification of a trend in the [REDACTED]. His change in the ratio to [REDACTED] was driven by expectations regarding the likelihood of an uncertain change in the legal landscape regarding publisher withdrawals from performing rights organizations. However, changes in such uncertainties are not well-captured by mapping them over a time horizon. Moreover, as the Services note, and as Dr. Eisenach concurs, even assuming *arguendo* such a change in relative uncertainty could be captured in a regression, other regression forms, such as a quadratic form, could have been used to demonstrate not a [REDACTED], but rather a return of the ratio to its prior level (an equally plausible future event). *See* 4/5/17 Tr. 495963 (Katz); Katz CWRT ¶ ¶ 104–107, Table 1,F; 4/4/17 Tr. 4807–08 (Eisenach) (noting his linear form of regression was not ''material'').

Moreover, the assumption behind Dr. Eisenach's regression was not borne out. In 2015, the Second Circuit Court of Appeals affirmed a 2014 decision by the Southern District of New York, *prohibiting such partial withdrawals. In re Pandora Media, Inc.* v. *ASCAP,* 785 F.3d 73, 77–78 (2d Cir. 2015), *aff'g In re Pandora Media,* 6 F. Supp. 3d 317, 322 (S.D.N.Y. 2014). Subsequently, in August, 2016, the Department of Justice issued a statement announcing that, consistent with these judicial decisions, it would not permit such partial withdrawals under the existing consent decrees. *See* Eisenach WDT ¶ 114 & n. 109 therein. In fact, as indicated *supra,* there were actual Pandora ''Opt-Out'' agreements that set rates through 2018 that established a sound recording:musical works ratio of [REDACTED], that Dr. Eisenach chose to disregard in favor of his extrapolated lower ratio. See Katz CWRT ¶ 103; Herring WRT ¶ 28.

iii. Dr. Eisenach's Per Play Sound Recording Rate

I also have difficulty relying on the data set which Dr. Eisenach developed for his estimation of a $[REDACTED] per play sound recording royalty rate, to which he applied the several benchmark ratios. The principal problems with this

[304] I take note of Dr. Eisenach's criticism of the [REDACTED] publishing rates as constrained by the ''shadow'' of the section 115 license. However, as explained elsewhere in this Dissent, I find the ''shadow'' of the section 115 statutory license to be beneficial in establishing rates that reflect the workings of an effectively competitive market.

[305] Pandora's status as a purely noninteractive service prior to 2018 does not impact the relevancy of this benchmark, because: (1) noninteractive and interactive services both pay performance royalties; (2) noninteractive services do not pay mechanical royalties; and (3) the performance license and the mechanical license are perfect complements.

data is that it covered a non-random sample of only approximately 15% of all interactive plays, excluding in particular plays on [REDACTED] ad-supported services and Apple's interactive streaming service. Inclusion of [REDACTED] would have [REDACTED] his per play rate from $[REDACTED] to $[REDACTED] (Inclusion of [REDACTED] would have [REDACTED] the $[REDACTED] estimate to $[REDACTED].) SJRPFF–CO at 158–59 (and record citations therein).

Dr. Eisenach explained that he restricted his data sample purposefully. He decided to omit several sound recording labels because they [REDACTED], which he asserted [REDACTED]. Eisenach WDT ¶ 150. I acknowledge Dr. Eisenach's assertion that this fact *could* have an impact, on the margin, of driving [REDACTED] the royalties paid by [REDACTED] to those labels. However, the evidence does not bear that out, because [REDACTED]. More particularly, the [REDACTED] contract with record labels that Dr. Eisenach reviewed show [REDACTED]. 4/4/17 Tr. 4739–53 (Eisenach); *see also, e.g.* Trial Ex. 2760 ([REDACTED]); Trial Ex. 2765 ([REDACTED]). [REDACTED].

With regard to Dr. Eisenach's specific omission of data from Spotify's ad-supported service, Copyright Owners make additional arguments. They claim that the ad-supported service does not reflect the actual value of the sound recordings, because that tier acts as a funnel to draw listeners to the subscription service. Therefore, Copyright Owners maintain, the ad-supported service is essentially a loss-leader, with the difference between the higher effective per play rates for subscription services and the lower effective per play rates for the ad-supported services more in the nature of a marketing expense that should not be deducted from Dr. Eisenach's royalty calculations. *See* Eisenach WDT ¶ 148 n.127.

However, that analysis omits several important facts. First, as Mr. McCarthy, Spotify's CFO testified, [REDACTED]. 3/21/17 Tr. 2058–59 (McCarthy) ([REDACTED]). Second, he notes that [REDACTED]% of Spotify's paid subscribers in the United States were previously such engaged users of the ad-supported service. McCarthy WRT ¶ 22; *see also* 3/21/17 Tr. 2059 (McCarthy). Third, Mr. McCarthy testified that the ad-supported tier [REDACTED]. *See* 3/21/17 Tr. 2059 (McCarthy) ([REDACTED]).

Notwithstanding the marketing value of the freemium model, it must be remembered that [REDACTED]. *These listeners, and the advertising revenue they generate, are real and reflect the WTP of a large swath of interactive listeners.*[306] *See* Marx WRT ¶ 115–16 & Fig. 9 (''While I agree that one aspect of the ad-supported service is to provide an on-ramp to paid services, it also has another important aspect, namely to serve low WTP customers . . . . Copyright Owners' economists err in not calculating the impact of the Copyright Owners' proposal on ad-supported services. Ad-supported services currently make up [REDACTED] in the industry.'') I agree with this point, and I therefore agree with the Services that Copyright Owners erred in their decision to exclude Spotify data from their analyses.[307]

I also disagree with Copyright Owners' suggestion that the ad-supported service deprives them of higher royalties from subscribers. Although ad-supported services identify future subscribers, until those subscribers are identified, they are not subscribers. In that sense, ad-supported services indeed are marketing tools, *but they do not reduce present royalties because the future subscribers have not yet been identified.* By using ad-supported services, Spotify certainly does avoid hard marketing costs that would be incurred through, for example, paid advertising to convince non-subscribers to subscribe. However, there is no record evidence that this hard cost saving translates directly into lost royalty revenue to Copyright Owners. Apparently, Copyright Owners argue that their loss is in the form of an *opportunity cost,* losing the opportunity to obtain subscription-level royalties from the ad-supported listeners. But if Spotify paid subscription-level royalties for all ad-supported listeners, it would be paying an implicit marketing cost that inefficiently was wasted on the [REDACTED].[308]

In this regard, it is important to remember that, as discussed *supra,* music is an ''experiential'' good. *See Byun, supra,* at 23. Thus, provision of a monetarily ''free-to-the user'' service is a reasonable marketing tool, and the Judges are loath to second-guess the business model incorporating that marketing approach, especially after it has proven successful while still providing royalties to rights owners. *See* Page WDT ¶ 27 (Spotify's freemium model monetizes through subscriptions more successfully than the sale of downloads and CDs, as well as terrestrial radio and, of course, piracy).

d. Service's Criticisms and Judicial Analysis of Dr. Eisenach's Method #1

The Services criticize Dr. Eisenach's Method #1 calculation as being based upon the incorrect assumption that the entire difference between interactive and noninteractive rates must be attributed to the mechanical license right. As the Services properly note, there are several reasons, all unrelated to the mechanical right and license, why interactive rates are higher than noninteractive rates for musical works performance rights. Leonard WRT ¶ 55; Katz CWRT ¶ ¶ 117–118; Hubbard WRT ¶ 6.4; 4/5/17 Tr. 4972–74 (Katz). First, Dr. Eisenach's Method #1 did not account for the presence of the ephemeral right in licensing noninteractive streaming (discussed *supra*), which accounts for 5% of the noninteractive rate. 4/4/17 Tr. 4851–52 (Eisenach); *see also* 4/5/17 Tr. 5159–5161 (Leonard) (discussing how Dr. Eisenach's analysis does not consider

[306] In the parlance of platform economics, and as noted *supra,* Spotify's ad-supported service provides a multi-platform approach, in which listeners, advertisers, sound recording rights holders and musical works holders all combine to obtain revenue based on the mutual values each brings to that platform. *See* 3/21/17 Tr. 2013 (Marx).

[307] Copyright Owners belatedly propose that—if the Judges intend to include the Spotify ad-supported service in the rate structure and rate calculations—that they establish (1) *separate rates* for ad-supported services that are not incorporated into the calculation of rates set for other services; and (2) *separate terms* for an ad-supported service that limit the functionality of such a service to avoid potential cannibalization of services paying higher royalties. COPCOL ¶ 228 & n.34. This argument is a tacit acknowledgement by Copyright Owners that a segmented market *may* require a differentiated rate structure (even as they strenuously dispute the appropriateness of such a structure). Such a post-hearing argument is ''too little, too late.'' If Copyright Owners wanted to argue in the alternative in this manner, they needed to do so during the hearing, and support their arguments for limited ad-supported functionality and segmented rates with testimony and evidence. As I noted *supra,* the Judges 'choices were limited to the rate structures proffered by the parties, or reasonably suggested by the evidence; a different structure, if proffered or suggested by the evidence, might have been preferable, but it had to be supported by record evidence. In any event, the rate structure I adopt in this Dissent does not simply average Spotify's lower effective per-unit rate into an overall rate, because the I am adopting a differentiated rate structure that continues to treat the ad-supported market segment separately, reflecting the presence of a market segment with a lower WTP. Startlingly, the majority adopts this reasoning wholesale in the Majority Opinion, *foreclosing Copyright Owners' argument.* So, although the majority agrees that Copyright Owners could not propose a new rate structure post-hearing, the majority gives itself a free pass to do the same, even though the harm to the parties is identical in either case—they are deprived of the opportunity to challenge the post-hearing creation.

[308] Another alternative marketing approach would be the offering of free trial subscriptions. However, there was no testimony as to whether free trials would better monetize listening than the freemium model used by Spotify. In fact, Spotify's CFO, Mr. McCarthy testified that, [REDACTED]. 3/21/17 Tr. 2113–2115 (McCarthy). *See also* COPFF ¶ 369.

the ephemeral right); Leonard WRT ¶ ¶ 55–56. Second, there is a difference in the performance rights royalty rates charged by PROs to interactive and noninteractive services that is not captured by Method #1. *See, e.g., In re Petition of Pandora Media, Inc.,* 6 F. Supp. 3d at 330 (ASCAP charges different royalty rates for performance rights depending on whether the service is non-interactive or interactive). Had Dr. Eisenach considered these factors, he might well have estimated a mechanical rate significantly less than the rates he derived, even using his ''valuation ratios.'' *See* Katz CWRT ¶ 122.

The Services also note the impact in Method #1 of Dr. Eisenach's decision to [REDACTED] from his modeling. As the Services note, adding [REDACTED] to Dr. Eisenach's effective per play rate for sound recording results in a per rate of $[REDACTED]. *See* 4/4/17 Tr. 4771–74 (Eisenach). Further, the Services note that, by introducing the unregulated sound recording rates in his ratio, Dr. Eisenach has imported the complementary oligopoly (Cournot Complements) power associated with those rates, as noted in *Web IV. See* Katz CWRT ¶ 56; Marx WRT ¶ ¶ 137, 141.

Combining all of the foregoing criticisms, the Services conclude as follows:

> If one were to use $[REDACTED] per hundred plays for the sound recording rate ([REDACTED]) (id. at 4771:10–4774:5), reduce that by 12% as the Board did in Web IV for complementary oligopoly power, increase the $0.20 per hundred plays Dr. Eisenach uses for musical works performance rights by 60% to account for the difference in ASCAP rates identified by Judge Cote [in the rate court], and then apply Dr. Eisenach's invalid ''valuation ratio'' of [REDACTED], the result would be $[REDACTED] per hundred plays [$[REDACTED] per play], way below the $0.15 per hundred plays rate [$0.0015 per play] that Dr. Eisenach attempts to validate.

SJPFF ¶ 279 (and record citations therein). Thus, the foregoing criticisms would reduce Copyright Owners' benchmark by 80%.

I agree with the Services that Method #1 does not provide a useful benchmark in this proceeding. As noted *supra,* and most importantly, the absence of interactive streaming data from Spotify is a critical omission. The fact that much of that data relates to ad-supported services with a limited functionality does not justify removing that data from a market analysis, *because that service is a part of the market.* In fact, Copyright Owners argument proves too much. That is, their willingness to distinguish and isolate the Spotify ad-supported service and related data in this manner only underscores the need for a differentiated/price discriminatory rate structure, such as proposed by this Dissent.

Also, I agree that Dr. Eisenach's analysis imports the complementary oligopoly power of the sound recording companies. Although (as also noted *supra*) I do not think that the Judges could simply import the 12% steering adjustment from *Web IV* to calculate this effect (because the 12% was a function of evidence specific to that proceeding), it is clear that any benchmark approach should adjust downward a rate inflated by the presence of complementary oligopoly in the benchmark market.

And to reiterate, although the Services utilize Dr. Eisenach's [REDACTED] ratio (implying a TCC of [REDACTED]%) to illustrate the impact of their other criticisms, I find that ratio to be much lower than what can reasonably be gleaned from Dr. Eisenach's benchmarks. As indicate *supra,* the most usable benchmark information from Dr. Eisenach's approach are the YouTube [REDACTED] ratio, and the Pandora ''Opt-Out'' ratio from actual agreements, which imply a TCC between [REDACTED]% and [REDACTED]%.

e. Services' Criticisms and Judicial Analysis of Dr. Eisenach's Method #2

The Services criticize Dr. Eisenach's Method #2 principally for the same reason they criticize his Method #1, *viz.,* his use of a ratio that embodies inapposite sound recording data. They also emphasize the import of his decision to omit Spotify's sound recording data from his Method #2 calculations. At the hearing, Dr. Eisenach acknowledged the significance impact of this omission, but he defended the omission as virtue rather than vice, because of the starkly different manner in which Spotify monetizes its ad-supported service. He testified that, had he incorporated all of Spotify's sound recording data in estimating a current industrywide monthly per user charge, he would have calculated a monthly per user sound recording rate of $[REDACTED] per month, rather than the $[REDACTED] rate he determined when excluding [REDACTED] data. 4/4/17 Tr. 4825–28 (Eisenach).

In addition, the Services assert that Method #2 is faulty because of Dr. Eisenach's use of the rate court performance royalty rates that he subtracts from his ratio-derived musical works rate to identify an implied mechanical works rate. More specifically, the Services assert that Dr. Eisenach's willingness to use the rate courts' performance rates is inconsistent with his broader claim that musical works rates have been artificially reduced below market rates. For example, when identifying benchmarks, Dr. Eisenach relies on the *non-rate court performance rights* paid by Pandora in the Opt-Out agreements precisely because they represent, in his opinion, market-based rates untainted by the depressing effects of the rate court. *See* Eisenach WDT ¶ ¶ 106–110, 4/4/17 Tr. 4805, 4821–23. (Eisenach). According to the Services, to be consistent, Dr. Eisenach should have increased the rate court levels to reflect what he understood to be market rates. Such consistency, they assert, would make the subtracted rate in the Method #2 formula larger, and the difference—which is Dr. Eisenach's mechanical rate—smaller.

Finally, the Services criticize Dr. Eisenach's Method #2 calculations because they exclude not only significant sound recording data, but also the performance royalty data for Amazon, Apple, Google, and Spotify. Accordingly, Method #2 accounts for only 13 percent of total interactive service revenues in 2015. *See* Katz CWRT ¶ 124.

I agree with the Services that Method #2 does not contain sufficient industrywide performance royalty and sound recording data to provide a meaningful analysis for determining a per-user monthly mechanical works royalty. I am also troubled by the apparent inconsistent use of rate court established rates in Method #2, when Dr. Eisenach had indicated in other contexts that rates unshackled from rate court decisions provide a truer indication of market rates.

More broadly, I understand that Dr. Eisenach omitted [REDACTED] because of [REDACTED], which is [REDACTED]. I recognize that combining [REDACTED] user data with other interactive streaming services' data [REDACTED]. *See* CORPFF–JS at pp. 183–184 (noting what Copyright owners describe as ''[t]he profound impropriety of [REDACTED] into Copyright Owners' benchmarking and calculations.)

Once again, though, that seeming anomaly actually underscores why I find the differentiated rate structure in the 2012 benchmark to be appropriate. The royalty rates paid by all services should be reflective of the differentiated WTP of their listeners (for the reasons discussed *supra*). That is, the same reason why Dr. Eisenach elected not to lump Spotify with other services in his calculations incorporated into Copyright

Owners' ''one size fits all'' rate structure. Indeed, the anomalous nature of Spotify's monetization of the downstream market underscores why ''one size *does not* fit all,'' and why the 2012 rate structure therefore is preferable (and why Copyright Owners made the post-hearing argument for a separate rate structure, with separate terms, for ad-supported services, as discussed *supra*).

f. Conclusion

For the reasons set forth above, I would not adopt Dr. Eisenach's proposed benchmark rates as the mechanical rates for the upcoming rate period. However, as explained *supra,* I find that the actual Pandora Opt-Out Agreements, the [REDACTED] YouTube Agreements [REDACTED] rates provide useful benchmark information (albeit not the same information that Dr. Eisenach identifies as useful from those agreements). Thus, usable ratios from Dr. Eisenach's analysis consist of the [REDACTED] and [REDACTED] ratios derived from the YouTube [REDACTED] agreements and the [REDACTED] ratio derived from the Pandora Opt-Out Agreements. These ratios, respectively convert to percentages (*i.e.,* a TCC percentages) of [REDACTED]%, [REDACTED]%, and {REDACTED]%. Also useful are the 21%-22% TCC values in the existing rate structure, which, as Dr. Eisenach indicated, [REDACTED]. *See* Eisenach WDT ¶ ¶ 84–92.

2. The Services' Benchmark Rates [309]

a. The Present Section 115 Rates

The Services do not examine in detail the particular rates within the existing rate structure. Rather, they treat the rates within that structure as benchmarks are generally treated—considerations in arriving at an agreement. Thus, just as Dr. Eisenach did not analyze *why* the rates and ratios on which he relied as benchmarks were set at the levels he identified, or consider the subjective understandings of the parties who negotiated his benchmarks, the Services' economists elect to rely on the 2012 rates as objectively useful evidence of the parties' revealed preferences.[310]

Copyright Owners disagree with this use of the 2012 rate structure. As with regard to the structure of the rates, they take the Services to task for failing to present evidence of the negotiations that led to the prior settlements, including the present 2012 benchmark. They argue that, without such supporting evidence or testimony, the Services cannot provide support for their proposed rates. *See* CORPFF–JS at p. 61 (noting the lack of evidence for the ''computations for different types of potential services'' in the 20212 benchmark).

The Services take a broad approach in their attempt to support the usefulness of the rate levels within the 2012 benchmark. They note that music publishers have consistently realized profits under these rates, including profits from musical works royalties. However, Copyright Owners note that mechanical royalties have not created a profit for Copyright Owners, and the Services' assertion of overall publisher profitability is based on their lumping of performance royalties together with performance royalties. As I have noted *supra,* in considering Professor Zmijewski's analysis, the combination of mechanical and performance royalties earned by the music publishers is the more important metric, because: (1) performance and mechanical royalties are perfect complements; and (2) the mechanical royalty has been calculated in an ''All-In'' fashion, subtracting the performance royalty from the mechanical royalty, which of course has the effect of inflating the performance royalty portion relative to the mechanical royalty portion.

The Services also maintain that they relied on the continuation of the rates that now exist to develop their business models. For example, Pandora, the latest entrant into the interactive streaming market, asserts that its decision to enter this market was based on its assumption that there would be no increase in the mechanical royalty rates. Herring WRT ¶ 3. I categorically reject this argument. The applicable regulations provide that ''[i]n any future proceedings the royalty rates payable for a compulsory license shall be established de novo.'' 37 CFR 385.17; *see also* 37 CFR 385.26 (same). A party may feel confident that past is prologue and the parties will agree to roll over the extant rates for another period; a party could be sanguine as to its ability to make persuasive arguments as to why the rates should remain unchanged; a party might even conclude that the mechanical rate is such a small proportion of the total royalty obligation that its increase would be unlikely to alter long-term business plans. But for sophisticated commercial entities to claim that they *simply assumed* the rates would roll over without the possibility of adjustment strikes me as so absurd and reckless as to raise serious doubts about the credibility of that position.

At least one of the Services, Spotify, further suggests that the present rates should not be increased because an increase in the rates might affect different interactive streaming services in different ways. In particular, there might be a dichotomous effect as between essentially pure play streaming services (such as Spotify and Pandora) and the larger new entrants with a wider commercial ''ecosystem'' (such as Amazon, Apple and Google). As Spotify's CFO testified:

> The Copyright Owners argue that ''a change in market-wide royalty rates such as this would affect all participants in a similar way,'' suggesting that the industry as a whole could increase prices without affecting their relative price points. Rysman WDT ¶ 94. [REDACTED]. See, *e.g.,* Rysman WDT ¶ 29 . . . . [REDACTED].

McCarthy WRT ¶ 38 (emphasis added); *see also* McCarthy WDT ¶ ¶ 50–51 ([REDACTED]); McCarthy WRT ¶ 36 ([REDACTED]).

I construe this argument as an iteration of the ''business model'' argument that the Judges have consistently rejected, *viz.,* that the Judges will not set rates in order to protect any particular streaming service business model. Final Rule and Order, *Digital Performance Right in Sound Recordings and Ephemeral Recordings,* 72 FR 24084, 24088 n.8 (May 1, 2007) (*Web II*). That is, I distinguish between: (1) business models that are necessary reflections of the fundamental nature of market demand, particularly, the varied WTP among listeners; and (2) business models that may simply be unable to meet dynamic competition within the market or a given market segment. If pure play interactive streaming services are unable to match the pricing power of businesses imbued with the self-financing power of a large commercial ecosystem, nothing in section 801(b)(1) permits—let alone requires—that the Judges protect those pure play

[309] The following analysis does not address the direct deals entered into by Pandora, cited by Professor Katz in his testimony. He candidly acknowledged that the probative value of these agreements was weakened by the fact that they included rates for other tiers of service, including noninteractive service, and he had not given consideration to how the bargaining and setting of each rate in each tier might be interrelated. *See* Katz WDT ¶ 105 (''The simultaneous agreement with respect to multiple services can cloud the interpretation of any given number in a contract because the rates are negotiated as a package.''). I agree with Professor Katz and, for this reason, I place no weight on those direct Pandora agreements.

[310] This point is not made to be critical of Dr. Eisenach's approach, but rather to show that the Services' reliance on the 2012 settlement as a benchmark shares this similar analytical characteristic, typical and appropriate for the benchmarking method in general.

interactive streaming services from the forces of *horizontal* competition.[311]

On balance, I do not find that the Services' status quo and business model arguments for maintaining the section 115 rates are themselves persuasive reasons to maintain those rates. If those rates should be maintained, support for such a result would need to be found elsewhere in the record.

b. The Services' Subpart A Benchmark

The Services propose the rate set forth in Subpart A as a benchmark for the Subpart B rates to be determined in this proceeding. As noted *supra,* Subpart A reflects the rates paid by record companies, as licensees, to Copyright Owners for the mechanical license, *i.e.,* the right to reproduce musical works in digital or physical formats. The particular Subpart A benchmark rate on which the Services' rely is the existing rate, which the Subpart A participants have also agreed to continue through the forthcoming rate period through the settlement noted *supra.*

In support of this benchmark, the Services emphasize that the total revenue created by the sale of digital phonorecord downloads and CDs is essentially commensurate with the revenues created through interactive streaming, indicative of an equivalent financial importance to publishers when negotiating rates when negotiating rates with licensees in Subparts A and B respectively. *See* 3/20/17 Tr. 1845 (Marx) (''downloads, in particular, are comparable to interactive streaming.''). Also, although the Subpart A rate is the product of a settlement, the Services argue that the rate is a useful benchmark because it reflects both the industry's sense of the market rate and the industry's sense of the how the Judges would apply the section 801(b)(1) considerations to those market rates. 3/15/17 Tr. 1184, 1186 (Leonard); 3/20/17 Tr. 1842–43 (Marx).

In opposition, Copyright Owners argue, for several reasons, that the Subpart A rates are not proper benchmarks. First, they emphasize that revenue from the sale of DPRs and CDs has been declining over the past several years. *See* COPFF ¶ ¶ 196, 583, 611, 736 (and record citations therein). Second, they note that, as the Services acknowledge, the parties are not identical; specifically, the licensees in Subpart A are the record companies whereas in Subpart B the licensees are the interactive streaming services. *See, e.g.,* 3/15/17 Tr. 1193 (Leonard). Third, they emphasize that the *existing* Subpart A rate is itself the product of a settlement, rather than a market rate.

More importantly, Copyright Owners also note that the subpart A settlement establishes a *per-unit* royalty rate of $.091 per physical or digital download delivery (with higher per-unit rates for longer songs), rendering that rate inapposite as a benchmark for the Services' present subpart B proposal. In support of the conclusion that this makes for an inapposite comparison, Copyright Owners argue that because the subpart A rate is expressed as a monetary unit price, the Copyright Owners have eliminated the risk that the retailers' downstream pricing decisions will impact Copyright Owners. More specifically, they note that, ''[u]nder the Subpart A rate structure, the label (as licensee) pays the same [penny rate] amount in mechanical royalties *regardless of the price at which the sound recording is ultimately sold* [within the] range of price points for individual tracks in the market ranging from $0.49 to $1.29 and the mechanical penny rate binds regardless of the price of the track. COPFF ¶ 727 (citing Ramaprasad WDT ¶ 28 & Table 1).

Of equal importance, Copyright Owners distinguish Subpart A from Subpart B based on the fact that downstream listeners to DPDs and CDs (and any other physical embodiment of a sound recording) become *owners* of the sound recording and the musical work embodied within it, whereas under Subpart B the listeners only obtain *access* to these songs and musical works for as long as they remain subscribers or registered listeners (to a non-subscription service).

In reply to this argument, Dr. Leonard, asserted that the legal ''ownership vs. access'' distinction does not reflect as fundamental an economic difference as might appear on the surface. Leonard WRT ¶ 27 (''[T]here are certain conceptual similarities between streaming and a download.''). Having paid for a track download, a user can listen to it as often as desired without further charge. Similarly, having paid the subscription fee, a streaming user can listen to a track as often as desired without further charge''); 3/15/17 Tr. 1098, 1113 (Leonard) (''in the case of a PDD, and streaming, in both cases you're getting—it's really about on-demand listening . . . . I think it's . . . a very, very useful benchmark.'').

I disagree with Dr. Leonard, and agree with Copyright Owners that the ''ownership vs. access'' dichotomy diminished the usefulness of the subpart A rate as a benchmark. Although Dr. Leonard is correct in noting that ownership is in essence a more comprehensive and unconditional form of access, a downstream purchaser acquires ownership of only the digital or physical embodiment of a sound recording (and the embodied musical work) in exchange for an up-front charge (the purchase price), and then has unlimited free access to that single sound recording/musical work going forward. By contrast, a subscriber to an interactive streaming service pays an up-front charge (usually monthly), and then likewise has unlimited access to the entire catalog of sound recordings (and the embodied musical works) for each such period.

Thus, the dissimilarities between the products regulated in subpart A and subpart B outweigh their similarities. An interactive streaming service provides an access (option) value to entire repertoires of music. A purchased download or CD provides unlimited access for only a single sound recording/musical work.

In other respects, though, I recognize that the subpart A market and settlement are somewhat comparable to the subpart B market. The licensed right in question is identical—the right to license copies of musical works for listening in a downstream market. Further, the licensors—*i.e.,* the music publishers and songwriters—are identical.[312] Finally, the time period is reasonably recent, and the Copyright Owners have not explained whether or how the particular market forces in the Subpart A market sectors have changed since 2012 to make the rate obsolete.

Notwithstanding these similarities though, I find that the facially different access value in subpart A constitutes a fatal flaw in its usefulness as a benchmark in this proceeding. However, the Services, and Apple, have presented

[311] Moreover, any disruption arising from the disparate impact of a rate increase among interactive streaming services would not constitute ''disruption'' under Factor D of section 801(b)(1), because such disruption would not impact the structure of the industry or generally prevailing industry practices, but rather would impact particular business models. The irrelevancy, for disruption purposes, of a rate increase *under the existing structure* must be distinguished from a rate increase caused, as in the Majority Opinion, by a radical change in the rate structure that cedes control of rates to private third-parties, *i.e.,* the record companies, who have economic interests adverse to both the services and Copyright Owners, as discussed *supra.*

[312] However, the licensees in the benchmark market are not the same. Moreover, as Copyright Owners note, there is an important economic difference in the identities of the licensees. In subpart A, the licensees are record companies, who use the licensed musical works as *inputs* to create a new product, the sound recording. In subpart B, the interactive streaming services use the musical work through their use of the finished product (the sound recording). This basic difference suggests that the different values are a consequence of a difference in kind.

evidence which they assert provides two different ways of rendering subpart A rates compatible. Accordingly, I consider those approaches below.

c. The Services' and Apple's Subpart A Benchmarking Approaches

To convert the per-unit rate in subpart A into a subpart B percent-of-revenue rate, the Services and Apple identify several alleged third-party conversion ratios between a given number of interactive streams and a single play of a purchased DPD that they allege are applicable in this proceeding.

Professor Marx first applies a conversion ratio of PDDs to streams of 1:150, which she noted had been established by the RIAA. Second, she (as well as Professor Katz) takes note of an academic study which estimated that, in the marketplace, 137 interactive streams was equivalent to the sale of one DPD. Marx WDT ¶ 108 & n.21 (citing L. Aguiar and J. Waldfogel, *Streaming Reaches Flood Stage: Does Spotify Stimulate or Depress Music Sales?* (working paper, National Bureau of Economic Research, 2015)); Katz WDT ¶ 110 (same). Apple's economic expert, Professor Ramaprasad, also relied on the Aguiar/Waldfogel article to support Apple's benchmark per play proposal. Ramaprasad WDT ¶ 56, n.102.[313]

To apply the 1:150 conversion ratio, Professor Marx first calculated the subpart A mechanical license fee as the weighted average of the PDD/CD mechanical license fee for songs five minutes or less and songs greater than five minutes: $[REDACTED] per copy for the former and $[REDACTED] per minute or a fraction thereof (conservatively assuming that songs longer than five minutes have an average length of eight minutes). Based on this assumption, she estimated a PDD/CD mechanical license fee of $[REDACTED] per song. Marx WDT ¶ 108. Next, Professor Marx obtained a per-play streaming royalty equivalent by dividing the $[REDACTED] per song amount (derived *supra*) by the number of streams, 150, yielding a value for the per-play total streaming royalty of $[REDACTED]. *Id.* ¶ ¶ 109–110. The resulting per-play royalty rate for the sum of mechanical and performance royalty translates to [REDACTED]% of Spotify's revenue. *Id.* ¶ 111. Subtracting out the performance royalty of [REDACTED]% as in an ''All-In'' calculation, she derived a mechanical royalty rate equivalent from Subpart A of approximately [REDACTED]% to [REDACTED]% of revenue. *Id.* ¶ 112, Fig. 22.

Professor Marx engaged in the same calculation methodology when applying the 1:137 conversion ratio from the Aguiar/Waldfogel article, and she determined a percent-of-revenue royalty for Spotify of [REDACTED]% (''All-In''), higher than the [REDACTED]% when applying the 1:150 conversion ratio. *Id.* ¶ 111 n.123.

On behalf of Pandora, Professor Katz used the same 1:150 conversion ratio as Professor Marx. He calculated a mechanical rate implied by the subpart A rate of 4.25%, higher than Professor Marx's implied rate, but still lower than the existing headline rate of 10.5% in subpart B. Katz WDT ¶ 111. On behalf of Apple, Professor Ramaprasad utilizes the 1:150 ratio, which she adopted from Billboard magazine's ''Stream Equivalent Albums'' approach. Ramaprasad WDT ¶ 84. Because Apple has advocated for a per stream rate, her conversion was expressed on a per stream basis, at $0.00061 per stream. Professor Ramaprasad noted that this rate was not only lower than the $0.0015 per stream rate proposed by Copyright Owners, but also significantly lower than Apple's own proposed per-stream rate of $0.00091. Ramaprasad WDT ¶ 86. When Professor Ramaprasad applied the Waldfogel/Aguiar 1:137 ratio, expressed on a per-play basis, she calculated a rate of $0.00066 per-stream for interactive streaming, which she noted also was even lower than the per-stream rate of $0.00091 Apple had proposed.

I do not place any weight on this ''conversion'' approach. Copyright Owners levy numerous criticisms of the ratio approach, and those criticisms, each on its own merit, serve to discredit the ratio approach. First, the Services and Apple simply adopted the equivalence ratios without defining what ''equivalence'' means. For example, the RIAA used the concept to identify albums that were sufficiently popular to garner ''gold'' or ''platinum'' awards. That use, absent other evidence, does not indicate that the conversion ratio is appropriate for rate-setting purposes. *See generally* Rysman WRT ¶ 96. Second, and relatedly, the experts who relied on the Aguiar/Waldfogel article did not verify that the input data used by the authors was appropriate for the purposes for which it has been relied upon in this proceeding. *See* 3/20/17 Tr. 1945–46 (Marx); 3/23/17 Tr. 2789–90 (Ramaprasad). Third, the Aguiar/Waldfogel article appears not to specifically address two issues that would make an equivalency ratio meaningful: (a) what happens to the download behavior of an individual who adopts streaming; and (b) how the availability of streaming alters the consumption of a particular song. *See* Rysman WRT ¶ 97. Fourth, the experts for the Services and Apple ignore that Aguiar and Waldfogel conducted an *additional analysis* described *in the same article* on which they rely. In that second analysis, the authors compared the weekly data from Spotify for the period April to December 2013 with weekly data from Nielson on digital download sales for the same exact songs during the same overlapping time period. That approach, which Aguiar and Waldfogel called their ''matched aggregate sales'' analysis, yielded a ratio of 1:43, implying a much higher mechanical rate for streaming. *See* COPFF ¶ ¶ 663–64 (and record citations therein).

The Services and Apple offer no sufficient evidence to overcome these criticisms of their ''equivalence'' approach for applying the Subpart A rates in this proceeding. Accordingly, I do not rely on such ''equivalence' approaches in this determination.

By contrast, the Services' *second* Subpart A benchmarking approach, utilized by both Professor Marx and Dr. Leonard, is more straightforward, and does not require a conversion of downloads into stream-equivalents. Rather, under this approach, Professor Marx simply divides the effective per-unit download royalty of $[REDACTED] by the average retail price of a download, $1.10, to calculate an ''All-In'' musical works royalty percent of [REDACTED]%. Subtracting Spotify's [REDACTED]% performance rate nets a mechanical works rate of [REDACTED]%. In similar fashion, given an average CD price of $1.24 per song, she finds that the ''All-In'' musical works rate equals [REDACTED]%. Subtracting Spotify's [REDACTED]% performance rate nets an ''effective'' mechanical royalty rate of [REDACTED]% under this approach. Thus, she concludes that the Services' proposal in general, and Spotify's proposal in particular, are conservative and reasonable, because those proposals provide for substantially higher royalty

[313] Professor Ramaprasad also relied on two other equivalency ratios, the first from *Billboard* magazine, and the second from another entity, UK Charts Company (UK Charts). However, she acknowledges that the *Billboard* ratio combines *video* streaming royalty data with *audio* streaming royalty data, which results in an overestimation of the ratio of streams to track sales relative to an audio-stream-only analysis. 3/23/17 Tr. 2760–61 (Ramaprasad). She also acknowledges that UK Charts changed its ratio from 1:100 to 1:150 without explanation, rendering uncertain that purported industry standard. *See* COPFF ¶ 683 (and record citations therein). Also, there was no evidence indicating that streaming and download activity in the United Kingdom would be comparable to U.S. activity.

rates than suggested by this subpart A benchmark analysis. Marx WDT ¶ ¶ 113–114 & Fig. 23.

Dr. Leonard did a similar calculation. He found that, applying the subpart A rates, expressed as a percentage of revenue, interactive streaming services would pay an ''All-In'' rate to Copyright Owners of 8.7% of revenue, based on the average retail price of digital downloads in 2015. Leonard AWDT ¶ 42. Dr. Leonard further calculated that, expressed as a percentage of payments to the record labels (rather than total downstream revenues) the subpart A settlement reflects a payment of 14.2% of ''All-In'' sound recording royalties, when compared to payments to record labels in 2015. Leonard AWDT ¶ 46.

Using updated 2016 data, which lowered the DPD retail price to $.99, Dr. Leonard calculates an ''effective'' percentage royalty rate of 9.6%. 3/15/17 Tr. 1108–09 (Leonard). Dr. Leonard then adjusts this result to make it comparable to Google's proposal, which seeks a 15% reduction of up to 15% in certain costs incurred to acquire revenues. Adjusting for this cost reduction, Dr. Leonard concludes that the equivalent percent of revenue (after deducting similar costs) in Subpart A is 10.2% in 2015 and 11.3% in 2016. *Id.* at 1109.

Copyright Owners do not dispute the calculations made by Professor Marx and Dr. Leonard in these regards. However, they emphasize that this approach nonetheless is not useful because it fails to fails even to attempt to explain the significant differences in access value between the purchase of a download or CD, on the one hand, and a subscription to (or free use of) an interactive streaming service, on the other. That is, whereas the Services and Apples' *first* approach is deficient because its conversion ratios are not applicable, Services' *second* approach fails because it simply bypasses altogether the problem of access value differences.

Finally, I take note of a point made by Professor Marx, that Copyright Owners, like any seller/licensor, would rationally seek to equalize the rate of return from each distribution channel *i.e.,* from licensing rights to sell DPDs/CDs under subpart A and from licensing to interactive streaming services under subpart B. As she explains:

> This principle of equalizing rates of return across different platforms has some similarities with that underlying the approach of W. Baumol and G. Sidak, ''The Pricing of Inputs Sold to Competitors,'' . . . . They propose an efficient component pricing rule whose purpose is to ensure that the bottleneck owner (in our case, the copyright holder) should get compensation for access from all downstream market participants, whether existing or new entrants, that leaves him as well off as he would have been absent entry.

Marx WDT ¶ 104, n.118. The Judges first identified this principle in *Web IV,* through a colloquy with an economic witness. *See Web IV,* 81 FR at 26344 (SoundExchange's economic expert, Professor Daniel Rubinfeld, acknowledging that, generally, licensors, as ''a fundamental economic process of profit maximization . . . would want to make sure that the marginal return that they could get in each sector would be equal, because if the marginal return was greater in the interactive space than the noninteractive . . . you would want to continue to pour resources, recordings in this case, into the [interactive] space until that marginal return was equivalent to the return in the noninteractive space.'').

However, that argument is dependent upon a usable conversion ratio to equalize access value per unit. Professor Marx does not explain how, absent such conversions, it would be possible to equalize rates of return across platforms. Accordingly, I find that the principle of ''equalized returns'' relied upon by Professor Marx cannot be applied.

3. Apple's Proposed Rate

Apple proposes a per-play rate of $0.00091 per unit. However, that rate is premised on two analytical factors that I have rejected, as discussed *supra.* First, as a single, per-play rate, it fails to reflect the variable WTP in the market, rendering it a less efficient upstream royalty rate. Second, Apple's proposed $0.00091 rate is derived from the subpart A conversion ratio approach that I have rejected, for the reasons discussed *supra.* I incorporate herein my analysis rejecting a per-unit approach, and my analysis rejecting the subpart A conversion ratio approach.

4. Findings Regarding the Reasonable Rate (before consideration of the four itemized factors)

There are several rates, as discussed *supra,* that I find to be supported by sufficient evidence to be relevant to the setting of rates in the present proceeding.

First, Dr. Eisenach's Pandora Opt-Out Agreement benchmarks, as contained in those agreements (*i.e.,* without extrapolation), reflect a ratio of [REDACTED] of sound recordings:musical works in a comparable benchmark setting. This ratio, as noted *supra,* translates to *a TCC percent of [REDACTED]%.* With sound recording royalty rates of approximately [REDACTED]% to [REDACTED]%, this TCC reflects a royalty equal to *an effective percent of total*[314] *revenue equal to [REDACTED]% to [REDACTED]%.*

Second, the YouTube agreements with music publishers identified by Dr. Eisenach—that relate to [REDACTED]. That [REDACTED]% royalty is a denominator in the ratio concept utilized by Dr. Eisenach,[315] and the numerator is the [REDACTED] sound recording royalty paid to the record companies. As explained *supra,* YouTube has agreed to pay [REDACTED], and has agreed to pay [REDACTED]. The [REDACTED] ratio reduces to [REDACTED], implying *a TCC ([REDACTED]) of [REDACTED]%.* The [REDACTED] ratio reduces to [REDACTED], implying *a TCC ([REDACTED]) of [REDACTED]%.*

Third, I look at the effective rates paid by Spotify, the largest interactive streaming service in terms of in terms of the number of subscriber-months and the number of plays. *See* Marx WRT ¶ ¶ 37–38 & Figs. 8 & 9. Under the current rate structure, as noted *supra, [REDACTED]*[316] *[REDACTED].*

Continuing with a consideration of Spotify's rates paid under the existing rate structure, [REDACTED].

[REDACTED]. The average rate is relevant in this proceeding because, as discussed *supra,* Spotify's two tiers are interrelated, in that the ''freemium'' model construes ad-supported listeners as a pool of potential converts to the subscription tier, even as they generate (indirectly) advertising revenue that converts to royalties for the Copyright Owners under the TCC prong.

Fourth, leaving the Spotify rates, I note that direct deals identified in the record reflect rates in the present regulations (as Dr. Eisenach noted, albeit he minimized the importance of those direct agreements). Also, the direct agreements contain additional terms that make them relatively uncertain benchmarks. For example, although Google's direct deals include rates that reflect the statutory rate—

[314] In the context of this section, ''total'' revenue is intended to distinguish from the percent of royalties paid by interactive streaming services to record companies as sound recording royalties (*i.e.,* TCC).

[315] To repeat for the sake of clarity, Dr. Eisenach does not rely on the ''static image'' agreements for his ultimate opinion. But the text accompanying this footnote expresses how the ''static image'' rate is being applied based on Dr. Eisenach's ratio approach.

[316] The record in some places records this figure as [REDACTED]% and [REDACTED]%. I understand these differences reflect rounding of figures and some discrepancy as to the time period covered. In any event, these differences do not impact my findings.

[REDACTED]. Leonard AWDT ¶ ¶ 53–54.[317] Also, its direct deals omit the Mechanical Floor, *id.,* which, as noted *supra,* [REDACTED].

[REDACTED] pays [REDACTED] royalties equal to [REDACTED] for its bundled subscription services which, after subtracting an [REDACTED]% performance royalty, equals a mechanical royalty of *[REDACTED] % of [REDACTED].* Leonard AWDT ¶ 64. [REDACTED].

Apple pays [REDACTED]. Wheeler WDT ¶ 10. [REDACTED]. *See* Eisenach WDT ¶ 10 (''[A]s a matter of economics the Section 115 license operates as a ceiling but not a floor on Section 115 royalties.'').

Based on the foregoing evidence regarding rates, I find that the existing rate structure is generating effective percent-of-revenue rates in the manner in which it was intended. The 10.5% headline rate is exceeded by the rates paid by [REDACTED], even as the effective per play rates that generate those percentages are lower. The rates actually paid and the rates under the 2012 benchmark are also consistent with the benchmark rates arising from the benchmark analyses undertaken by Dr. Eisenach that I find to be sufficiently comparable, particularly with regard to the TCC prong. The clustering of the effective percent of revenue rates in this regard indicates that the price discriminatory aspects of the existing structure allow for the growth of revenue, as the interactive streaming services ''exploit the demand curve'' by offering tiers of service that appeal to the budget constraints and the preferences of the segmented marketplace. The fact that a wide array of products with different characteristics at different price points has monetized usage, such that some effective actual rates exceed the 10.5% ''headline'' rate, is testament to the mutual benefits of the existing rates.

As noted *supra*, this finding does not mean that there might not be better ways to monetize demand, and I do not suggest that the record permits me (or the majority) to identify appropriate rates with mathematical precision. However, as the D.C. Circuit has held, and as noted *supra,* our rate-setting is an intensely practical affair, and mathematical precision is not possible. *Nat'l Cable Television Ass'n,* 724 F.2d at 182. Moreover, the Judges are constrained: We must choose among the rates and structures proposed by the parties, or reasonably ascertainable from the evidence, through an evidentiary process that the parties were permitted to consider, challenge and rebut at the hearing. What the Judges cannot do is attempt to cobble together elements of different proposals (the majority's ''Frankenstein's Monster'' approach, as characterized by Copyright Owners) without evidence as to how those combined elements would impact the industry and its participants.

VI. SUBPART C: APPLYING THE 2012 BENCHMARK

The parties' negotiations in *Phonorecords II* that culminated in the 2012 settlement focused more intensely on the rates that would apply to new service types, including cloud locker services, that would ultimately be embodied in subpart C of 37 CFR part 385. Parness WDT ¶ 13; Levine WDT ¶ ¶ 38–39; Israelite WDT ¶ ¶ 28–30. In fact, the subpart C negotiations that created five new service categories were quite protracted, the subject of a negotiation over more than one year. 3/29/17 Tr. 3652–55 (Israelite). Moreover, in this protracted give-and-take, the NMPA rejected some categories proposed by the services, while others were accepted and became part of subpart C. *Id.* at 3654- 56.

In setting these rates—rather than developing a new royalty structure for these service types—the parties ultimately agreed on a structure for subpart C that resembled the subpart B structure, adopting a headline percentage of revenue royalty rate and per-subscriber and TCC minima. Parness WDT ¶ 14; *see also* 37 CFR 385.22. As with the bundling negotiations relating to subpart B, the parties negotiated and created a bundled service category under subpart C (with certain adjustments to the definition of ''revenue.'') 3/8/17 Tr. 161–64 (Levine); 37 CFR 385.21. Not only are these provisions the default statutory terms, but publishers and service also incorporate these rates and terms in their direct licenses. *See* Leonard AWDT ¶ ¶ 54, 58, 67, 69.

Copyright Owners now urge the elimination of these subpart C provisions. They note that, although the Services had been very interested in locker services (a large focus of subpart C) during the 2012 negotiations, locker services have decreased in popularity and significance, and have largely disappeared. They explain this phenomenon as linked to the transition by listeners from ownership to access models, rendering functionally unimportant a listener's access to his or her own libraries as stored in a cloud locker. In fact, Copyright Owners point out that the Services' own witnesses have acknowledged this decrease in the popularity of lockers. 3/8/17 Tr. 159–160 (Levine); 3/16/17 Tr. 1458–1461 (Mirchandani) ([REDACTED]); Mirchandani WDT ¶ 33 ([REDACTED]), Copyright Owners further note that this fall in popularity is reflected in the fact that neither Spotify nor Pandora offers either a purchased content or a paid locker service. They note that Apple, which at one time offered a paid locker service, has abandoned that product, but still offers a purchased content locker service (perhaps a function of its market share of previous listener purchases of digital downloads from its iTunes Store). 3/22/17 Tr. 2523 (Dorn).

Copyright Owners also note that the Services' subpart C arguments suffer from the same defect as their subpart B arguments: they have not provided any evidence explaining the basis for any of the rates or terms contained in . . . subpart C . . . . of the statute. CORPFF–JS at p.2.

In opposition, the Services argue that Copyright Owners do not point to any evidence to show that locker services have completely ''disappeared.'' Rather, they note that Apple and Amazon continue to offer locker services. Joyce WDT ¶ 5; Mirchandani WDT ¶ ¶ 16–17. In this regard, Apple notes that each service in this proceeding that sells downloads also offers locker services. *See* 3/22/17 Tr. 2523–25 (Dorn); Ramaprasad WDT, Table 3. The Services also note that Copyright Owners are seeking rates for subpart C products that are substantially higher than present rates. *See* Joyce WDT ¶ 19.

More generally, the Services urge the Judges to use the subpart C rate structure as the benchmark for rates in the forthcoming period for the same reasons as they urge the use of the subpart B benchmarks a an appropriate benchmark. That is, the 2012 subpart C benchmarks were negotiated by the same parties, covering the same rights over a relatively contemporaneous period, and the economic circumstances are sufficiently similar. Amazon characterizes the ''[t]he existing . . . Subpart C service categories and rate structures [as] represent[ing] the collective efforts of industry participants . . ., including [a] proceeding[] before the [Judges] which were resolved by a negotiated settlement agreement among the participants many of whom are also participants in this proceeding.'' Mirchandani WDT ¶ ¶ 58–62. Moreover, several of the listed services already provided (or had plans to provide) subpart C services in 2012, underscoring the relevance of the negotiated settlement. *See* 3/18/17 Tr. 157–158 (Levine) (discussing Google's plans to launch a . . . locker service in

[317] [REDACTED].

the period of *Phonorecords II* negotiations); Mirchandani WDT ¶ 16 (discussing launch of Amazon locker service in mid-2012).

The Services also criticize the application of Copyright Owners' greater-of approach in the subpart C context as absurd. They claim that under Copyright Owners' proposal, licensors would receive $0.091 for each download of a copy from a purchased content locker, and at least $1.06 per-month for each month that a listener facilitates a copy in order to accesses the track via that locker, because. This would be absurd, according to the Services, because the separate copy is the basis for the royalty payments that Copyright Owners had already received when the listener originally purchased the product. Mirchandani WRT ¶ 47. Adding to this criticism, Apple emphasizes that Copyright Owners fail to mention that: (1) all purchased content locker services are free by definition, pursuant 37 CFR 385.21; and (2) some locker service streams originate from private copies of songs that are not streamed content from a central service (see 3/13/17 Tr. 829–830 (Joyce).

On balance, I find that the subpart C rate structure has the same attributes of a useful benchmark as does the subpart B rate structure. The categories of parties were the same, the rights are the same and the agreement is relatively contemporaneous. I do not find that the lack of popularity of the subpart C configurations cuts against the use of the 2012 rate structure as a benchmark. If the subpart C categories wither in the marketplace, the impact of this rate structure will be of little importance. But if these lockers, bundles and other offerings grow in popularity, the relative strength of this benchmark will be preferable to the ''greater of'' formulation proposed by Copyright Owners.

In that regard, Copyright Owners' rate structure proposal for subpart C (identical to its proposal for subpart B) is rejected for the same reasons as it was rejected for subpart B, and those criticisms are incorporated into this section. Further, locker services are distinguishable from other products. Musical works embodied in the sound recordings that have already been purchased have a value that is reflected in the sale through another distribution channel. It would be anomalous to apply the same rate structure to the right of a service to obtain a copy so that the downstream customer could store or access that which he or she already owns. I find that the parties' prior arm's length negotiations of the subpart C structure better reflects their understanding of the different use values implicated by subpart B and the locker services identified in subpart C.[318]

VII. THE FOUR ITEMIZED FACTORS IN SECTION 801(b)

The four itemized factors set forth in section 801(b)(1) require the Judges to exercise ''legislative discretion'' in making independent policy determinations that balance the interests of copyright owners and users.'' *SoundExchange, Inc.* v. *Librarian of Cong.,* 571 F.3d 1220, 1224 (DC Cir. 2009); *see also RIAA v. CRT,* 662 F.2d 1, 8–9 (D.C. Cir. 1981) (analyzing identical factors applied by predecessor rate-setting body and holding that the statutory policy objectives of 801(b)(1) ''invite the [Board] to exercise a legislative discretion in determining copyright policy in order to achieve an equitable division of music industry profits between the copyright owners and users'').

The four factors ''pull in opposing directions,'' leading to a ''range of reasonable royalty rates that would serve all these objectives adequately but to differing degrees.'' *Recording Indus. Ass'n of Am. v. Copyright Royalty Tribunal,* 662 F.2d 1, 9 (D.C. Cir. 1981) (''*Phonorecords 1981 Appeal*'') (citations omitted). Certain factors require determinations ''of a judgmental or predictive nature,'' while others call for a broad fairness inquiry. *Id.* at 8 (citations & quotations omitted). Accordingly, the Judges are ''free to choose'' within the range of reasonable rates . . . within a 'zone of reasonableness.' '' *Id.* at 9 (citations omitted).

Further, as explained at note 205 (and the accompanying text) *supra,* the ''reasonableness'' analysis can be undertaken as an initial step, followed by consideration of the four itemized factors, or the four-factor analysis can be undertaken as part of the ''reasonableness'' analysis. I have followed what I understand to be the more conventional approach in proceedings applying the section 801(b)(1) standards by essentially undertaking the former approach. However, my following consideration of the four itemized section 801(b)(1) factors also provides further support for the findings identifying the reasonable rate structure and rates.

A. The Relationship of the Four Itemized Factors to the Market Rate

The D.C. Circuit recently reiterated the relationship between the 801(b) standard and market-based rates by contrasting that standard with the willing buyer/willing-seller standard set forth in 17 U.S.C. 114(f)(2)(B). The court noted that the two standards are distinguishable by the fact that, unlike section 114(f)(2)(B), section 801(b)(1) does not focus in the same manner as rates that would be set in a marketplace. *SoundExchange, Inc. v. Muzak LLC,* 854 F.3d 713, 715 (D.C. Cir. 2017).

However, to the extent that market factors may implicitly address any (or all) of the four itemized factors, the reasonable, market-based rates may remain unadjusted, And, if the evidence suggest that the market-based rates fail to account for any (or all) of these four itemized factors, the Judges will adjust the reasonable, market-based rate appropriately. *See SDARS I, supra* at 4094 (applying the same itemized factors and holding that ''[t]he ultimate question is whether it is necessary to adjust the result indicated by marketplace evidence in order to achieve th[e] policy objective.'').[319]

B. Factor A: Maximizing the Availability of Creative Works to the Public

1. Introduction

Factor A provides that rates and terms should be determined to ''maximize the availability of creative works to the public.'' 17 U.S.C. 801(b)(1)(A). Of particular importance, this provision unambiguously links the *upstream* rates and terms that the Judges are setting with the *downstream* market, in which ''the public'' is listening to sound recordings that embody musical works.

In a prior Determination, the Judges made a general statement, attributed to an expert economic witness, Dr. Janusz Ordover, in *SDARS I,* that ''[w]e agree with Dr. Ordover that 'voluntary transactions between buyers and sellers as mediated by the market are the most effective way to implement efficient allocations of societal resources.'

[318] Once again, separate and apart from the usefulness of the 2012 benchmark structure and rates as benchmark evidence, the existing rate structure and rates, which embody the 2012 settlement, serve as a default rate structure and set of rates, because the other evidence in the record does not support an alternative approach. *See Music Choice, supra.*

[319] Thus, the Judges reject Copyright Owners' argument that the first three itemized section 801(b)(1) factors *per se* reflect the same forces that shape the rate set in the marketplace. *See* 4/4/17 Tr. 4589, 4666 (Eisenach). The Services also challenge Dr. Eisenach's assertion that he believes that the first three itemized factors reflect market forces, based on his prior writings and testimony, a charge that he persuasively denies. *Compare* SJRCOPFF at p.5 *with* 4/4/17 Tr. 4676–79 (Eisenach). I find this dustup to be irrelevant to their objective analysis of the itemized 801(b)(1) factors.

Ordover WDT at 11.'' *SDARS I,* 73 FR at 4094. However, as the discussion of the economics of this market, *supra,* should make plain, I do not agree that such a broad statement captures all the economic realities of the market. In fact, Professor Ordover's full testimony in *SDARS I* clearly demonstrates that he fully appreciates the particular aspects of the economics of the markets at issue, including the aspects relevant to Factor A. More fully, Professor Ordover testified as follows in *SDARS I:*[320]

> Unimpeded market transactions promote economic efficiency and lead to supply and demand decisions that maximize society's economic welfare. [I]n the special case of markets for sound recordings and other intellectual property . . . the incremental cost of serving any single user is very low relative to the initial cost of creation, and use by any single user does not diminish the availability of the content to others. . . . [T]o account for these differences, pricing in these markets should be based on the underlying value of the product to the buyer.
>
> . . .
>
> The solutions to this policy problem focus on an oft-noted tension in the pricing of intellectual property between static and dynamic efficiency. . . . [E]conomists have . . . a clear answer . . . provided by so called second-best . . . pricing.'' . . . The rule is that those customers—be they final users or intermediate customers (such as the SDARS, for example)—whose demand for the product (content) is inelastic should pay a higher markup above the marginal cost of serving them, and those whose demands are elastic should pay a lower markup. . . . Since elasticity of demand is related to ''willingness to pay'' [WTP] [so] users or usages with a high [WTP] . . . should be required to contribute the most (per unit of usage). . . . *[T]his principle assures that the greatest number of consumers will be able to benefit from use of a product* . . . . [''V]alue-based pricing'' . . . provides the correct incentives for producers of content insofar as it ensures that overall revenues from all sources recoup the costs of creating the content in the first place.

Ordover WDT at 4, 16–18 (emphasis added). Professor Ordover then noted the same upstream/downstream link that I have identified in this proceeding:

> [I]t is important to note that demand for music content by the SDARS [or any distribution channel] is a ''derived demand'' in the sense that it flows from consumers' demand for the service as a distribution channel for music. . . . [T]he SDARS' [or any distribution channel's] [WTP] content owner is inextricably linked to consumers' [WTP] for the . . . service . . . .

Id. at 18–19 (emphasis added).[321]

2. The Services' Position

On behalf of the Services, Professor Marx approaches Factor A in a manner that is at once novel (for these proceedings) yet consistent with fundamental and relevant economic principles. Specifically, she asserts that maximization of the availability of musical works (embodied in sound recordings) to the public, through interactive streaming, requires that the combined ''producer surplus'' and ''consumer surplus'' be maximized, because that leads to listening by all segments of the public regardless of their WTP. To understand Professor Marx's analysis, the economic terminology on which she relies needs a brief explanation.

The ''producer surplus'' is ''the amount by which the total revenue received by a firm for units of its product exceeds the total marginal cost. . . .'' A Schotter, *Microeconomics: A Modern Approach* at 389 (2009). The ''consumer' surplus'' is ''[t]he difference between what the consumer would be willing [and able] to pay and what the consumer actually has to pay.'' *Mansfield & Yohe, supra,* at 93. When a perfectly competitive market is in equilibrium (or tending that way) ''the sum of consumer surplus . . . and producer surplus . . . is maximized.'' *Schotter, supra,* at 420. By contrast, if a market is not perfectly competitive because the sellers have some degree of market power, and the level of output is somewhat restricted, producer surplus increases relative to consumer surplus—with a portion of the overall surplus redistributed to producers/sellers. Another portion is lost as ''a pure 'deadweight' loss . . . the principal measure of the allocation of harm'' arising from the exercise of market power. *Mansfield & Yohe, supra,* at 499. *See also* Schotter, *supra,* at 398 (setting forth the accepted definition of ''deadweight loss'' as ''[t]he dollar measure of the loss that society suffers when units of a good whose marginal social benefits exceed the marginal social cost of providing them are not produced because of the profit-maximizing motives of the firm involved.'').[322]

As the foregoing definitions imply, the two surpluses may be measured by reference to a single equilibrium price. However, when sellers are able to *price discriminate,* they enlarge the total value of the combined surpluses, diminish the ''deadweight loss'' and appropriate for themselves the larger, combined surplus. *See Varian, supra* at 465 (With price discrimination, ''[j]ust as in the case of a competitive market, the sum of producer's and consumer's surplus is maximized [but with] the producer . . . getting *the entire* surplus generated in the market. . . .''). In fact, price discrimination is ubiquitous in the marketplace. *See Baumol, Regulation Misread by Misread Theory, supra.*

Professor Marx marshals these microeconomic principles, Marx WDT ¶ ¶ 119–122, to explain why the 2012 rate structure tends to incentivize and support the maximization of musical works available to the public under Factor A. *Id.* ¶ ¶ 123–133. As she testified:

> [H]aving different means of price discrimination is going to allow greater efficiency to be achieved [i]f we have a way for low willingness to pay consumers to access music, for example, student discounts, family discounts or *ad-supported streaming, where low-willingness-to-pay consumers can still access music in a way that still allows some monetization of that provision of that service.*

3/20/17 Tr. 1894–95 (Marx) (emphasis added). *See also* Marx WDT ¶ 12 (''An economic interpretation of [F]actor A is that the royalty structure should ''maximize the pie'' of total producer and consumer surplus. . . .'').

More granularly, Professor Marx explained why the price discriminatory rate structure is superior to a per play model in maximizing the availability of musical works to the public:

> The subscription model provides an efficiency benefit because the price of a play is equal to the marginal cost of roughly zero—a subscriber faces the true marginal cost of playing a song over the internet and thus consumes music at the efficient level. When subscribers face a per-play royalty cost of zero, interactive streaming services have the appropriate incentive to encourage music listening at the margin.
>
> In contrast, if interactive streaming services faced a positive per-play royalty cost, they would have a diminished incentive to attract and retain high-use consumers, the very type of consumers who create the most social surplus through their listening. They would also have an incentive to discourage music listening among the high-use consumers they retain. The higher the level of per-play royalties is, the more this incentive might affect the behavior of interactive streaming services.

[320] I recount Professor Ordover's testimony to provide the context for the snapshot of his testimony excerpted and relied on in *SDARS I.* I do not rely on Professor Ordover's testimony in deciding any *factual* issues in this proceeding.

[321] To estimate the different values (elasticities) within a distribution channel, Professor Ordover found ''highly informative'' the ''survey data and results'' obtained by a testifying survey expert, *id.* at 23—just as I find informative the results of the Klein Survey.

[322] To be clear, this *static* ''harm'' is hardly conclusive evidence that such market power is actually harmful, or even inefficient, on balance, in a *dynamic* sense. A monopoly may be more efficient in reducing unit costs because of, *inter alia,* necessary scale (such as a natural monopoly) or because of superior production techniques.

Id. ¶ ¶ 130–131 and n.135 (emphasis added) [323]

Although Professor Marx's analysis is based on an understanding that maximizing the availability of musical works is a function of incentives to distributors and a function of *downstream* demand characteristics, she notes that the variable, percent-of-rate based rate structure is consistent with agreements in the unregulated *upstream* market, where record companies license sound recordings to these same interactive streaming services. In that regard, she notes:

> Ironically, given the preference of . . . Copyright Owners' economists for market outcomes in this context, they support a proposal that would tend to [REDACTED], which the unregulated sound recording side of the market has facilitated. Their proposal would also completely do away with percentage-of-revenue rates that form a key part of unregulated rates negotiated between music labels and interactive streaming services.

Marx WRT ¶ 84 (emphasis added).

Beyond these theoretical arguments, Dr. Leonard notes that this is the basic rate structure that has existed for two rate periods, and there is no evidence that the songwriters as a group have diminished their supply of musical works to the public. In fact, he notes that the music publishing sector has been profitable throughout the present rate period. 3/15/17 Tr. 1120 (Leonard). I understand this point—particularly in the context of Factor A—to indicate that there has been and will continue to be a growing supply of musical works available to the public, because profitability is a market signal for the entry of new resources and supply. *See generally Varian, supra* at 416 (''[I]f a firm is making profits we would expect entry to occur.'').

3. Copyright Owners' Position

Copyright Owners, principally through the rebuttal testimony of Professor Watt, argue that Professor Marx has made a fundamental error in equating the maximizing of availability of musical works with a maximization of the sum of the producer and consumer surplus. Watt WRT ¶ 10. According to Professor Watt: ''A better understanding of criterion A is that the royalty payments should ensure that a plentiful supply of works is forthcoming into the future. . . .'' *Id.* To accomplish that end, Professor Watt argues the rates should be set so as to ensure that ''creators are given the correct incentives to continue to create and make available valuable works.'' *Id.*

Further, Professor Watt argues that even if the rates and rate structure are designed to maximize the consumer and producer surplus, such maximization would not inform the Judges as to whether that result satisfies Factor A. Rather, according to Professor Watt:

> In effect, a royalty structure is simply a way in which producer surplus, once created, is shared between the interactive streaming firms and the copyright holders, but in and of itself, the structure does not determine the size of either producer or consumer surplus. Consumer surplus and producer surplus are both entirely determined by the interplay of the demand curve for the product in question (here, interactive music streaming) and the way the product is priced by the interactive streaming industry to its consumers. That is, regardless of the structure of the royalty payments, the ''size of the pie'' is determined by the unilateral decisions made by interactive streaming firms about their pricing to consumers.

Watt WRT ¶ 11.

Professor Watt also attempts to de-couple the upstream and downstream rate structures by analogizing interactive streaming to a retail restaurant offering of an ''all you can eat buffet.'' There, restaurants pay a positive per unit price for inputs of food offered at the buffet, yet still—according to Professor Watt—charge a single price for unlimited access to the buffet. (Professor Watt does not provide any evidence of how buffet restaurants in fact make pricing decisions.) Thus, he concludes that a retailer, such as an interactive streaming service or a buffet restaurant, can pay for inputs (musical works or food) per-unit while still charging an up-front access fee ($9.99 per monthly subscription or $9.99 for a buffet meal). By this analogy, Professor Watt purports to demonstrate that interactive streaming services do not *require* non-unit royalty rates to serve their downstream listeners. *Id.* ¶ 12.

Professor Watt further notes that Spotify is not accurate when it claims that listeners to its ad-supported service do not pay a marginal positive price. He notes that listening to advertising that interrupts the music imposes a time-related/annoyance cost that the listeners must accept. This suggests to Professor Watt that per-unit pricing (at least in a non-monetary manner) indeed is possible downstream. *Id.* ¶ 13. (However, to the extent the advertising is informative, especially when it is targeted to specific listeners, it is not clear from the record that such ''interruptions'' would constitute a pure cost. *See* Phillips WDT ¶ 33 (noting the ability of streaming services to ''deliver extremely targeted advertising to particular audiences.'')).

Further, Professor Watt opines that any positive marginal cost pricing of songs by interactive streaming services on subscription plans necessarily would be offset by a reduction in the up-front subscription price. He further suggests that this consequence would not necessarily be deleterious for the streaming service because ''[w]ith the reduction in the fixed fee (along with the positive per-unit price), it becomes entirely possible that consumers who were not initially in the market now find it to be in their interests to join the market, consuming positive amounts of streamed music where previously they consumed none.'' *Id.* ¶ 15.

In their affirmative case regarding Factor A, Copyright Owners argue that ''availability maximization'' should be considered through the lens of the creators, who seek high rates as a signal to spur creation, and would see low rates as a disincentive. In particular, another of Copyright Owners' expert economic witnesses, Professor Rysman, testified, in colloquy with the Judges, that the importance of price-signaling was so paramount that even a hypothetical *outlandish* royalty would induce creators to maximize availability:

> THE JUDGES: So if all the available music was available on streaming services and the subscription price was $10,000 a month, that would be equally available as it would on an ad-supported service?
>
> PROFESSOR RYSMAN: That's how I read availability. . . . I think that would raise questions in the other factors, but as I read availability, that would still satisfy availability.

4/3/17 Tr. 4397 (Rysman).

4. Analysis and Findings

For several reasons, I find that Professor Marx's analysis of how a price discriminatory model maximizes availability is correct.

First, the rationale for price discrimination is two-fold; not only does it serve low WTP listeners, but it also serves copyright owners, by incentivizing interactive streaming services to increase the total revenue that the price discriminating licensor can obtain. Any seller or licensor would prefer to maximize its revenue, and a rate structure that will effect such maximization thus would be the best structural inducement. Moreover, for

[323] With regard to Factor A as it relates to Copyright Owners' proposal, Professor Hubbard also notes the supply-side ''Cournot Complements'' problem created by Copyright Owners' reliance on the unregulated sound recording market. This is a problem because rates in such a ''must have'' unregulated market can be even higher than monopoly rates, thereby depressing the quantity supplied—contrary to a goal of maximizing the availability of musical works. *See* 4/7/17 Tr. 5532 (Hubbard).

purposes of applying Factor A, a rate structure that better increases revenues, *ceteris paribus,* would induce more production of musical works, a result that Copyright Owners should desire.[324]

Second, and by contrast, it would be less profitable simply to equate ''availability'' with a higher rate. As noted *supra,* any product that is priced beyond the WTP of a significant portion of the public is *unavailable* to that segment. In this regard, Copyright Owners have taken a cramped and unrealistic view of such incentives. In particular, I disagree with Professor Rysman's assertion that even a $10,000 per month subscription price would increase ''availability.'' I find that he misapprehends the nature of a price signal. If the price is so high as to eliminate or reduce total revenue to creators, in no way will higher rates simply induce the supply of creative works over time.[325] Indeed, even monopolists do not seek the highest price possible, but rather seek to maximize profits. *See Mansfield & Yohe, supra,* at 362–63 (''Monopolies maximize profits by producing where marginal cost equals marginal revenue.''). Thus, even monopolists—who have the most market power—are constrained in their pricing by the demand curve and the marginal revenue it creates.[326] Although a higher royalty *rate* might have an immediate superficial appeal, if the consequence will be lower revenues, the high per-play rate would reveal itself as a form of fool's gold.[327]

Third, I find that the objective of maximizing the availability of musical works *downstream* to the public is furthered by an *upstream* rate structure that contains price discriminatory characteristics that enhance the ability of the interactive streaming services to engage in *downstream* price discrimination (''down the demand curve,'' increasing revenue for both Copyright Owners and the interactive streaming services). That is, as recognized by both Professor Marx in this proceeding—and Professor Ordover in *SDARS I*—upstream pricing is a function of derived demand, and should be ''value-based,'' *i.e.,* discriminating among the different values placed on streamed music by different segments of listeners.

Fourth, I find that Professors Watt and Marx are talking past each other regarding price discrimination. Professor Watt argues that a percent-of-revenue based upstream royalty structure is not *necessary* in order for the streaming services to price discriminate downstream. However, I understand Professor Marx to be asserting *not* that a percent-of-revenue royalty structure is a *necessary* condition for downstream price discrimination, but rather that some form of price discrimination is appropriate, and that a discriminatory percent-of-revenue royalty structure will better align the upstream and downstream incentives, thus maximizing the availability of musical works downstream. A single upstream price for musical works would tend to make price discrimination downstream more difficult, because (as noted by Professor Marx and Professor Ordover in *SDARS I*) upstream demand is derived from downstream demand.

To be clear, I do agree with Professor Watt that percent-of-revenue pricing is not *necessary* to facilitate price discrimination downstream. Indeed, in *Web IV,* the Judges adopted multi-tier upstream per-play pricing, not percent-of-revenue pricing, to reflect variable WTP downstream. But here, Copyright Owners have not proposed multiple-tier per unit pricing, and nothing in the record indicates how the Judges could mold Copyright Owners' per- play rate into multiple, discriminatory rates. The only rate structure proposed in this proceeding that promotes such efficiencies is the existing rate structure. Because the Judges remain subject to (and bounded by) the evidence adduced at the hearing, they have before them only one rate structure that promotes and reflects the downstream market's need for price discrimination to promote the availability of musical works to the public.[328]

In this regard, Pandora notes the challenges of operating a business that has fixed revenues per customer but variable cost. Herring WRT ¶ 17. Copyright Owners did not provide sufficient evidence that their proposed per unit royalty rate would better accommodate such risks. Instead, as noted *supra,* Copyright Owners rely on an analogy; Professor Watt's comparison of the streaming industry to the buffet restaurant industry, in which he assumed input suppliers did not charge based on a percent of revenue. However, Professor Watt admitted that his testimony in this regard was ''pure observation,'' and that he has never consulted for a buffet restaurant and has never performed any economic analysis of the business strategies of buffet restaurants. 3/27/17 Tr. 3173–74 (Watt). I note one particular difference between a foodstuff input to a buffet restaurant and a musical stream input to an interactive service: the foodstuff is a private good, rivalrous in consumption, *i.e.,* with a positive marginal cost, whereas the copy of the musical work is non-rivalrous, *i.e.,* with a zero

[324] This point appears to raise a question: How could Copyright Owners and their economic experts argue against a rate structure that inures to their benefit as well? The answer is: They do not. As stated *supra,* they advocate for a rate set under the bargaining room theory, through which mutually beneficial rate structures can still be negotiated, but not subject to the ''reasonable rate'' and itemized factor analysis required by law. In those negotiations, as Dr. Eisenach candidly acknowledged, Copyright Owners would have a different threat point to use in order to obtain better rates and terms. 4/4/17 Tr.4845–46 (Eisenach).

[325] This point is reminiscent of an old joke from the era of the Great Depression. A poor boy is selling Apples on the street corner for a price of $1 million per apple. A man approaches and asks the boy: ''How many apples do you expect to sell at that price?'' To which the boy responds: ''Well, I only have to sell one!''

[326] On a technical economic level, perhaps beyond the material in a prototypical ''Economics 101'' course, a party with market power, whether a monopolist or otherwise, is not subject to a supply curve, because a supply curve depicts how much supply would be forthcoming at given prices, whereas a firm with any pricing power can influence both price and quantity. *See* Krugman & Wells, *supra,* at 368 (''[M]onopolists don't have supply curves . . . [A] monopolist . . . does not take the price as a given; it chooses a profit maximizing quantity, taking into account its own ability to influence the price.''). Oligopolists act similarly, but their influence on price is complicated by their predictions of, and reactions to, the pricing and production decisions of their oligopolistic competitors. *See Nicholson & Snyder, supra,* at 521 (''[I]n an oligopoly . . . prices depend on how aggressively firms compete, which in turn depends on which strategic variables firms choose, how much information firms have about rivals, and how often firms interact with each other in the market.'') In similar fashion, Professor Watt acknowledged the presence of a supply curve in competitive markets but declined to conclude that one exists in the markets at issue here. 3/27/17 Tr. 3035–36 ([JUDGES]: ''Is there a supply curve in the market?'' [PROFESSOR WATT]: ''[T]hat's a hard question to answer. . . . [C]learly . . . economic theory points to certain markets where there is no supply curve, *per se,* and other markets in which there would be. Like a perfectly competitive market, it's acceptable that there's a supply curve. . . . [O]once you get into non-perfectly competitive output markets . . . it becomes really debatable.'').

[327] And, again, Copyright Owners are not economic naifs. Once more, the bargaining room approach is relevant, in connection with the foregoing price discrimination analysis. A licensor who could segment the market via WTP could exploit the demand curve and increase revenues above the revenues available in a single-price market. Copyright Owners appear to understand this point—acknowledging they would *bargain* with licensees if the single-price rate set by the Judges was too high.

[328] More particularly, in *Web IV,* the Judges set *multiple* per-stream noninteractive royalty rates on a per-play basis, differentiating among subscription services, ad-supported services and educational webcasters. These decisions were based on the Judges' understanding of the evidence at the hearing. If the parties had presented the Judges with evidence in *this* proceeding that would have permitted them to fashion *price-discriminatory* per-play or per user rates, those would have been an options for consideration. However, there was insufficient evidence to permit me to depart from the parties' proposals in that regard.

marginal production cost. Because this difference is a critical aspect of the economics of intellectual property, Copyright Owners' failure to explore this distinction precludes judicial reliance on their proffered analogy.

Fifth, I find that Professors Watt and Marx are also talking past each other with regard to the usefulness of the consumer surplus/producer surplus approach. Professor Watt claims that the development of the surplus is relevant only to determine how the surplus will be split, as noted *supra. See* Watt WRT ¶ 11. Professor Marx takes issue with the assertion that the rate structure does not determine the size of either producer or consumer surplus. I understand Professor Marx's point to be that a royalty structure that efficiently incentivizes price discrimination will enlarge the producer surplus by appropriating consumer surplus and eliminating deadweight loss,[329] resulting in more surplus that can then be allocated between the licensors and licensees. Indeed, a close reading of Professor Watt's testimony is not inconsistent with this understanding. He testified that the rate structure ''in and of itself'' does not determine the size of the producer surplus. Rather, he testified that producer (and consumer) surplus are ''entirely determined by the interplay of the [downstream] demand curve and the way the product is priced [downstream].'' *Id.* But Professor Marx's point is that (1) upstream price discrimination makes downstream price discrimination more efficient; and (2) downstream price discrimination (a) increases the producer surplus (by appropriating consumer surplus and eliminating the ''deadweight loss); and (b) increases the quantity of musical works listened to downstream, *i.e.,* that are available to the public at prices approximating their WTP. She does not state that the rate structure ''in and of itself'' will impact the consumer surplus; in fact, her point is that the rate structure interacts with the demand curve, via price discrimination, to affect the size of the producer surplus.[330]

Sixth, I am unpersuaded by Professor Watt's argument that a positive per-play charge levied downstream would likely necessitate a lower subscription price that would maximize availability of music to the public. Although the point is economically logical, the services are the market actors who interact with listeners and are in the better position to gauge consumer demand. It would be inappropriate to rely on the opinion of Copyright Owners' expert as to what is theoretically possible if the business model was changed, or the impact of that change on the availability of musical works. Indeed, Professor Watt could testify only that if the interactive streaming services attempted to pass through to listeners a per-unit royalty via a per-unit downstream charge, it would become ''*possible*'' that consumers who were not initially in the market would be induced by the lower subscription price to join the market, preferring the combination of the lower subscription price and the positive per play rate to a higher subscription price and a lower per play rate. Watt WRT ¶ 15. However, the net effect of such a change is simply speculative. What can be said with some assurance is that such a change would impose a positive marginal cost on the listener for a product (the copy of streamed music) that has a zero production cost, which is inconsistent with static allocative efficiency. Also, if the services could obtain more revenue by lowering the subscription price and charging a per-play rate, there is *nothing in the record* to explain why they have not engaged in such a strategy on a widespread basis.[331]

Seventh, although I acknowledge that, in response to per-play pricing, the services could implement downstream usage restrictions, such as listening caps, usage-based tiers and overage charges (*see* Rysman WRT 75) such steps would not align with the price discriminatory model that would best serve a listening market with a variable WTP. Again, a price discriminatory upstream rate structure is appropriate not because it is either *necessary* or the *only* way in which this market can be structured, but rather because the record indicates it is a rate structure (among all the ''second best'' economic options) that has aligned well the characteristics of both the upstream and downstream markets in a manner that increases the availability of musical works ''down the demand curve.'' And once again, I note that Copyright Owners and their experts are not in the business of attempting to market interactive streaming services in the downstream market, so their ''advice'' as to the beneficial use of listening caps, overages and tiered subscriptions is simply speculative. *See* [REDACTED].

In sum, I am persuaded that Professor Marx's analysis of Factor A is consistent with the purpose of that statutory objective and sound economic theory. An upstream rate structure that contains multiple royalties reflective of and derived by downstream variable WTP will facilitate beneficial price discrimination. In turn, such price discrimination allows for access to be afforded ''down the demand curve,'' making musical works available to more members of the public. Accordingly, I would not make any adjustment pursuant to Factor A.[332]

C. Factors B and C: Fair Income and Returns and Consideration of the Parties' Relative Roles

Factor B directs the Judges to set rates that ''afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.'' Factor C instructs the Judges to weigh ''the

[329] And shift some consumer surplus to the producers, which is the point of price discrimination from the perspective of the seller.

[330] Indeed, the enhancement of efficiency and the increase in profits (with the attendant signal to producers) is at the essence of price discrimination. *See Nicholson & Snyder, supra,* at 507 (when sellers' price discrimination leads to an increase in total output it is ''allocatively superior'').

[331] Professor Watt notes that Spotify has engaged in a non-monetary version of this strategy, offering an ad-supported service with no up-front subscription price but a non-monetary ''fee'' in the form of burdensome advertising. Watt WRT ¶ 15. However, as noted *supra,* it is not necessarily correct to equate listening to advertising with a monetary cost, because some advertising is valuable, especially more targeted advertising (why else would advertisers pay to advertise?) and non-monetary costs may be quite *de minimis* for an appreciable segment of the public. In any event, the business of identifying consumer preferences in order to establish the appropriate mix of up-front fees and per-play ''costs'' is the specialized business activity of the interactive streaming services, so any change in rate structure that is premised on an *assumption* that market demand and the availability of musical works can be equally or better served via a different rate structure needs to be supported by additional record evidence.

[332] The Majority Opinion finds that its significant increase in rates is necessary to provide sufficient income to songwriters and, thereby incentivize songwriting which will make more musical works ''available'' to the public. In this regard, the majority has made the same mistake as Professor Rysman, confusing higher prices with increased revenues. The majority has collapsed the existing price discriminatory rate structure into a single greater-of structure, based on two revenue prongs. (which I acknowledge to be a ''blunt'' price discriminatory tool, compared with the richer price discrimination in the 2012 rate structure that has worked successfully).The majority's approach fails to address two problems: (1) what is the evidence as to the elasticity of demand that makes them confidence that their 44% increase in rates will bring forth additional revenue to songwriters? (That is, what would be the corresponding decrease in quantity demanded?); and (2) with the TCC rate uncapped, how can the majority conclude that sound recording companies will not seek to preserve their share of royalties even as mechanical royalties rise under the majority's approach, leading to a spiraling of royalties and a reduction of overall quantity demanded that offsets the rate increases? (This second problem is a reprise of my broader criticism of the majority's assumption that the sound recording companies will docilely accept a ''Shapley Surrender'' (to coin a phrase) and accept the transfer of tens of millions of dollars of royalties from them to music publishers/songwriters, rather than attempt to preserve their revenues and take that preservation out of the hides of the services, Copyright Owners, or both.

relative roles of the copyright owner and copyright user in the product made available to the public,'' across several dimensions.[333]

As explained *supra,* Factor B, and, implicitly, Factor C, were included in section 801(b)(1) to establish a legal standard that would pass constitutional muster, yet the statutory language paralleled public utility-style regulatory principles.[334] According to Mr. Nathan in his 1967 congressional testimony, these principles were ill-suited for setting rates that ''equitably divided compensation for the ''relative roles'' of licensors and licensees in order to provide a ''fair'' outcome.[335] However, as the parties' economic experts make clear in their approaches to Factors B and C, economics has evolved since Mr. Nathan's 1967 testimony in which he criticized as economically impossible any regulatory attempt to equitably divide creative contributions.

The parties' economic experts have addressed the Factor B and C issues through either a Shapley value analysis or an analysis ''inspired'' by the Shapley valuation approach.[336] The Judges defined and described the Shapley value in a prior distribution proceeding: ''[T]the Shapley value gives each player his 'average marginal contribution to the players that precede him,' where averages are taken with respect to all potential orders of the players.'' *Distribution of 1998 and 1999 Cable Royalty Funds,* 80 FR 13423, 13429 (Docket No. 2008–1) (March 13, 2015) (citing U. Rothblum, *Combinatorial Representations of the Shapley Value Based on Average Relative Payoffs,* in *The Shapley Value: Essays in Honor of Lloyd S. Shapley* 121 (A. Roth ed. 1988)).[337] *See also* Gans WDT ¶ 64 (''The Shapley value approach . . . models bargaining processes in a free market by considering all the ways each party to a bargain would add value by agreeing to the bargain and then assigns to each party their average contribution to the cooperative bargain.''); Marx WDT ¶ 144 (''The idea of the Shapley value is that each party should pay according to its average contribution to cost or be paid according to its average contribution to value. It embodies a notion of fairness.''); Watt WRT ¶ 23 (''The Shapley model is a game theory model that is ultimately designed to model the outcome in a hypothetical ''fair'' market environment. It is closely aligned to bargaining models, when all bargainers are on an equal footing in the process.'').

In the parties' direct cases, on behalf of the Services, Professor Marx constructed a Shapley model. On behalf of Copyright Owners, Professor Gans developed what he described as a ''Shapley-inspired'' approach. In rebuttal to Professor Marx's Shapley value model, Copyright Owners, through the testimony of Professor Watt, criticized Professor Marx's analysis, and made adjustments to her model.

1. The Parties' Shapley Value Evidence and Testimony

a. Shapley Values

A Shapley value approach requires the economic modeler to identify downstream revenues available for division among the parties. The economic modeler must also input each provider's costs, which each must recover out of downstream revenues, in order to identify the residue, *i.e.,* the Shapley ''surplus,'' available for division among the parties. As such, the Shapley approach is cost-based, in the same general manner as a public utility-style rate-setting process identifies a utility's costs that must be recovered before an appropriate rate of return can be set.[338] In the present case, Copyright Owners and the Services have applied this general approach in different ways, and each challenges the appropriateness of the other's model.

To summarize the differences in their approaches, Professor Marx utilizes a Shapley value approach that *purposely alters the actual market structure* in order to obtain results that *intentionally deviate* from the market-based distribution of profits—in order to determine rates she identifies as reflecting a ''fair'' division of the surplus (Factor B) and recompense for the parties' relative roles (Factor C).

By contrast, Professor Watt's ''correction'' of Professor Marx's model rejects her alteration of the market structure to achieve such a result. Rather, he maintains that the incorporation of ''all potential orders of the players'' in her model—as in *all* Shapley models—*already adjusts for the hold-out power of any input provider who might threaten to walk away from a transaction.*

Professor Gans, like Professor Watt, does not attempt to alter the market structure. However, Professor Gans also does not attempt to construct Shapley values from the ground up. Rather, he takes *as a given* Dr. Eisenach's estimation that record companies receive a royalty of $[REDACTED] per play from interactive streaming services. Because Professor Gans identifies musical works and sound recordings as perfect complements, he assumes that the musical works licensors would receive the same profit as the record companies (but not the same royalty rate, given their different costs). Because this is not a Shapley value ground-up

[333] These dimensions are: ''creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.'' *Id.*

[334] Public utility-style regulation—especially in 1967 when Mr. Nathan was testifying—was classic ''rate-of-return'' regulation. Essentially, the regulator would identify the utility's costs, determine the value of invested capital, ascertain an appropriate rate of return on such capital, and, then, establish the rate (or rates) charged to customers (or to different customers), in order to provide the utility with revenue that covers its costs and provides a ''reasonable rate of return.'' *See generally* C. Decker, *Modern Economic Regulation* at 104 (2014).

[335] The economic experts for Copyright Owners and the Services acknowledge that microeconomic principles (pre-Shapley values) do not provide insights as to what constitutes ''fairness.'' *See, e.g.,* 3/30/17 Tr. 3991 (Gans) (''fairness . . . is not a topic that is sitting in an economics textbook somewhere.''); 3/20/17 Tr. 1830 (Marx) (''Fairness is not a notion that has a unique definition within economics.''); 1128–29 (Leonard) (''economists . . . typically don't do 'fair' ''); 4/13/17 Tr. 5919 (Hubbard) (Economists aren't philosophers. I can't go to the biggest picture meaning of ''fair''. . . .). Rather, economists attempt to identify *ex ante* ''fairness'' by identifying fair *processes* in the workings of and structure of markets and bargaining, and in the *efficiency of outcomes* generated by these processes, although their understanding of what constitutes a fair ''process'' varies. *See, e.g.* 3/13/17 Tr. 555 (Katz) (''[T]he most useful or practical way of thinking about it here was really to focus on whether the process is fair'' . . . [and] a conception that's often used in economics is that a process is fair if it's . . . competitive or the outcome of a competitive market. A competitive bargaining process is fair. And so that's the—the central notion of fairness that I used here.''); 3/15/17 Tr. 1129 (Leonard) (''My concept of fair . . . and what I think a lot of economists would say is that if you have . . . a negotiation between two parties and there are no . . . constraints such as holdup . . . and there's no market power . . . again I hesitate to use the word, so maybe I'll put it in quotes, would be [']fair[']. ''); Eisenach WDT ¶ 24 (''a rate set at the fair market value by definition provides fair returns and incomes to both the licensee and licensor.'')

[336] Dr. Lloyd Shapley won a Nobel Memorial Prize in economics for this work. The Shapley approach represents a method for identifying fair outcomes, previously unaddressed in microeconomics. Mr. Nathan did not reference the potential use of the Shapley value approach in his 1967 testimony, perhaps because this methodology, although developed by Lloyd Shapley in 1953, was not yet widespread in the economic literature.

[337] The parties' economic expert witnesses find that these Factors B and C are properly considered jointly in the present proceeding, and I agree. *See* Marx WDT ¶ ¶ 11–2 (the Shapley value . . . operationalizes the concept of fair return based on relative contributions.''); Watt WRT ¶ 22 (''the Shapley model is a very appropriate methodology for finding a rate that satisfies factors B and C of 801(b)''); *see also* Gans WDT ¶ ¶ 65 n. 35, 67 (noting the Shapley approach provides for a ''fair allocation'' as among input suppliers to reflect ''the contributions made by each party.'')

[338] Unlike in public utility regulation, the Shapley value method considers the costs of all input providers whose returns will be determined. In traditional public utility rate regulation, the utility is a monopoly and thus the only provider of a regulated service.

approach (which would entail estimating the input costs of *all three input providers*—the record companies, the music publishers *and* the interactive streaming services—Professor Gans candidly acknowledged on cross-examination that he did not perform a full-fledged Shapley value analysis; hence he describes his methodology as a ''Shapley-inspired'' approach. 3/30/17 Tr. 4109 (Gans) ([Q]: ''[Y]ou do, is it fair to say, a Shapley-inspired analysis, if it wasn't a Shapley model?'' [PROFESSOR GANS]: ''That's fair enough.'').

b. Professor Marx's Shapley Value Approach

Professor Marx testified that, as an initial matter ''[t]he Shapley value depends upon how [the modeler] delineate[s] the entities contributing to a particular outcome.'' Marx WDT ¶ 145. More particularly, Professor Marx delineated the entities in a manner that was ''not putting in market power into the model.'' 3/20/17 Tr. 1862–63 (Marx). That is, she modeled the downstream interactive streaming services as a combined single service (and she added to her model ''other distribution types as another form of downstream distribution to account for the potential opportunity cost (''cannibalization'') of interactive streaming). By modeling the downstream market in this manner, Professor Marx artificially—but *intentionally*—treated the *multiple* interactive streaming services as a *single* service, a treatment used as a device (or artifact) to countervail the allegedly real market power of the collectives (the music publishers and the record companies respectively) that owned the other inputs—a market power that Professor Marx concluded must be removed (*i.e.,* offset) to establish a *fair* division of the surplus and a fair rate. *See* 3/20/17 Tr. 1865, 1907 (Marx) (''[M]y goal is to model a fair market, where there [are] no obvious asymmetries in market power upstream versus down. So I viewed it as appropriate to view interactive streaming as one player.'').

With regard to the upstream market of copyright holders, Professor Marx utilized two separate approaches. In her self-described ''baseline'' approach, she ''treat[ed] rights holders as one upstream entity, reflecting the broad overlap in ownership between publishers and record labels.'' Marx WDT ¶ ¶ 146, 162. In her ''alternative'' approach, she ungrouped the two collectivized copyright holders—the songwriters/publishers, on the one hand, and the recording artists/record companies, on the other. *Id.* The two purposes of her alternative approach were: (1) to separately allocate surplus and indicate rates for musical works (the subject of this proceeding); and (2) to illuminate the additional ''bargaining power'' of each category of copyright holder when these two categories of necessary complements arrive separately in the input market under the Shapley methodology. 3/20/17 Tr. 1883–84 (Marx). Each of Professor Marx's Shapley value approached is considered in more detail *infra.*

i. Professor Marx's Baseline Approach

Professor Marx noted the undisputed principle that ''[t]he calculation of the Shapley value depends on the total value created by all the entities together and the values created by each possible subset of entities.'' Marx WDT ¶ 147. Equally undisputed is the understanding that ''[t]hese values are functions of the associated revenue and costs.'' *Id.*

The surplus to be divided (from which rates can be derived) is realized at the downstream end of the distribution chain when revenues are received from retail consumers. That surplus can be measured as the profits of the downstream streaming services (and the alternative services in her model), *i.e.,* their ''revenue minus . . . non-content costs.'' [339] The *total combined* value created by the delivery of the sound recordings through the interactive (and substitutional) streaming services consists of: (1) the aforementioned profits downstream (*i.e.,* service revenue − non-content cost) *minus* (2) ''the copyright owners' non-content costs. Simply put, ''surplus'' reflects the amount of retail revenue that the input providers can split among themselves after their non-content costs (*i.e.,* the costs they do not simply pay to each other) have been recovered.

Thus, any Shapley value calculation requires data to estimate costs and revenues. In her Shapley analysis, Professor Marx relied on 2015 data from Warner/Chappell for her music publisher non-content cost data and its ownership-affiliated record company, Warner Music Group, for record company non-content costs. She was limited to this data set for non-content costs because among all major holders of musical works and sound recording copyrights ''only Warner . . . breaks down its cost by geographic region and by source in enough detail to estimate the amounts needed.'' Marx WDT ¶ ¶ 149–50. Utilizing this Warner cost data and extrapolating to the entire industry, Professor Marx estimated that ''Musical Work Copyright Holders' Total Non-Content Costs'' equaled $424 million; and ''Sound Recording Copyright Holders' Total non-content costs equaled $2.605 billion (more than six times copyright Holders' non-content costs), summing to total upstream non-content costs of $3.028 billion. *Id.* ¶ 150, Fig. 26.

Turning to the downstream distribution outlets, Professor Marx identified and relied on Spotify's 2015 revenue and cost data from for interactive streaming services, and for the alternative distribution modes, she relied on Pandora's and Sirius XM's revenue and cost data. *Id.* ¶ 152 and nn.149–152. Using that data, Professor Marx estimated interactive streaming revenue of $[REDACTED]; and (2) interactive streaming profit of $[REDACTED]. For the alternative distributors (Pandora and Sirius XM), she estimated (1) revenues of $8.514 billion; and (2) profits of $3.576 billion. The total downstream revenue, according to Professor Marx, equaled an estimated $10.118 billion. *Id.* ¶ 153 & Fig. 27.

Professor Marx noted that there would be some degree of substitution between interactive streaming services and alternative distribution channels (*e.g.,* non-interactive internet radio and satellite radio). *Id.* ¶ 154. She opined that ''it is difficult to determine the exact value of this substitution effect,'' so she reported a range of Shapley value calculations that corresponded to ''a range of possible substitution effects.'' *Id.*

These data were all inputs into the Shapley algorithm, *i.e.,* assigning value to each input provider for each potential order of arrival among these categories of providers to the market. The multiple values were summed and averaged as required by the Shapley methodology to arrive at the ''Shapley value,'' which as explained *supra,* accounts for each entity's revenues and (non-content) costs under each possible ordering of market-arrivals.

Based on the foregoing, Professor Marx estimated that the total royalty payment due from the interactive streaming services to the Copyright Owners would range from $[REDACTED] to $[REDACTED], based on varying assumptions as to the substitution between interactive services and substitute delivery

[339] Content costs, as opposed to non-content costs, are not deducted because the content costs comprise the surplus to be allocated in terms of royalties paid and residual (if any) that remains with the interactive streaming (and substitute) services. The non-content costs, as discussed *infra,* must be recovered by each input provider as part of its Shapley value, because entities must recover costs.

channels. This range of dollar-based revenues reflected a ''percentage of revenue'' paid by interactive streaming services *to all copyright holders* (musical works and sound recordings) ranging from [REDACTED]% to [REDACTED]%. *Id.* ¶ ¶ 159–160. Professor Marx then noted that this is well below the combined royalty rate of [REDACTED]% paid by Spotify for musical works and sound recording rights, indicating that the actual combined royalty payments are clearly too high. *Id.* ¶ 161.[340]

ii. Professor Marx's Alternative Approach

As noted *supra,* Professor Marx also performed an ''alternative'' Shapley value in which (as opposed to her baseline approach) she modeled the upstream market as *two* entities: ''a representative copyright holder for musical works and a representative copyright holder for sound recordings.'' *Id.* ¶ 163. (That change enlarged the number of ''arrival'' orderings to 24 (four factorial) but, in all other respects, Professor Marx's methodology was the same as her methodology in her initial approach. *See id.* ¶ 199, App. B).

Under this alternative approach with two owners of collective copyrights upstream (musical works owners and sound recording owners), interactive streaming's total royalty payments range from [REDACTED]% to [REDACTED]% of streaming revenue. *Id.* (Sound recording copyright holders' total royalty income under this alternative approach ranged from [REDACTED]% to [REDACTED]% of revenue. *Id.* Professor Marx explained that this higher range of combined royalties (as a percentage) in her alternative approach arose from the fact that splitting the copyright holders into two creates two ''must-haves'' providing each upstream entity with more ''market power and consequently higher payoffs than the baseline calculation.'' *Id.* ¶ 164, n.153. By splitting the upstream licensors into two categories (record companies and musical works licensors), Professor Marx calculated that ''musical work copyright holders' total royalty income as a percentage of revenue ranges from [REDACTED]% to [REDACTED]%.'' *Id.* ¶ 163. By way of comparison, Spotify actually pays [REDACTED]% of its revenue for musical works royalties (*i.e.,* ''All-In'' royalties). Accordingly, Professor Marx concludes that ''[b]ecause this proceeding is about mechanical rates, the fairness component of 801(b) factors suggests that interactive streaming's mechanical rates should be reduced from their current level.'' *Id.* ¶ 161.

iii. Discussion of Professor Marx's Shapley Value Approach and the Criticisms of the Copyright Owners' Witnesses

Copyright Owners criticize Professor Marx's model for ''failing to accurately reflect realities of the market, where current observed market rates for sound recording royalties alone are approximately [REDACTED]% of service revenue. *See* Watt WRT ¶ 23; *Written Rebuttal Testimony of Joshua Gans on Behalf of Copyright Owners* ¶ ¶ 19, 28 (Gans WRT); *see also* COPFF ¶ 741. More technically, Copyright Owners object to Professor Marx's joinder of the sound recording and musical works rightsholders as a single upstream entity in her ''baseline'' model, which had the undisputed effect of lowering Shapley values, and hence royalties, available to be divided between the two categories of rightsholders. Gans WRT ¶ 21; Watt WRT App. 3 at 2) (noting that in the real world, as opposed to the stylized Shapley-world, the institutional structure is such that the two would not *jointly* negotiate with licensees); *see also* COPFF ¶ 742. Even more particularly, Professor Gans questions Professor Marx's rationale for her joint negotiation assumption, *viz.,* the' overlapping ownership interests of record companies and music publishers. Gans WRT ¶ 21.

I find this criticism of Professor Marx's baseline approach to be appropriate, in that it was not *necessary* to combine the two rightsholders in a Shapley analysis. As Professor Watt explained in his separate criticism, there is no need to collapse the rightsholders into a single bargaining entity to eliminate holdout power by the respective rightsholders, because the ''heart and soul'' of the Shapley value excludes the holdout value that any input supplier could exploit in an actual bargain. 3/27/17 Tr. 3073 (Watt). More particularly, Professor Watt explains:

> The model . . . allows us to capture a player's necessity [and] bargaining power, including vetoes, holdouts, everything . . . that's actually in the market. It allows us to import all of that into a model that generates a fair reflection upon each player of what they actually do without any abuse of . . . any power that they may have.

Id. at 3058–59. He emphasizes that, because the Shapley approach incorporates all possible ''arrivals'' of input suppliers, it eliminates from the valuation and allocation exercise the effect of an essential input supplier holding out every time or arriving simultaneously with another input supplier (or apparently creating Cournot Complement inefficiencies). *Id.* at 3069–70.

However, the foregoing criticism does not pertain to Professor Marx's *second* Shapley value model—her ''Alternative'' model—in which she maintains the two separate rightsholders for musical works and sound recordings. Marx WDT ¶ 146, n.153; 3/20/17 Tr. 1871–72 (Marx). With regard to this Alternative model, Copyright Owners level a more general criticism of Professor Marx's approach that does pertain to this model (as well as her Baseline model). They assert, through both Professors Gans and Watt, that Professor Marx wrongly distorted the actual market in yet another manner—by assuming the existence of only one interactive streaming service—rather than the presence of competing interactive streaming services. Watt WRT ¶ ¶ 25, 32 n.19, 17; Gans WRT ¶ ¶ 55–56; see *also* COPFF ¶ 755. By this change, they argue, Professor Marx inflated the Shapley surplus attributable to the interactive streaming services compared to the actual proportion they would receive in the market.

According to Professor Gans, this simplified assumption belies the fact that the market is replete with many substitutable interactive streaming services, whose competition *inter se* reduces each service's bargaining power. The problem, he opines, is that to the extent the entities being combined are substitutes for one another—such as alternative music services—then combining them ignores the effects of competition between them, thereby inflating their combined share of surplus from the joint enterprise (*i.e.* their Shapley value). Gans WRT ¶ 21.

Professor Marx does not deny that she intentionally elevated the market power of the services by combining them in the model as a single represent agent. However, as noted *supra,* she explained that she made this adjustment to offset the concentrated market power that the rightsholders possess—separate and apart from any holdout power they might have (which, as noted by Professor Watt, is addressed by the Shapley ordering algorithm). Thus, her alteration of market power apparently was designed to address an issue—market power—that the Shapley value approach does not address. 3/20/17 Tr.

[340] Because her baseline approach combines sound recording and musical works licensors into a single entity, Professor Marx does not break out separate royalties for musical works or mechanical licenses. However, she recommends that the mechanical rate should be lowered based on this finding. Professor Marx does specifically estimate the musical works rate under her Alternative approach, as discussed *infra.*

1863 (Marx) (''I want a model that represents a fair outcome in the absence of market power, so I am going to have to be careful about how I construct the model that I am not putting in market power into the model.'').

Although at first blush it would seem more appropriate for Professor Marx to have *directly* adjusted the copyright holders' market power by breaking them up into several entities each with less bargaining power, such an approach would have made Shapley modeling less tractable (by increasing the number of arrival alternatives in the algorithm), compared with the practicality of equalizing market power by inflating the power of the streaming services (by reducing them to a single representative agent).[341]

Professor Gans testified that (regardless of how Professor Marx sought to equalize market power) her approach was erroneous because Shapley values are meant to incorporate market power asymmetries, not to eliminate them. Gans WRT ¶ 31 (noting Shapley values incorporate market power asymmetries). However, I note that Professor Gans acknowledged that in an Australian legal proceeding, he too combined multiple downstream entities into a single entity in his Shapley value approach in ''comparison'' to two upstream rightsholders. 3/30/17 Tr. 4179 (Gans). Additionally, Professor Watt has authored and published an article (cited at Gans WDT ¶ 65, n.36) in which he too ''artificially'' equalized market power between rightsholders and licenses (radio stations) in the same manner. *See* R. Watt, *Fair Copyright Remuneration: The Case of Music Radio,* 7, 25, 35 (2010) 7 Rev. of Econ. Res. on Copyright Issues 21, 25, 35 (2010) (''artificially'' modeling the ''demand side of the market as a single unit, rather than individual radio stations . . . thereby . . . add[ing] (notionally) monopsony power to the demand side'' to offset the monopoly power of the input supplier).

In essence, the import of this criticism is actually not about the faithfulness of Professor Marx's approach to the Shapley Value model. Rather, the salience of this critique pertains to her decision to include within her ''fair income/return'' and ''relative contribution'' analysis of Factors B and C an *adjustment for market power asymmetry* that seeks to equalize market power as between Copyright Owners and the streaming services. In this regard, her adjustment is consistent with testimony by Professor Katz, who cautioned that the Shapley value approach takes the parties' market power as a given, locking-in whatever disparities exist. 4/15/15 Tr. 4992–93 (Katz).

I agree with Professor Watt and find that the Shapley value approach inherently eliminates the ''hold-out'' problem that would otherwise cause a rate to be unreasonable, in that it would fail to reflect effective (or workable) competition. However, Professor Marx's Shapley value approach attempts to eliminate *a separate factor—market power*—that she asserts renders a market-based Shapley approach incompatible with the objectives of Factors Band C of section 801(b)(1). Strictly speaking, this issue does not raise the question of which approach is more consistent with the traditional Shapley value approach, but rather, as Professor Marx noted, whether the modeler should equalize market power in this particular context in order to satisfy these two statutory objectives. *See also* 3/27/17 Tr. 3126–27 (Watt) (indicating that a market rate ''might reflect'' both existing market power and ''abuse of monopoly power,'' the latter in the form of ''hold-out'' behavior, but the Shapley Value approach will eliminate the ''*abuse* of monopoly power.'').[342]

In the present case, the issue of market power, as it relates to the fairness of the rates and their reflection of the parties' relative roles and contributions, pertains in large measure to the power of the rightsholders derived from their status as *collectives.* As noted *supra,* music publishing is highly concentrated among a few large publishers. (As also noted *supra,* the major record companies likewise control significant percentages of the market.) These large entities provide the efficiencies of a collective, performing the salutary service of minimizing licensing transaction costs. However, a by-product of collectives is the concentration of pricing power. This is why, for example, the performing rights societies, ASCAP and BMI, operate under consent decrees that limit their receipt of royalty rates reflective of their market power. *See* R. Epstein, *Antitrust Consent Decrees* at 31(2007) (noting that a collective representing numerous musical works can be understood as ''all potential competitors in the market banded together . . . who will sell their goods—at above-competitive prices.'').

Professor Marx's adjustment for market power, like Professor Watt's adjustment as noted in his article (and like Professor Gans's adjustment in his Shapley approach in the aforementioned Australian proceeding), ameliorates this collective pricing power. In that sense, the adjustment renders the Shapley value more representative of ''fairness'' and ''relative contributions.'' In the process, the baby is not thrown out with the bathwater, so to speak, because the lower transaction costs achieved by the collectives are inputs in the Shapley model, thereby enlarging the surplus available for sharing among all input suppliers. (That is, if the songwriters were disaggregated (''uncollectivized'') and required to bargain separately with each interactive streaming service, transaction costs would be higher, if not disabling.)

Professor Marx's adjustment thus mitigates the collective market power of music publishers, yet retains the lower transaction costs incurred by rightsholders. In this approach, I detect a clear and modern echo of the ''public utility'' rate regulation history that was the foundation for Factors B and C of section 801(b)(1). The goal of such rate regulation has been to maintain the efficient cost structure of the utility (*i.e.,* its low average costs), while ameliorating the ability of sellers to use their concentrated market power to earn

[341] For example, in Professor Marx's ''alternative'' Shapley model, she models four entities, two upstream (musical works holders and sound recording holders), and two downstream (the representative single streaming service and a single alternate distribution outlet). With these four entities, the number of different arrival orders is 4!, or 24. If Professor Marx instead had broken the musical works copyright holders and the sound recording copyright holders respectively into two entities, the number of total entities would have increased from 4 to 6. The number of arrival orders would then have increased from 24 to 720.

[342] At the hearing, Professor Watt was confronted on cross-examination with his published article stating that the Shapley value eliminates ''market power.'' As the foregoing analysis indicates, though, the Shapley value incorporates whatever market power exists (unless otherwise adjusted). Professor Watt testified that his language in this regard was ''poorly worded'' and that he intended to state that the Shapley value eliminates the ''*abuse* of market power,'' by which he meant the ability of ''must have'' suppliers to ''hold out'' and refuse (or threaten to refuse) to negotiate. 3/27/17 Tr. 3131–33, 3148 (Watt). The Judges find, considering the totality of Professor Watt's testimony and writings, that he indeed intended to refer to ''abuse of market power'' in his prior writing. This seems clear because he has consistently expressed the opinion that the Shapley value *does* prevent the exploitation of complementary oligopoly (must have/hold out) power, through its inclusion of all ''arrival orderings'' in its algorithm. However, his writings (like Professor Gans's prior work with which he was confronted on cross-examination) demonstrate that the Shapley value approach *may* be applied by adjusting the number of licensors or licensees to change any existing market power disparities. This is fully consistent with Professor Marx's testimony that the extent of market power remains a choice for the Shapley modeler, and Professor Katz's testimony that a Shapley value that makes no such adjustment simply takes as given any disparity in market power that actually exists.

supranormal profits. *See Decker, supra,* (public utility rate of return regulation is intended to allow the regulated entity to recover its costs and a ''fair rate of return''). Professor Marx's market power adjustment provides a form of market power mitigation, while still incorporating the higher surplus emanating from the more efficient cost structure of collectivized licenses.[343]

iv. Application of Professor Marx's Shapley Value Analysis in this Proceeding

Consideration of whether to apply Professor Marx's Shapley value model requires the placement of her modeling *in the proper context of other evidence in this proceeding.* More particularly, her Shapley value methodology must be compared with the process that led to the creation of the 2012 rate structure. *This comparison demonstrates that the Judges should not make any adjustment to the reasonable rates they have determined in this proceeding through an application of the Shapley value analyses.*[344]

The 2012 rate structure (for subparts B and C) was the product of an *industrywide* negotiation, with the music publishers represented by the NMPA and the interactive streaming services represented by DiMA, their respective trade associations, continuing the 2008 industrywide settlement rate structure for subpart B. (Although individual entities also participated, the settlement was industrywide.) *When such a settlement occurs, it contains the same benefits with regard to the avoidance of the ''hold-out'' effect and the equalizing of bargaining power as produced by Professor Marx's Shapley value modeling. See* 3/13/17 Tr. 577 (Katz) (''I think of the shadow as balancing the bargaining power between the two parties.''); Katz CWRT 136, n.236 (''there are market forces that promote the achievement of the statutory objectives in private agreements, such as the 2012 Settlement, when the parties are equally matched (it was an industry-wide negotiation) and the negotiations are conducted in the shadow of a pending rate-setting proceeding that can be expected to set reasonable rates in the event that the private parties do not reach agreement.''). Accordingly, any attempt by me to use Professor Marx's Shapley modeling approach, after I have accepted the appropriateness of the present rate structure and rates as benchmarks, would constitute an inappropriate form of double-counting.

The Judges came to a similar analytical conclusion with regard to analogous private agreements in *Web III (on remand),* where they adopted as benchmarks two settlements between SoundExchange (as the negotiating and settling agent for the record company licensors), and respectively, the National Association of Broadcasters (NAB) and Sirius XM. *Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings,* 79 FR 23102 (Apr. 25, 2014). There (although Shapley values were not in evidence), the Judges found that

> SoundExchange, as a collective, would internalize the impact of the complementary nature of the repertoires on industry revenue and thus seek to maximize that overall revenue. This would result in lower overall rates compared to the situation in which the individual record companies negotiated separately. . . .
>
> The . . . power of SoundExchange was compromised by the fact that the NAB . . . could have chosen instead to be subject to the rates to be set by the Judges . . . which would be free of any potential cartel effects—rather than voluntarily agree to pay above-market rates.

Id. at 23114 (emphasis added). In those settlements, the licensees likely were represented by, respectively, a trade association (NAB), and the entire licensee-side of the relevant market (Sirius XM). Thus, the Judges have previously acknowledged a similar removal of the ''abuse of market power'' (arising from complementarity) as in a Shapley value analysis, when the licensors are jointly represented in negotiations by a common agent.

Further, because the 2012 settlement was industrywide, with both sides represented by (*inter alia*) their respective trade associations; there was no apparent imbalance of market power in the negotiating process (such as the imbalance that Professor Marx attempted to eliminate by equalizing the number of Shapley-participants on each side of the bargain). In this regard, in *Web III (on remand),* the Judges also found that these settlement agreements—with the ''shadow'' of a statutory license looming over the negotiations—avoided the same market power imbalance that Professor Marx seeks to eliminate in her Shapley modeling equalizing the number of licensors and interactive streaming services. Specifically, in *Web III (on remand),* the Judges held:

> [T]he NAB, which negotiated on behalf of a group of broadcasters, enjoyed a degree of bargaining power on the buyers' side during its negotiations with SoundExchange. . . . . [S]uch added market power on the buyer side tends to mitigate, if not fully offset, additional leverage that SoundExchange might bring to the negotiations. . . . The question of competition is not confined to an examination of the seller's side of the market alone. Rather, it is concerned with whether market prices can be unduly influenced by sellers' power or buyers' power in the market.

Id. Thus, the Judges have previously recognized that a negotiated agreement between industrywide representatives—when a failure to agree will trigger a statutory rate proceeding—will: (1) ameliorate the complementary oligopolists' ''abuse of power'' arising from the threat to withhold a ''must have'' license; and (2) reflect countervailing licensee power that neutralizes the monopoly power of a licensor-collective.

Web III, as a prior determination by this body, thus underscores the redundancy of a Shapley value adjustment in such a context.[345] [346] Further, absent any valid reason to the contrary, the Judges have a statutory

[343] To be clear, although I find such a market power adjustment a relevant consideration in a section 801(b)(1) Factor B and C analysis, it is not a consideration when determining only a rate that reflects ''effective competition.'' An effectively competitive rate need not adjust for such market power, because such a rate (as also set under the willing buyer/willing seller standard of 17 U.S.C. 14(f)(2)(B)) does not include consideration of these two factors or their public utility style legislative history antecedents. Alternately stated, the Shapley value approach, without any adjustments for market power, eliminates only the complementary oligopoly (''must have'') effect, through its use of all ''arrival orderings,'' indicating the outcome of an effectively competitive market, but does not necessarily address the Factor B and C objectives.

[344] Professor Marx estimated a Shapley-derived rate of [REDACTED]% to [REDACTED]%. Marx WDT ¶ 163 & App. B. This rate range brackets the ''headline'' 10.5% rate in the 2012 benchmark but is [REDACTED] pursuant to the 2012 benchmark structure. However, I note that Professor Marx testified that the mechanical rate she derived in her Alternate Shapley approach was not intended to be precise, but rather indicative of a range and direction for the Judges to consider. 4/7/17 Tr. 5576 (Marx) (the Factor B and C Shapley Value analysis points in the ''direction'' of rates ''moving slightly lower'' within the existing rate structure).

[345] Of course, the parties in the present proceeding could not know in advance that the Judges would determine a rate structure incorporating these principles, and their Shapley analyses thus were proffered given that uncertainty.

[346] Professors Watt and Gans also criticize Professor Marx's selection of data as inputs in her Shapley model. In fact, Professor Gans testified that his re-working of Professor Marx's model through the use of different data alone accounted for the bulk of his increase (''the lion's share'') of the surplus attributable to rights holders. However, in his written testimony, he did not separately quantify the impact of Professor Marx's attempts to equalize market power by reducing the number of streaming services. 3/30/17 Tr. 4057, 4119 (Gans). Because I find that Professor Marx's Shapley value model would be redundant given the rate structure analysis undertaken, for the reasons stated in the text, *supra,* these data input disputes are moot. Of course, if one were to apply the Shapley values in this proceeding (as the majority does), each party's criticisms of the sufficiency of the other's data sets would need to be carefully scrutinized.

duty to act in accordance with their prior determinations. 17 U.S.C. 803(a)(1).[347]

c. Professor Gans's ''Shapley-Inspired Approach''

On behalf of Copyright Owners, Professor Gans presented a model that he described as ''inspired'' by the Shapley value approach, and thus not *per se* a Shapley value approach. 3/30/17 Tr. 4109 (Gans). At a high level, his Shapley-inspired approach attempted to determine the ratio of sound recording royalties to musical works royalties that would prevail in an unconstrained market. After calculating that ratio, he estimated what publisher mechanical royalty rates would be in a market without compulsory licensing by multiplying the benchmark sound recording rates by this ratio. Gans WDT ¶ 63.

Professor Gans begins his analysis by making two critical assumptions: (1) publishers and record companies must have equal Shapley values (*i.e.,* they must each recover from total surplus equal profits), because musical compositions and sound recording performances are perfect complements and essential components of the streamed performance; and (2) the label profits from interactive streaming services are used as benchmark Shapley values. Gans WDT ¶ 77. The royalties that result will differ, given the different level of costs incurred by music publishers and record companies respectively. Gans WDT ¶ ¶ 23, 71, 74, 76; Gans WRT ¶ ¶ 15–17; *see also* 3/30/17 Tr. 3989 (Gans).

Echoing Dr. Eisenach, Professor Gans found these assumptions critical because agreements between record companies and interactive streaming services are freely negotiated, *i.e.,* they are not set by any regulatory body or formally subject to an ongoing judicial consent decree and, accordingly, are also not subject to any regulatory or judicial ''shadow'' that arguably might be cast from such governmental regulation in the market. Professor Gans therefore uses the profits arising from these unregulated market transactions to estimate what the mechanical rate for publishers would be if they too were also able to freely negotiate the rates for the licensing of their works. Gans WDT ¶ 75.

In light of his decision to *assume* this equality in upstream Shapley values, Professor Gans also coined the phrase ''top-down'' approach to describe his approach, as distinguished from Professor Marx's approach which—again coining a phrase—he labeled a '''bottom-up'' approach. Gans WDT ¶ 77. Moreover, as Professor Gans noted, an important distinction between the two approaches is that the bottom-up approach was ''really an exercise . . . in modeling the royalty rate as the result of a hypothetical bargain [whereas] [t]he top-down approach was to actually calculate this [b]enchmark I was worried about. Is this price [*i.e.,* the Copyright Owner's proposed rate] too high or not?'' 3/30/17 Tr. 4013–14 (Gans).

Professor Gans utilized data from projections in a Goldman Sachs analysis to identify the aggregate profits of the record companies and the music publishers, respectively. 3/30/17 Tr. 4017 (Gans). Given his assumption that sound recordings and musical works were both ''essential'' inputs and thus able to claim an equal share of the profits, Professor Gans posed the question: ''[H]ow much revenue do we need to hand to the publishers so that they end up earning the same profits as the labels?'' *Id.* at 4018.

He found that, for the music publishers to recover their costs and achieve profits commensurate with those of the record companies under his ''top down'' approach, the ratio of sound recording royalties to musical works royalties derived from his Shapley-inspired analysis was 2.5:1. (which attributes equal profits to both classes of rights holders and acknowledges the higher costs incurred by record companies compared to music publishers). Gans WDT ¶ 77, Table 3.

As noted, Professor Gans made a key assumption, treating as accurate Dr. Eisenach's calculation of an effective per play rate for sound recordings of $[REDACTED]. Given those two inputs (the 2.5:1 ratio and the $[REDACTED] per play rate), Professor Gans's approach indicated a market-derived musical works royalty rate of $[REDACTED] (rounded). *Id.* ¶ 78, Table 3. However, because the musical works royalty is comprised of the mechanical rate and the performance rate paid to PROs (not to publishers), this $[REDACTED] rate needed to be adjusted down. Accordingly, he subtracted the performance rate and determined that the percent of revenues attributable to mechanical royalties was 81% of the total musical works royalties, under his Shapley-inspired approach. Thus, he estimated a mechanical royalty rate of $[REDACTED] (rounded) (*i.e.,* [REDACTED] × [REDACTED]), Gans WDT ¶ 78, confirming, in his opinion, the reasonableness of Copyright Owners' proposed $0.0015 statutory per play rate.

On this basis, Professor Gans also concluded that his Shapley-inspired approach supports the Copyright Owners' per-user rate proposal. Applying the Shapley value based ratio of 2.5 to 1 to the benchmark per-user rate negotiated by the labels of %[REDACTED] per user per month, and after subtracting the value of the performance rights royalty, Professor Gans obtained an equivalent publisher mechanical rate of $[REDACTED] (rounded) per user per month. (*i.e.,* ([REDACTED]/2.5) × 80%).[348] Gans WDT ¶ 85.

i. Services' Criticisms and Dissent's Analysis of Professor Gans's Approach

I do not credit Professor Gans's Shapley-inspired model, *because of its assumption and use of the $[REDACTED] per play sound recording interactive rate.* As found *supra,* Dr. Eisenach's $[REDACTED] per play sound recording rate is not supported by the weight of the evidence. Therefore, Professor Gans's Shapley-inspired analysis is unpersuasive for that reason alone. More particularly, the record company profits are inflated by the inefficient rates created through the Cournot Complements ''hold out'' problem that impacts the agreements between record companies and streaming services, as noted by the Services' experts in this proceeding, and as the Judges noted in *Web IV.*

Professor Gans's model is also troubling because it begs two broad questions: (1) whether the model produces a ''reasonable'' rate as required by Sec. 801(b)(1); and (2) whether the model produces a rate that also adequately satisfies Factors B and C of section 801(b)(1). He testified as follows as to why he understands a Shapley-based methodology generally will provide an economic approach that satisfies the objectives of section 801(b)(1):

> [O]ne of the reasons why the Shapley analysis is useful is because these regulations have a fairness objective. I wasn't the only one—every economist I think you've asked about what they meant by fairness. It's—it's not a topic that is sitting in an economic

[347] If the Judges had considered the impact of the Shapley value analyses in the context of setting a reasonable rate—rather than as a separate consideration under Factors B and C—they would have reached the same result, given the countervailing power that exists between the settling parties.

[348] Professor Gans multiplies the per play rate by 81% but the per user rate by 80%. *Compare* Gans WDT ¶ 78 *with* Gans WDT ¶ 85. The rate derived by Professor Gans was the 80% figure. Gans WDT ¶ 77, Table 3, line 17. This discrepancy does not impact the relevance of his analysis or my findings.

textbook somewhere. But the way in which, you know, I viewed it turned out to be similar to others in that it means that if you contribute something of economic value that is very similar to what somebody else does in terms of economic value, you should be expecting them to get the same out of it in terms of what they get to take home.

Tr. 3/30/17 3991 (Gans). Thus, if (as Dr. Eisenach opines), there is an identity between a market rate and a reasonable (effectively competitive) rate that takes into account Factors B and C of section 801(b)(1), then Professor Gans's Shapley-inspired analysis would be useful (absent any other defects). Conversely, if there is no identity between a purely market-based rate and a reasonable (effectively competitive) rate that explicitly takes into account Factors B and C, then Professor Gans's model is not helpful in applying those statutory factors.

I find that Professor Gans's model fails to incorporate sufficiently the reasonableness requirements and the ''fairness'' and ''relative roles'' elements of section 801(b)(1). As explained *supra,* the concept of a ''reasonable'' rate reflects a market rate that is not distorted by a lack of effective competition. Here again, a key assumption made by Professor Gans, by his own admission, is that the $[REDACTED] per play rate estimated by Dr. Eisenach satisfies the statutory requirement of reasonableness. But, as discussed *supra,* Dr. Eisenach's calculation of the $[REDACTED] per play rate sound recording rate reflects the unregulated ''must have'' hold out power of the record companies. Thus, Professor Gans's Shapley-inspired approach has imported the record companies' ''must have'' hold out power, and therefore inserted the ''abuse of power'' that Professor Watt rightly identified as necessarily excluded from a full-fledged Shapley value approach. Although Professor Gans chose to describe his approach by coining the phrases ''Shapley-inspired'' and a '''top-down' Shapley,'' I find his borrowing of the Shapley moniker in this context to be somewhat Orwellian, and find his approach to be too dissimilar from a full-fledged Shapley approach to be of assistance in establishing a reasonable (effectively competitive) rate. *See* 3/30/17 Tr. 4107–09 (Gans) (acknowledging that the top down/bottom up dichotomy is of his own making and that the original work by Dr. Shapley ''is closer to a bottom-up approach'').

Professor Gans's Shapley-inspired approach also does not attempt to eliminate any *other market power that may be possessed by the music publishers.* As explained *supra* with regard to Professor Marx's model and the critiques thereto, a model that does not address the market power asymmetries of the parties (as Professor Gans expressly acknowledges his model does not) thus fails to address the concepts of fairness and relative roles/contributions required by Factors B and C. Thus, while Professor Marx's analysis is *redundant* of the market power adjustments reflected in the 2012 settlement, Professor Gans's Shapley-inspired approach *omits* such adjustments.

I also agree with Professor Marx's further criticism that Professor Gans's Shapley-inspired model is lacking in certain other important respects. Perhaps most importantly, he intentionally omits the streaming services from his model, because he is interested only in equating Copyright Owners' profits with those of the record companies. Professor Gans did not provide any convincing evidence to explain why the Judges should rely on a model that omits from consideration the very licensees who would be paying the royalties pursuant to a rate the model is intended to confirm. (I understand this omission by Professor Gans to be one reason why he described his model a ''top-down,'' Shapley ''inspired'' approach, as opposed to a full-fledged Shapley value model.). Consequently, Professor Gans's results provide for the streaming services to pay total royalties (sound recording and musical works) greater than their total revenue, leading to losses despite their undisputed contribution to the total surplus available for distribution. Marx WRT ¶ 184 (Professor Gans's Shapley-inspired calculation of a per-play musical works royalty rate of $0.0031, combined with the existing sound recording royalty rate, would cause Spotify to pay [REDACTED]% of its revenue in royalties).

Professor Gans apparently explains away these losses by the fact that the Services have been engaging in below market pricing to increase market share and such pricing shows up in their lower revenues. I address that issue elsewhere in this Determination. However, to the extent Professor Gans is correct in this regard, it shows the limits of a Shapley-inspired approach that, by definition, treats accounting costs and revenue inputs as relevant parameters. Further in that regard, it is important to note ''[t]hat the main problem with the Shapley approach . . . a particularly pressing problem [is] that of data availability.'' R. Watt, *Fair Copyright Remuneration: The Case of Music Radio,* 7 Rev. Econ. Rsch Copyright. Issues at 21, 27 (2010).[349]

Finally, one of the assumptions behind Professor Gans's approach is that musical works are as indispensable as sound recordings for purposes of a Shapley value approach. However, that assumption is subject to challenge. More particularly, I find merit in a further critique made by Dr. Leonard. He questioned the underlying assumption that musical works are ''essential inputs,'' or ''must haves,'' in the same way in which sound recordings are essential inputs/''must haves.''

As he explained, at the time a recording artist and a record company decide upon which song to record, they have numerous songs from which to choose. *No one song therefore is essential at the time in which the recording artist and the record company must select the song.* (The essentiality of the song may exist, as Copyright Owners note, in those instances when the songwriter himself or herself is of sufficient acclaim and notoriety.). It is only *after* a song has been incorporated into a recording that it has become essential. As Dr. Leonard notes, this point is analogous to the problem of ''hold up'' in the setting of royalties for patented inputs within a larger complex device. At an early stage of production, the device manufacturer has the opportunity to select among several competing patented inputs, but once one of them is selected, its uniqueness allows the owner of the input to demand a disproportionate share of the revenue in royalties, because, *ex post* selection, it *has become* ''essential.'' However, *ex ante* selection, it was not ''essential.'' Thus, the existing spread between musical works royalties and sound recording royalties, according to Dr. Leonard, may reflect this phenomenon, rather than simply an artificial regulatory diminution in the mechanical royalty rate. 4/5/17 Tr. 5185–87 (Leonard).

d. Professor Watt's Shapley Approach and the ''See-Saw'' Effect

As noted *supra,* Professor Watt appeared solely as a *rebuttal* witness. In that capacity, he testified as to purported defects in Professor Marx's Shapley modeling. In addition, he presented alternative modeling intended

[349] Because I do not apply the Shapley approaches to adjust the rates or to determine reasonableness, the parties' attacks on the usefulness of the other's data sets are moot. However, as noted *supra,* to the extent the Majority Opinion applies any of the Shapley approaches, it needed to address and resolve the issues of data reliability.

to apply an adjusted version of Professor Marx's Shapley value model.

Professor Watt agreed that the Shapley model is extremely well-suited to address Factors B and C within section 801(b)(1). 3/27/17 Tr. 3057 (Watt). He characterizes the Shapley model as an approach ''for analyzing complex strategic behavior in a very simple way.'' *Id.* at 3058. However, he found that Professor Marx's approaches contained several flaws and methodological issues. *Id.* at 3057. Accordingly, he, like Professor Gans, attempted to adjust her modeling in a manner that, in his opinion, generated ''decent, believable results.'' *Id.* at 3058.

Professor Watt criticized Professor Marx's alternative Shapley model, in which she treated sound recording and musical works as being owned by two distinct entities. 3/20/17 Tr. 1885 (Marx). In that alternative model, Professor Marx found that Spotify's total royalties for musical works and sound recordings combined would range from {REDACTED]% to [REDACTED]% of total royalties. *Id.*[350] That total indicated a payment of approximately [REDACTED]% to [REDACTED]% of total revenue for sound recording royalties. Although she understood that Spotify actually pays [REDACTED]% of its revenue in total for these royalties (*see id.* at 1860–61), she was not concerned by the difference, or by the reduction of royalties paid to record companies under her alternative Shapley model, because she ''wasn't trying to construct a model of the market as it is,'' but rather . . . a model that represents the allocation of surplus in a way that is fair and respects the relative contributions of the parties''. *Id.* at 188.

In his Shapley modeling adjusting Professor Marx's analysis, Professor Watt reached conclusions that were broadly consistent with her finding that *the ratio* of sound recording:musical works royalty rates should decline. Specifically, Professor Watt found that at least [REDACTED]% of interactive streaming revenue should be allocated to the rightsholders, and, of this [REDACTED] should be retained by the Musical Works copyright holders, *which equals [REDACTED]% (i.e., [REDACTED]) of total interactive streaming revenue.* As these calculations imply, the record companies would receive [REDACTED]% ([REDACTED]) of the [REDACTED]% of interactive streaming revenues allocated to the rightsholders. Thus, the *record companies would receive [REDACTED]% of total interactive streaming revenues ([REDACTED]).* Watt WRT ¶ 35; 3/27/17 Tr. 3083, 3115–16 (Watt).[351]

Professor Watt's ratio of 37.9%:29.1% equals 1.3:1, whereas Professor Marx's ratio (given the range she estimated) is [REDACTED], a ratio of [REDACTED]. Moreover, both of their ratios are well below the current ratio of approximately [REDACTED] for Spotify, and approximately [REDACTED] comparing the 10.5% headline rate to an average sound recording rate of approximately [REDACTED]% of revenue. Accordingly, under their Shapley value models, Professors Watt and Marx appear to be in general agreement that the ratio of sound recording:musical works royalties should decline. *However, Professor Watt's model indicates that this ratio reduction should occur via a significant increase in musical works royalties and an even greater precipitous decline in the sound recording royalties set in an unregulated market.* On the other hand, Professor Marx's model indicates that the ratio should narrow essentially through a dramatic reduction in sound recording royalties and an essentially stable musical works rate.

Professor Watt explains that the cause of the dramatically lower sound recording rates in his Shapley model is the existing regulation of musical works rates. Specifically, he opines:

> [The reason] my predicted fraction of revenues for sound recording royalties is significantly less than what is observed in the market [is] simple. The statutory rate for mechanical royalties in the United States is significantly below the predicted fair rate, and the statutory rate effectively removes the musical works rightsholders from the bargaining table with the services. Since this leaves the sound recording rightsholders as the only remaining essential input, bargaining theory tells us that they will successfully obtain most of the available surplus.

Watt WRT ¶ 36.[352] Professor Watt opines that, because the mechanical rate should rise, the sound recording rate therefore should fall—a phenomenon the parties have summarized as a ''see-saw'' effect. *See, e.g.,* 4/5//17 Tr. 5079–80:10 (Katz).[353]

However, no witness explained how this seesaw effect would occur, and there were no witnesses from the record companies who testified that the record companies would impotently acquiesce to a significant loss in royalties to accommodate the diversion of a huge economic surplus away from them and to the Copyright Owners.[354] Indeed, when the Judges inquired of Professor Watt how such an adjustment might occur, given existing contractual rates between the Services and record companies, he acknowledged that he had not thought of that problem until he was questioned by the Judges at the hearing, and he acknowledged that the timing of any adjustment might be disruptive. 3/27/17 Tr. 3091–92 (Watt).[355]

[350] Under her baseline Shapley value model, Professor Marx estimated combined royalty payments equaling [REDACTED]% to [REDACTED]% of total Spotify revenue. *Id.* at 1888. She could not break that range down into musical works and sound recording royalties because her baseline model treated both types of royalties as if they were paid to a single rightsholder.

[351] At present, record companies receive approximately 55% to 60% of total interactive streaming revenue, substantially higher than the 37.9% calculated by Professor Watt.

[352] More specifically, Professor Watt calculates that, for each dollar that the statutory rate holds down fair market musical works royalties, 95 cents is captured by the record companies (and 5 cents is captured by the streaming services). Watt WRT ¶ 23, n.13 & App. 3.

[353] Although it is noteworthy that Professor Gans does not anticipate such an effect, and instead speculates that the Services might simply pay the same sound recording royalty rate and the higher mechanical rate out of existing profits or through an increase in downstream prices. Gans WRT ¶ 32. The Judges find no evidence to support the speculation that the Services could engage in such substantial adjustments in the market.

[354] According to the RIAA, interactive streaming revenues for 2015 totaled $1.604 billion. *See* Marx WDT ¶ 153 & App. B.1.b (citing RIAA figures). *The assumption that the see-saw effect would induce record companies to surrender a significant amount of this revenue (which has been growing year-over-year as streaming becomes more popular), absent any evidence, makes the assumption of the see-saw effect speculative and unreasonable.*

[355] Copyright Owners argue that Professor Watt (as a non-lawyer) did not appreciate that contracts between record companies and interactive streaming services could be renegotiated at any time upon mutual agreement of those parties. See CORPFF–JS at 221–22 (and citations therein). While this legal point of course is correct, it does not address the economic uncertainty as to whether the record companies would be willing to renegotiate rates in a manner by which they concede a loss of royalty revenue as indicated by Professor Watt's anticipated see-saw effect.

I am loath to adopt the *hypothetically* plausible idea of a ''see-saw'' effect impacting the division of this surplus, when there is simply no evidence that such an adjustment would occur.[356] Given at least $[REDACTED] in interactive streaming revenue, if the record companies were to passively accept a reduction of royalties from approximately [REDACTED]% of that revenue, $[REDACTED], to Professor Watt's proposed 37.9%, *i.e.,* to $[REDACTED], they would lose (assuming no further growth in streaming) approximately $[REDACTED] annually, or $[REDACTED] over five years. The Judges cannot merely assume that the record companies would ''go quietly into that good night,'' rather than seek some other market structure in which to protect this revenue, such as, for example, resurrecting the idea of establishing or otherwise integrating their own streaming services. The Services' experts, and Apple's expert, testified that any purported see-saw effect was indeterminate with regard to its impact on the interactive streaming services. *See* 4/5/17 Tr. 4944–45 (Katz) (acknowledging the possibility that a mechanical royalty rate increase would affect sound recording royalties in the future but not immediately, and that there is no reliable estimate of the size of any such adjustment); 4/7/17 Tr. 5515–5516(Marx) ([REDACTED]); 4/5/17 Tr. 5704–05 (Ghose) (''[I]t's quite likely that the streaming service will want to maintain their royalties and their revenues at the current levels. And so, you know, to me it seems like an extreme statement that the entire increase in publisher profits will come at the expense of the streaming services.'').

In any event, from an evidentiary perspective, there is no need to indulge in such speculation. There is absolutely no evidence that such a significant shift in royalty distribution would occur, nor is there sufficient evidence as to the potential consequences of such a draconian reallocation of revenue.

In sum, my analysis of the Shapley approaches with regard to the elements of Factors B and C demonstrates (whether that analysis was undertaken as part of the ''reasonable rate'' analysis or as a separate ''factor'' analysis) that there is no basis to apply those elements to adjust the reasonable rates as set forth in the 2012 benchmark.

D. Factor D

The last itemized factor of section 801(b)(1), Factor D, directs the Judges ''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)(D). In *Phonorecords I,* 74 FR at 4525, the Judges reiterated their understanding of Factor D, concluding that a rate would need adjustment under Factor D if that rate

> directly produces an adverse impact that is substantial, immediate and irreversible in the short-run because there is insufficient time for either [party] to adequately adapt to the changed circumstance 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.

Id. I adopt and apply in this Determination the same Factor D test as set forth above.

The Services are advocating broadly for essentially the same rate structure that now exists, except for the elimination of the Mechanical Floor. *See* SJPFF at 1. My proposed rate structure is consistent with that position, except that I would maintain the Mechanical Floor. I would also maintain the existing rates. Because this result would continue the existing structure and rates, neither the services nor Copyright Owners can reasonably complain of disruption under the standard quoted above. Indeed, a continuation of the present rate structure and rates reflects constancy rather than disruption.

More particularly, the fact that interactive streaming services are failing to realize an accounting profit under this structure does not demonstrate that the rate structure proposed would threaten their viability. As noted *supra,* such year-over-year accounting losses are consistent with a long-run competition *for* the market, during which losses can be endured as a cost of doing business. Indeed, the services remain in business despite the existence of chronic losses. In that regard, a financial expert engaged jointly by the Services testified that he was ''not aware of a single standalone digital music service that has sustained profitability to date,'' *Testimony of David B. Pakman* ¶ 23 (Pakman WDT), yet that lack of sustained profitability has not materially diminished the ranks of interactive streaming services nor dampened competition from new entrants into the market.

Moreover, the record indicates that the services are not as concerned with short-term rates as they are with long-term market share, or what the services call ''scaling,'' in their Schumpeterian competition *for* the market. This point was made clearly by [REDACTED] (emphasis added). Of course, [REDACTED]. Katz CWRT ¶ 204.

The point is well-recognized by Google as well. *See* Joyce WDT ¶ 20 ([REDACTED]) (emphasis added). This acknowledgement was echoed by one of Copyright Owners' economic expert witnesses, who explained that the services' competitive posture was typical of internet-based entities that accept short-term losses to build economies of scale through, for example, investing in customer loyalty. Rysman WDT ¶ 32.

Moreover, another expert economic witness for the Services, Dr. Leonard, candidly acknowledged that ''[a]n argument may be made that the services expect to be profitable eventually, otherwise they would go out of business and Spotify, for example, would not have positive market value.'' Leonard AWDT 101, n.153. Likewise, Pandora notes that it can ''achieve the growth it projects . . . *under a continuation of existing rates and terms* . . . .'' Pandora's Introductory Rebuttal Memorandum at 3 (emphasis added).

This inability of the services to become profitable will persist based on the record, under existing competitive conditions. As Mr. Pakman testified: [N]o current music subscription service—including marquee brands like Pandora, Spotify and Rhapsody—can ever be profitable, even if they execute perfectly . . . .'' Pakman WDT 23 n.5 (citation omitted). Although Mr. Pakman blames the lack of profitability (in part) on the level of mechanical royalties, *id.,* I find, based on the Services' own acknowledgement, that the lack of profitability is a function of

[356] As a matter of economic theory, *given the present interactive streaming market structure,* the record companies already have the economic power to put streaming services out of business, because the market in which record companies and interactive streaming services negotiate is unregulated. So, I recognize that—*given the present interactive streaming market structure*—the record companies apparently find it in their self-interest to maintain the presence of interactive licensees. Indeed, the evidence in *Web IV* revealed that the record companies' strategy has been to ''[REDACTED].'' *Web IV, supra,* at 63 (restricted version). However, if mechanical royalty rates were to increase to a level that significantly reduced the profits of the record companies from streaming, there is no evidence in the record in this proceeding that indicates whether the record companies would decide to maintain the current vertical structure of the market and docilely accept such a revenue loss. For example, they could create their own streaming services (perhaps learning the lessons from the failed Pressplay and MusicNet attempts of the past). Or, they could maintain the sound recording royalty rates, thereby hastening a more immediate exit of streaming services from the market. Although such an acceleration of exit might be the consequence in an unregulated market (fostering Schumpeterian competition for the holy grail of market scale), such a change would not only be inconsistent with affording the services a fair income, but also would clearly be disruptive pursuant to Factor D of section 801(b)(1).

a lack of scale (which is another way of indicating that market share is divided among too many competing interactive streaming services). In fact, Mr. Pakman himself recognizes the importance of scale to long-run profitability. Pakman WDT ¶ 26 n.11 (''Scale is a magic word for so many cloud-based companies and services. . . . It may be that Spotify will gain some power over the royalties it pays once it has a critical mass of customers . . . .''). Pakman WDT ¶ 26 n.11 (emphasis added).

Given the paramount importance of scaling to the long-term success of interactive streaming, lowering mechanical royalties in this proceeding—simply to mitigate or prevent shorter-term losses by interactive streaming services—would constitute an unwarranted subsidy to these services at the expense of Copyright Owners.[357]

Also, although the services have indicated their ability to withstand short-term losses as they compete for scale/market share, the record also indicates that there is a limit to such losses—however imprecise and unknown—beyond which services will be unable to attract capital and survive until the long run market dénouement. In this regard, Mr. Joyce noted that, [REDACTED], at some point [REDACTED]. Joyce WDT ¶ 18. As Dr. Leonard testified, ''[REDACTED].'' Leonard AWDT ¶ 101 n.151. This testimony reflects the well-understood principle that ''[t]here is no specific time period . . . that separates the short run from the long run.'' R. Pindyck & D. Rubinfeld, *Microeconomics* at 190 (6th ed. 2005). Thus, although the services appear able to withstand current rates, a rate increase of the magnitude sought by Copyright Owners would run the very real risk of preventing the services from surviving the ''short-run,'' threatening the type of disruption Factor D is intended to prevent.[358]

Moreover, the 44% rate increase adopted by the majority likewise places the services in quite unchartered waters regarding the disruptive impact of that increase. The majority actually recognizes that the increase is so draconian that it cannot be implemented immediately. *See Majority Opinion, supra.* Instead, the majority leaches the increase into the rates year-by-year, as if one can simply assume that the disruptive impact of such a rate increase is ameliorated in this manner. Without a record to consider the impact of that rate increase, the majority may simply be substituting a slow bleed for a fatal blow.[359]

With regard to the Mechanical Floor, I do not find that the continuation of this element of the existing rate structure would be disruptive under the applicable standard. As discussed *supra,* the risks of fractionalized licenses and publisher withdrawals have receded, belying any reasonable assertion that such events are on the ''immediate'' horizon. Further, given that musical works royalties are a fraction of the total royalties paid by interactive streaming services, the triggering of the Mechanical Floor would be unlikely to ''threaten the viability'' of the interactive market.'' Further, because the Mechanical Floor was a bargained-for feature of the benchmark structure on which the Services rely, and because that provision protects the funds available to provide liquidity to songwriters in the form of advances, *removal* of the Mechanical Floor would more likely disrupt ''prevailing industry practices.'' The continuation of the Mechanical Floor avoids that disruption.

With regard to the impact on Copyright Owners, I find that the adoption of a rate structure based on the 2012 benchmark would not be disruptive under the standard quoted above. The record indicates that music publishers have been profitable while this standard has been in effect, and that interactive streaming has contributed to that profitability. Although that profitability is generated by a combination of mechanical and performance royalties paid by interactive streaming services, the fact that those two rights are—without dispute—perfect complements, means that the profitability of Copyright Owners must be viewed economically in the context of royalties realized from both rights (especially given the ''All-In'' aspect of the mechanical royalty).

Indeed, Copyright Owners' principal complaint is that, although their mechanical royalty revenue has increased, it has not increased as fast as the increase in the number of musical works streamed via sound recordings performed on interactive services. However, as noted, *supra,* the record reflects that the increase in streams is itself a function of the price discriminatory rate structure that incentivizes downstream services that can move ''down the demand curve'' and offer streaming services to listeners with a low WTP. 3/13/17 Tr. 701 (Katz). Such a structure will produce an increase in royalties, even as it may produce a lower effective royalty per stream but, as Professor Hubbard explained, that comparison misses the salient economic point. 4/13/17 Tr. 5971–73 (Hubbard).

Further, the current rate structure has allowed for rates to exceed the 10.5% headline rate. For example, [REDACTED]. *Accord,* 3/29/17 Tr. 3637 (Israelite (''I don't even think we thought of them as minima. We thought of them as alternate rates. And we would get the greatest of three different rates.''). In this regard, the existing ''greater of'' structure incorporates the benefits that the Copyright Board of Canada identified (as discussed *supra*) as tilted in favor of rights holders, although the existing structure, established via settlement, ameliorates that impact by providing a ''lesser-of'' approach in the second rate prong.)

In sum, I find no evidentiary basis to support a Factor D adjustment to the rates I have otherwise proposed in this Dissent.

Because I have rejected Copyright Owners' rate proposal, the potential disruptive impact of their proposal is moot, given my decision to consider the ''reasonable'' rate structure and rate issues *before* considering the four itemized factor of section 801(b)(1). However, if I *had incorporated* this disruption consideration within the ''reasonable rate'' analysis, my finding would be the same, *i.e.,* that Copyright Owners' rate proposal would be unreasonable because it would be disruptive under the Factor D standards.

That disruptive effect is captured by the following summary of the rate changes for the several services if Copyright Owners' proposal were to be implemented:

[357] In this regard, Copyright Owners argue that the services could attempt to cut their non-content costs in order to remain sustainable. They suggest that the services emulate Sirius XM, which successfully reduced its non-content costs as a percent of revenue. *See* Rysman WDT ¶ ¶ 98–100. However, as Spotify's CFO, Mr. McCarthy notes, Sirius and XM (the pre-merger predecessors to Sirius XM) ''nearly bankrupted themselves and merged in order to survive.'' McCarthy WRT ¶ 42. Moreover, not only were Sirius XM's content costs lower as a percent of revenue, but also its ''costs declined as a percentage of revenue *as they grew their subscriber base.* . . . . Their costs declined as they achieved scale.'' *Id.* Once again, the necessity of scale remains paramount.

[358] That is, the potentially profitable long-run cost curve, from scaling, may never be attainable if the interactive streaming services remain on perpetual loss-inducing short-run cost curves.

[359] Of course, it is *possible* that the majority may be correct that rolling out this rate increase over five years will ameliorate its disruptive impact. But it is *equally possible* that the rate and structure remain disruptive even when introduced in this extended manner. The salient point, again, is that the fact this rate structure and these rates were adopted post-hearing with the absence of a record to support them makes the analysis too speculative. The parties deserve an opportunity, and are entitled to one under the statute, to challenge the rates and rate structure, whether as inconsistent with Factor D or as inconsistent with any other requisite set forth in section 801(b)(1).

FIGURE 3—IMPACT OF COPYRIGHT OWNERS' PROPOSAL ON SPOTIFY'S ROYALTIES

[In thousands except percentages, 2H2015–1H2016]

[REDACTED]

FIGURE 4—ESTIMATED IMPACT OF THE COPYRIGHT OWNERS' PROPOSAL ON OTHER STREAMING SERVICES, 2015

Service name	Current		Copyright Owner's proposal		Impact of Copyright Owners' proposal	
	Mechanical royalties	Musical works royalties	Mechanical royalties	Musical works royalties	% increase in mechanical royalties	% increase in musical works royalties
Google	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Amazon Prime	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Rhapsody	$7,323,476	$10,253,216	$11,230,793	$14,160,533	53%	38%
Apple Music	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
TIDAL	$755,522	$1,754,546	$1,600,723	$2,599,747	112%	48%
Deezer	$438,412	$563,412	$822,541	$947,540	88%	68%
Other	$4,478,824	$11,255,046	$16,709,012	$23,485,234	273%	109%
Average	*$5,277,869*	*$8,311,074*	*$16,098,189*	*$19,131,394*	*194%*	*109%*

Marx WRT at 8–9.

These increases are on an order of magnitude that indicates to me that such increase would clearly implicate the applicable disruption standard.

The knock-on effects of this proposal would be disruptive under the applicable standard. Pandora indicates it would have little choice but to eliminate its limited offering Pandora Plus product. *See* Herring WRT ¶ 10. Under Copyright Owners' proposed per user rate, it would pay [REDACTED] the amount it now pays for both mechanical and performance royalties, and royalties would be even higher on the other prong—based on the number of songs played, Herring WRT ¶ 7, even though the overwhelming majority of streams on Pandora Plus are noninteractive and do not implicate the mechanical right. *See* Herring WRT ¶ 16. Mr. Herring further testified that, under Copyright Owners' proposal, [REDACTED]. Consequently, he notes that Pandora would lack any resources to invest in its burgeoning interactive streaming service offerings. Herring WDT ¶ 58.

[REDACTED]. Marx WRT ¶ 16 & Fig. 1.

In similar fashion, Google claims that Copyright Owners' rate proposal would [REDACTED] rates it pays for interactive streaming on its Google Play Music service. More particularly, if Google had paid Copyright Owners' proposed rates from June 2013 to June 2016, [REDACTED], Leonard WRT ¶ 9. On dollar terms, Google estimates that it would have paid $[REDACTED] for musical works rights under Copyright Owners' proposal, compared with [REDACTED] it paid during that period under existing rates. *Id.* ¶ ¶ 8, 9.

Apple also claims that Copyright Owners' proposal would lead to a shutdown of one of its services. Specifically, Apple asserts that it would not continue to offer its purchased content locker service if it were subject to Copyright Owners' per-user proposal and that Apple would never offer a paid content locker again if the Copyright Owners' rates were in place. 3/22/17 Tr. 2526 (Dorn).

Copyright Owners argue that the services could ameliorate any disruptive impact from these rates by estimating the number of plays per user, raising rates and/or limiting functionality (*e.g.,* by capping listening). *See* Rysman WRT ¶ 75. However, there is no sufficient evidence in the record that the services could engage in such modifications and estimations in order to offset the draconian rate increases that would result from Copyright Owners' proposal.

Copyright Owners argue that the current status of the interactive streaming market indicates that neither their proposed rate structure nor their proposed higher rates would be disruptive pursuant to Factor D or the Judges' application of that factor. In that regard, Copyright Owners make three points with regard to ongoing market developments:

1. Ongoing entry of new interactive streaming services indicates that the market is healthy and expanding;
2. The entry in particular of large entities with comprehensive product ''ecosysems'' (*i.e.,* Amazon, Apple and Google) specifically demonstrates the opportunity for profitable interactive streaming; and
3. [REDACTED].

4/4/17 Tr. 4647–49 (Eisenach).

I find these three points inapposite with regard to the issue of whether Copyright Owners' proposed rate structure and rate increase would minimize disruption. Simply put, Copyright Owners' proposed changes are not yet in existence, so any evidence of changes that have occurred *previously* cannot reflect the potential impact of Copyright Owners' proposals. Of particular note, Copyright Owners' proposal would eliminate the ''All-In'' feature of the mechanical rate, resulting in the disruption from ''double-counting'' the value of perfect complements that the ''All-In'' feature is designed to avoid.

And again, I return to Copyright Owners' endorsement of the bargaining room theory and their concomitant acknowledgement that they might well engage in bargaining, by which they would agree to lower rates to accommodate different services catering to differing listener segments. That argument at least implicitly acknowledges that Copyright Owners' ''one-size-fits-all'' rate is a misnomer, and that their proposal is designed to handle potential disruptive impacts through negotiation that were not subject to an application of any of the section 801(b)(1) factors.

In sum, even if I had integrated my disruption analysis into my reasonable rate analysis (as opposed to treating it separately), I would have rejected Copyright Owners' rate structure and rate proposal as inconsistent with Factor D.

I also find that Apple's per play rate structure would be disruptive,

essentially for the same reason that Copyright Owners' proposed structure would be disruptive. For example, Apple's proposed per-play rate would increase Spotify's royalty payments on its ad-supported service to [REDACTED]% of revenue, threatening the continuation of that service—the only one to provide a monetarily free service. *See Written Rebuttal Testimony of Paul Vogel (on behalf of Spotify USA Inc.)* ¶ 48. In this regard, the senior director of Apple Music, David Dorn, indicated in colloquy with the Judges, that [REDACTED]. *See* 3/22/17 Tr. 2538 (Dorn) ([REDACTED]). Of course, the ad-supported Spotify service, and the [REDACTED], for example, are designed to [REDACTED], so Apple's proposed rate structure and rates would disincentivize such distribution channels, impeding the ''future'' listener conversion Mr. Dorn anticipates. Moreover, such low WTP listeners on an ad-supported or other free-to-the-listener service generate royalties that would otherwise not be paid. *See Written Rebuttal Testimony of Will Page (On behalf of Spotify USA Inc.)* ¶ 48 ([REDACTED]); *see also* 4/7/17 Tr. 5503 (Marx) ([REDACTED]).

4. Conclusion

For the foregoing reasons, I respectfully dissent.

Issue Date: November 5, 2018.

David R. Strickler,

Copyright Royalty Judge.

List of Subjects in 37 CFR Part 385

Copyright, Phonorecords, Recordings.

Final Regulations

■ For the reasons set forth in the preamble, the Copyright Royalty Judges revise 37 CFR part 385 to read as follows.

PART 385—RATES AND TERMS FOR USE OF NONDRAMATIC MUSICAL WORKS IN THE MAKING AND DISTRIBUTING OF PHYSICAL AND DIGITAL PHONORECORDS

Subpart A—Regulations of General Application

Sec.
385.1 General.
385.2 Definitions.
385.3 Late payments.
385.4 Recordkeeping for promotional or free trial non-royalty-bearing uses.

Subpart B—Physical Phonorecord Deliveries, Permanent Digital Downloads, Ringtones, and Music Bundles

385.10 Scope.
385.11 Royalty rates.

Subpart C—Interactive Streaming, Limited Downloads, Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Locker Services, and Other Delivery Configurations

385.20 Scope.
385.21 Royalty rates and calculations.
385.22 Royalty floors for specific types of offerings.

Subpart D—Promotional and Free-to-the-User Offerings

385.30 Scope.
385.31 Royalty rates.

Authority: 17 U.S.C. 115, 801(b)(1), 804(b)(4).

PART 385—RATES AND TERMS FOR USE OF NONDRAMATIC MUSICAL WORKS IN THE MAKING AND DISTRIBUTING OF PHYSICAL AND DIGITAL PHONORECORDS

Subpart A—Regulations of General Application

§ 385.1 General.

(a) *Scope.* This part establishes rates and terms of royalty payments for the use of nondramatic musical works in making and distributing of physical and digital phonorecords in accordance with the provisions of 17 U.S.C. 115. This subpart contains regulations of general application to the making and distributing of phonorecords subject to the section 115 license.

(b) *Legal compliance.* Licensees relying on the compulsory license detailed in 17 U.S.C. 115 shall comply with the requirements of that section, the rates and terms of this part, and any other applicable regulations. This part describes rates and terms for the compulsory license only.

(c) *Interpretation.* This part is intended only to set rates and terms for situations in which the exclusive rights of a Copyright Owner are implicated and a compulsory license pursuant to 17 U.S.C. 115 is obtained. Neither the part nor the act of obtaining a license under 17 U.S.C. 115 is intended to express or imply any conclusion as to the circumstances in which a user must obtain a compulsory license pursuant to 17 U.S.C. 115.

(d) *Relationship to voluntary agreements.* The rates and terms of any license agreements entered into by Copyright Owners and Licensees relating to use of musical works within the scope of those license agreements shall apply *in lieu* of the rates and terms of this part.

§ 385.2 Definitions.

Accounting Period means the monthly period specified in 17 U.S.C. 115(c)(5) and any related regulations.

Affiliate means an entity controlling, controlled by, or under common control with another entity, except that an affiliate of a record company shall not include a Copyright Owner to the extent it is engaging in business as to musical works.

Bundled Subscription Offering means a Subscription Offering providing Licensed Activity consisting of Streams or Limited Downloads that is made available to End Users with one or more other products or services (including products or services subject to other subparts) as part of a single transaction without pricing for the subscription service providing Licensed Activity separate from the product(s) or service(s) with which it is made available (*e.g.,* a case in which a user can buy a portable device and one-year access to a subscription service providing Licensed Activity for a single price),

Copyright Owner(s) are nondramatic musical works copyright owners who are entitled to royalty payments made under this part pursuant to the compulsory license under 17 U.S.C. 115.

Digital Phonorecord Delivery or *DPD* has the same meaning as in 17 U.S.C. 115(d).

End User means each unique person that:

(1) Pays a subscription fee for an Offering during the relevant Accounting Period; or

(2) Makes at least one Play during the relevant Accounting Period.

Family Plan means a discounted subscription to be shared by two or more family members for a single subscription price.

Free Trial Offering means a subscription to a Service's transmissions of sound recordings embodying musical works when:

(1) Neither the Service, the Record Company, the Copyright Owner, nor any person or entity acting on behalf of or *in lieu* of any of them receives any monetary consideration for the Offering;

(2) The free usage does not exceed 30 consecutive days per subscriber per two-year period;

(3) In connection with the Offering, the Service is operating with appropriate musical license authority and complies with the recordkeeping requirements in § 385.4;

(4) Upon receipt by the Service of written notice from the Copyright Owner or its agent stating in good faith that the Service is in a material manner operating without appropriate license authority from the Copyright Owner under 17 U.S.C. 115, the Service shall within 5 business days cease

transmission of the sound recording embodying that musical work and withdraw it from the repertoire available as part of a Free Trial Offering;

(5) The Free Trial Offering is made available to the End User free of any charge; and

(6) The Service offers the End User periodically during the free usage an opportunity to subscribe to a non-free Offering of the Service.

GAAP means U.S. Generally Accepted Accounting Principles in effect at the relevant time, except that if the U.S. Securities and Exchange Commission permits or requires entities with securities that are publicly traded in the U.S. to employ International Financial Reporting Standards in lieu of Generally Accepted Accounting Principles, then that entity may employ International Financial Reporting Standards as ''GAAP'' for purposes of this subpart.

Interactive Stream means a Stream, where the performance of the sound recording by means of the Stream is not exempt from the sound recording performance royalty under 17 U.S.C. 114(d)(1) and does not in itself, or as a result of a program in which it is included, qualify for statutory licensing under 17 U.S.C. 114(d)(2).

Licensee means any entity availing itself of the compulsory license under 17 U.S.C. 115 to use copyrighted musical works in the making or distributing of physical or digital phonorecords.

Licensed Activity, as the term is used in subpart B of this part, means delivery of musical works, under voluntary or statutory license, *via* physical phonorecords and Digital Phonorecord Deliveries in connection with Permanent Digital Downloads, Ringtones, and Music Bundles; and, as the term is used in subparts C and D of this part, means delivery of musical works, under voluntary or statutory license, *via* Digital Phonorecord Deliveries in connection with Interactive Streams, Limited Downloads, Limited Offerings, mixed Bundles, and Locker Services.

Limited Download means a transmission of a sound recording embodying a musical work to an End User of a digital phonorecord under 17 U.S.C. 115(c)(3)(C) and (D) that results in a Digital Phonorecord Delivery of that sound recording that is only accessible for listening for—

(1) An amount of time not to exceed one month from the time of the transmission (unless the Licensee, *in lieu* of retransmitting the same sound recording as another limited download, separately and upon specific request of the End User made through a live network connection, reauthorizes use for another time period not to exceed one month), or in the case of a subscription plan, a period of time following the end of the applicable subscription no longer than a subscription renewal period or three months, whichever is shorter; or

(2) A number of times not to exceed 12 (unless the Licensee, *in lieu* of retransmitting the same sound recording as another Limited Download, separately and upon specific request of the End User made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.

Limited Offering means a subscription plan providing Interactive Streams or Limited Downloads for which—

(1) An End User cannot choose to listen to a particular sound recording (*i.e.,* the Service does not provide Interactive Streams of individual recordings that are on-demand, and Limited Downloads are rendered only as part of programs rather than as individual recordings that are on-demand); or

(2) The particular sound recordings available to the End User over a period of time are substantially limited relative to Services in the marketplace providing access to a comprehensive catalog of recordings (*e.g.,* a product limited to a particular genre or permitting Interactive Streaming only from a monthly playlist consisting of a limited set of recordings).

Locker Service means an Offering providing digital access to sound recordings of musical works in the form of Interactive Streams, Permanent Digital Downloads, Restricted Downloads or Ringtones where the Service has reasonably determined that the End User has purchased or is otherwise in possession of the subject phonorecords of the applicable sound recording prior to the End User's first request to use the sound recording via the Locker Service. The term Locker Service does not mean any part of a Service's products otherwise meeting this definition, but as to which the Service has not obtained a section 115 license.

Mixed Service Bundle means one or more of Permanent Digital Downloads, Ringtones, Locker Services, or Limited Offerings a Service delivers to End Users together with one or more non-music services (*e.g.,* internet access service, mobile phone service) or non-music products (*e.g.,* a telephone device) of more than token value and provided to users as part of one transaction without pricing for the music services or music products separate from the whole Offering.

Music Bundle means two or more of physical phonorecords, Permanent Digital Downloads or Ringtones delivered as part of one transaction (*e.g.,* download plus ringtone, CD plus downloads). In the case of Music Bundles containing one or more physical phonorecords, the Service must sell the physical phonorecord component of the Music Bundle under a single catalog number, and the musical works embodied in the Digital Phonorecord Delivery configurations in the Music Bundle must be the same as, or a subset of, the musical works embodied in the physical phonorecords; provided that when the Music Bundle contains a set of Digital Phonorecord Deliveries sold by the same Record Company under substantially the same title as the physical phonorecord (*e.g.,* a corresponding digital album), the Service may include in the same bundle up to 5 sound recordings of musical works that are included in the stand-alone version of the set of digital phonorecord deliveries but not included on the physical phonorecord. In addition, the Service must permanently part with possession of the physical phonorecord or phonorecords it sells as part of the Music Bundle. In the case of Music Bundles composed solely of digital phonorecord deliveries, the number of digital phonorecord deliveries in either configuration cannot exceed 20, and the musical works embodied in each configuration in the Music Bundle must be the same as, or a subset of, the musical works embodied in the configuration containing the most musical works.

Offering means a Service's engagement in Licensed Activity covered by subparts C and D of this part.

Paid Locker Service means a Locker Service for which the End User pays a fee to the Service.

Performance Royalty means the license fee payable for the right to perform publicly musical works in any of the forms covered by subparts C and D this part.

Permanent Digital Download or *PDD* means a Digital Phonorecord Delivery in a form that the End User may retain on a permanent basis and replay at any time.

Play means an Interactive Stream, or play of a Limited Download, lasting 30 seconds or more and, if a track lasts in its entirety under 30 seconds, an Interactive Stream or play of a Limited Download of the entire duration of the track. A Play excludes an Interactive Stream or play of a Limited Download

that has not been initiated or requested by a human user. If a single End User plays the same track more than 50 straight times, all plays after play 50 shall be deemed not to have been initiated or requested by a human user.

Promotional Offering means a digital transmission of a sound recording, in the form of an Interactive Stream or Limited Download, embodying a musical work, the primary purpose of which is to promote the sale or other paid use of that sound recording or to promote the artist performing on that sound recording and not to promote or suggest promotion or endorsement of any other good or service and:

(1) A Record Company is lawfully distributing the sound recording through established retail channels or, if the sound recording is not yet released, the Record Company has a good faith intention to lawfully distribute the sound recording or a different version of the sound recording embodying the same musical work;

(2) For Interactive Streaming or Limited Downloads, the Record Company requires a writing signed by an authorized representative of the Service representing that the Service is operating with appropriate musical works license authority and that the Service is in compliance with the recordkeeping requirements of § 385.4;

(3) For Interactive Streaming of segments of sound recordings not exceeding 90 seconds, the Record Company delivers or authorizes delivery of the segments for promotional purposes and neither the Service nor the Record Company creates or uses a segment of a sound recording in violation of 17 U.S.C. 106(2) or 115(a)(2);

(4) The Promotional Offering is made available to an End User free of any charge; and

(5) The Service provides to the End User at the same time as the Promotional Offering stream an opportunity to purchase the sound recording or the Service periodically offers End Users the opportunity to subscribe to a paid Offering of the Service.

Purchased Content Locker Service means a Locker Service made available to End User purchasers of Permanent Digital Downloads, Ringtones, or physical phonorecords at no incremental charge above the otherwise applicable purchase price of the PDDs, Ringtones, or physical phonorecords acquired from a qualifying seller. With a Purchased Content Locker Service, an End User may receive one or more additional phonorecords of the purchased sound recordings of musical works in the form of Permanent Digital Downloads or Ringtones at the time of purchase, or subsequently have digital access to the purchased sound recordings of musical works in the form of Interactive Streams, additional Permanent Digital Downloads, Restricted Downloads, or Ringtones.

(1) A *qualifying seller* for purposes of this definition is the entity operating the Service, including affiliates, predecessors, or successors in interest, or—

(i) In the case of Permanent Digital Downloads or Ringtones, a seller having a legitimate connection to the locker service provider pursuant to one or more written agreements (including that the Purchased Content Locker Service and Permanent Digital Downloads or Ringtones are offered through the same third party); or

(ii) In the case of physical phonorecords:

(A) The seller of the physical phonorecord has an agreement with the Purchased Content Locker Service provider establishing an integrated offer that creates a consumer experience commensurate with having the same Service both sell the physical phonorecord and offer the integrated locker service; or

(B) The Service has an agreement with the entity offering the Purchased Content Locker Service establishing an integrated offer that creates a consumer experience commensurate with having the same Service both sell the physical phonorecord and offer the integrated locker service.

(2) [Reserved]

Record Company means a person or entity that:

(1) Is a copyright owner of a sound recording embodying a musical work;

(2) In the case of a sound recording of a musical work fixed before February 15, 1972, has rights to the sound recording, under the common law or statutes of any State, that are equivalent to the rights of a copyright owner of a sound recording of a musical work under title 17, United States Code;

(3) Is an exclusive Licensee of the rights to reproduce and distribute a sound recording of a musical work; or

(4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of the Copyright Owner of the sound recording.

Relevant Page means an electronic display (for example, a web page or screen) from which a Service's Offering consisting of Streams or Limited Downloads is directly available to End Users, but only when the Offering and content directly relating to the Offering (*e.g.,* an image of the artist, information about the artist or album, reviews, credits, and music player controls) comprises 75% or more of the space on that display, excluding any space occupied by advertising. An Offering is directly available to End Users from a page if End Users can receive sound recordings of musical works (in most cases this will be the page on which the Limited Download or Interactive Stream takes place).

Restricted Download means a Digital Phonorecord Delivery in a form that cannot be retained and replayed on a permanent basis. The term Restricted Download includes a Limited Download.

Ringtone means a phonorecord of a part of a musical work distributed as a Digital Phonorecord Delivery in a format to be made resident on a telecommunications device for use to announce the reception of an incoming telephone call or other communication or message or to alert the receiver to the fact that there is a communication or message.

Service means that entity governed by subparts C and D of this part, which might or might not be the Licensee, that with respect to the section 115 license:

(1) Contracts with or has a direct relationship with End Users or otherwise controls the content made available to End Users;

(2) Is able to report fully on Service Revenue from the provision of musical works embodied in phonorecords to the public, and to the extent applicable, verify Service Revenue through an audit; and

(3) Is able to report fully on its usage of musical works, or procure such reporting and, to the extent applicable, verify usage through an audit.

Service Revenue. (1) Subject to paragraphs (2) through (5) of this definition and subject to GAAP, *Service Revenue* shall mean:

(i) All revenue from End Users recognized by a Service for the provision of any Offering;

(ii) All revenue recognized by a Service by way of sponsorship and commissions as a result of the inclusion of third-party ''in-stream'' or ''in-download'' advertising as part of any Offering, *i.e.,* advertising placed immediately at the start or end of, or during the actual delivery of, a musical work, by way of Interactive Streaming or Limited Downloads; and

(iii) All revenue recognized by the Service, including by way of sponsorship and commissions, as a result of the placement of third-party advertising on a Relevant Page of the

Service or on any page that directly follows a Relevant Page leading up to and including the Limited Download or Interactive Stream of a musical work; provided that, in case more than one Offering is available to End Users from a Relevant Page, any advertising revenue shall be allocated between or among the Services on the basis of the relative amounts of the page they occupy.

(2) Service Revenue shall:

(i) Include revenue recognized by the Service, or by any associate, affiliate, agent, or representative of the Service in lieu of its being recognized by the Service; and

(ii) Include the value of any barter or other nonmonetary consideration; and

(iii) Except as expressly detailed in this part, not be subject to any other deduction or set-off other than refunds to End Users for Offerings that the End Users were unable to use because of technical faults in the Offering or other bona fide refunds or credits issued to End Users in the ordinary course of business.

(3) Service Revenue shall exclude revenue derived by the Service solely in connection with activities other than Offering(s), whereas advertising or sponsorship revenue derived in connection with any Offering(s) shall be treated as provided in paragraphs (2) and (4) of this definition.

(4) For purposes of paragraph (1) of this definition, advertising or sponsorship revenue shall be reduced by the actual cost of obtaining that revenue, not to exceed 15%.

(5) In instances in which a Service provides an Offering to End Users as part of the same transaction with one or more other products or services that are not Licensed Activities, then the revenue from End Users deemed to be recognized by the Service for the Offering for the purpose of paragraph (1) of this definition shall be the lesser of the revenue recognized from End Users for the bundle and the aggregate standalone published prices for End Users for each of the component(s) of the bundle that are Licensed Activities; provided that, if there is no standalone published price for a component of the bundle, then the Service shall use the average standalone published price for End Users for the most closely comparable product or service in the U.S. or, if more than one comparable exists, the average of standalone prices for comparables.

Stream means the digital transmission of a sound recording of a musical work to an End User—

(1) To allow the End User to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction;

(2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction; and

(3) That is subject to licensing as a public performance of the musical work.

Streaming Cache Reproduction means a reproduction of a sound recording embodying a musical work made on a computer or other receiving device by a Service solely for the purpose of permitting an End User who has previously received a Stream of that sound recording to play the sound recording again from local storage on the computer or other device rather than by means of a transmission; provided that the End User is only able to do so while maintaining a live network connection to the Service, and the reproduction is encrypted or otherwise protected consistent with prevailing industry standards to prevent it from being played in any other manner or on any device other than the computer or other device on which it was originally made.

Student Plan means a discounted Subscription to an Offering available on a limited basis to students.

Subscription means an Offering for which End Users are required to pay a fee to have access to the Offering for defined subscription periods of 3 years or less (in contrast to, for example, a service where the basic charge to users is a payment per download or per play), whether the End User makes payment for access to the Offering on a standalone basis or as part of a Bundle with one or more other products or services.

Total Cost of Content or *TCC* means the total amount expensed by a Service or any of its affiliates in accordance with GAAP for rights to make interactive streams or limited downloads of a musical work embodied in a sound recording through the Service for the accounting period, which amount shall equal the applicable consideration for those rights at the time the applicable consideration is properly recognized as an expense under GAAP. As used in this definition, ''applicable consideration'' means anything of value given for the identified rights to undertake the Licensed Activity, including, without limitation, ownership equity, monetary advances, barter or any other monetary and/or nonmonetary consideration, whether that consideration is conveyed via a single agreement, multiple agreements and/or agreements that do not themselves authorize the Licensed Activity but nevertheless provide consideration for the identified rights to undertake the Licensed Activity, and including any value given to an affiliate of a record company for the rights to undertake the Licensed Activity. Value given to a Copyright Owner of musical works that is controlling, controlled by, or under common control with a Record Company for rights to undertake the Licensed Activity shall not be considered value given to the Record Company. Notwithstanding the foregoing, applicable consideration shall not include in-kind promotional consideration given to a Record Company (or affiliate thereof) that is used to promote the sale or paid use of sound recordings embodying musical works or the paid use of music services through which sound recordings embodying musical works are available where the in-kind promotional consideration is given in connection with a use that qualifies for licensing under 17 U.S.C. 115.

§ 385.3 Late payments.

A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment owed to a Copyright Owner and remaining unpaid after the due date established in 17 U.S.C. 115(c)(5) and detailed in part 210 of this title. Late fees shall accrue from the due date until the Copyright Owner receives payment.

§ 385.4 Recordkeeping for promotional or free trial non-royalty-bearing uses.

(a) *General.* A Licensee transmitting a sound recording embodying a musical work subject to section 115 and subparts C and D of this part and claiming a Promotional or Free Trial zero royalty rate shall keep complete and accurate contemporaneous written records of making or authorizing Interactive Streams or Limited Downloads, including the sound recordings and musical works involved, the artists, the release dates of the sound recordings, a brief statement of the promotional activities authorized, the identity of the Offering or Offerings for which the zero-rate is authorized (including the internet address if applicable), and the beginning and end date of each zero rate Offering.

(b) *Retention of records.* A Service claiming zero rates shall maintain the records required by this section for no less time than the Service maintains records of royalty-bearing uses

involving the same types of Offerings in the ordinary course of business, but in no event for fewer than five years from the conclusion of the zero rate Offerings to which they pertain.

(c) *Availability of records.* If a Copyright Owner or agent requests information concerning zero rate Offerings, the Licensee shall respond to the request within an agreed, reasonable time.

Subpart B—Physical Phonorecord Deliveries, Permanent Digital Downloads, Ringtones, and Music Bundles

§ 385.10 Scope.

This subpart establishes rates and terms of royalty payments for making and distributing phonorecords, including by means of Digital Phonorecord Deliveries, in accordance with the provisions of 17 U.S.C. 115.

§ 385.11 Royalty rates.

(a) *Physical phonorecord deliveries and Permanent Digital Downloads.* For every physical phonorecord and Permanent Digital Download the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied in the phonorecord or PDD shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.

(b) *Ringtones.* For every Ringtone the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied therein shall be 24 cents.

(c) *Music Bundles.* For a Music Bundle, the royalty rate for each element of the Music Bundle shall be the rate required under paragraph (a) or (b) of this section, as appropriate.

Subpart C—Interactive Streaming, Limited Downloads, Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Locker Services, and Other Delivery Configurations

§ 385.20 Scope.

This subpart establishes rates and terms of royalty payments for Interactive Streams and Limited Downloads of musical works, and other reproductions or distributions of musical works through Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Paid Locker Services, and Purchased Content Locker Services provided through subscription and nonsubscription digital music Services in accordance with the provisions of 17 U.S.C. 115, exclusive of Offerings subject to subpart D of this part.

§ 385.21 Royalty rates and calculations.

(a) *Applicable royalty.* Licensees that engage in Licensed Activity covered by this subpart pursuant to 17 U.S.C. 115 shall pay royalties therefor that are calculated as provided in this section, subject to the royalty floors for specific types of services described in § 385.22.

(b) *Rate calculation.* Royalty payments for Licensed Activity in this subpart shall be calculated as provided in paragraph (b) of this section. If a Service includes different Offerings, royalties must be calculated separately with respect to each Offering taking into consideration Service Revenue and expenses associated with each Offering.

(1) *Step 1: Calculate the all-In royalty for the Offering.* For each Accounting Period, the all-in royalty shall be the greater of the applicable percent of Service Revenue and the applicable percent of TCC set forth in the following table.

TABLE 1 TO PARAGRAPH (b)(1)—2018–2022 ALL-IN ROYALTY RATES

Royalty year	2018 (%)	2019 (%)	2020 (%)	2021 (%)	2022 (%)
Percent of Revenue	11.4	12.3	13.3	14.2	15.1
Percent of TCC	22.0	23.1	24.1	25.2	26.2

(2) *Step 2: Subtract applicable Performance Royalties.* From the amount determined in step 1 in paragraph (b)(1) of this section, for each Offering of the Service, subtract the total amount of Performance Royalty that the Service has expensed or will expense pursuant to public performance licenses in connection with uses of musical works through that Offering during the Accounting Period that constitute Licensed Activity. Although this amount may be the total of the Service's payments for that Offering for the Accounting Period, it will be less than the total of the Performance Royalties if the Service is also engaging in public performance of musical works that does not constitute Licensed Activity. In the case in which the Service is also engaging in the public performance of musical works that does not constitute Licensed Activity, the amount to be subtracted for Performance Royalties shall be the amount allocable to Licensed Activity uses through the relevant Offering as determined in relation to all uses of musical works for which the Service pays Performance Royalties for the Accounting Period. The Service shall make this allocation on the basis of Plays of musical works or, where per-play information is unavailable because of *bona fide* technical limitations as described in step 3 in paragraph (b)(3) of this section, using the same alternative methodology as provided in step 4 in paragraph (b)(4) of this section.

(3) *Step 3: Determine the payable royalty pool.* The payable royalty pool is the amount payable for the reproduction and distribution of all musical works used by the Service by virtue of its Licensed Activity for a particular Offering during the Accounting Period. This amount is the greater of:

(i) The result determined in step 2 in paragraph (b)(2) of this section; and

(ii) The royalty floor (if any) resulting from the calculations described in § 385.22.

(4) *Step 4: Calculate the per-work royalty allocation.* This is the amount payable for the reproduction and distribution of each musical work used by the Service by virtue of its Licensed Activity through a particular Offering during the Accounting Period. To determine this amount, the Service must allocate the result determined in step 3 in paragraph (b)(3) of this section to each musical work used through the Offering. The allocation shall be accomplished by dividing the payable royalty pool determined in step 3 for the Offering by the total number of Plays of all musical works through the Offering during the Accounting Period (other than Plays subject to subpart D of this part) to yield a per-Play allocation, and multiplying that result by the number of Plays of each musical work (other than Plays subject to subpart D of this part)) through the Offering during the Accounting Period. For purposes of determining the per-work royalty allocation in all calculations under step 4 in this paragraph (b)(4) only (*i.e.,* after the payable royalty pool has been determined), for sound recordings of musical works with a playing time of

over 5 minutes, each Play shall be counted as provided in paragraph (c) of this section. Notwithstanding the foregoing, if the Service is not capable of tracking Play information because of *bona fide* limitations of the available technology for Offerings of that nature or of devices useable with the Offering, the per-work royalty allocation may instead be accomplished in a manner consistent with the methodology used by the Service for making royalty payment allocations for the use of individual sound recordings.

(c) *Overtime adjustment.* For purposes of the calculations in step 4 in paragraph (b)(4) of this section only, for sound recordings of musical works with a playing time of over 5 minutes, adjust the number of Plays as follows.

(1) 5:01 to 6:00 minutes—Each play = 1.2 plays.

(2) 6:01 to 7:00 minutes—Each play = 1.4 plays.

(3) 7:01 to 8:00 minutes—Each play = 1.6 plays.

(4) 8:01 to 9:00 minutes—Each play = 1.8 plays.

(5) 9:01 to 10:00 minutes—Each play = 2.0 plays.

(6) For playing times of greater than 10 minutes, continue to add 0.2 plays for each additional minute or fraction thereof.

(d) *Accounting.* The calculations required by paragraph (b) of this section shall be made in good faith and on the basis of the best knowledge, information, and belief of the Licensee at the time payment is due, and subject to the additional accounting and certification requirements of 17 U.S.C. 115(c)(5) and part 210 of this title. Without limitation, a Licensee's statements of account shall set forth each step of its calculations with sufficient information to allow the Copyright Owner to assess the accuracy and manner in which the Licensee determined the payable royalty pool and per-play allocations (including information sufficient to demonstrate whether and how a royalty floor pursuant to § 385.22 does or does not apply) and, for each Offering the Licensee reports, also indicate the type of Licensed Activity involved and the number of Plays of each musical work (including an indication of any overtime adjustment applied) that is the basis of the per-work royalty allocation being paid.

§ 385.22 Royalty floors for specific types of offerings.

(a) *In general.* The following royalty floors for use in step 3 of § 385.21(b)(3)(ii) shall apply to the respective types of Offerings.

(1) *Standalone non-portable Subscription—streaming only.* Except as provided in paragraph (a)(4) of this section, in the case of a Subscription Offering through which an End User can listen to sound recordings only in the form of Interactive Streams and only from a non-portable device to which those Streams are originally transmitted while the device has a live network connection, the royalty floor is the aggregate amount of 15 cents per subscriber per month.

(2) *Standalone non-portable Subscription—mixed.* Except as provided in paragraph (a)(4) of this section, in the case of a Subscription Offering through which an End User can listen to sound recordings either in the form of Interactive Streams or Limited Downloads but only from a non-portable device to which those Streams or Limited Downloads are originally transmitted, the royalty floor for use in step 3 of § 385.21(b)(3)(ii) is the aggregate amount of 30 cents per subscriber per month.

(3) *Standalone portable Subscription Offering.* Except as provided in paragraph (a)(4) of this section, in the case of a Subscription Offering through which an End User can listen to sound recordings in the form of Interactive Streams or Limited Downloads from a portable device, the royalty floor for use in step 3 of § 385.21(b)(3)(ii) is the aggregate amount of 50 cents per subscriber per month.

(4) *Bundled Subscription Offerings.* In the case of a Bundled Subscription Offering, the royalty floor for use in step 3 of § 385.21(b)(3)(ii) is the royalty floor that would apply to the music component of the bundle if it were offered on a standalone basis for each End User who has made at least one Play of a licensed work during that month (each such End User to be considered an ''active subscriber'').

(b) *Computation of royalty rates.* For purposes of paragraph (a) of this section, to determine the royalty floor, as applicable to any particular Offering, the total number of subscriber-months for the Accounting Period, shall be calculated by taking all End Users who were subscribers for complete calendar months, prorating in the case of End Users who were subscribers for only part of a calendar month, and deducting on a prorated basis for End Users covered by an Offering subject to subpart D of this part, except in the case of a Bundled Subscription Offering, subscriber-months shall be determined with respect to active subscribers as defined in paragraph (a)(4) of this section. The product of the total number of subscriber-months for the Accounting Period and the specified number of cents per subscriber (or active subscriber, as the case may be) shall be used as the subscriber-based component of the royalty floor for the Accounting Period. A Family Plan shall be treated as 1.5 subscribers per month, prorated in the case of a Family Plan Subscription in effect for only part of a calendar month. A Student Plan shall be treated as 0.50 subscribers per month, prorated in the case of a Student Plan End User who subscribed for only part of a calendar month.

Subpart D—Promotional and Free-to-the-User Offerings

§ 385.30 Scope.

This subpart establishes rates and terms of royalty payments for Promotional Offerings, Free Trial Offerings, and Certain Purchased Content Locker Services provided by subscription and nonsubscription digital music Services in accordance with the provisions of 17 U.S.C. 115.

§ 385.31 Royalty rates.

(a) *Promotional Offerings.* For Promotional Offerings of audio-only Interactive Streaming and Limited Downloads of sound recordings embodying musical works that the Record Company authorizes royalty-free to the Service, the royalty rate is zero.

(b) *Free Trial Offerings.* For Free Trial Offerings for which the Service receives no monetary consideration, the royalty rate is zero.

(c) *Certain Purchased Content Locker Services.* For every Purchased Content Locker Service for which the Service receives no monetary consideration, the royalty rate is zero.

(d) *Unauthorized use.* If a Copyright Owner or agent of the Copyright Owner sends written notice to a Licensee stating in good faith that a particular Offering subject to this subpart differs in a material manner from the terms governing that Offering, the Licensee must within 5 business days cease Streaming or otherwise making available that Copyright Owner's musical works and shall withdraw from the identified Offering any End User's access to the subject musical work.

Dated: December 18, 2018.

Suzanne M. Barnett,

Chief Copyright Royalty Judge.

Approved by:

Carla D. Hayden,

Librarian of Congress.

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The President

Executive Order 13858—Strengthening Buy-American Preferences for Infrastructure Projects

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Presidential Documents

Title 3—

The President

Executive Order 13858 of January 31, 2019

Strengthening Buy-American Preferences for Infrastructure Projects

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to strengthen Buy-American principles in Federal financial assistance programs, it is hereby ordered as follows:

Section 1. *Policy.* As expressed in Executive Order 13788 of April 18, 2017 (Buy American and Hire American), it is the policy of the executive branch to maximize, consistent with law, the use of goods, products, and materials produced in the United States, in Federal procurements and through the terms and conditions of Federal financial assistance awards.

Sec. 2. *Definitions.* As used in this order:

(a) ''Produced in the United States'' means, for iron and steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.

(b) ''Federal financial assistance'' shall have the meaning and shall be interpreted consistent with the definition provided by the Office of Management and Budget's Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, found at section 200.40 of title 2, Code of Federal Regulations.

(c) ''Manufactured products'' means items and construction materials composed in whole or in part of non-ferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including optical fiber; and lumber.

(d) ''Infrastructure project'' means a project to develop public or private physical assets that are designed to provide or support services to the general public in the following sectors: surface transportation, including roadways, bridges, railroads, and transit; aviation; ports, including navigational channels; water resources projects; energy production, generation, and storage, including from fossil-fuels, renewable, nuclear, and hydroelectric sources; electricity transmission; gas, oil, and propane storage and transmission; electric, oil, natural gas, and propane distribution systems; broadband internet; pipelines; stormwater and sewer infrastructure; drinking water infrastructure; cybersecurity; and any other sector designated through a notice published in the *Federal Register* by the Federal Permitting Improvement Steering Council.

(e) ''Covered program'' means any program for which a focus of the statutory authorities under which it is administered is the award of Federal financial assistance for the alteration, construction, conversion, demolition, extension, improvement, maintenance, reconstruction, rehabilitation, or repair of an infrastructure project in the United States, except that this term shall not include:

(i) programs for which providing a domestic preference is inconsistent with law; or

(ii) programs providing Federal financial assistance that are subject to comparable domestic preferences.

(f) ''Domestic Preference'' means a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States,

including iron and aluminum as well as steel, cement, and other manufactured products.

Sec. 3. *Application of Buy-American Principles to Covered Programs.* (a) Within 90 days of the date of this order, the head of each executive department and agency (agency) administering a covered program shall, as appropriate and to the extent consistent with law, encourage recipients of new Federal financial assistance awards pursuant to a covered program to use, to the greatest extent practicable, iron and aluminum as well as steel, cement, and other manufactured products produced in the United States in every contract, subcontract, purchase order, or sub-award that is chargeable against such Federal financial assistance award.

(b) The head of each agency administering a covered program shall include in the report required by section 4 of this order a detailed explanation of the strategy, plan, or program developed to satisfy the requirement of subsection (a) of this section.

Sec. 4. *Identification of Opportunities to Maximize the Use of Buy-American Principles.* Within 120 days of the date of this order, the head of each agency administering a covered program shall identify in a report to the President, through the Assistant to the President for Trade and Manufacturing Policy, any tools, techniques, terms, or conditions that have been used or could be used, consistent with law and in furtherance of the policy set forth in section 1 of this order, to maximize the use of iron and aluminum as well as steel, cement, and other manufactured products produced in the United States in contracts, sub-contracts, purchase orders, or sub-awards that are chargeable against Federal financial assistance awards for infrastructure projects. In preparing this report, the agency head shall take care to analyze whether covered programs within the agency head's jurisdiction would support, through terms and conditions on new Federal financial assistance awards under such covered programs, the imposition of a requirement to use iron and aluminum as well as steel, cement, and other manufactured products produced in the United States in contracts, sub-contracts, purchase orders, or sub-awards that are chargeable against such Federal financial assistance awards.

Sec. 5. *Amendment to Executive Order 13788.* Subsection 1(a) of Executive Order 13788 is hereby amended by substituting ''Federal financial assistance'' for ''Federal grants''.

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

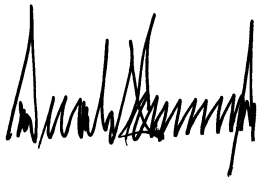
(i) the authority granted by law to an executive department or agency, or the head thereof;

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

(iii) existing rights or obligations under international agreements.

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

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



THE WHITE HOUSE,
January 31, 2019.

[FR Doc. 2019–01426
Filed 2–4–19; 11:15 am]
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