Vanessa A. Countryman,
Secretary.
Issued in Washington, DC, on October 23, 2020, by the Commodity Futures Trading Commission.
Christopher Kirkpatrick,
Secretary of the Commission.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendices to Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—CFTC Voting Summary and Commissioner’s Statement

Appendix 1—CFTC Voting Summary
On this matter, Chairman Tarbert and Commissioners Quintenz, Behnanz, Stump, and Berkovitz voted in the affirmative. No Commissioner voted in the negative.

Appendix 2—Supporting Statement of CFTC Commissioner Brian Quintenz

I am proud to support today’s request for comment, which marks the beginning of the agencies’ consideration of ways to implement a portfolio margining regime for uncleared swaps and non-cleared security-based swaps. Portfolio margining can lead to efficiencies in margin calculation by appropriately accounting for the impact offsetting positions have on a portfolio’s actual risk profile. This, in turn, gives firms and customers additional capital that can be deployed elsewhere.

However, given the differences between the regulatory regimes for swaps and security-based swaps, it also implicates incredibly important legal and policy considerations. This request for comment solicits critical feedback from market participants on how portfolio margining could impact the safety and soundness of firms, result in competitive advantages for certain types of registrants, and raise questions about how collateral would be treated in the event of bankruptcy. In order to make an informed decision about if, and how, portfolio margining should be implemented for uncleared swaps and non-cleared security-based swaps, we need thoughtful feedback on these complex questions. I encourage all interested parties to provide written comments, including data wherever possible, in order to further the agencies’ understanding of the various options presented in the request for comment.

[FR Doc. 2020-23928 Filed 11-4-20; 8:45 am]

I. Background

This SNPRM is issued subsequent to a notification of inquiry published in the Federal Register on September 24, 2019 and a notice of proposed rulemaking (“NPRM”) published on July 17, 2020 relating to implementation of the Music Modernization Act (“MMA”).1 In its NPRM, the Office proposed regulations pertaining to cumulative statements of account, which digital music providers (“DMPs”) are required to provide to the mechanical licensing collective (“MLC”) for such DMPs to be eligible for the statutory limitation on liability for unlicensed uses of musical works prior to the license availability date.2 This SNPRM generally assumes familiarity with the prior NPRM and notification of inquiry, as well as the public comments and summaries of ex parte meetings received in response to those documents, all of which are publicly accessible from the Copyright Office’s website.3

As relevant here, the NPRM considered whether to propose regulations with respect to the ability of DMPs to rely upon estimates and subsequently adjust cumulative statements of account. The SNPRM tentatively declined to propose broad language given the “one-time nature” of cumulative statements of account, but did propose that DMPs could estimate applicable performance royalties, and that “any overpayment (whether resulting from an estimate or otherwise) should be credited to the DMP’s account, or refunded upon request.”4

LIBRARY OF CONGRESS
U.S. Copyright Office
37 CFR Part 210
[Docket No. 2020–12]

Music Modernization Act Transition Period Transfer and Reporting of Royalties to the Mechanical Licensing Collective: Request for Additional Comments

AGENCY: U.S. Copyright Office, Library of Congress.
ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: This supplemental notice of proposed rulemaking (“SNPRM”) updates the Copyright Office’s July 17, 2020 proposed rule concerning the Music Modernization Act transition period transfer and reporting of royalties to the mechanical licensing collective. Specifically, this SNPRM provides an alternate approach to requirements concerning the content of cumulative statements of account to be submitted by digital music providers to the mechanical licensing collective at the conclusion of the statutory transition period and proposes estimate and adjustment provisions with respect to payment of accrued royalties to the mechanical licensing collective in connection with this reporting.

DATES: Written comments must be received no later than 11:59 p.m. Eastern Time on November 25, 2020.

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/mma-transition-reporting. 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:
Ragan A. Smith, General Counsel and Associate Register of Copyrights, by email at regans@copyright.gov; John R. Riley, Assistant General Counsel, by email at jri@copyright.gov; or Jason E. Sloan, Assistant General Counsel, by email at jslo@copyright.gov. Each can be contacted by telephone by calling (202) 707–8350.

SUPPLEMENTARY INFORMATION:
The NPRM also considered comments from the Digital Licensee Coordinator ("DLC") asking for regulatory language to clarify the relationship between this reporting obligation and pre-existing private agreements between a large number of music publishers and certain digital services that the DLC characterized as providing for the liquidation of accrued royalties for unmatched works through payments based on market share to publishers signing releases.5 At the time, the Office tentatively declined to propose regulatory language. Instead, the Office provided initial guidance regarding the statutory obligation to transfer and report information related to accrued royalties for unlicensed uses under the MMA and noted that it remained available to dialogue further.6

In response to a request from the MLC, the NPRM also proposed expanding the present cumulative statement of account regulations, which require providing “all of the information that would have been provided to the copyright owner had the digital music provider been serving Monthly Statements of Account,”7 “to requirements for reporting information that would ‘largely mirror the requirements proposed for reports of usage.’”8 While the DLC initially contended that such a proposal was “impractical,”9 it now describes such a requirement as “impossible” given the business practicalities of how this information was or was not compiled and stored over time.10 Similarly, the Digital Media Association (“DiMA”) stated that the NPRM’s expanded reporting requirements would create “massive operational hurdles” and would “jeopardize [every DMP’s]

5 Id. at 43522–23; see also DLC Ex Parte Letter at 1 (Aug. 11, 2020); NMPA Ex Parte Letter at 5 (Aug. 25, 2020).
6 85 FR at 43523 (noting that because “voluntary licenses” “remain in effect by law,” “by implication, DMPs would not retain accrued royalties (as defined in the MMA) for works licensed under private agreements”).
8 85 FR at 43519.
9 DLC Reply Comment at 24.
10 DLC NPRM Comment at 2, 8–9 (explaining that some of the additional information was not collected by DMPs in the past and cannot be collected in time to include in cumulative statements of account); DLC Ex Parte Letter at 2 (Aug. 11, 2020) (“[S]ervices have been compiling reporting under the regulatory regime that the Office put in place shortly after the enactment of the MMA. We explained the impossibility—merely months before license availability date—of completely revamping royalty accounting systems to accommodate the Office’s new proposed rules.”).

eligibility for the limitation on liability.”11

II. Supplemental Proposed Regulatory Provisions

As discussed further below, while the Copyright Office continues to consider the proposed rule described in the NPRM, it is now also providing alternative regulatory language for public comment. As with other MMA rulemakings to date, the Office has received robust engagement from interested parties in this proceeding, as reflected in the administrative record.12 Since issuing its NPRM, the Office has reviewed many written comments and conducted several ex parte meetings with various parties on these matters, which have further informed its thinking.13 In addition, the D.C. Circuit partially vacated and remanded the Copyright Royalty Judges’ “Phonorecors III” determination, which was intended to set rates and terms for the section 115 mechanical license for the period from January 1, 2018 through December 31, 2022, which provides an additional ground for the Office to establish a mechanism for DMPs to estimate the amount of royalties due and subsequently adjust payments (since the ultimate rates for this time period have not yet been finalized).

The Office also received guidance from Senate Judiciary Chairman Graham regarding the issue of certain industry agreements between publishers and DMPs that predate the MMA’s enactment and required the payment of unmatched accrued royalties to

11 DiMA NPRM Comment at 6–7 (“digital music providers have maintained usage information . . . with the existing statement of account regulations in mind”).
12 See 85 FR at 43523 (“The Office . . . remains available to dialogue further, in accordance with the public process for written comments and/or ex parte meetings.”); 84 FR at 49968 [noting that the Office is willing to “utilize informal meetings to gather additional information . . . [and would establish] guidelines for ex parte communications” to be issued on its website].

14 Johnson v. Copyright Royalty Bd., 969 F.3d 363, 381 (D.C. Cir. 2020).

copyright owners by market share, stating:

Since the intent of the MMA was to provide legal certainty for past, present, and future usage, it is critical that this issue be resolved in a manner that protects copyright owner interests while ensuring that songwriters are paid their splits and services are not burdened with double payments. . . . If the parties are unable to address this current dispute on their own in the immediate future, I urge the Copyright Office to bring them together in order to prevent a return to the inefficient litigation that featured prominently in the prior licensing regime.15

Since receiving the letter, the Office understands that the parties have continued to communicate on other aspects of the proposed rule, but have not on their own resolved their disagreement over the proper interpretation of the relevant statutory provisions.

Indeed, subsequent information provided to the Office in this proceeding confirms that the underlying dispute remains. Specifically, the DLC has clarified that its reference to prior negotiated agreements centers around agreements between four specific DMPs and the National Music Publishers’ Association (“NMPA”) and (subsequent agreements with participating publishers), and both the DLC and individual DMPs have provided additional views regarding those agreements.16 The Office also heard from multiple songwriter groups, all of which stressed the importance of royalties for uses of works being paid over by DMPs in a manner that results in payments to songwriters, and expressed uncertainty over whether payments under such agreements had indeed been passed through to songwriters.17 The MLC confirmed that it believes its role to be a “trusted party to receive unmatched royalties and ensure that they are paid to the right parties, with interest (for the period that

15 Letter from Senator Lindsey O. Graham, Chairman, Senate Committee on the Judiciary, to U.S. Copyright Office (Sept. 30, 2020).
the MLC held such royalties].” The MLC also offered its view that the proper statutory read would require DMPs to transfer payment for all unmatched uses, regardless of whether a valid agreement previously resulted in the liquidation of a portion of associated royalties or whether there have been related voluntary releases. The Office has also heard from the NMPA as well as individual publishers on this issue, with the NMPA urging the Office to avoid a regulation that might interfere with private agreements. While publisher perspectives varied, significantly, some noted that they consider claims settled pursuant to these agreements to be closed, and to date, all publishers the Office has heard from confirmed that their associated songwriters have already participated in unclaimed royalties received by those publishers pursuant to the agreements at issue. Overall, the comments, in particular as between the MLC on the one hand, and the DLC or individual services, on the other, reveal competing statutory interpretations regarding the provision requiring DMPs to transfer over accrued royalties that have been maintained in accordance with generally accepted accounting principles.

For its part, the Office is carefully analyzing the statutory text and will give appropriate weight to the legislative history and consideration of these public comments when promulgating a final rule. At this point, however, the Office has determined that the public process would benefit from providing supplemental, alternative regulatory language, to ensure that further stakeholder views can be duly considered as the Office evaluates these important issues. Although the Office has not made any final conclusions on these matters, this SNPRM is being issued so that interested parties have adequate notice and an opportunity to comment specifically on these potential alternatives sufficiently in advance of the February 2021 deadline to submit cumulative statements of account to the MLC.

While the NPRM outlined in detail several considerations with respect to these and other issues, and while the Office continues to seriously consider the insightful comments it has received to date, in light of those comments, Chairman Graham’s letter, and the Phonorecords III remand, the Office now provides regulatory language regarding the following topics.

This regulatory language is largely additive to the language proposed in the NPRM, and also includes potential substitutes for certain provisions included in the NPRM. Interested commenters may wish to review that earlier NPRM and the public comments received to date offering varying perspectives on factual and legal issues underlying this proposal.

Estimates and adjustments, including previously released claims. The Office is providing proposed provisions that would allow DMPs to rely upon certain estimates and subsequently submit adjustments to cumulative statements of account where the computation of accrued royalties depends upon an input that is unable to be finally determined at the time the cumulative statement of account is due.

One set of estimate and adjustment provisions would address situations where a DMP cannot calculate a necessary input in a royalty calculation (e.g., performance royalties, sound recording-related consideration) or needs to make a future adjustment under other specified circumstances (e.g., in response to a change in the statutory royalty rates or terms). Statements of adjustment adjusting cumulative statements of account to the MLC because of the unmatched status of statement of account is delivered to the MLC, and also includes potential substitutes for certain provisions included in the NPRM. Interested commenters may wish to review that earlier NPRM and the public comments received to date offering varying perspectives on factual and legal issues underlying this proposal.

Related provisions would address situations where a DMP has accrued and maintained royalties in reasonable good-faith belief as to the impact of negotiated agreements upon the computation of accrued royalties required to be transferred to the MLC and it is necessary to estimate such amount at the time the cumulative statement of account is delivered to the MLC because of the unmatched status of the relevant musical works. They would clarify that the statutory obligation to maintain accrued royalties in accordance with generally accepted accounting principles includes maintenance in accordance with such principles concerning derecognition of liabilities. They would accordingly accommodate situations where a DMP has made good-faith estimates where the DMP has used unmatched works in covered activities prior to the license availability date and the DMP has determined that accrued liability for an amount of otherwise attributable royalties has been extinguished due to negotiated agreements (whether considered a voluntary agreement, liquidation agreement, settlement, or release, etc.) executed on a catalog or participating party basis, rather than a matched-work basis. In such a circumstance, the DMP could report based upon its good-faith estimate of accrued royalties for unmatched uses when reporting to the MLC, and would be required to make an adjustment to retain the limitation on liability if that estimate ends up being incorrect. Under no circumstances could this provision be used to shortchange payment of accrued royalties for musical work copyright owners who did not

22 See Accounting Standards Codification 405–20–40–1 (stating a debtor “shall derecognize a liability if and only if it has been extinguished. A liability has been extinguished if either of the following conditions is met: a. the debtor pays the creditor and is relieved of its obligation for the liability, or b. The debtor is legally released from being the primary obligor under the liability, either judicially or by the creditor.”); see also Black’s Law Dictionary (11th ed. 2019) (defining “accredited liability” as “[a] debt or obligation that is properly chargeable in a given accounting period but that is not yet paid”).

23 Again, it has been represented to the Office that for certain DMPs, for certain periods of time, the overwhelming majority of the music publishing industry participated in such agreements and has settled relevant claims for those periods. This proposed mechanism is intended to allow DMPs who believe that these agreements impact the calculation of their accrued royalties to transfer over their reasonable estimation of accrued royalties remaining, including royalties accrued for non-participating publishers during the relevant periods, subject to a later true-up to maintain eligibility for the limitation on liability. In this regard and without opinion as to the substance of these private agreements, the proposal is intended to further congressional intent to “protect[] copyright owner interests without burdening services with “double payment” and incentivizing inefficient litigation. Letter from Senator Lindsey O. Graham, Chairman, Senate Committee on the Judiciary, to U.S. Copyright Office 1 (Sept. 30, 2020).
participate in such agreements. A DMP relying upon such an estimate would be required to provide a list of such agreements to the MLC to use in connection with matching against musical work information provided by copyright owners and to provide an avenue for copyright owners to dispute the fact or effect of such agreements. As the DLC has requested, the proposal includes a requirement for such a DMP to cover any deficit through prompt payment of an invoice issued by the MLC. Under the proposed rule, unremediable or bad-faith withholding of accrued royalties by a DMP may result in loss of the limitation on liability.

Sound Recording and Musical Work Information and Format. In addition to continuing to consider the requirements proposed in the NPRM, the Copyright Office is now considering whether to instead potentially adopt language closer to existing regulations for reporting sound recording and musical work information, to reflect the DLC’s reporting sound recording and musical work information provided by copyright owners to institute court action). Additionally, MediaNet recently voiced its concern with being able to report its pre-2013 royalty and usage data in cumulative statements of account, stating that such data is not in its possession and may not have been maintained by its former vendors.30 Noting that it is one of the oldest digital services, it asked for a regulatory exemption to address these concerns.31 Given the timing of MediaNet’s request, the Office is not proposing its own regulatory language, but requests comments on MediaNet’s proposal.

The SNPRM also proposes imposing a records of use provision on DMPs, and allowing the MLC and a DMP flexibility to agree to alter non-substantive procedures, for example reporting formats, provided that any such alteration does not materially prejudice copyright owners owed royalties required to be transferred to the MLC or for the DMP’s eligibility for the 17 U.S.C. 115(d)(10) limitation on liability. The SNPRM further proposes a modified version of the provision concerning partially matched works. In addition, at the DLC’s request, the SNPRM proposes that if a DMP is unable to report cumulative statements of account the MLC’s preferred

III. Additional Comments and Timing

While the Copyright Office is interested in comments regarding the above issues, it welcomes public comment on all aspects of the NPRM and submitted comments, including comments contained in ex parte meeting summary letters. In light of the statutory deadline related to the submission of cumulative statements of account, the Office is providing twenty days’ notice for comment on this issue, and will continue to be available for ex parte meetings with attendant disclosures concurrently with the comment submission period.

List of Subjects in 37 CFR Part 210

Copyright, Phonorecords, Recordings.

Proposed Regulations

For the reasons set forth in the preamble, the Copyright Office proposes amending 37 CFR part 210 as follows:

PART 210—COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHYSICAL AND DIGITAL PHONORECORDS OF NONDRAMATIC MUSICAL WORKS

1. The authority citation for part 210 continues to read as follows:


2. Amend § 210.2 by revising paragraph (k) and removing paragraphs (l) through (o) to read as follows:

§ 210.2 Definitions.

* * * * *

(k) Any terms not otherwise defined in this section shall have the meanings set forth in 17 U.S.C. 115(e).

3. Amend § 210.10 by revising paragraphs (b) introductory text, (b)(1), (b)(2) introductory text, and (b)(3)(i) and
§ 210.10  Statements required for limitation on liability for digital music providers for the transition period prior to the license availability date.  

(a) If the copyright owner is not identified or located by the end of the calendar month in which the digital music provider first makes use of the work, the digital music provider shall accrue and hold royalties calculated under the applicable statutory rate in accordance with the usage of the work, from initial use of the work until the accrued royalties can be paid to the copyright owner or are required to be transferred to the mechanical licensing collective, as follows:  

(1) Accrued royalties shall be maintained by the digital music provider in accordance with generally accepted accounting principles, including those concerning derecognition of liabilities. Accrued royalties can cease being accrued if the copyright owner is not identified or located, whereby the digital music provider is legally released from the liability by the relevant creditor copyright owner.  

(2) If a copyright owner of an unmatched musical work (or share thereof) is not identified and located by or to the digital music provider before the license availability date, the digital music provider shall, unless a voluntary license or other agreement entered into prior to the time period specified in paragraph (b)(2)(i) of this section applies to such musical work (or share thereof)—

* * * * *

(b) If the copyright owner is not identified or located by the end of the calendar month in which the digital music provider first makes use of the work, the digital music provider shall accrue and hold royalties calculated under the applicable statutory rate in accordance with usage of the work, from initial use of the work until the accrued royalties can be paid to the copyright owner or are required to be transferred to the mechanical licensing collective, as follows:

(1) The period (months and years) covered by the cumulative statement of account.

(2) The full legal name of the digital music provider and, if different, the trade or consumer-facing brand name(s) of the service(s), including any specific offering(s), through which the digital music provider engages, or has engaged at any time during the period identified in paragraph (c)(1) of this section, in covered activities. If the digital music provider has a unique DDEX identifier number, it must also be provided.

(3) The full address, including a specific number and street name or rural route, of the place of business of the digital music provider. A post office box or similar designation will not be sufficient except where it is the only address that can be used in that geographic location.

(4) For each sound recording embodying a musical work that is used by the digital music provider in covered activities during the period identified in paragraph (c)(1) of this section and for which a copyright owner of such musical work (or share thereof) is not identified and located by the license availability date, a detailed cumulative statement, from which the mechanical licensing collective may separate and match the covered activities. If the digital music provider fails to report such information for each month and year for each applicable activity or offering including as may be defined in paragraph 385 of this title, of all of:

(i) The royalty payment and accounting information required by paragraph (d) of this section; and

(ii) The sound recording and musical work information required by paragraph (e) of this section.

(5) The total accrued royalty payable by the digital music provider for the period identified in paragraph (c)(1) of this section, computed in accordance with the requirements of this section and part 385 of this title, and including detailed information regarding how the royalty was computed, with such total accrued royalty payable broken down by month and year and by each applicable activity or offering including as may be defined in part 385 of this title.

(i) Where a digital music provider has a reasonable good-faith belief that the total accrued royalties payable are less than the total of the amounts reported under paragraph (c)(4)(i) of this section and the precise amount of such accrued royalties cannot be calculated at the time the cumulative statement of account is delivered to the mechanical licensing collective because of the unmatched status of relevant musical works embodied in sound recordings reported under paragraph (c)(4)(ii) of this section, a reasonable estimate of the total accrued royalties may be reported and transferred, determined in accordance with GAAP and broken down by month and year and by each applicable activity or offering including as may be defined in part 385 of this title. Any such estimate shall be made in good faith and on the basis of the best knowledge, information, and belief of the digital music provider at the time the cumulative statement of account is delivered to the mechanical licensing collective, and subject to any additional accounting and certification requirements under 17 U.S.C. 115 and this section. In no case shall the failure to match a musical work by the license availability date be construed as prohibiting or limiting a digital music provider’s entitlement to use such an estimate if the digital music provider has satisfied its obligations under 17 U.S.C. 115(d)(10)(B) to engage in required matching efforts.

(ii) A digital music provider reporting and transferring estimated accrued royalties must provide a description of any voluntary license or other agreement containing an appropriate release of royalty claims relied upon by the digital music provider in making its estimation that is sufficient for the mechanical licensing collective to engage in efforts to confirm uses of musical works subject to any such agreement. Such description shall be sufficient if it includes at least the following information:

(A) An identification of each of the digital music provider's services, including by reference to any applicable types of activities or offerings that may be defined in part 385 of this title, relevant to any such agreement. If such an agreement pertains to all of the digital music provider's applicable services, it may state so without identifying each service.

(B) The start and end dates of each covered period of time.

(C) Each applicable musical work identified by name and any known and appropriate unique identifiers, and appropriate contact information for each such musical work.

(3) Not later than 45 calendar days after the license availability date, transfer accrued royalties to the mechanical licensing collective (as required by paragraph (j)(2) of this section), such payment to be reported if the copyright owner is identified or located by the end of the calendar month in which the digital music provider first makes use of the work, the digital music provider shall accrue and hold royalties calculated under the applicable statutory rate in accordance with usage of the work, from initial use of the work until the accrued royalties can be paid to the copyright owner or are required to be transferred to the mechanical licensing collective, as follows:

(3) The year and month of the license availability date, the digital music provider shall, unless a voluntary license or other relevant agreement entered into prior to the time period identified in paragraph (b)(2)(i) of this section applies to such musical work (or share thereof)—

* * * * *

(4) For each sound recording embodying a musical work that is used by the digital music provider in covered activities during the period identified in paragraph (c)(1) of this section and for which a copyright owner of such musical work (or share thereof) is not identified and located by the license availability date, the digital music provider shall, unless a voluntary license or other agreement entered into prior to the time period identified in paragraph (b)(2)(i) of this section applies to such musical work (or share thereof)—

* * * * *

(3) Not later than 45 calendar days after the license availability date, transfer accrued royalties to the mechanical licensing collective (as required by paragraph (j)(2) of this section), such payment to be reported if the copyright owner is identified or located by the end of the calendar month in which the digital music provider first makes use of the work, the digital music provider shall, unless a voluntary license or other relevant agreement entered into prior to the time period identified in paragraph (b)(2)(i) of this section applies to such musical work (or share thereof)—

* * * * *

(4) For each sound recording embodying a musical work that is used by the digital music provider in covered activities during the period identified in paragraph (c)(1) of this section and for which a copyright owner of such musical work (or share thereof) is not identified and located by the license availability date, the digital music provider shall, unless a voluntary license or other relevant agreement entered into prior to the time period identified in paragraph (b)(2)(i) of this section applies to such musical work (or share thereof)—

* * * * *

(5) The total accrued royalty payable by the digital music provider for the period identified in paragraph (c)(1) of this section, computed in accordance with the requirements of this section and part 385 of this title, and including detailed information regarding how the royalty was computed, with such total accrued royalty payable broken down by month and year and by each applicable activity or offering including as may be defined in part 385 of this title.

(i) Where a digital music provider has a reasonable good-faith belief that the total accrued royalties payable are less than the total of the amounts reported under paragraph (c)(4)(i) of this section and the precise amount of such accrued royalties cannot be calculated at the time the cumulative statement of account is delivered to the mechanical licensing collective because of the unmatched status of relevant musical works embodied in sound recordings reported under paragraph (c)(4)(ii) of this section, a reasonable estimate of the total accrued royalties may be reported and transferred, determined in accordance with GAAP and broken down by month and year and by each applicable activity or offering including as may be defined in part 385 of this title. Any such estimate shall be made in good faith and on the basis of the best knowledge, information, and belief of the digital music provider at the time the cumulative statement of account is delivered to the mechanical licensing collective, and subject to any additional accounting and certification requirements under 17 U.S.C. 115 and this section. In no case shall the failure to match a musical work by the license availability date be construed as prohibiting or limiting a digital music provider’s entitlement to use such an estimate if the digital music provider has satisfied its obligations under 17 U.S.C. 115(d)(10)(B) to engage in required matching efforts.

(ii) A digital music provider reporting and transferring estimated accrued royalties must provide a description of any voluntary license or other agreement containing an appropriate release of royalty claims relied upon by the digital music provider in making its estimation that is sufficient for the mechanical licensing collective to engage in efforts to confirm uses of musical works subject to any such agreement. Such description shall be sufficient if it includes at least the following information:

(A) An identification of each of the digital music provider’s services, including by reference to any applicable types of activities or offerings that may be defined in part 385 of this title, relevant to any such agreement. If such an agreement pertains to all of the digital music provider’s applicable services, it may state so without identifying each service.

(B) The start and end dates of each covered period of time.

(C) Each applicable musical work identified by name and any known and appropriate unique identifiers, and appropriate contact information for each such musical work.
collective shall notify the relevant
(whether in whole or in part). If
additional amounts are owed
licensing collective that it is disputing
later than 14 business days after receipt
of such notice, the digital music
transfer) and the basis for the
115(d)(3)(H)(ii) from the original date of
been held by the mechanical licensing
mechanical licensing collective shall
delivery of an invoice and/or response file
mechanical licensing collective is
to the relevant copyright owner(s) or
this section, if the amount transferred to
appropriately relied upon the
the digital music provider has
agreement, including during the
pendency of a dispute between a digital
music provider and copyright owner
over the digital music provider’s
reliance on an identified agreement.
During the pendency of such a dispute,
the mechanical licensing collective shall
not make a corresponding distribution
to the relevant copyright owner(s) or
the amount at issue as an
overpayment unless it is directed to do
so pursuant to the mutual agreement of
the relevant parties or by order of an
adjudicative body with appropriate
authority.
(iv) Subject to paragraph (c)(5)(iii) of
this section, if the amount transferred to
the mechanical licensing collective is
insufficient to cover any required
distributions to copyright owners, the
mechanical licensing collective shall
deliver an invoice and/or response file
to the digital music provider consistent
with paragraph (h) of this section that
includes the amount outstanding (which
shall include the interest that would
have accrued on such amount had it
been held by the mechanical licensing
collective pursuant to 17 U.S.C.
115(d)(3)(II)(ii) from the original date of
transfer) and the basis for the
mechanical licensing collective’s
conclusion that such amount is due. No
later than 14 business days after receipt
of such notice, the digital music
provider must either pay the invoiced
amount or notify the mechanical
licensing collective that it is disputing
that additional amounts are owed
(whether in whole or in part). If
disputed, the mechanical licensing
collective shall notify the relevant
copyright owner(s) and shall act in
accordance with paragraph (c)(5)(iii) of
this section. In the event a digital music
provider is found by an adjudicative
body with appropriate authority to have
erroneously, but not unreasonably or in
bad faith, withheld accrued royalties,
the digital music provider may remain
in compliance with this section for
purposes of retaining its limitation on
liability if the digital music provider has
otherwise satisfied the requirements for
the limitation on liability described in
17 U.S.C. 115(d)(10) and if the
additional amount due is paid in
accordance with a relevant order.
(v) Any overpayment of royalties
based upon an estimate permitted by
paragraph (c)(5)(i) of this section shall be
handled in accordance with
paragraph (k)(5) of this section.
(vi) Any underpayment of royalties
shall be remedied by a digital music
provider without regard for the adjusted
statute of limitations described in 17
estimate permitted by either paragraph
(c)(5)(i) or (d)(2) of this section, a digital
music provider agrees to waive any
statute-of-limitations-based defenses
with respect to any asserted
underpayment of royalties connected to
the use of such an estimate.
(6) If the total accrued royalty
reported under paragraph (c)(5) of
this section does not reconcile with the
royalties actually transferred to the
mechanical licensing collective, or if the
royalties reported include use of an
estimate as permitted under paragraph
(c)(5)(i) of this section, a clear and
detailed explanation of the difference
and the basis for it.
(d) The royalty payment and
accounting information called for by
paragraph (c)(4)(i) of this section shall
consist of the following:
(1) A detailed and step-by-step
accounting of the calculation of
attributable royalties under applicable
provisions of this section and part 385
of this title, sufficient to allow the
mechanical licensing collective to assess
the manner in which the digital music
provider determined the royalty and the
accuracy of the royalty calculations,
including but not limited to the number
of payable units, including, as
applicable, permanent downloads,
plays, and constructive plays, for each
reported sound recording.
(2) Where computation of the
attributable royalties depends on an
input that is unable to be finally
determined at the time the cumulative
statement of account is delivered to the
mechanical licensing collective and
where the reason the input cannot be
finally determined is outside of the
digital music provider’s control (e.g., the
amount of applicable public
performance royalties and the amount of
applicable consideration for sound
recording copyright rights), a reasonable
estimation of such input, determined in
accordance with GAAP, may be used or
provided by the digital music provider.
Royalty payments based on such
estimates shall be adjusted pursuant to
paragraph (k) of this section after being
finally determined. A cumulative
statement of account containing an
estimate permitted by this paragraph
(c)(2) should identify each input that
has been estimated, and provide the
reason(s) why such input(s) needed to be
estimated and an explanation as to the
basis for the estimate(s).
(3) All information and calculations
provided pursuant to paragraph (d) of
this section shall be made in good faith
and on the basis of the best knowledge,
information, and belief of the digital
music provider at the time the
cumulative statement of account is
delivered to the mechanical licensing
collective, and subject to any additional
accounting and certification
requirements under 17 U.S.C. 115 and
this section.
(e)(1) The following information must
be provided for each sound recording
embodying a musical work required to
be reported under paragraph (c)(4)(ii) of
this section:
(i) The information referenced in
§ 210.6(c)(3) that would have been
provided to the copyright owner had the
digital music provider been serving
Monthly Statements of Account as a
compulsory licensee in accordance with
this subpart on the copyright owner
from initial use of the work.
(ii) Any additional information
requested in writing by the mechanical
licensing collective that either is
referred to in 17 U.S.C.
115(d)(10)(B)(i)(I)(aa) or (bb) and that
was acquired by the digital music
provider in connection with its efforts to
obtain such information under 17 U.S.C.
115(d)(10)(B)(i)(I), or, if available, is a
unique identifier assigned by the digital
music provider to a reported sound
recording. The digital music provider
must respond to such a request within
a reasonable period of time and may
deliver any such requested
supplemental information to the
mechanical licensing collective outside of
its cumulative statement of account
in a commercially reasonable manner of
the digital music provider’s choosing.
Providing such supplemental
information shall not be construed as an
adjustment to a cumulative statement of
account under paragraph (k) of this
section.
(2) For each track for which a share of a musical work has been matched and for which accrued royalties for such share have been paid, but for which one or more shares of the musical work remains unmatched and unpaid, the digital music provider must provide a clear identification of the total aggregate percentage share that has been matched and paid and the owner(s) of the aggregate matched and paid share (including any unique party identifiers for such owner(s) that are known by the digital music provider), provided that, in the event such information is maintained by a third-party vendor, that information is made available to the digital music provider on commercially reasonable terms.

(f) The information required by paragraphs (c), (d), (e), and (k) of this section requires intelligible, legible, and unambiguous statements in the cumulative statements of account, without incorporation of facts or information contained in other documents or records.

(g) References to part 385 of this title, as used in paragraphs (c), (d), and (k) of this section, refer to the rates and terms of royalty payments as in effect as to each particular reported use based on when the use occurred.

(h) If requested by a digital music provider, the mechanical licensing collective shall deliver an invoice and/or a response file to the digital music provider within a reasonable period of time after the cumulative statement of account and related royalties are received. The response file shall contain such information as is common in the industry to be reported in response files, backup files, and any other similar such files provided to digital music providers by applicable third-party administrators.

(i) (1) To the extent practicable, each cumulative statement of account delivered to the mechanical licensing collective under paragraph (b)(3)(i) of this section shall be compatible with the information technology systems of the mechanical licensing collective as reasonably determined by the mechanical licensing collective and set forth on its website, taking into consideration relevant industry standards and the potential for different degrees of sophistication among digital music providers. The mechanical licensing collective must offer at least two options, where one is dedicated to smaller digital music providers that may not be reasonably capable of complying with the requirements of a reporting or data standard or format that the mechanical licensing collective may see fit to adopt for larger digital music providers with more sophisticated operations. Nothing in this section shall be construed as prohibiting the mechanical licensing collective from adopting more than two reporting or data standards or formats. If it is not practicable for a digital music provider to deliver its cumulative statement of account in a flat-file or other machine-readable format (e.g., Excel, comma-separated values (CSV)) to the extent such digital music provider’s applicable data exists in such a format.

(2) To the extent practicable, royalty payments shall be delivered to the mechanical licensing collective in such manner and form as the mechanical licensing collective may reasonably determine and set forth on its website. A cumulative statement of account and its related royalty payment may be delivered together or separately, but if delivered separately, the payment must include information reasonably sufficient to allow the mechanical licensing collective to match the cumulative statement of account to the payment.

(j) Each cumulative statement of account delivered to the mechanical licensing collective under paragraph (b)(3)(i) of this section shall be accompanied by:

(1) The name of the person who is signing and certifying the cumulative statement of account.

(2) A signature, which in the case of a digital music provider that is a corporation or partnership, shall be the signature of a duly authorized officer of the corporation or of a partner.

(3) The date of signature and certification.

(4) If the digital music provider is a corporation or partnership, the title or official position held in the partnership or corporation by the person who is signing and certifying the cumulative statement of account.

(5) One of the following statements:

(i) Statement one:

I certify that (1) I am duly authorized to sign this cumulative statement of account on behalf of the digital music provider, (2) I have examined this cumulative statement of account, and (3) all statements of fact contained herein are true, complete, and correct to the best of my knowledge, information, and belief, and are made in good faith.

(ii) Statement two:

I certify that (1) I am duly authorized to sign this cumulative statement of account on behalf of the digital music provider, (2) I have prepared or supervised the preparation of the data used by the digital music provider and/or its agent to generate this cumulative statement of account, (3) such data is true, complete, and correct to the best of my knowledge, information, and belief, and was prepared in good faith, and (4) this cumulative statement of account was prepared by the digital music provider and/or its agent using processes and internal controls that were subject to an examination, during the past year, by a licensed certified public accountant in accordance with the attestation standards established by the American Institute of Certified Public Accountants, the opinion of whom was that the processes and internal controls were suitably designed to generate monthly statements that accurately reflect, in all material respects, the digital music provider’s usage of musical works, the statutory royalties applicable thereto, and any other data that is necessary for the proper calculation of the statutory royalties in accordance with 17 U.S.C. 115 and applicable regulations.

(k) A certification by a duly authorized officer of the digital music provider that the digital music provider has fulfilled the requirements of 17 U.S.C. 115(d)(10)(B)(i) and (ii) but has not been successful in locating or identifying the copyright owner.

(1) A digital music provider may adjust its previously delivered cumulative statement of account, including related royalty payments, by delivering to the mechanical licensing collective a statement of adjustment.

(2) A statement of adjustment shall be clearly and prominently identified as a “Statement of Adjustment of a Cumulative Statement of Account.”

(3) A statement of adjustment shall include a clear statement of the following information:

(i) The previously delivered cumulative statement of account, including related royalty payments, to which the adjustment applies.

(ii) The specific change(s) to the previously delivered cumulative statement of account, including a detailed description of any changes to any of the inputs upon which computation of the royalties payable by the digital music provider depends. Such description shall include the adjusted royalties payable and all information used to compute the adjusted royalties payable, in accordance with the requirements of this section and part 385 of this title, such that the mechanical licensing collective can provide a detailed and step-by-step accounting of the calculation of the adjustment under
applicable provisions of this section and part 385 of this title, sufficient to allow each applicable copyright owner to assess the manner in which the digital music provider determined the adjustment and the accuracy of the adjustment. As appropriate, an adjustment may be calculated using estimates permitted under paragraph (d)(2) of this section.

(iii) Where applicable, the particular sound recordings and uses to which the adjustment applies.

(iv) A description of the reason(s) for the adjustment.

(4) In the case of an underpayment of royalties, the digital music provider shall pay the difference to the mechanical licensing collective contemporaneously with delivery of the statement of adjustment or promptly after being notified by the mechanical licensing collective of the amount due. A statement of adjustment and its related royalty payment may be delivered separately, but if delivered separately, the payment must include information reasonably sufficient to allow the mechanical licensing collective to match the statement of adjustment to the payment.

(5) In the case of an overpayment of royalties, the mechanical licensing collective shall appropriately credit or offset the excess payment amount and apply it to the digital music provider’s account, or upon request, issue a refund within a reasonable period of time.

(6)(i) A statement of adjustment must be delivered to the mechanical licensing collective no later than 6 months after the occurrence of any of the scenarios specified by paragraph (k)(6)(ii) of this section, where such an event necessitates an adjustment. Where more than one scenario applies to the same cumulative statement of account at different points in time, a separate 6-month period runs for each such triggering event.

(ii) A statement of adjustment may only be made:

(A) Except as otherwise provided for by paragraph (c)(5) of this section, where the digital music provider discovers, or is notified of by the mechanical licensing collective or a copyright owner, licensor, or author (or their respective representatives, including by an administrator or a collective management organization) of a relevant sound recording or musical work that is embodied in such a sound recording, an inaccuracy in the cumulative statement of account, or in the amounts of royalties owed, based on information that was not previously known to the digital music provider despite its good-faith efforts;

(B) When making an adjustment to a previously estimated input under paragraph (d)(2) of this section;

(C) Following an audit of a digital music provider that concludes after the cumulative statement of account is delivered and that has the result of affecting the computation of the royalties payable by the digital music provider (e.g., as applicable, an audit by a sound recording copyright owner concerning the amount of applicable consideration paid for sound recording copyright rights); or

(D) In response to a change in applicable rates or terms under part 385 of this title.

(7) A statement of adjustment must be certified in the same manner as a cumulative statement of account under paragraph (j) of this section.

(l)(1) Subject to the provisions of 17 U.S.C. 115, a digital music provider and the mechanical licensing collective may agree in writing to vary or supplement the procedures described in this section, including but not limited to pursuant to an agreement to administer a voluntary license, provided that any such change does not materially prejudice copyright owners owed royalties required to be transferred to the mechanical licensing collective for the digital music provider to be eligible for the limitation on liability described in 17 U.S.C. 115(d)(10). The procedures surrounding the certification requirements of paragraph (j) of this section may not be altered by agreement. This paragraph (l)(1) does not empower the mechanical licensing collective to agree to alter any substantive requirements described in this section, including but not limited to the required royalty payment and accounting information and sound recording and musical work information.

(ii) The mechanical licensing collective shall maintain a current, free, and publicly accessible online list of all agreements made pursuant to paragraph (l)(1) of the section that includes the name of the digital music provider (and, if different, the trade or consumer-facing brand name(s) of the services(s), including any specific offering(s), through which the digital music provider engages, or has engaged at any time during the period identified in paragraph (c)(1) of this section, in covered activities) and the start and end dates of the agreement. Any such agreement shall be considered a record that a copyright owner may access in accordance with 17 U.S.C. 115(d)(0)(M)(ii). Where an agreement made pursuant to paragraph (l)(1) of this section is made pursuant to an agreement to administer a voluntary license or any other agreement, only those portions that vary or supplement the procedures described in this section and that pertain to the administration of a requesting copyright owner’s musical works must be made available to that copyright owner.

(m) Each digital music provider shall, for a period of at least seven years from the date of delivery of a cumulative statement of account or statement of adjustment to the mechanical licensing collective, keep and retain in its possession all records and documents necessary and appropriate to support fully the information set forth in such statement (except that such records and documents that relate to an estimated input permitted under paragraph (d)(2) of this section must be kept and retained for a period of at least seven years from the date of delivery of the statement containing the final adjustment of such input).

Regan A. Smith, General Counsel and Associate Register of Copyrights.

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 70

RIN 2900–AP89

Change in Rates VA Pays for Special Modes of Transportation

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its regulations concerning beneficiary travel. The revisions would amend the Veterans Health Administration’s (VHA) beneficiary travel regulations to establish a new payment methodology for special modes of transportation. The new payment methodology would apply in the absence of a contract between VA and a vendor of the special mode of transportation. For transport by ambulance, VA proposes to pay the lesser of the actual charge or the amount determined by the Medicare Part B Ambulance Fee Schedule (AFS) established by the Centers for Medicare & Medicaid Services (CMS). For travel by modes other than ambulance, VA proposes to establish a payment methodology based on states’ posted rates or the actual charge. VA would replace this payment methodology for travel by modes other than ambulance at