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Contents

Federal Register

Vol. 86, No. 205

Wednesday, October 27, 2021

Agriculture Department
See Animal and Plant Health Inspection Service
NOTICES
Solicitation of Nominations:
Equity Commission Advisory Committee, Equity Commission Subcommittee on Agriculture; Extension of Application Period, 59360

Alcohol, Tobacco, Firearms, and Explosives Bureau
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Identification of Imported Explosives Materials, 59426

Animal and Plant Health Inspection Service
NOTICES
Pest Risk Analysis for the Importation of Fresh Turmeric (Curcuma longa) Rhizome From Samoa Into the United States (including Territories), 59360–59361

Centers for Disease Control and Prevention
NOTICES
Record of Decision:
Acquisition of Site for Development of a Replacement Underground Safety Research Program Facility for the Centers for Disease Control and Prevention/National Institute for Occupational Safety and Health, Mace, WV, 59391–59392

Civil Rights Commission
NOTICES
Meetings:
Virginia Advisory Committee, 59361

Coast Guard
RULES
Fire Protection for Recreational Vessels, 59303
PROPOSED RULES
Port Access Route Study:
Alaskan Arctic Coast, 59326–59327

Commerce Department
See Foreign-Trade Zones Board
See International Trade Administration
See National Oceanic and Atmospheric Administration

Comptroller of the Currency
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Company-Run Annual Stress Test Reporting Template and Documentation for Covered Institutions with Total Consolidated Assets of $250 Billion or More under the Dodd-Frank Wall Street Reform and Consumer Protection Act, 59447–59448

Copyright Office, Library of Congress
PROPOSED RULES
Copyright Claims Board:
Initiation of Proceedings and Related Procedures, 59327

Copyright Royalty Board
RULES
Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate those Performances (Web V), 59452–59593

Education Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Education Stabilization Fund—Emergency Assistance for Non-Public Schools Program Recipient Annual Reporting Data Collection Form, 59371–59372
School Pulse Panel Data Collection, 59370–59371

Energy Department
See Federal Energy Regulatory Commission
PROPOSED RULES
Energy Conservation Program:
Test Procedures for Fans and Blowers, 59308–59309

Environmental Protection Agency
PROPOSED RULES
Air Quality State Implementation Plans; Approvals and Promulgations:
Michigan and Wisconsin; Finding of Failure to Attain the 2010 Sulfur Dioxide Primary National Ambient Air Quality Standard for the Detroit and Rhinelander Nonattainment Areas, 59327–59333
Oklahoma; Updates to the General SIP and Incorporation by Reference Provisions, 59333–59336
State Plans for Designated Facilities and Pollutants; Approvals and Promulgations:
Florida; Control of Emissions from Existing Municipal Solid Waste Landfills, 59336–59338
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Contractor Conflicts of Interest, 59380
Contractor Cumulative Claim and Reconciliation, 59385
NO_x SIP Call, 59376
Servicing of Motor Vehicle Air Conditioners, 59386–59387
Fortieth Update of the Federal Agency Hazardous Waste Compliance Docket, 59376–59380
Pesticide Product Registration:
Receipt of Applications for New Uses (October 2021), 59380–59381
Proposed CERCLA Cost Recovery and Work Administrative Settlement:
Wampus Milford Associates Site, Milford, Connecticut, 59385–59386
Proposed Consent Decree:
Safe Drinking Water Act Claims, 59383–59385
Requests for Nominations:
Science Advisory Committee on Chemicals, 59382–59383

Federal Communications Commission
RULES
Best Practices for Equipment Disposal and Revises FCC Form 5640 Certifications for the Secure and Trusted Communications Networks Reimbursement Program, 59304–59307

Federal Deposit Insurance Corporation
RULES
Real Estate Lending Standards, 59279–59282

Federal Energy Regulatory Commission
NOTICES
Combined Filings, 59374–59375
License Application:
Warrensburg Hydropower Limited Partnership, 59372
Meetings:
FFP Project 101, LLC, 59375–59376
Permit Application:
PacifiCorp, 59375
Request under Blanket Authorization:
WBI Energy Transmission, Inc., 59372–59373

Federal Maritime Commission
NOTICES
Agreement Filed, 59387

Federal Mediation and Conciliation Service
NOTICES
Privacy Act; Systems of Records, 59387–59390

Federal Motor Carrier Safety Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Annual Report of Class I and Class II For-Hire Motor Carriers, 59446–59447

Federal Reserve System
NOTICES
Treatment of U.S. Firms Operating in the Spanish Government Debt Market, 59390–59391

Fish and Wildlife Service
PROPOSED RULES
Endangered and Threatened Wildlife and Plants:
Listing Endangered and Threatened Species and Designating Critical Habitat, 59353–59357
Regulations for Designating Critical Habitat, 59346–59353
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Native Youth Community Adaptation and Leadership Congress, 59416–59418
Urban Bird Treaty Program Requirements, 59414–59416

Food and Drug Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Registration of Producers of Drugs and Listing of Drugs in Commercial Distribution, 59402–59405
Determination of Regulatory Review Period for Purposes of Patent Extension:
INREBIC, 59397–59399
XENLETA Injection New Drug Application 211673, 59394–59395
XENLETA Tablets New Drug Application 211672, 59392–59394
Exemption of Certain Categories of Biological Products from Certain Reporting Requirements Under the Federal Food, Drug, and Cosmetic Act, 59395–59397
Guidance:
Website Location of Center for Devices and Radiological Health Fiscal Year 2022, 59399–59401
Issuance of Priority Review Voucher; Rare Pediatric Disease Product, 59405
Meetings:
Antimicrobial Drugs Advisory Committee, 59401–59402

Foreign Assets Control Office
NOTICES
Blocking or Unblocking of Persons and Properties, 59448–59449

Foreign-Trade Zones Board
NOTICES
Application for Expansion of Subzone:
Lam Research Corp., Foreign-Trade Zone 18, San Jose, CA, 59361–59362

General Services Administration
NOTICES
Federal Travel Regulation:
Applicability of the Federal Travel Regulation Part 301–13 to Employees who are Nursing, 59391

Geological Survey
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
National Cooperative Geologic Mapping Program (EDMAP and STATEMAP), 59418–59419

Health and Human Services Department
See Centers for Disease Control and Prevention
See Food and Drug Administration
See National Institutes of Health

Homeland Security Department
See Coast Guard
See U.S. Customs and Border Protection
NOTICES
Privacy Act; Systems of Records, 59408–59411

Housing and Urban Development Department
RULES
Section 108 Loan Guarantee Program:
Announcement of Fee to Cover Credit Subsidy Costs, 59302–59303
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Community Development Block Grant Entitlement Program, 59411–59412
Eviction Protection Grant Program, 59412–59414

Indian Affairs Bureau
NOTICES
Request for Applications:
Living Languages Grant Program, 59419–59422

Interior Department
See Fish and Wildlife Service
See Geological Survey
See Indian Affairs Bureau
See Land Management Bureau
See National Park Service
PROPOSED RULES
Acquisition Regulation:
Buy Indian Act; Procedures for Contracting, 59338–59345

International Trade Administration
NOTICES
Antidumping or Countervailing Duty Investigations, Orders, or Reviews:
Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China, 59367–59369
Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates, 59364–59366
Multilayered Wood Flooring from the People's Republic of China, 59362–59364
Polyethylene Retail Carrier Bags from Indonesia, Malaysia, the People's Republic of China, Taiwan, Thailand, and the Socialist Republic of Vietnam, 59366–59367

International Trade Commission
NOTICES
Decision to Review In Part an Initial Determination:
Certain Vacuum Insulated Flasks and Components Thereof, 59424–59426

Justice Department
See Alcohol, Tobacco, Firearms, and Explosives Bureau
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Request for Registration under the Gambling Devices Act, 59427

Labor Department
See Labor Statistics Bureau
See Mine Safety and Health Administration
See Occupational Safety and Health Administration

Labor Statistics Bureau
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 59427–59428

Land Management Bureau
NOTICES
Application:
Withdrawal Extension and Opportunity for Public Meeting for the Holden Mine Reclamation Project, Washington, 59422–59423

Library of Congress
See Copyright Office, Library of Congress
See Copyright Royalty Board

Mine Safety and Health Administration
NOTICES
Petition for Modification of Application of an Existing Mandatory Safety Standard, 59428–59431

National Credit Union Administration
RULES
CAMELS Rating System, 59282–59289
Credit Union Service Organizations, 59289–59302

National Institutes of Health
NOTICES
Meetings:
Center for Scientific Review, 59405–59406
National Institute of Environmental Health Science, 59406

National Oceanic and Atmospheric Administration
PROPOSED RULES
Endangered and Threatened Wildlife and Plants:
Listing Endangered and Threatened Species and Designating Critical Habitat, 59353–59357
Pacific Island Pelagic Fisheries:
2022 U.S. Territorial Longline Bigeye Tuna Catch Limits, 59357–59359
NOTICES
Deadline Extension for the NOAA Brennan Matching Fund Opportunity for Ocean and Coastal Mapping, 59369–59370
Meetings:
Gulf of Mexico Fishery Management Council, 59370

National Park Service
NOTICES
Meetings:
Tule Springs Fossil Beds National Monument Advisory Council, 59423–59424

National Science Foundation
NOTICES
Permit Application:
Antarctic Conservation Act, 59431–59432

Nuclear Regulatory Commission
NOTICES
License Transfer:
In the Matter of Arizona Public Service Co., Salt River Project Agricultural Improvement and Power District, Public Service Co. of New Mexico Palo Verde Nuclear Generating Station, Units 1 and 2 and Independent Spent Fuel Storage Installation, 59432–59434

Occupational Safety and Health Administration
PROPOSED RULES
Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, 59309–59326

Personnel Management Office
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Representative Payee Application/Information Necessary for a Competency Determination, 59434–59435
Privacy Act; Systems of Records, 59435–59437

Postal Regulatory Commission
NOTICES
New Postal Product, 59438–59439
New Postal Products, 59437–59438

Presidential Documents
PROCLAMATIONS
Special Observances:
United Nations Day (Proc. 10293), 59595–59598
ADMINISTRATIVE ORDERS
John F. Kennedy, Assassination; Temporary Certification of Disclosure of Information in Certain Related Records (Memorandum of October 22, 2021), 59599–59602

Securities and Exchange Commission
NOTICES
Meetings:
Small Business Capital Formation Advisory Committee, 59439

Self-Regulatory Organizations; Proposed Rule Changes:
BOX Exchange, LLC, 59439–59443
New York Stock Exchange, LLC, 59443–59445

Small Business Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 59445

State Department
NOTICES
Culturally Significant Objects Imported for Exhibition:
Mixpantli: Space, Time, and the Indigenous Origins of Mexico, 59445–59446

Transportation Department
See Federal Motor Carrier Safety Administration

Treasury Department
See Comptroller of the Currency
See Foreign Assets Control Office

U.S. Customs and Border Protection
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Declaration of Free Entry for Returned American Products, 59407–59408
Guarantee of Payment, 59406–59407

Veterans Affairs Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Application for Reimbursement of Licensing or Certification Test Fees, 59449–59450
Apportionment of Beneficiary's Award, 59449
Interest Rate Reduction Refinancing Loan Worksheet, 59450

Separate Parts In This Issue

Part II
Library of Congress, Copyright Royalty Board, 59452–59593

Part III
Presidential Documents, 59595–59602

Reader Aids
Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, and notice of recently enacted public laws.

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CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

3 CFR

Proclamations:

10293 59597

Administrative Orders:

Memorandums:

Memorandum of October 22, 2021 59599

10 CFR

Proposed Rules:

429 59308

431 59308

12 CFR

365 59279

700 59282

701 59282

703 59282

704 59282

712 59289

713 59282

24 CFR

570 59302

29 CFR

Proposed Rules:

1910 59309

1915 59309

1917 59309

1918 59309

1926 59309

1928 59309

33 CFR

1 59303

175 59309

Proposed Rules:

167 59326

37 CFR

380 59362

Proposed Rules:

201 59327

220 59327

222 59327

223 59327

224 59327

40 CFR

Proposed Rules:

52 (2 documents) 59327, 59333

62 59336

46 CFR

25 59303

47 CFR

54 59304

48 CFR

Proposed Rules:

1426 59338

1452 59338

1480 59338

50 CFR

Proposed Rules:

17 59346

424 59353

665 59357

Rules and Regulations

Federal Register

Vol. 86, No. 205

Wednesday, October 27, 2021

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 365

RIN 3064–AF72

Real Estate Lending Standards

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The FDIC is issuing a final rule to amend Interagency Guidelines for Real Estate Lending Policies (Real Estate Lending Standards). The purpose of the final rule is to incorporate consideration of the community bank leverage ratio (CBLR) rule, which does not require electing institutions to calculate tier 2 capital or total capital, into the Real Estate Lending Standards. The final rule allows a consistent approach for calculating the ratio of loans in excess of the supervisory loan-to-value limits (LTV Limits) at all FDIC-supervised institutions, using a methodology that approximates the historical methodology the FDIC has followed for calculating this measurement without requiring institutions to calculate tier 2 capital. The final rule also avoids any regulatory burden that could arise if an FDIC-supervised institution subsequently decides to switch between different capital frameworks.

DATES: The final rule is effective on November 26, 2021.

FOR FURTHER INFORMATION CONTACT: Alicia R. Marks, Examination Specialist, Division of Risk Management and Supervision, (202) 898–6660, *AMarks@FDIC.gov;* Navid K. Choudhury, Counsel, (202) 898–6526, or Catherine S. Wood, Counsel, (202) 898–3788, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429. For the hearing impaired only, TDD users may contact (202) 925–4618.

SUPPLEMENTARY INFORMATION:

I. Policy Objectives

The policy objective of the final rule is to provide consistent calculations of the ratios of loans in excess of the supervisory LTV Limits between banking organizations that elect, and those that do not elect, to adopt the CBLR framework, while not including capital ratios that some institutions are not required to compute or report. The final rule amends the Real Estate Lending Standards set forth in appendix A of 12 CFR part 365.

Section 201 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA) directs the FDIC, the Board of Governors of the Federal Reserve System (FRB), and the Office of the Comptroller of the Currency (OCC) (collectively, the agencies) to develop a community bank leverage ratio for qualifying community banking organizations. The CBLR framework is intended to simplify regulatory capital requirements and provide material regulatory compliance burden relief to the qualifying community banking organizations that opt into it. In particular, banking organizations that opt into the CBLR framework do not have to calculate the metrics associated with the applicable risk-based capital requirements in the agencies' capital rules (generally applicable rule), including total capital.

The Real Estate Lending Standards set forth in appendix A of 12 CFR part 365, as they apply to FDIC-supervised banks, contain a tier 1 capital threshold for institutions electing to adopt the CBLR and a total capital threshold for other banks. As described in more detail below in Section III, the final rule provides a consistent treatment for all FDIC-supervised banks without requiring the computation of total capital.

II. Background

The Real Estate Lending Standards, which were issued pursuant to section 304 of the Federal Deposit Insurance Corporation Improvement Act of 1991, 12 U.S.C. 1828(o), prescribe standards for real estate lending to be used by FDIC-supervised institutions in adopting internal real estate lending policies. Section 201 of the EGRRCPA amended provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act relative to the capital rules administered by the agencies. The CBLR rule was issued by the agencies to implement section 201 of the EGRRCPA, and it provides a simple measure of capital adequacy for community banking organizations that meet certain qualifying criteria.[1] Qualifying community banking organizations[2] that elect to use the CBLR framework (Electing CBOs) may calculate their CBLR without calculating tier 2 capital, and are therefore not required to calculate or report tier 2 capital or total capital.[3] As described in more detail below, the FDIC proposed a revision to the Real Estate Lending Standards to allow a consistent approach for calculating loans in excess of the supervisory LTV Limits without having to calculate tier 2 or total capital as currently provided in part 365 and its appendix.

The final rule ensures that the FDIC's regulation regarding supervisory LTV Limits is consistent with how examiners are calculating credit concentrations, as provided by a statement issued by the agencies on March 30, 2020. The statement provided that the agencies' examiners will use tier 1 capital plus the appropriate allowance for credit losses as the denominator when calculating credit concentrations.[4]

III. Proposal

On June 25, 2021, the FDIC published a notice of proposed rulemaking (NPR or proposal) to amend part 365 in response to changes in the type of capital information available after the implementation of the CBLR rule.[5] The FDIC proposed to amend the Real Estate Lending Standards so that all FDIC-supervised institutions, both Electing CBOs and other insured financial institutions, would calculate the ratio of loans in excess of the supervisory LTV Limits using tier 1 capital plus the

[1] 85 FR 64003 (Oct. 9, 2020).

[2] The FDIC's CBLR rule defines qualifying community banking organizations as ''an FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution'' with less than $10 billion in total consolidated assets that meet other qualifying criteria, including a leverage ratio (equal to tier 1 capital divided by average total consolidated assets) of greater than 9 percent. 12 CFR 324.12(a)(2).

[3] Total capital is defined as the sum of tier 1 capital and tier 2 capital. *See* 12 CFR 324.2.

[4] See the Joint Statement on Adjustment to the Calculation for Credit Concentration Ratios (FIL–31–2020).

[5] 86 FR 33570 (June 25, 2021).

appropriate allowance for credit losses[6] in the denominator. The proposed amendment would provide a consistent approach for calculating the ratio of loans in excess of the supervisory LTV Limits for all FDIC-supervised institutions. The proposed amendment would also approximate the historical methodology specified in the Real Estate Lending Standards for calculating the loans in excess of the supervisory LTV Limits without creating any regulatory burden for Electing CBOs and other banking organizations.[7] Further, the FDIC noted in the proposal that this approach would provide regulatory clarity and avoid any regulatory burden that could arise if Electing CBOs subsequently decide to switch between the CBLR framework and the generally applicable capital rules. The FDIC proposed to amend the Real Estate Lending Standards only relative to the calculation of loans in excess of the supervisory LTV Limits due to the change in the type of capital information that will be available, and did not consider any revisions to other sections of the Real Estate Lending Standards. Additionally, due to a publishing error, which excluded the third paragraph in this section in the *Code of Federal Regulations* in prior versions, the FDIC included the complete text of the section on loans in excess of the supervisory loan-to-value limits.

IV. Comments

The FDIC received only one comment on the proposal. The commenter, a trade organization, commended the FDIC for proposing this amendment to the calculation of supervisory LTV ratios as a sensible way to help provide uniform application of the measurement of the safety and soundness of all community banking organization on a consistent basis, and it noted that such consistency will allow community banking organizations to be assessed more effectively regardless of their decision to elect the CBLR for regulatory capital reporting.

V. The Final Rule

For the reasons stated herein and in the NPR, the FDIC is adopting the proposal without change.

VI. Expected Effects

As of March 31, 2021, the FDIC supervises 3,215 insured depository institutions. The revisions to the Real Estate Lending Standards apply to all FDIC-supervised institutions. The effect of the revisions at an individual bank would depend on whether the amount of its current or future real estate loans with loan-to-value ratios that exceed the supervisory LTV thresholds is greater than, or less than, the sum of its tier 1 capital and allowance (or credit reserve in the case of CECL adopters) for loan and lease losses. Allowance levels, credit reserves, and the volume of real estate loans and their loan to value ratios can vary considerably over time. Moreover, the FDIC does not have comprehensive information about the distribution of current loan to value ratios. For these reasons, it is not possible to identify how many institutions have real estate loans that exceed the supervisory LTV thresholds that would be directly implicated by either the current Real Estate Lending Standards or the revisions.

Currently, 3,055 FDIC supervised institutions have total real estate loans that exceed the tier 1 capital plus allowance or reserve benchmark adopted in this final rule, and are thus potentially affected by these revisions depending on the distribution of their loan to value ratios. In comparison, 3,063 FDIC supervised institutions have total real estate loans exceeding the current total capital benchmark and are thus potentially affected by the current Real Estate Lending Standards. As described in more detail below, the population of banks potentially subject to the Real Estate Lending Standards is therefore almost unchanged by these revisions, and their substantive effects are likely to be minimal.[8]

The FDIC believes that a threshold of ''tier 1 capital plus an allowance for credit losses'' is consistent with the way the FDIC and institutions historically have applied the Real Estate Lending Standards. Also, the typical (or median) FDIC-supervised institution that had not elected the CBLR framework reported almost no difference between the amount of its allowance for credit losses and its tier 2 capital.[9] Consequently, although the FDIC does not have information about the amount of real estate loans at each institution that currently exceeds, or could exceed, the supervisory LTV limits, the FDIC does not expect the final rule to have material effects on the safety-and-soundness of, or compliance costs incurred by, FDIC-supervised institutions.

VII. Alternatives

The FDIC considered two alternatives; however, it believes that none are preferable to the final rule. The alternatives are discussed below.

First, the FDIC considered making no change to its Real Estate Lending Standards. The FDIC is not in favor of this approach because the FDIC does not favor an approach in which some banks use a tier 1 capital threshold and other banks use a total capital threshold, and because the existing provision could be confusing for institutions.

Second, the FDIC considered revising its Real Estate Lending Standards so that both Electing CBOs and other institutions would use tier 1 capital in place of total capital for the purpose of calculating the supervisory LTV Limits. While this would subject both Electing CBOs and other institutions to the same approach, because the amount of tier 1 capital at an institution is typically less than the amount of total capital, this alternative would result in a relative tightening of the supervisory standards with respect to loans made in excess of the supervisory LTV Limits. The FDIC believes that the general level of the current supervisory LTV Limits, which are retained by this final rule, is appropriately reflective of the safety and soundness risk of depository institutions, and therefore the FDIC does not consider this alternative preferable to the final rule.

VIII. Regulatory Analysis

A. Effective Date

In the proposal, the FDIC proposed to make all provisions of the final rule effective upon publication in the **Federal Register**. The FDIC noted that the Administrative Procedure Act (APA) allows for an effective date of less than 30 days after publication ''as otherwise provided by the agency for good cause found and published with the rule.''[10]

[6] Banking organizations that have not adopted the current expected credit losses (CECL) methodology will use tier 1 capital plus the allowance for loan and lease losses (ALLL) as the denominator. Banking organizations that have adopted the CECL methodology will use tier 1 capital plus the portion of the allowance for credit losses (ACL) attributable to loans and leases.

[7] The proposed amendment approximates the historical methodology in the sense that both the proposed and historical approach for calculating the ratio of loans in excess of the LTV Limits involve adding a measure of loss absorbing capacity to tier 1 capital, and an institution's ALLL (or ACL) is a component of tier 2 capital. Under the agencies' capital rules, an institution's entire amount of ALLL or ACL could be included in its tier 2 capital, depending on the amount of its risk-weighted assets base. Based on December 31, 2019, Call Report data—the last Call Report date prior to the introduction of the CBLR framework—96.0 percent of FDIC-supervised institutions reported that their entire ALLL or ACL was included in their tier 2 capital, and 50.5 percent reported that their tier 2 capital was entirely composed of their ALLL.

[8] March 31, 2021, Call Report data.

[9] According to March 31, 2021, Call Report data, the median FDIC-supervised institution that had not elected the CBLR framework reported an allowance for credit losses (or allowance for loan and lease losses if applicable) that was $3,000 (or about 0.45 percent) greater than tier 2 capital.

[10] 5 U.S.C. 553(d)(3).

The purpose of the 30-day waiting period prescribed in APA section 553(d)(3) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. The FDIC believed that this waiting period would be unnecessary as the proposed rule, if codified, would likely lift burdens on FDIC-supervised institutions by allowing them to calculate the ratio of loans in excess of the supervisory LTV Limits without calculating tier 2 capital, and would also ensure that the approach is consistent, regardless of the institutions' CBLR election status. Consequently, the FDIC believed it would have good cause for the final rule to become effective upon publication.

The FDIC did not receive any comment on whether good cause exists to waive the delayed effective date of the rule once finalized. However, because it is not possible to identify how many institutions have real estate loans that exceed the supervisory LTV thresholds that would be directly implicated by either the current Real Estate Lending Standards or the revisions, the FDIC, after further consideration, has determined to implement a 30-day delayed effective date as provided in the APA. Accordingly, all provisions of the final rule will be effective 30 days after publication in the **Federal Register**.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires that, in connection with a final rule, an agency prepare and make available for public comment a final regulatory flexibility analysis that describes the impact of the rule on small entities.[11] 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 $600 million.[12] Generally, the FDIC considers a significant effect to be a quantified effect in excess of 5 percent of total annual salaries and benefits per institution, or 2.5 percent of total noninterest expenses. The FDIC believes that effects in excess of these thresholds typically represent significant effects for FDIC-supervised institutions. For the reasons provided below, the FDIC certifies that the final rule will not have a significant economic impact on a substantial number of small banking organizations. Accordingly, a regulatory flexibility analysis is not required.

As of March 31, 2021, the FDIC supervised 3,215 institutions, of which 2,333 were ''small entities'' for purposes of the RFA.[13] The effect of the revisions at an individual bank would depend on whether the amount of its current or future real estate loans with loan-to-value ratios that exceed the supervisory LTV thresholds is greater than, or less than, the sum of its tier 1 capital and allowance (or credit reserve in the case of CECL adopters) for loan and lease losses. Allowance levels, credit reserves, and the volume of real estate loans and their loan to value ratios can vary considerably over time. Moreover, the FDIC does not have comprehensive information about the distribution of current loan to value ratios. For these reasons, it is not possible to identify how many institutions have real estate loans that exceed the supervisory LTV thresholds that would be directly implicated by either the current Guidelines or the final revisions.

Currently, 2,210 small, FDIC supervised institutions have total real estate loans that exceed the tier 1 capital plus allowance or reserve benchmark in the revisions and are thus potentially affected by the revisions depending on the distribution of their loan to value ratios. In comparison, 2,218 small, FDIC supervised institutions have total real estate loans exceeding the current total capital benchmark and are thus potentially affected by the current Real Estate Lending Standards. As described in more detail below, the population of banks potentially subject to the Real Estate Lending Standards is therefore almost unchanged by these final revisions, and their substantive effects are likely to be minimal.[14]

The FDIC believes that a threshold of ''tier 1 capital plus an allowance for credit losses'' is consistent with the way the FDIC and institutions historically have applied the Real Estate Lending Standards. Also, the typical (or median) small, FDIC-supervised institution that had not elected the CBLR framework reported almost no difference between the amount of its allowance for credit losses and its tier 2 capital.[15] Consequently, although the FDIC does not have information about the amount of real estate loans at each small institution that currently exceeds, or could exceed, the supervisory LTV limits, the FDIC does not expect the final rule to have material effects on the safety-and-soundness of, or compliance costs incurred by, small FDIC-supervised institutions. However, small institutions may have to incur some costs associated with making the necessary changes to their systems and processes in order to comply with the terms of the final rule. The FDIC believes that any such costs are likely to be minimal given that all small institutions already calculate tier 1 capital and the allowance for credit losses and had been subject to the previous thresholds for many years before the changes in the capital rules.

Therefore, and based on the preceding discussion, the FDIC certifies that the final rule will not significantly affect a substantial number of small entities.

C. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA),[16] the FDIC may not conduct or sponsor, and a 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 FDIC has reviewed this final rule and determined that it would not introduce any new or revise any collection of information pursuant to the PRA. Therefore, no submissions will be made to OMB with respect to this final rule.

D. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),[17] in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institution, each Federal banking agency must consider, consistent with principles of safety and

[11] 5 U.S.C. 601 *et seq.*

[12] The SBA defines a small banking organization as having $600 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.'' 13 CFR 121.201 n.8 (2019). ''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. . . .'' 13 CFR 121.103(a)(6) (2019). Following these regulations, the FDIC uses a covered entity's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is ''small'' for the purposes of RFA.

[13] March 31, 2021, Call Report data.

[14] *Id.*

[15] According to March 31, 2021, Call Report data, the median small, FDIC-supervised institution that had not elected the CBLR framework reported an allowance for credit losses (or allowance for loan and lease losses if applicable) that was $1,000 (or about 0.17 percent) greater than tier 2 capital.

[16] 44 U.S.C. 3501–3521.

[17] 12 U.S.C. 4802(a).

soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on insured depository institutions generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.[18]

The FDIC believes that this final rule does not impose new reporting, disclosure, or other requirements, and likely instead reduces such burdens by allowing Electing CBOs to avoid calculating and reporting tier 2 capital, as would be required under the current Real Estate Lending Standards. Therefore, the FDIC believes that it is not necessary to delay the effective date beyond the 30-day period provided in the APA.

E. Plain Language

Section 722 of the GLBA [19] requires each Federal banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. The FDIC sought to present the final rule in a simple and straightforward manner and did not receive any comments on the use of plain language in the proposal.

F. Congressional Review Act

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

The Congressional Review Act defines a ''major rule'' as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in (1) an annual effect on the economy of $100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

The OMB has determined that the final rule is not a major rule for purposes of the Congressional Review Act, and the FDIC will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

List of Subjects in 12 CFR Part 365

Banks, Banking, Mortgages, Savings associations.

Authority and Issuance

For the reasons stated in the preamble, the Federal Deposit Insurance Corporation amends part 365 of chapter III of title 12 of the Code of Federal Regulations as follows:

PART 365—REAL ESTATE LENDING STANDARDS

■ 1. The authority citation for part 365 continues to read as follows:

Authority: 12 U.S.C. 1828(o) and 5101 *et seq.*

■ 2. Amend appendix A to subpart A by revising the section titled ''Loans in Excess of the Supervisory Loan-to-Value Limits'' to read as follows:

Appendix A to Subpart A of Part 365—Interagency Guidelines for Real Estate Lending Policies

* * * * *

Loans in Excess of the Supervisory Loan-to-Value Limits

The agencies recognize that appropriate loan-to-value limits vary not only among categories of real estate loans but also among individual loans. Therefore, it may be appropriate in individual cases to originate or purchase loans with loan-to-value ratios in excess of the supervisory loan-to-value limits, based on the support provided by other credit factors. Such loans should be identified in the institution's records, and their aggregate amount reported at least quarterly to the institution's board of directors. (See additional reporting requirements described under ''Exceptions to the General Policy.'')

The aggregate amount of all loans in excess of the supervisory loan-to-value limits should not exceed 100 percent of total capital.[4] Moreover, within the aggregate limit, total loans for all commercial, agricultural, multifamily or other non-1-to-4 family residential properties should not exceed 30 percent of total capital. An institution will come under increased supervisory scrutiny as the total of such loans approaches these levels.

In determining the aggregate amount of such loans, institutions should: (a) Include all loans secured by the same property if any one of those loans exceeds the supervisory loan-to-value limits; and (b) include the recourse obligation of any such loan sold with recourse. Conversely, a loan should no longer be reported to the directors as part of aggregate totals when reduction in principal or senior liens, or additional contribution of collateral or equity (*e.g.,* improvements to the real property securing the loan), bring the loan-to-value ratio into compliance with supervisory limits.

* * * * *

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on October 21, 2021.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2021–23381 Filed 10–26–21; 8:45 am]

BILLING CODE 6714–01–P

[18] *Id.* at 4802(b).

[19] 12 U.S.C. 4809.

[4] For the purposes of these Guidelines, for state non-member banks and state savings associations, ''total capital'' refers to the FDIC-supervised institution's tier 1 capital, as defined in § 324.2 of this chapter, plus the allowance for loan and leases losses or the allowance for credit losses attributable to loans and leases, as applicable. The allowance for credit losses attributable to loans and leases is applicable for institutions that have adopted the Current Expected Credit Losses methodology.

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 700, 701, 703, 704, and 713

RIN 3133–AF32

CAMELS Rating System

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board (the Board) is updating the NCUA's supervisory rating system from CAMEL to CAMELS by adding the ''S'' (Sensitivity to Market Risk) component to the existing CAMEL rating system and redefining the ''L'' (Liquidity Risk) component. The benefits of adding the ''S'' component are to enhance transparency and allow the NCUA and federally insured natural person and corporate credit unions to better distinguish between liquidity risk (''L'') and sensitivity to market risk (''S''). The addition of ''S'' also enhances consistency between the supervision of credit unions and financial institutions supervised by the other banking agencies. The effective date of the rule will be April 1, 2022. The Board plans to implement the addition of the ''S'' rating component and a redefined ''L'' rating for examinations and contacts started on or after April 1, 2022.

DATES: The rule becomes effective April 1, 2022.

FOR FURTHER INFORMATION CONTACT: Thomas Fay, Director of Capital Markets at (703) 518–1179 or Robert Bruneau, Senior Capital Markets Specialist at (703) 945–2491, Office of Examination and Insurance; or Marvin Shaw, Senior Staff Attorney, Office of General Counsel, at (703) 518–6540.

SUPPLEMENTARY INFORMATION:

I. Legal Authority and Background

The Board is issuing this final rule pursuant to its authority under the Federal Credit Union Act (the Act).[1] Under the Act, the NCUA is the chartering and supervisory authority for federal credit unions (FCUs) and the federal supervisory authority for federally insured credit unions (FICUs).[2] The Act grants the NCUA a broad mandate to issue regulations governing both FCUs and FICUs. Section 120 of the Act is a general grant of regulatory authority and authorizes the Board to prescribe regulations for the administration of the Act.[3] Section 209 of the Act is a plenary grant of regulatory authority to the NCUA to issue regulations necessary or appropriate to carry out its role as share insurer for all FICUs.[4] The Act also includes an express grant of authority for the Board to subject federally chartered central, or corporate, credit unions to such rules, regulations, and orders as the Board deems appropriate.[5]

As part of its supervisory activities, the NCUA adopted the CAMEL rating system in 1987.[6] Through CAMEL ratings, the NCUA sought to account for and reflect all significant financial, operational, and management factors that examiners assess in their evaluation of a credit union's performance and risk profile. Under this system, as specified in the 2007 Letter to Credit Unions (LCU), the NCUA assigns each credit union a composite CAMEL rating and five component ratings based on the agency's evaluation of a credit union's financial condition and operations.[7] The five components address a credit union's:

- Capital adequacy;
- Asset quality;
- Management;
- Earnings; and
- Liquidity and asset liability management.

Examiners assign composite and component CAMEL ratings using a scale that ranges from ''1'' to ''5.'' The highest rating is a ''1,'' indicating the strongest performance and risk management practices, and the least degree of supervisory concern. The lowest rating is a ''5,'' indicating the weakest performance, inadequate risk management practices, and the highest degree of supervisory concern. Examiners rate these components based upon qualitative and quantitative factors using their professional judgement.

In 1997, members of the Federal Financial Institutions Examination Council (FFIEC), with the exception of the NCUA, proposed and subsequently adopted revisions to the Uniform Financial Institutions Rating System (UFIRS).[8] The FFIEC released a Policy Statement at that time to reaffirm the five CAMEL rating system components and added a sixth component, Sensitivity to Market Risk (''S''), to address price and interest rate risks (IRR).[9] The NCUA opted not to use the ''S'' component based on the relative lack of complexity in the consolidated balance sheets of credit unions at the time. Instead, the NCUA retained its existing CAMEL rating system.

However, since 1997, credit union balance sheets have grown larger and more complex. For example, the credit union industry significantly increased the percentage of holdings in mortgage related assets to total assets from 19 percent in 1997 to 45 percent in June 2021. Accordingly, the NCUA has made several modifications to the CAMEL rating system since 1997. These involved changes to financial ratios, adding and subsequently eliminating a CAMEL matrix, accommodating the adoption of Prompt Corrective Action, and incorporating the NCUA's risk-focused exam approach.[10] [11]

As balance sheets of natural person credit unions have become larger and more complex, the NCUA has consistently provided supervision and guidance regarding IRR to the credit union industry. The NCUA also advised credit unions that IRR was a supervisory priority from 2012 through 2019.[12]

In 2012, the Board implemented regulations that introduced standards and expectations affecting examiner procedures and the NCUA's IRR assessment requirements. The NCUA's IRR rule became effective for credit unions in September 2012. The rule requires insured credit unions that have more than $50 million in assets to maintain a written IRR policy and an effective IRR management program.[13]

In April 2014, the NCUA also finalized its derivatives rule and subsequently amended it in May 2021. The amendments modernize the NCUA's derivatives rule and make it more principles-based, while retaining key safety and soundness components. The changes provide more flexibility for qualified FCUs to manage IRR through the use of derivatives.[14]

In January 2017, the NCUA also implemented its revised IRR supervision program incorporating the regulatory requirements from § 741.3(b)(5) (IRR) and subpart B to part 703 (derivatives), enhancing examiner guidance, improving the consistency of IRR ratings, and identifying outlier credit unions with excessive IRR levels.[15]

II. Proposed Rule

On January 14, 2021, the Board approved issuing a notice proposing to amend the existing CAMEL rating system by adding an ''S'' component to assess sensitivity to market risk and modify the ''L'' component to include only liquidity evaluation content and rating criteria.[16] The Board explained that these changes would provide greater clarity and transparency regarding credit unions' sensitivity to market and liquidity risk exposures. The Board further explained that the proposed changes would make the NCUA's rating system more consistent with the other banking agencies' rating systems at the federal and state levels.[17]

In support of the proposal, the Board explained that changes in the size and complexity of FICUs warranted the

[1] 12 U.S.C. 1751 *et. seq.*

[2] 12 U.S.C. 1752–1775.

[3] 12 U.S.C. 1766(a).

[4] 12 U.S.C. 1789.

[5] 12 U.S.C. 1766(a).

[6] NCUA LCU No. 93 (September 25, 1987).

[7] NCUA LCU 07–CU–12 (December 2007).

[8] At the time, the FFIEC was comprised of the Federal Deposit Insurance Corporation (FDIC), the Board of Governors of the Federal Reserve (Federal Reserve), and the Office of the Comptroller of the Currency (OCC), the NCUA, and the Office of Thrift Supervision, which merged into OCC as a result of the Dodd Frank Wall Street Reform and Consumer Protection Act. *See* Section 312 of Public Law 111–203.

[9] 62 FR 752, (Jan. 6, 1997).

[10] In 1998, Congress enacted the Credit Union Membership Access Act (Pub. L. 105–219, 112 Stat. 913 (1998)), which amended the Act to require the NCUA to adopt, by regulation, a system of prompt corrective action consisting of minimum capital standards and corresponding remedies to improve the net worth of federally insured ''natural person'' credit unions.

[11] NCUA LCU 00–CU–08 (November 2000)—superseded by NCUA LCU 03–CU–04; NCUA LCU 07–CU–12 (December 2007); NCUA LCU 03–CU–04 (March 2003)—superseded by NCUA LCU 07–CU–12; NCUA LCU 19–CU–01 (January 2019).

[12] *See, e.g.,* NCUA LCU 19–CU–01 (January 2019).

[13] 77 FR 5155 (Feb. 2, 2012). *See* 12 CFR 741.3, 12 CFR 741, app. A.

[14] 86 FR 28241 (May 26, 2021).

[15] NCUA LCU 16–CU–08 (October 2016).

[16] 86 FR 13494.

[17] The banking regulators (Federal Reserve Board, FDIC, and OCC) each include the ''S'' component to evaluate sensitivity to marketplace risk. In addition, as of January 2021, 24 SSAs have adopted the ''S'' component.

changes and that increased complexity typically requires greater focus on interest rate and liquidity risk profiles.

The Board noted that separating the ''S'' and ''L'' component ratings will allow NCUA to better:

- Monitor sensitivity to market and liquidity risks in the credit union system;
- Communicate specific concerns to individual credit unions; and
- Allocate resources.

III. Final Rule and Public Comments on the Proposed Rule

The Board solicited public comments over a 60-day comment period and received 16 comments. Commenters included credit union trade associations, state credit union leagues, an organization of state credit union supervisors, credit unions, and individuals. Most commenters supported the proposal. Several expressed concern about the proposal's implementation, particularly about the associated compliance costs and the need for consistent application across the NCUA regions and examiners.

As noted previously, commenters generally supported the proposal, stating that it would provide more precise supervision of credit unions. One trade association stated that the change will add clarity and transparency. That commenter also stated that this change recognizes that there is a difference between market sensitivity and liquidity risk, so separating the two components makes sense even if they are interrelated. Additionally, several commenters stated that the proposed change would enhance consistency with other financial institution rating systems, specifically for FDIC-insured financial institutions. These commenters stated the change would enhance consistency with several state credit union regulators who already include the ''S'' in their rating systems. They also said the change will allow examiners to better communicate specific concerns to credit unions.

A few commenters stated that the proposal added burden without any corresponding benefit and thus is unwarranted and unnecessary. One commenter believed that the amendment is not necessary because other components of CAMEL, including Capital, Asset Quality, and Liquidity, already evaluate market risk. This commenter stated that the proposal adds significant burden on both credit unions and examiners and is not necessary or valuable.

A. Comments Regarding Adopting the ''S'' Component

One commenter requested that the NCUA release details about the agency's expectations of credit unions meeting any new standards for the ''S'' component and what this change will mean for the examination process.

The NCUA will issue an updated Letter to Credit Unions that explains the criteria and standards for the ''S'' component and how this change will be incorporated into the examination process. Additionally, the NCUA Examiner's Guide will integrate the extensive discussion and tables set forth in the proposal that detailed the Board's expectations.

With respect to the ''S'' component, the proposal noted that sensitivity to market risk reflects the exposure of a credit union's current and prospective earnings level and economic capital position arising from changes in market prices and interest rates. The Board noted that effective risk management programs include comprehensive IRR policies, appropriate and identifiable risk limits, clearly defined risk mitigation strategies, and a suitable governance framework. The Board further notes that Sensitivity to Market Risk ratings will be based on the proposed ''S'' component evaluation content and rating criteria.

One commenter recommended that the ''S'' component should be examined by looking at asset liability modeling and engagement levels of the asset and liability management, loans, deposits, and investment committees. This commenter also stated that it would be beneficial to review the change in Net Economic Value of equity.

The Board agrees that these factors should be considered in evaluating the ''S'' component and notes that examiners will continue to review them in their evaluation of IRR. The NCUA's LCU 16–CU–08, Revised Interest Rate Risk Supervision, and the related guidance that the NCUA implemented in 2017, was designed with the prospect of adding the ''S'' component and expressly details how the NCUA assesses IRR.

One commenter requested that the Board specifically include a definition of ''market risk'' as it relates to various sensitivity factors. That commenter stated that the term ''market risk'' is used quite frequently in the descriptions of the proposed factors, but the term ''market risk'' is not clearly defined in the proposal.

After reviewing the NCUA's Supervisory Guidance, Examiner's Guide, and regulations, the Board has determined that it is unnecessary to include a definition of ''market risk'' in the Code of Federal Regulations (CFR). Additionally, no discrete part of the NCUA's regulations addresses market risk in a dedicated section. Further, the proposal's sensitivity to market risk evaluation criteria clearly states that market risk represents the exposure of a credit union's current and prospective earnings and economic capital arising from changes in market prices and of interest rates. Additionally, the description of market risk is highly consistent with how other prudential regulators, such as the FDIC, Federal Reserve Board, and the OCC define market risk in their instructions to examiners.[18] Therefore, the Board has determined the definition of market risk can effectively be addressed in an Letter to Credit Unions that will explain the CAMELS rating system and replace the existing letter.[19]

A commenter sought clarity to better understand the methodology underlying the direct assessment of IRR. That commenter stated that the thresholds for assessment are a key aspect to maintaining a sound interest rate hedging strategy and managing interest rate sensitivity. The commenter asked if the NCUA will be able to provide context for differentiating a rise in interest rates from an ''adverse'' rise in interest rates, or from a ''materially adverse'' IRR exposure.

The NCUA has previously provided this type of guidance about the methodology underlying the direct assessment of IRR in its LCU 16–CU–08, Revised Interest Rate Risk Supervision, which details how NCUA examiners assess IRR. Credit unions are encouraged to review this guidance.

The Board has determined that updating the NCUA's supervisory rating system from CAMEL to CAMELS by adding the ''S'' (Sensitivity to Market Risk) component to the existing CAMEL rating system as proposed and listed in the following table is appropriate and consistent with the NCUA's overall mission to ensure the safety and soundness of FICUs.[20]

''S'' Component for Sensitivity to Market Risk

The sensitivity to market risk reflects the exposure of a credit union's current and prospective earnings and economic

[18] *https://www.fdic.gov/regulations/safety/manual/section7-1.pdf* (Section 7.1) (July 2018) *https://occ.gov/publications-and-resources/publications/comptrollers-handbook/files/bank-supervision-process/pub-ch-bank-supervision-process.pdf* (June 2018).

[19] NCUA LCU 07–CU–12 (December 2007).

[20] 12 CFR 741.3(b)(5).

capital arising from changes in market prices and interest rates. Effective risk management programs include comprehensive interest rate risk policies, appropriate and identifiable risk limits, clearly defined risk mitigation strategies, and a suitable governance framework.[21]

Sensitivity to Market Risk ratings are based on, but not limited to, the following evaluation factors:

- Sensitivity of a credit union's current and future earnings and economic value of capital to adverse changes in market prices and interest rates;
- Management's ability to identify, measure, monitor, and control exposure to market risk considering a credit union's size, complexity, and risk profile; and
- The nature and complexity of interest rate risk exposure.

The Board has determined that updating the NCUA's supervisory rating system from CAMEL to CAMELS by adding the ''S'' component to the existing CAMEL rating system to evaluate sensitivity to market risk and adding rating criteria as outlined in the proposed rule, along with the added evaluation factor examples, is appropriate and consistent with the NCUA's overall mission to ensure the safety and soundness of FICUs.[22] The Board notes that the updated rating system is based on, and is consistent with, the UFIRS system utilized by the other prudential regulators. Nevertheless, the Board made certain minor, non-substantive modifications to the rating descriptions to clarify and better reflect supervision of credit unions. Notwithstanding this slight divergence from UFIRs, the Board has determined that the NCUA's revised rating system is consistent with the other financial supervisors.

Examiners will rate a credit union's ''S'' CAMELS rating component on a scale of ''1'' to ''5''.

''S'' rating	Description
1	• Risk management practices and controls for market risk are strong for the size and sophistication of the credit union, and the level of market risk it has accepted. • There is minimal potential for market price or interest rate changes to create a material adverse effect on the credit union's earnings performance or capital position. • The credit union has more than sufficient earnings and capital to support the level of market risk taken by the credit union.
2	• Risk management practices and controls for market risk are satisfactory for the size and sophistication of the credit union, and the level of market risk it has accepted. • There is only moderate potential for market price or interest rate changes to create a material adverse effect on the credit union's earnings performance or capital position. • The credit union has sufficient earnings and capital to support the level of market risk taken by the credit union.
3	• Risk management practices and controls for market risk are not fully commensurate with the size and sophistication of the credit union, or the level of market risk it has accepted. • There is high potential for market price or interest rate changes to create a material adverse effect on the credit union's earnings performance or capital position. • The level of market risk taken is high in relation to the credit union's earnings or capital.
4	• Risk management practices and controls for market risk are significantly deficient given the size and sophistication of the credit union, or the level of market risk it has accepted. • There is high potential for market price or interest rate changes to threaten the viability of the credit union. • The level of market risk taken is excessive in relation to the credit union's earnings or capital.
5	• The level of market risk taken or exposure to market price or interest rate changes is an imminent threat to the credit union's viability.

B. Comments Regarding Modifying the ''L'' Component

One commenter stated that liquidity should be evaluated with respect to how a credit union maintains access to non-member funds and tracking member balances as well as cash flow projections and stress testing.

The NCUA agrees that a liquidity review should include these items. The Board notes that the proposal's liquidity evaluation content is comprehensive and addresses liquidity sources as well as liquidity measurements under various scenarios. However, the Board is adding examples of liquidity evaluation factors to the evaluation content to enhance the clarity of its expectations and consistency with UFIRS.

The Board has determined that updating the NCUA's supervisory rating system from CAMEL to CAMELS by modifying the ''L'' (Liquidity Risk) component in the existing CAMEL rating system to include only liquidity evaluation content and rating criteria as outlined in the proposed rule, along with the added evaluation factor examples, is appropriate and consistent with the NCUA's overall mission to ensure the safety and soundness of FICUs.[23] The following discussion and table address the liquidity evaluation content and rating criteria.

''L'' Component for Liquidity Risk

In evaluating the adequacy of a credit union's liquidity profile, examiners consider the current and prospective sources of liquidity compared to funding needs and the adequacy of liquidity risk management relative to a credit union's size, complexity, and risk profile. A credit union's liquidity risk management practices should ensure the credit union maintains sufficient liquidity to timely meet its financial obligations and member share and loan demands. These practices should reflect the credit union's ability to manage unplanned changes in funding sources, respond to changes in market conditions affecting its ability to quickly liquidate assets with minimal loss, ensure liquidity is maintained at a reasonable cost, and limit reliance on funding sources that may not be available in times of financial stress or adverse changes in market conditions.[24]

A credit union's liquidity risk management practices should also be commensurate with the complexity of the balance sheet and its capital adequacy. This includes evaluating the reporting mechanisms in place to monitor and control risk, management's

[21] *https://publishedguides.ncua.gov/examiner/Pages/default.htm#ExaminersGuide/IRR/_IRR_Overview.htm%3FTocPath%3DInterest%2520Rate%2520Risk%7C____0.*

[22] 12 CFR 741.12.

[23] 12 CFR 741.12.

[24] *https://publishedguides.ncua.gov/examiner/Pages/default.htm#ExaminersGuide/Liquidity/Liquidity.htm%3FTocPath%3DLiquidity%7C____0.*

response when risk exposure approaches or exceeds the credit union's risk limits, and the prescribed corrective action taken when necessary.[25]

Liquidity ratings are based on, but not limited to, the following evaluation factors:

- The adequacy of liquidity sources compared to present and future needs and the ability of the credit union to meet liquidity needs without adversely affecting its operations or condition;
- The availability of assets readily convertible to cash without undue loss;
- Access to sources of funding;
- The level of diversification of funding sources, both on- and off-balance sheet;
- The degree of reliance on short-term, volatile sources of funds to fund longer term assets;
- The trend and stability of deposits; and
- The capability of management to properly identify, measure, monitor, and control the credit union's liquidity position, including the effectiveness of funds management strategies, liquidity policies, management information systems, and contingency funding plans.

The Board has determined that updating the NCUA's supervisory rating system from CAMEL to CAMELS by modifying the ''L'' (Liquidity Risk) component in the existing CAMEL rating system to include only liquidity evaluation content and rating criteria as outlined in the proposed rule, along with the added evaluation factor examples, is appropriate and consistent with the NCUA's overall mission to ensure the safety and soundness of FICUs.[26] The Board notes that the updated rating system is based on, and is consistent with, the UFIRS system utilized by the other prudential regulators. Nevertheless, the Board made certain minor, non-substantive modifications to the rating descriptions to clarify and better reflect supervision of credit unions. Notwithstanding this slight divergence from UFIRs, the Board has determined that the NCUA's revised rating system is consistent with the other financial supervisors.

Examiners will rate a credit union's ''L'' CAMELS component rating on a scale of ''1'' to ''5''.

''L'' rating	Description
1	• The credit union has strong liquidity levels. • The credit union has well-developed funds management policies and practices. • The credit union has reliable access to sufficient sources of funds on favorable terms to meet present and anticipated liquidity needs.
2	• The credit union has satisfactory liquidity levels. • The credit union has adequate funds management policies and practices. • The credit union has access to sufficient sources of funds on acceptable terms to meet present and anticipated liquidity needs.
3	• The credit union has low liquidity levels. • The credit union's funds management policies and practices are not fully commensurate with its size and complexity, or the liquidity risks it has taken. • The credit union may lack ready access to funds on reasonable terms.
4	• The credit union has inadequate liquidity levels. • The credit union's funds management policies and practices are inadequate given its size and complexity, or the liquidity risks it has taken. • The credit union is likely not able to obtain sufficient funds on reasonable terms to meet liquidity needs.
5	• Liquidity levels are so deficient there is an imminent threat to the credit union's viability. • The credit union requires extraordinary external financial assistance to meet maturing obligations or other liquidity needs.

C. Comments Regarding Technical Amendments in the Code of Federal Regulations

The Board did not receive comments regarding the proposed technical amendments to the CFR. The CAMEL rating system is not in a separate section or part in the NCUA's regulations, but references to CAMEL appear in several parts in the CFR. NCUA regulations regularly refer to CAMEL composite ''1'' or ''2'' rated credit unions, which indicate the ability to safely support additional regulatory flexibility; or CAMEL composite ''4'' or ''5'' rated credit unions, which warrant increased regulatory scrutiny. The Board has determined that amending the term CAMEL to CAMELS in the following sections in the CFR as proposed is necessary with the decision to adopt the CAMELS rating system for both natural persons and corporate FICUs.

- § 700.2 definition of Troubled condition
- § 701.14 Change in official or senior executive officer in credit unions that are newly chartered or are in troubled condition
- § 701.23 Purchase, sale, and pledge of eligible obligations
- § 703.13 Permissible investment activities
- § 703.14 Permissible investments
- § 703.108 Eligibility
- § 704.4 Prompt corrective action [for corporate credit unions]
- § 713.6 Fidelity Bond and Insurance Coverage for FICUs

D. Other Comments

Several commenters supported the proposal, stating it would enhance uniformity with other regulators. One commenter requested that the NCUA should adopt the UFIRS, which was approved by the FFIEC and used by the OCC, FDIC, the Federal Reserve Board, and many State Supervisory Authorities. The same commenter further suggested that the Board should keep its rating descriptions consistent with the rating descriptions for the ''L'' and ''S'' ratings used by other banking agencies by adopting the UFIRS in its entirety, stating the agency would benefit from not having to establish and maintain a separate authoritative framework for its examination rating system. The commenter stated that using the same CAMELS terminology but with different definitions from the UFIRS would create unnecessary confusion, impair a common understanding of the condition of financial institutions, create a disconnect with FFIEC guidance, and

[25] *https://www.ncua.gov/files/letters-credit-unions/LCU2013-10-InteragencyPolicyStatementFunding.pdf.*

[26] 12 CFR 741.12.

impose additional regulatory costs and burdens on credit unions.

The NCUA initially modeled its CAMEL rating system framework in 1987 after the FFIEC's UFIRS, or CAMEL framework. Subsequently, FFIEC updated the CAMEL system to CAMELS in 1996. The NCUA continued to model subsequent amendments to its CAMEL system after the FFIEC's CAMELS framework. The Board's decision to add the ''S'' component and thus adopt the CAMELS rating system further enhances the consistency of the NCUA's rating system with the UFIRS system. The Board notes that the risk rating criteria for the ''S'' and ''L'' components are consistent with UFIRS. In addition, all other composite and component evaluation content and rating criteria are highly consistent with the FFIEC's CAMELS rating system. Consequently, the Board has determined that it is not necessary or beneficial to adopt UFIRS in its entirety.

Another commenter requested that the NCUA address the consistency of the examination process, stating that it has varied over the years from examiner to examiner. The commenter noted that the added criteria, which the commenter referred to as bifurcating components, could create more inconsistencies.

The NCUA has a framework in place that supports the uniform application of CAMEL. It includes annual supervisory priorities and examination scope updates, routine updates to the Examiner's Guide and National Supervisory Policy Manual, a standardized examination platform and training program, regional and national quality assurance and control programs, and periodic training that address the inter-relationships between and among risk categories and the CAMEL rating implications. As with all examination systems across financial regulators, there is the need for examiner judgment to assess a particular situation; however, the Board believes that the agency has established processes that will support uniformity in the application of the CAMELS rating system.

Several commenters expressed concern that the proposal would require changes to some credit union processes and procedures. One commenter was especially concerned that recent accounting changes to Current Expected Credit Losses may make the changes related to CAMELS more problematic, given the increased volatility in income statements. Another commenter expressed concern that changing the rating system will disrupt the examination process for credit unions, especially smaller credit unions. The commenter stated that even though this change will not likely be a problem for larger credit unions that already maintain separate policies to address these risks, it may impact smaller credit unions that do not already maintain separate policies. Such credit unions may be required to create new policies and train staff on procedures to monitor them to comply with the proposed rule. The commenter continued that smaller credit unions may not have reached the level of sophistication that is required by this change, thus creating a challenge for them.

The Board believes that the changes will not result in an unreasonable burden on credit unions. As the commenters noted, typically larger credit unions already have processes, procedures, and systems in place. With respect to smaller credit unions (for example, those with assets less than $100 million, or 65 percent of credit unions as of June 2021), the Board believes that the changes will not impose a burden. Examiners of small credit unions will continue using the Estimated NEV Tool (ENT) to evaluate IRR.[27] The ENT results inform the IRR category rating which in turn, would inform the ''S'' component rating. With the exception of the examination report separately disclosing the liquidity risk in the ''L'' component and sensitivity to market risk in the ''S'' component, the Board believes that small credit unions will experience minimal, if any, changes in examination procedures. Moreover, the change is an enhancement to the NCUA's supervision. Credit unions do not need to do anything more than they are already doing to comply with the policy requirements of the IRR Rule (§ 741.3(b)(5)).

One commenter stated that it is appropriate to implement the change in the first quarter of 2022 to allow credit unions to modify their systems. Several other commenters requested more lead time. One commenter suggested that the NCUA offer a transitional year in 2022, specifically performing examinations with the bifurcation but waiting to officially apply the ''S'' to the CAMEL rating until 2023. The commenter believed this delay would afford the NCUA time to complete the implementation of its new MERIT system and prepare clear internal guidance for examiners to follow along with clear guidance to the credit unions. Several other commenters recommended that the new rating system not be effective until at least six months after publication in the **Federal Register** noting the additional time would allow credit unions to adjust their reporting systems.

Credit unions and other stakeholders are aware that the Board has been working toward the new CAMELS system. Specifically, the NCUA's Office of Inspector General issued a report recommending this change in 2015 and issued a number of updates between 2016 and 2021 regarding the agency's CAMELS implementation status.[28] Accordingly, the Board has determined that its plans to have the CAMELS system take effect on April 1, 2022, as proposed, is appropriate.

One commenter stated that the NCUA should give credit unions the opportunity to comment should the NCUA decide to modify the rating descriptions used by the banking agencies.

The Board does not anticipate any modifications of the rating descriptions used by the other financial regulators. Nevertheless, the Board notes that any substantive change to the CAMELS rating system—either through recommendations by the FFIEC or at the Board's initiative—would generally be made through public notice and comment under the Administrative Procedure Act.

One commenter provided a comment, beyond the scope of the proposal, that suggested the NCUA should establish and publish an examination policy stating that if a credit union's operations have not changed from previous years, yet the same circumstances are leading to a new finding or a downgrade of a credit union's composite rating under the new system, an automatic review will be triggered. Similarly, another commenter requested that the Board create a process to allow a credit union to appeal a component and composite CAMELS rating.

The Board notes these comments are beyond the scope of the proposal and thus it would be inappropriate to make these changes in this rulemaking. The Board believes that it is more appropriate to address these issues in the supervisory process on a case-by-case basis. Further, credit unions currently may appeal composite CAMEL ratings of ''3,'' ''4,'' or ''5,'' and component ratings that have a significant adverse effect on the nature or level of supervisory oversight.[29]

[27] NCUA LCU 16–CU–08 (October 2016).

[28] Review of NCUA's Interest Rate Risk Program, Report #OIG–15–11, NCUA Office of Inspector Gen, (Nov. 13, 2015), *available at https://www.ncua.gov/files/oig/NCUA_Semiannual_Report_Congress_March_2016.pdf.*

[29] 12 CFR 746.103.

IV. Regulatory Procedures

A. Regulatory Flexibility Act

The Regulatory Flexibility Act requires the NCUA to prepare an analysis to describe any significant economic impact a regulation may have on a substantial number of small entities.[30] For purposes of this analysis, the NCUA considers small credit unions to be those having under $100 million in assets.[31] The agency has determined that this rule will not significantly affect credit unions regardless of asset size because it is not adding any substantive requirement. Accordingly, the associated cost is minimal. The NCUA certifies the rule will not have a significant economic impact on a substantial number of small credit unions.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden.[32] For purposes of the Paperwork Reduction Act of 1995, a paperwork burden may take the form of either a reporting or a recordkeeping requirement, both referred to as information collections. This rule imposes no new paperwork-related requirements. Therefore, this rule will not create new paperwork burdens or modify any existing paperwork burdens.

C. Executive Order 13132

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

D. 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, 1999.[33]

E. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) generally provides for congressional review of agency rules.[34] A reporting requirement is triggered in instances where the NCUA issues a final rule as defined by § 551 of the Administrative Procedure Act. An agency rule, in addition to being subject to congressional oversight, may also be subject to a delayed effective date if the rule is a ''major rule.'' The NCUA does not believe this rule is a ''major rule'' within the meaning of the relevant sections of SBREFA. As required by SBREFA, the NCUA will submit this final rule to OMB for it to determine if the final rule is a ''major rule'' for purposes of SBREFA. The NCUA also will file appropriate reports with Congress and the Government Accountability Office so this rule may be reviewed.

List of Subjects

12 CFR part 700

Credit unions.

12 CFR part 701

Credit unions. Insurance. Reporting and recordkeeping requirements.

12 CFR part 703

Credit unions. Investments. Reporting and recordkeeping requirements.

12 CFR part 704

Corporate Credit Unions, Prompt Corrective Action

12 CFR part 713

Bonds. Credit unions. Insurance.

By the National Credit Union Administration Board on October 21, 2021

Melane Conyers-Ausbrooks,
Secretary of the Board.

For the reasons discussed in the preamble, the Board amends 12 CFR parts 700, 701, 703, 704, and 713 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.

§ 700.2 [Amended]

■ 2. In § 700.2, amend the definition of ''troubled condition'' by removing the word ''CAMEL'' and adding in its place the word ''CAMELS'', wherever it appears.

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, 1788, 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.

§ 701.14 [Amended]

■ 4. Amend § 701.14, in paragraphs (b)(3)(i) and (ii) and (b)(4)(i) and (ii), by removing the word ''CAMEL'' and adding in its place the word ''CAMELS''.

§ 701.23 [Amended]

■ 5. Amend § 701.23, in paragraph (b)(2) introductory text, by removing the word ''CAMEL'' and adding in its place the word ''CAMELS.''

PART 703—INVESTMENT AND DEPOSIT ACTIVITIES

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

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

§ 703.13 [Amended]

■ 7. Amend § 703.13, in paragraph (d)(3)(iii), by removing the word ''CAMEL'' and adding in its place the word ''CAMELS''.

§ 703.14 [Amended]

■ 8. Amend § 703.14, in paragraphs (i) and (j)(4), by removing the word ''CAMEL'' and adding in its place the word ''CAMELS'', and in paragraph (j)(4) by removing the word ''subparagraph'' and adding ''paragraph (j)(4)'' in its place.

PART 704—CORPORATE CREDIT UNIONS

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

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

§ 704.4 [Amended]

■ 10. Amend § 704.4, in paragraph (d)(3)(ii), by removing the word ''CAMEL'' and adding in its place the word ''CAMELS''.

[30] 5 U.S.C. 603(a).

[31] Interpretive Ruling and Policy Statement 03–2, 68 FR 31949 (May 29, 2003) *as amended by* Interpretive Ruling and Policy Statement 13–1, 78 FR 4032 (Jan. 18, 2013).

[32] 44 U.S.C. 3507(d); 5 CFR part 1320.

[33] Public Law 105–277, 112 Stat. 2681 (1998).

[34] 5 U.S.C. 551.

PART 713—FIDELITY BOND AND INSURANCE COVERAGE FOR FEDERALLY INSURED CREDIT UNIONS

■ 11. The authority citation for part 713 continues to read as follows:

Authority: 12 U.S.C. 1761a, 1761b, 1766(a), 1766(h), 1789(a)(11).

§ 713.6 [Amended]

■ 12. Amend § 713.6, wherever it appears in the table in paragraph (a)(1) and paragraph (c), by removing the word ''CAMEL'' and adding in its place the word ''CAMELS''.

[FR Doc. 2021–23332 Filed 10–26–21; 8:45 am]

BILLING CODE 7535–01–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 712

RIN 3133–AE95

Credit Union Service Organizations (CUSOs)

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board (Board) is issuing a final rule that amends the NCUA's credit union service organization (CUSO) regulation. The final rule accomplishes two objectives: expanding the list of permissible activities and services for CUSOs to include the origination of any type of loan that a Federal credit union (FCU) may originate; and granting the Board additional flexibility to approve permissible activities and services.

DATES: This final rule is effective November 26, 2021.

FOR FURTHER INFORMATION CONTACT: Frank Kressman, Office of General Counsel, (703) 518–6540; or by mail at National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314.

SUPPLEMENTARY INFORMATION:

I. Introduction

Legal Authority and Background

The Board is issuing this rule pursuant to its authority under the Federal Credit Union Act (FCU Act).[1] Under the FCU Act, the NCUA is the chartering and supervisory authority for FCUs and the federal supervisory authority for federally insured credit unions (FICUs). The FCU Act grants the NCUA a broad mandate to issue regulations governing both FCUs and FICUs. Section 120 of the FCU Act is a general grant of regulatory authority and authorizes the Board to prescribe regulations for the administration of the FCU Act.[2] Section 209 of the FCU Act is a plenary grant of regulatory authority to the NCUA to issue regulations necessary or appropriate to carry out its role as share insurer for all FICUs.[3] Accordingly, the FCU Act grants the Board broad rulemaking authority to ensure that the credit union industry and the National Credit Union Share Insurance Fund (NCUSIF) remain safe and sound.

Under the FCU Act, FCUs have the authority to lend up to one percent of their paid-in and unimpaired capital and surplus, and to invest an equivalent amount, in CUSOs.[4] The NCUA regulates FCUs' lending to, and investment in, CUSOs in part 712 of its regulations (CUSO rule).[5] In general, a CUSO is an organization: (1) In which a FICU has an ownership interest or to which a FICU has extended a loan; (2) is engaged primarily in providing products and services to credit unions, their membership, or the membership of credit unions contracting with the CUSO; and (3) whose business relates to the routine daily operations of the credit unions it serves.[6] The CUSO rule provides a list of preapproved activities and services related to the routine daily operations of credit unions.[7]

The list of preapproved activities and services in the CUSO rule has not been substantively revised since 2008.[8] The 2008 final rule added two new categories of permissible CUSO activities: (1) Credit card loan origination and (2) payroll processing services. The 2008 final rule also added new examples of permissible CUSO activities and clarified that FCUs may invest in, and loan to, CUSOs that buy and sell participations in loans they are authorized to originate. In the 2008 final rule, commenters requested that FCUs be permitted to lend to or invest in CUSOs involved in broader types of lending; specifically, car loans, including direct lending and the purchase of retail installment sales contracts from vehicle dealerships, and payday lending. The NCUA, however, declined to provide such authority at that time.[9]

II. Proposed Rule

At its January 14, 2021 meeting, the Board issued the proposed rule to amend the NCUA's CUSO regulation.[10] The proposed rule would accomplish two objectives: Expanding the list of permissible activities and services for CUSOs that FCUs may lend to or invest in to include origination of any type of loan that an FCU may originate; and granting the Board additional flexibility to approve permissible activities and services. The NCUA also sought comment on broadening general FCU investment authority in CUSOs based on the FCU Act's provision that authorizes FCUs to invest in organizations providing services associated with the routine operations of credit unions, which is codified in a separate provision from the authority for FCUs to lend to ''credit union organizations.'' The proposed rule provided for a 30-day comment period that closed on March 29, 2021. To allow interested persons more time to consider and submit comments, the Board extended the comment period for an additional 30 days. The extended comment period closed on April 30, 2021.[11]

The Board received over 1,000 comments on the proposed rule. Comments were received from credit unions, both state and federal, CUSOs, credit union leagues and trade associations, banking trade organizations, individuals, consumer organizations, and an association of state credit union supervisors. In general, consumer organizations, banking trade organizations, and individuals who participated in a form letter writing campaign were opposed to the proposed rule. Credit unions were not unanimous, with some credit unions supporting the rule and others opposing it. CUSOs, credit union leagues, and trade organizations were generally in favor of the proposed rule.

III. Final Rule

The final rule adopts the proposed rule without any substantive change. Under the final rule, therefore, CUSOs are permitted to originate any type of

[1] 12 U.S.C. 1751 *et seq.*

[2] 12 U.S.C. 1766(a).

[3] 12 U.S.C. 1789.

[4] 12 U.S.C. 1757.

[5] 12 CFR part 712. All sections of part 712 apply to FCUs. Sections 712.2(d)(2)(ii), 712.3(d), 712.4, and 712.11(b) and (c) apply to federally insured, state-chartered credit unions (FISCUs), as provided in § 741.222 of the chapter. FISCUs must follow the law in the state in which they are chartered with respect to the sections in part 712 that only apply to FCUs. Corporate credit union CUSOs are subject to part 704. Any amendments to part 704 would occur through a separate rulemaking and are not included in this final rule.

[6] *See* 12 CFR 712.1(d), 712.3(b), and 712.5.

[7] 12 CFR 712.5.

[8] 73 FR 79307 (Dec. 29, 2008).

[9] The NCUA's rationale for not extending CUSO lending authority more broadly is discussed in detail in Section III, Final Rule.

[10] 86 FR 11645 (Feb. 26, 2001).

[11] 86 FR 16679 (Mar. 31, 2021).

loan that an FCU may originate and grants the Board additional flexibility to approve permissible CUSO activities and services outside of notice and comment rulemaking.[12] The final rule and a discussion of the Board's responses to the comments are discussed in detail subsequently. First, however, the Board explains the general principles and approach it has taken to examine and reconcile the competing viewpoints of commenters as well as past statements by the NCUA and individual Board Members on risks relating to CUSO activity.

As detailed in response to commenters' different points, which are grouped by subject matter in the following sections, the Board has re-examined several key statutory and policy principles to engage in a thorough, balanced review of the comments. These points include the following:

1. The Board's views regarding safety and soundness and risk to the NCUSIF. On this critical issue, the Board has considered key reference points, including the statutory definition of a ''material loss'' to the NCUSIF and requirements for NCUA insurance of member accounts. These authorities do not define all losses as material or involving undue risk to the NCUSIF. This preamble elaborates on these reference points in considering the degree of risk the rule may pose.

2. The need to balance predicted risks against predicted benefits. Many commenters opposing the proposed rule made, for the most part, generalized predictions of harm to the NCUSIF, to consumers, or to the reputation of credit unions. While the Board recognizes the need to consider these concerns, it also finds that they do not account for the potential benefits that the regulatory changes may bring to FCUs by enhancing efficiency and supporting innovation, and to consumers by expanding lending options and access through credit union-affiliated lenders. The Board also finds this expansion in FCU authority appropriate for parity purposes because the Board currently does not restrict the activity of CUSOs in which only FISCUs lend or invest.

3. Some of the policy concerns invoked by commenters, as well as the Board at times in the past, have been both qualified and conditional. Most notably, some commenters and the Board in past CUSO rulemakings have considered the potential for FCUs lending to or investing in CUSOs with expanded authorities to dilute the FCU common bond and introduce more competition to small credit unions. The Board continues to recognize that these issues raise concerns for some parties, but has found that neither rests on clear statutory authority in the FCU Act. That is to say, nothing in the FCU Act binds CUSOs to FCU field of membership common bond provisions, and the Board itself has invoked this concern only conditionally in past rulemakings, allowing it to yield to the needs of credit unions to avail themselves of expanded CUSO lending activity. Further, the FCU Act does not require a CUSO to serve credit unions and members exclusively, but rather primarily, which balances a focus on credit union members while expressly authorizing CUSOs to serve others. Similarly, the Board does not believe it is prudent to allow concerns over legitimate competition in the marketplace to restrain regulatory changes that may benefit many credit unions and the system as a whole. Accordingly, to the extent these factors are appropriate regulatory considerations, the Board believes they must yield to the benefits of expanded FCU authority about CUSO activity and other factors.

4. Application of the Board's judgment to reconcile differing viewpoints. Commenters opposing the rule raised several concerns, and in a few cases, cited past examples or incidents. But the Board does not believe that commenters opposing the rule provided substantial evidence to support their predictions that adopting the proposed rule would result in various harm. Commenters supporting the rule provided reasons they believe the rule would be beneficial. In considering these competing viewpoints, the vast majority of which are general policy views, the Board has applied its own judgment to make the best conclusions it can about the potential benefits and risks of the proposed rule. Throughout this review, the Board has concluded that limiting expansion and innovation indefinitely based only on generalized concerns would result in regulatory stagnation, which may harm the credit union system in the long term.

After considering the mixed viewpoints, the Board has determined that the overall weight of the factors in the record favor moving forward to enhance opportunities for FCUs CUSOs to engage in all types of lending permitted for FCUs.

Expansion of Permissible FCU Lending and Investment in CUSOs Engaged in Lending Activity

The Board has reconsidered its 2008 position on permitting FCUs to invest in or lend to CUSOs that engage in all types of lending. The Board now believes that permitting FCUs to invest in or lend to CUSOs that originate any type of loan that an FCU may originate may better enable FCUs to compete effectively in today's marketplace and better serve their members.

As discussed in the preceding section, the FCU Act permits an FCU to lend to or invest in a CUSO that provides services associated with the routine and daily operations of credit unions. The NCUA has interpreted this statutory authority broadly to permit an FCU to lend to, and invest in, a CUSO that does most of the same activities and services permissible for an FCU.[13] To date, however, FCUs have not been permitted to invest in, or lend to, CUSOs that originate certain kinds of loans.[14]

As discussed in the proposed rule, the NCUA historically has been reluctant to grant FCUs authority to invest in or lend to CUSOs with broad lending authority. First, the NCUA has been hesitant because CUSOs may serve those who are not members of a member credit union. The NCUA has been concerned about FCUs benefiting from CUSO profits generated from non-members.[15] Second, the NCUA has also expressed concern that if member loans were being made by CUSOs, the NCUA would have a duty to examine such loans and that would necessitate greater NCUA examination authority over CUSOs.[16] Finally, the NCUA has also had concerns that permitting CUSOs to engage in a core credit union function could negatively affect affiliated credit union services.[17]

Due to these concerns, the NCUA has previously found compelling justification for permitting FCUs to invest in or lend to CUSOs engaged in only four types of loans: (1) Business; (2) consumer mortgage; (3) student; and (4) credit cards.[18] In permitting these types of lending, the NCUA has considered factors specific to each type of lending, such as whether these activities require specialized staff or economies of scale, and, as discussed subsequently, whether loan aggregation

[12] Originate means to fund or make loans. This is separate from the already permissible activity for FCUs to lend to or invest in CUSOs that engage in loan support services that include loan processing and servicing under § 712.5(j).

[13] 12 CFR 712.5.

[14] *See,* 62 FR 11779 (Mar. 13, 1997).

[15] *Id.*

[16] *Id.*

[17] 68 FR 16450 (Apr. 4, 2003).

[18] *Id. See also,* 73 FR 79307 (Dec. 29, 2008).

was prevalent in the marketplace for the particular type of lending.

Upon reexamination, the Board now believes it is appropriate to permit FCUs to invest in, or lend to, CUSOs that engage in all types of lending permitted for FCUs. As discussed previously, the Board received extensive comments on the proposed rule. The commenters, including credit union commenters, were split on whether permitting CUSOs to originate any loan that an FCU can originate would be ultimately beneficial to credit unions, particularly small credit unions, or detrimental to the long-run interests of credit unions. Comments are discussed in detail in the following paragraphs.

Safety and Soundness

Some commenters who supported the proposed rule generally stated that the rule would not cause safety and soundness concerns and that the current CUSO regulatory framework sufficiently protects FCUs and the NCUSIF. Commenters pointed to several existing authorities to manage the potential risk from CUSO lending. First, commenters noted that under the current regulation, the NCUA may at any time, based upon supervisory, legal, or safety and soundness reasons, limit any CUSO activities or services, or refuse to permit any CUSO activities or services. Commenters further stated that the NCUA can exert pressure on FCUs if CUSOs engaged in unsafe or unsound behavior. Second, an FCU may invest in, loan to, and/or contract with only those CUSOs that are sufficiently bonded or insured for their specific operations and engaged in preapproved activities and services. Third, FCUs are bound by an aggregate limit of loans and investments in CUSOs to two percent of paid-in and unimpaired capital and surplus. Fourth, FCUs (as well as FISCUs) are required to include provisions in contracts with CUSOs in which they lend or invest to give the NCUA complete access to any books and records of the CUSO and the ability to review the CUSO's internal controls. Finally, other commenters noted that CUSOs are subject to state lending laws and federal consumer protection laws. In addition, some CUSOs may be subject to supervision at the state level by way of state licensing requirements or third-party oversight authority.

Some commenters discussed that CUSOs currently have extensive lending authority and there have not been any extraordinary losses.

A few commenters also discussed that the bigger safety and soundness risk may arise from not adopting the proposed rule as it permits FCUs to remain competitive and build capital. Commenters also discussed that FCUs could be subject to reputational harm if they cannot provide members the necessary services.

In response to a question in the proposed rule about potential safety and soundness conditions, one commenter urged caution on the potential to apply risk retention requirements to participation loans originated by wholly owned CUSOs. The commenter stated that, since the balance sheets of the CUSO and its parent are consolidated, the participation becomes effectively nonexistent, so a risk retention requirement becomes unnecessary.[19]

In contrast, some of the commenters who opposed the proposed rule believed that the proposal would have substantial unintended consequences and affect the safety and soundness of FCUs and the NCUSIF. Commenters primarily focused on the NCUA's lack of examination or oversight authority and the systemic risk that arises from a few CUSOs providing services to a large portion of credit unions.

Commenters generally discussed that the NCUA has no examination or oversight authority over CUSOs. One commenter noted that several federal agencies, including the Government Accountability Office and the Financial Stability Oversight Council, have recommended that the NCUA be given supervisory oversight of CUSOs and that the Chairs of every NCUA Board over the past decade, as well as the NCUA's Inspector General, have called for vendor authority. These commenters believed expanding CUSO lending authority at the same time the NCUA has acknowledged an existing risk related to CUSOs would exacerbate the current problems that arise from the inability to supervise CUSOs. One commenter questioned why the NCUA would propose providing CUSOs with all the powers of FCUs, but with none of the commensurate prudential supervision or consumer safeguards to mitigate the risk. One commenter recommended a hybrid approach that would enable the NCUA to review a CUSO's loan origination activities, but not permit a complete NCUA examination.

The Board does not believe that the limited expansion of FCUs' ability to lend to, or invest in, CUSOs engaged in lending permissible for an FCU contradicts its long-stated need for additional examination and enforcement authority of CUSOs and other third-party vendors.[20] It is the Board's continuing policy to seek third-party vendor authority for the agency from Congress. The Board does not believe this rule undermines its request for such authority as the rule provides only a modest expansion of FCU authority to lend to, and invest in, CUSOs and results in only an incremental amount of additional risk to the NCUSIF.

The Board also believes there are several factors that may mitigate the risk to the NCUSIF, though the Board acknowledges that despite these mitigating factors CUSOs have caused more than $500 million in losses to FICUs since 2008. First, as commenters in favor of the rule discussed, even though the NCUA does not have examination or enforcement authority over CUSOs, FCUs only have the authority to lend up to one percent of their paid-in and unimpaired capital and surplus, and to invest an equivalent amount, in total to CUSOs. These investment and lending limits mitigate risk to the NCUSIF. Additionally, § 712.3(d) requires all FICUs that obtain an ownership interest in a CUSO to ensure by contract that the NCUA has access to the CUSO's books and records and other information and reports. CUSOs are also subject to state lending laws and federal consumer protection laws. These and the other regulatory requirements discussed above mitigate the potential risk to the NCUSIF due to the modest expansion of FCU authority to lend to and invest in CUSOs engaged in all lending activities.

The Board also notes that it has broad investigative subpoena authority that agency staff can use to obtain records and testimony in certain extraordinary circumstances.[21] This broad authority is not limited to credit unions and may permit NCUA staff to obtain information from third parties in connection with the agency's examinations of credit unions.[22] The Board does not currently

[19] Note that a CUSO's balance sheet would be consolidated with a credit union's if required by applicable accounting principles. Generally, the NCUA requires credit unions to consolidate a CUSO's balance sheet with the credit union's when the credit union wholly owns or owns a controlling interest in the CUSO. *See* NCUA Call Report Form 5300 Instructions, Statement of Financial Condition, at 2, effective Sept. 2021, *available at https://www.ncua.gov/files/publications/regulations/call-report-instructions-september-2021.pdf.*

[20] The Board also notes that its request for third-party vendor authority is more expansive than examination and enforcement authority over CUSOs. The term third-party vendors include any third-party service provider regardless of credit union ownership, a larger category of institutions than just CUSOs. The NCUA currently has very limited oversight of non-CUSO third-party vendors.

[21] 12 U.S.C 1784(a), 1786(p).

[22] 12 U.S.C. 1784(a); *see United States* v. *Inst. for Coll. Access & Success,* 27 F. Supp. 3d 106, 112

Continued

use this authority broadly to obtain information from CUSOs, but the Board could potentially instruct NCUA staff to employ these oversight tools to their full potential to guard against risks to the NCUSIF associated with CUSO activity in the absence of direct statutory examination and enforcement authority over CUSOs.

Further, regarding its enforcement authority, the Board also notes that it may have statutory enforcement authority in certain cases over CUSOs that commit misconduct. Specifically, an insured credit union's independent contractor may be subject to the Board's enforcement powers under the FCU Act if it knowingly or recklessly participates in certain violations that cause or are likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured credit union.[23] Thus, the Board may have greater power in certain circumstances than opposing commenters acknowledge.

The Board also believes that the risk to the NCUSIF is mitigated because in its experience most CUSO loans are sold to credit unions, which are subject to NCUA enforcement and examination authority. In addition, the Board also believes that the additional risk is mitigated because most CUSOs are wholly owned by the parent credit union (as of the end of 2020, for instance, approximately 72 percent of natural person CUSOs were wholly owned by credit unions),[24] which provides the NCUA additional leverage if a CUSO is engaging in unsafe or unsound lending practices. In both situations, the NCUA would likely have additional insight into the risk of the CUSO's lending. The Board acknowledges, however, that there may be gaps in its jurisdiction for certain CUSOs that may retain its loans, sell them to third parties, or are not wholly owned by credit unions.[25] It is the Board's belief that this risk is limited and is outweighed by the potential benefits of the final rule.

As some commenters supporting the proposed rule observed, the expanding lending authority may be beneficial to FCUs by enhancing their competitiveness and ability to generate capital. Increased credit union capital would strengthen the NCUSIF by reducing the potential for losses due to credit union failures. The Board believes that the potential benefits of the expanded authority for FCUs to lend to or invest in CUSOs engaged in all lending activities may outweigh the potential costs of the rule including additional risk to the NCUSIF, decreased credit union lending due to increased competition, and increased consolidation, particularly among smaller credit unions. In any event, the Board considers the potential benefit to credit unions and the NCUSIF to be at least a partial mitigating factor against the potential incremental risks.

Other commenters expressed concerns about systemic risk. For example, one commenter quoted former NCUA Board Chair Mark McWatters to highlight how CUSOs contribute to systemic risk: ''Since 2008, CUSOs have caused more than $500 million in losses to federally insured credit unions, and they have contributed to the failure of 11 credit unions . . . more than half of the NCUA's institutions hold less than $33 million in assets and average approximately three to four full-time employees per institution. These institutions are heavily dependent on third-party outsourced services and do not possess the resources to independently perform full due diligence on all of their critical services providers.'' Another commenter stated that a large CUSO operating as a loan originator and selling participations or whole loans could produce systemic risks within the industry as evidenced by prior events caused by single originators, a concentrated group of originators, or by overconcentration within a sector.

As discussed in its responses to other comments in the preceding section, the Board has considered the potential benefits and risks of FCUs lending to or investing in CUSOs engaged in broader types of lending. The Board recognizes that several present and prior Board Members, the Inspector General, and other government bodies have found that the NCUA needs statutory enforcement authority over third-party vendors, including CUSOs, to manage the associated risks appropriately. The NCUA has also documented significant previous losses to the NCUSIF that were attributed to CUSOs, particularly between 2008 and 2015.

The Board, however, does not find it necessary to continue to limit FCUs' authority to invest in, or lend to, CUSOs engaged in lending activities permissible for FCUs until the FCU Act is amended to add enforcement authority over CUSOs. Such a response is disproportionate to the modest expansion permitted in this final rule.

The Board also finds that prior statements about losses to the NCUSIF do not support any firm prediction that similar losses will occur in the future because of this final rule (or even with a mere continuation of the current authorities).[26] For example, the Board considers what has occurred since 2015, as reflected in the Inspector General's regular reports. Under the FCU Act, the Inspector General must submit a written report to the Board, the Comptroller General of the United States, and other parties when the NCUSIF incurs a ''material loss'' an insured credit union, with material loss defined as one exceeding $25 million and 10 percent of total assets of the credit union.[27] These reports must include a description of the reasons that the problems of the credit union resulted in a material loss to the NCUSIF and recommendations for preventing any such loss in the future.[28] For losses that are not material as defined in this section of the FCU Act, the Inspector General must identify losses occurring in each 6-month period and report semi-annually to the Board and Congress on whether any of those losses warrant an in-depth review.[29] Since 2015, the NCUA's Inspector General has not issued any Material Loss Review reports in which CUSO activity was cited as the reason, or part of the reason, for the losses. The NCUA also looked at the total losses due to CUSOs in failed FICUs from 2015 to June 30, 2021. The Board found that failed FICUs lost approximately $4 million due to CUSOs during this period. And, the NCUSIF lost only an amount estimated to be under $1 million due to CUSOs during this period as most of the failed FICUs with CUSO-related losses were merged into other institutions without substantial loss to the NCUSIF.

(D.D.C. 2014) (an agency Inspector General's administrative subpoena to third party in an investigation was enforceable even though third party was not an entity subject to agency's regulatory jurisdiction).

[23] 12 U.S.C. 1786(r).

[24] CUSOs at a Glance (2020), *available at https://www.ncua.gov/analysis/cuso-economic-data/cusos-glance.*

[25] The Board notes that such risk is already present in the credit union system as the NCUA insures FISCUs that may be subject to substantially less restrictive CUSO requirements. For example, many states do not restrict, or have higher limits for, FISCU investments in CUSOs.

[26] The Board also notes that there have been significant changes to laws, regulations, and industry practices for loan underwriting and credit administration since the 2008 financial crisis. Therefore, the Board also believes that the historical losses attributed to CUSOs that were discussed in the comments are not reflective of the current standards and practices, so the referenced historical losses may not necessarily be predictive of future losses.

[27] 12 U.S.C. 1790d(j)(1), (2).

[28] 12 U.S.C. 1790d(j)(1).

[29] 12 U.S.C. 1790d(j)(4). This discussion provides only a general description of these requirements and the Inspector General's duties and activities. More information is available on the Inspector General website and in its Semi-Annual Reports to Congress.

The Board finds the absence of material CUSO-related losses during this period noteworthy; however, the Board acknowledges it excluded losses that occurred during the 2008 banking crisis and looked at data that occurred during a relatively robust economy. This absence does not guarantee that material losses will not occur in the future, but it illustrates the uncertainty associated with predictions by some commenters. A past pattern of material losses is not, in the Board's opinion, sufficient evidence that the pattern will continue.

In reconciling these competing perspectives, the Board also has considered the general principles discussed in the introduction to this preamble. Neither the FCU Act nor the NCUA's regulations or policies require the agency to ensure all potential losses to the NCUSIF are avoided. The FCU Act requires the Board to consider whether a credit union applying for insurance of member accounts poses ''undue risk'' to the NCUSIF and to deny the application if the financial conditions and policies are unsafe and unsound or if the applicant poses undue risk to the NCUSIF.[30] In its regulations in § 741.204(d), the Board has further defined ''undue risk'' to the NCUSIF as a condition that creates a probability of loss in excess of that normally found in a credit union and which indicates a reasonably foreseeable possibility of insolvency and a resulting claim against the NCUSIF. Similarly, in considering whether a credit union's practices are unsafe and unsound for chartering and field of membership purposes, the Board considers whether the action or lack of action would result in an ''abnormal risk of loss'' to the credit union, its members, or the NCUSIF.[31]

The Board also notes that the ongoing trend of credit union consolidation is already increasing systemic risk. On an aggregate basis, the total number of credit unions has been cut in half over the prior two decades as smaller credit unions have merged or consolidated. There were over 5,000 fewer credit unions with less than $1.0 billion in total assets in 2020 than there were in 2000. As the number of credit unions has declined, loan portfolios have become increasingly concentrated within the largest credit unions. Expanding FCUs' authority to lend or invest in CUSOs engaged in all lending activities may allow smaller credit unions to combine their resources to remain more competitive within the changing lending landscape, which could result in a reduction of systemic risk.

Separately, the Board already insures FISCUs that may, depending on state law, lend or invest in CUSOs that engage in all lending activities. In its role as insurer, the Board finds it would be unreasonable to decline to expand FCU authority on a risk basis when it currently allows the activity for FISCUs.

Based on these standards and principles, the Board does not find that the expanded FCU authority to lend to or invest in CUSOs engaged in all lending activities provided by this rule are likely or more likely than not to result in material losses to the NCUSIF or unsafe and unsound practices posing an undue risk to the NCUSIF.

Regarding the concern over concentration risk, the Board believes that existing limitations in §§ 701.22 and 701.23 on the amount of eligible obligations that FCUs may purchase and on the amount of loan participations that all federally insured credit unions may purchase from a single source will provide significant protection against this concern. Additionally, the Board believes there is some potential benefit to small credit unions buying loans from CUSOs. In such a case, many credit unions may be purchasing loans from the same entity leading collectively to enhanced due diligence on the CUSO.

Commenters also discussed the risk for reputational harm. For example, the ownership structure of CUSOs may result in the public's linking any aggressive or improper CUSO lending activity with the lending activity of FCUs themselves.

The Board agrees that confusion over the status of CUSOs or mistaken belief that they are federally insured and subject to the NCUA's full oversight would be problematic. The Board notes that certain FCU practices related to the promotion of CUSO services or CUSOs with names related to their FCU parents may raise unfair, deceptive, or abusive acts or practices issues.[32] FCUs should pay particular attention to their marketing and ensure that members are informed and understand the legal significance between FCU-originated loans and CUSO-originated loans. For example, FCUs should ensure that members clearly understand that the NCUA may have a more limited ability to address member complaints related to CUSO-originated loans. The Board notes that standardized disclaimers in loan origination documentation may be insufficient to address this concern. The Board, however, finds that the current regulations, including the prohibition on unfair, deceptive, or abusive acts or practices, reasonably guard against the concern about member confusion. First, § 712.4(a) specifies that an insured credit union must take several steps to ensure corporate separateness from a CUSO, including that each is held out to the public as separate enterprises. Adherence to this requirement, and proper enforcement of it by the NCUA, is likely to mitigate much or all of the concern regarding confusion. Second, and similarly, the NCUA's advertising regulation in § 740.2 requires, among other matters, that an insured credit union using a trade name in advertising must use its official name in loan agreements and account statements. This requirement may further safeguard against the risk of confusing a credit union with an associated CUSO with a similar name because the official loan documentation would disclose which entity or entities are involved. Each of these provisions on their own, therefore, and when considered in concert, may work to address this concern.

Commenters also noted that CUSO lending activities are currently considered complex or high risk. The Board acknowledges that CUSO lending activity has the potential to create material financial risk. This is why lending CUSOs are currently subject to additional reporting requirements in § 712.3(d). As discussed above, however, the Board does not believe this rule represents an undue safety and soundness risk; rather, the Board believes it only represents an incremental risk to credit unions and the NCUSIF. This relatively modest, incremental risk is further mitigated, as discussed above, by the existing regulatory and supervisory controls and standards in place.

Finally, one commenter recommended that loans purchased from a CUSO be subject to the same limitations as loans purchased from other credit unions and recommended that the NCUA have a process to ensure the quality of CUSO loans.

The Board has considered this recommendation and declines to adopt it. First, regarding new limitations on loans, the Board underscores that currently, §§ 701.22 and 701.23 of the Board's regulations restrict loan and loan participation purchases by credit unions. Subject to various exceptions, including those provided in the temporary COVID rule in effect through

[30] 12 U.S.C. 1781(c).

[31] 12 CFR 701, App. B, Glossary.

[32] Dodd-Frank Wall Street Reform and Consumer Protection Act, Title X, Subtitle C, § 1036; Public Law 111–203 (July 21, 2010).

December 31, 2021,[33] FCUs may purchase only eligible obligations of its members for loans the FCU would itself be empowered to grant.[34] Section 701.22, most of which applies to FISCUs as well as to FCUs, restricts the types of loan participations that a credit union may purchase to those the credit union is empowered to grant and also requires the originating lender, including a CUSO, to retain at least five percent of the outstanding balance of the loan through the life of the loan (10 percent is required if the originating lender is an FCU).[35]

The Board believes that these existing restrictions are sufficient to ensure that the loans or loan interests purchased by credit unions from CUSOs will have reasonable terms. At the same time, the Board acknowledges that CUSOs may originate loans that parties other than credit unions purchase. In turn, this would make the restrictions discussed in the preceding paragraph inapplicable. This is, however, the current situation for loans originated by CUSOs. The commenter who recommended this new restriction did not present persuasive evidence that this new restriction is necessary and further provided no analysis or evidence regarding how the restrictions might hamper CUSO activities and thus decrease the value of credit union interests in CUSOs. Accordingly, the Board declines to adopt this recommendation.

Second, regarding the quality of loans, the Board believes that credit unions and other parties who purchase CUSO-originated loans can perform due diligence and ensure that loans are underwritten and documented appropriately. Further, as part of the examination process, NCUA examiners can continue to request documentation on credit unions' due diligence and other policies and procedures associated with their investment, lending, and other interaction with CUSOs. As with the recommendation on the terms of loans, the Board finds no persuasive evidence or analysis of the benefits and risks of such new oversight and declines to adopt the recommendation.

Consumer Protection

Commenters who supported the rule did not extensively discuss consumer protection issues. Several commenters stated that CUSOs would likely only issue loans that comply with the NCUA's loan origination rules as generally CUSO-originated loans would be sold to the parent credit unions. Another commenter stated that the proposed rule would expand financial inclusion due to the potential for collaboration to develop new technologies. Finally, commenters noted that CUSOs are subject to state lending laws and federal consumer protection laws.

In contrast, commenters who were against the proposed rule generally expressed concerns that the proposed rule would create risk to consumers. Several commenters expressed concerns that CUSO-originated loans are not subject to the same restrictions as loans originated by FCUs. For instance, the FCU Act limits interest rate, maturity, and prepayment terms for FCU-originated loans. Commenters were concerned that this rule change would enable an FCU to circumvent statutory lending restrictions through a CUSO subsidiary. Commenters were especially concerned about abuses because the proposed rule would principally allow payday and auto lending, which may be more likely targeted towards members in low-to-moderate-income communities and underserved areas. Furthermore, several commenters stated that CUSOs have been responsible for abusive lending in the past. One commenter noted that CUSOs were marketing payday loan products to state-chartered credit unions with triple digit interest rates in Texas until restrictions were implemented on the state level. One noted a 2010 National Consumer Law Center report, which documented that over 40 credit unions were involved with payday lending through CUSOs. This prompted the NCUA to issue a letter to credit unions. Another commenter stated that the proposal will disproportionately harm communities of color and exacerbate financial exclusion, even as the Board elsewhere emphasizes racial equity and financial inclusion. Another commenter stated that investing in CUSOs that violate the FCU Act usury ceiling creates not only reputation risk, but compliance and legal risk as loans that exceed the usury cap in the FCU Act should not be considered part of the routine operations of credit unions.

Commenters raised several potential solutions to potential consumer harm. One commenter stated that any expansion of CUSO lending activity should be limited to loans FCUs are themselves empowered to make. Another commenter recommended changes to the Payday Alternative Loans (PALs) program if the goal is to encourage more small-dollar lending and included ideas on how to increase credit unions' adoption of PALs. Another commenter suggested requesting examination findings from the Consumer Financial Protection Bureau, which has requisite authority to examine CUSOs to determine whether consumer protection laws are being followed.

The Board has considered the comments on this point and finds that overall, they provide support for proceeding with adopting the regulatory change to CUSO lending authorities as proposed.

As commenters in support of the expansion of FCU authority with respect to loans to and investments in CUSOs engaged in all lending activities stated, more collaboration and use of financial services technology may positively affect financial inclusion. By authorizing more parties to offer an array of consumer loans, the Board may increase beneficial competition and expand consumer choice. The Board also believes that CUSOs would likely adhere to the statutory and regulatory restrictions on loans that FCUs are empowered to grant in order to be able to sell these loans to FCUs (though the Board notes that the purchasing authority provisions may vary for FISCUs because the Board's eligible obligation purchase regulation in § 701.23 applies to FCUs only) and that CUSOs may not be under the same liquidity pressure for auto and payday loans as other types of loans currently authorized by the CUSO rule. The Board also notes that it recently relaxed some of these protections in light of the COVID–19 pandemic.[36] As a whole, however, it is the Board's belief that the current authorities governing FCU purchases of loans would likely result in a substantial amount of CUSO loans being issued on terms equivalent to those in the FCU Act, or what is already permitted for FISCUs.

The Board is, of course, concerned about the risk of unfavorable terms for consumers. As one commenter noted, in 2009, the NCUA Chairman issued a letter to all FCUs on consumer lending, including consumer protection issues.[37] The Board has also established two payday alternative loans (PALs) programs for FCUs to promote short-term, small-dollar loans for FCUs and their members that can serve as an alternative to loans with less favorable terms. The Board's concerns are partially mitigated, however, by state usury laws and other consumer

[33] 85 FR 22010 (Apr. 21, 2020); 85 FR 83405 (Dec. 22, 2020).

[34] 12 CFR 701.23(b).

[35] 12 CFR 701.22(b)(3).

[36] 85 FR 83405 (Dec. 22, 2020).

[37] Payday Lending, 09–FCU–05, July 2009, *available at https://www.ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/payday-lending.*

protection laws that may be enough to curtail the risk of predatory lending by CUSOs. The Board acknowledges, however, that the majority of states permit payday lending and therefore state laws only provide some mitigation relating to the concern of CUSOs offering loans at excessive interest rates.[38] The Board plans to monitor new practices closely and take aggressive action when it can to protect consumers from abusive terms that are contrary to law. When the Board lacks direct authority, it can partner with other federal agencies, such as the CFPB, or state authorities to address any such situations. Ultimately, the Board and other parties, in combination, have tools available to protect consumers and curb abusive practices.

At the same time, the Board disagrees with commenters who believe that the expanded FCU authority to lend to or invest in CUSOs engaged in all lending activities would open up a new area of lending above the FCU interest rate cap and that such activity is contrary to the FCU Act.

First, the Board finds greater competition in the consumer loan market from FCU-owned entities is likely to introduce better consumer options and greater choice. If the Board decides to limit innovation and expansion out of concern for potential consumer harm, it may actually perpetuate a lack of consumer choice and access. Regardless of what action the Board takes, other parties will continue to lend in the marketplace and may lack the same grounding in the credit union mission and industry that would tend to mitigate the risk of abusive lending practices. Confronted with this choice, the Board's judgment is that CUSOs will be more likely than other lenders to offer only reasonable terms to consumers and be held accountable by the NCUA, other federal agencies, or state authorities. Second, regarding one commenter's opinion about the ''daily operations of credit unions'' not including lending above the FCU interest rate ceiling, the Board finds that the FCU Act's broad wording should not be read so narrowly. Reading this limitation into the phrase would, if applied to other areas of CUSO activity, such as trustee and fiduciary activity that is not generally within the power of an FCU, limit CUSOs to only those activities that FCUs may perform within all limitations of the FCU Act. CUSOs have long been permitted to engage in activities that are not specifically bound by these limitations. In particular, since originally authorizing CUSOs to engage in limited lending activity, the Board has not imposed the interest rate ceiling or other restrictions applicable to FCU-made loans to CUSO-made loans. The concern, therefore, that some commenters raise is not specific to this rulemaking and has long stood as the agency's position on CUSO activities, including lending.

Ultimately, when faced with the choice between limiting or proceeding with this expansion of FCU authority to lend to, or invest in, CUSOs engaged in all lending activities, the Board finds in its judgment that the regulatory changes carry the potential to benefit consumers and FCUs through greater choice. At the same time, the Board will closely monitor the expanded activity given the importance of consumer protection.

In addition, the Board notes that amending the PALs program is beyond the scope of the CUSO rulemaking but will take commenters' input on that program into account in any future action on that program.

Innovation

Some of the commenters who supported the proposed rule generally stated that CUSOs enable necessary innovation. Many commenters discussed how CUSOs can pool resources for various projects each credit union could not afford to embark on individually, especially smaller credit unions. With innovation and technology continuously evolving at a significant pace, giving FCUs the option to start or partner with a CUSO to advance their technology capabilities would help FCUs remain competitive as they often lack the resources to build and maintain the technology infrastructure. Commenters stated that CUSOs are currently helping credit unions survive in the rapidly changing financial industry and several credit unions credited CUSOs with assisting them in reaching members, including low-to-moderate income members. Many commenters mentioned fintechs and that CUSOs are enabling credit unions to compete with fintechs and large banking organizations that have the resources to develop new technologies. Several commenters stated that credit unions must continue to innovate, reduce costs, and generate income, especially as traditional sources of income, like net interest margins, are no longer sufficient.

Some of the commenters who were opposed to the proposed rule stated that CUSOs are already able to facilitate FCUs' collective investment in technology without having their lending powers broadened. CUSOs' permissible activities include ''loan support services, including loan processing, servicing, and sales,'' which means CUSOs can currently play a support role in FCU lending according to one commenter.

When discussing current CUSO authorities to do indirect lending, another commenter stated that small FCUs struggle to engage in indirect lending, which requires significant investment and oversight. The commenter further stated that managing relationships with dealers and monitoring the quality of loans an FCU receives is paramount to the success of an indirect lending program. As a result, the indirect lending channel is often closed to small FCUs.

The Board has considered the wide variety of viewpoints on this issue. As several commenters noted, broadening the permissible CUSO lending categories may foster innovation and partnerships. Conversely, some commenters contended that the rule change is not needed for this purpose because credit unions already partner effectively with CUSOs to develop technology to support FCU lending. The Board views this difference of opinion and predictions similarly to how it views other general predictions about the risks and benefits of the rule change. The Board recognizes that the expanded FCU authority to lend to or invest in CUSOs engaged in all lending activities may not result in enhanced partnerships and cooperation with CUSOs and other credit unions because it is not possible to predict the future of the marketplace with certainty. Alternatively, the regulatory changes may enhance this collaboration for some credit unions in some type of lending but not in all.

However, the Board in its judgment also finds that expanded areas of activity and investment would naturally tend to increase collaboration and cooperation. Affording greater opportunities for FCUs to lend to and invest in CUSOs engaged in a broader range of lending may facilitate more partnerships that position FCUs better to work with new entities and technologies in financial services. For this reason, the Board continues to find this a good basis to proceed with the regulatory changes.[39]

[38] See the CFPB final rule, Payday, Vehicle Title, and Certain High-Cost Installment Loans, 85 FR 44382, 44383 (July 22, 2020).

[39] The Board also notes that innovation and collaboration were not the sole basis for the proposed rule. As discussed in the preamble to the proposed rule, another basis for the rule was to enable FCUs to better serve their members. The Board views the various bases in the proposed rule as independently sufficient to support the rule. 86 FR 11645, 11646 (Feb. 26, 2001).

Credit Union Mission

Some of the commenters in favor of the proposed rule broadly stated that CUSOs enable FCUs to fulfill their mission by enhancing their ability to serve members. Several commenters stated there is no evidence that the proposed rule would hurt the industry, members, or the NCUSIF.

In contrast, some of the commenters opposed to the proposed rule stated that the proposed rule undermines fundamental principles of the FCU Act. Principally, in their view, the proposed rule would dilute the common bond by permitting lending outside of FCUs' fields of membership. These commenters stated that allowing FCUs to directly profit from loans that are originated to non-members is contrary to the intent of the FCU Act. Many commenters generally stated that the profit FCUs would derive from non-members calls into question the rationale for the exclusion from federal income taxation.

The Board finds that concerns about diluting the FCU common bond do not warrant modifying or declining to adopt the proposed rule.

First, the Board does not agree with commenters who believe the FCU Act requires consideration of this factor in evaluating proposed CUSO activities. The FCU Act's field of membership and common bond provisions apply to FCUs, not to CUSOs.[40] The loan authority for CUSOs in the FCU Act specifically defines a ''credit union organization'' in part as an organization ''established primarily to serve the needs of its member credit unions, and whose business relates to the daily operations of the credit unions they serve.''[41] Thus, the FCU Act does not require that CUSOs be established exclusively to serve credit union members or credit unions. Accordingly, any objection based on a claim that expanded FCU authority to lend to or invest in CUSOs engaged in all lending activities violates the FCU Act is unfounded.

Second, apart from the statutory provisions, in this rulemaking the Board has re-examined its prior policy-based concern regarding dilution of the common bond through CUSO lending authorities. As the proposed rule recounted, historically the Board has been hesitant in granting CUSOs authority to make consumer loans because it may be perceived as diluting the common bond. In a 1998 final rule in which it granted CUSOs authority to make student loans, but not other types of consumer loans, the Board elaborated that it limited the expansion because Congress and the public may perceive it as a dilution of the common bond.[42] In the same discussion, the Board explained that it would grant authority to CUSOs to make student loans because they required more specialized staff and experience, whereas general consumer loans did not.[43]

The 1998 final rule is, therefore, best read as relying on two bases for limited expansion at that time: Perception of dilution of the common bond and the need for credit unions to partner with CUSOs for certain types of loans. And in that rule, the determination that one type of new loan authority would be beneficial to credit unions overcame the generalized concern about perceived dilution. In fact, in the same final rule, the Board refuted in detail the contention by a commenter that CUSOs are subject to the statutory common bond requirement,[44] demonstrating further that the perceived dilution concern was not viewed as an absolute or particularly strong counterweight to other policy rationales. That is to say, incremental expansion of FCU authority about CUSO lending authorities based on the Board's judgment and experience have in the past outweighed this concern. Based on this re-examination, the Board concludes that the concern over perceived dilution of the common bond is relatively weak and has not historically been given great weight or decisiveness in evaluating the reasons for and against an expansion of FCU authority related to this activity.

Given this background and context for the perceived common bond dilution concern, the Board finds that it does not warrant refraining from adopting this final rule. The commenters who cited this concern provided only generalized predictions or policy arguments that lack specific evidence even to predict with any certainty that the regulatory changes would appear to dilute the common bond. Other commenters predicted that the expanded authority might instead bring credit union membership to more people. The Board believes this result is at least as likely as one in which the common bond is perceived by some subjectively as being diluted. For example, non-credit union members who are eligible for membership may decide to join a credit union after obtaining a loan from an affiliated CUSO. And in any event, a CUSO engaging in this type of lending would still be required to primarily serve credit unions, its membership, or the membership of credit unions contracting with the CUSO.[45]

Accordingly, based on this re-examination of the perceived dilution concern and the limited support offered by commenters opposing the rule on this basis, the Board concludes that this concern does not weigh against adopting the rule as proposed.

Another commenter stated that FCUs would profit from loans exceeding usury caps in the FCU Act, and this is against the spirit of the FCU Act.

The Board does not find this generalized concern persuasive. Currently, CUSOs are not subject to the interest rate ceiling in the FCU Act.[46] This provision applies to loans made by an FCU. By regulation, subject to some exceptions, an FCU may not buy a loan it is not empowered to grant.[47] However, the Board recognizes that an FCU investing in a CUSO may receive revenue derived from loans the CUSO makes but does not sell to an FCU. This is true under the current regulation, but the customer base requirement discussed in the preceding section tends to limit this effect by requiring that CUSOs primarily serve credit unions, CUSO members, and members of credit unions contracting with the CUSO. The same requirement will apply to CUSOs engaged in new types of consumer loans. For this reason, the Board finds this concern lacks sufficient support and weight to warrant not adopting the rule as proposed.

Growth or Competition

Some of the commenters who supported the proposed rule generally stated that the CUSOs would not compete with credit unions because CUSOs do not have enough liquidity to originate and hold loans. These commenters stated that CUSOs will originate loans only as a mechanism to secure more loans for their lending partners and will then sell the loans to credit unions. Several commenters pointed to credit union loan growth in mortgages, student loans, credit cards, and business lending. One credit union trade organization acknowledged credit unions and CUSOs would likely compete for loans; however, it believed the greater threat comes from fintech and banks.

Several commenters also stated that the proposed rule would help FCUs

[40] 12 U.S.C. 1759 and the NCUA's Chartering and Field of Membership Manual, 12 CFR 701, App. B., set forth common bond definitions and requirements for FCUs.

[41] 12 U.S.C. 1757(5)(D).

[42] 63 FR 10743, 10752 (Mar. 5, 1998).

[43] *Id.*

[44] *Id.* at 10745.

[45] 12 CFR 712.3(b).

[46] 12 U.S.C. 1757(5)(A)(vi).

[47] 12 CFR 701.23(b).

because it would result in increased lending opportunities. One of the reasons for increased lending discussed was CUSOs' potential to lower costs through economies of scale. Several commenters stated that CUSOs enable FCUs to share costs, distribute risk, and provide scale. A few commenters specifically stated that the proposed rule would enable smaller FCUs to continue their lending activities but, instead of keeping their lending operations in-house, utilize the services of a CUSO to generate loans.

In contrast, several commenters who opposed the proposed rule believed that CUSOs would bring unnecessary competition, particularly for smaller credit unions. Some commenters stated that the proposed rule could benefit certain, larger FCUs, but it could hurt other, smaller credit unions as well-funded CUSOs could capture potentially significant market share. One commenter noted that past NCUA Boards have been concerned that CUSOs only benefit large credit unions and once noted that smaller credit unions have been unable to meet minimum eligibility requirements in order to partake of CUSO services. One commenter noted there is no evidence FCUs need help with non-complex consumer loans or auto loans. Other commenters stated that the proposed rule would not result in increased lending and that CUSO-originated loans sold to credit unions do not drive credit union loan growth.

A few other commenters believed that the rule could be anti-competitive as it may result in additional industry consolidation because small credit unions could lose market share.

The Board has considered the differing viewpoints on this issue and determined that this concern does not warrant refraining from adopting the rule as proposed. As discussed in the introduction to this preamble, the Board has re-examined its historical stance on competition as it relates to CUSO activity and small credit unions.

First, it is not clear that the Board should, as a matter of principle, consider shielding credit unions from competition as an important consideration in its rulemaking.[48] Doing so may result in stagnation and could produce overall negative results for the credit union system and the NCUSIF over time.

Second, the NCUA currently does and will continue to provide significant support and flexibility to small credit unions through various regulatory and supervisory programs. These efforts recognize the challenges that these small credit unions face by reducing regulatory burdens. For example, the NCUA has a small credit union examination program that streamlines the examination process for small FCUs with a record of solid performance.[49]

The Board believes the final rule presents an opportunity for all credit unions to work collaboratively. It is the Board's belief that the final rule has the potential to benefit all credit unions, especially smaller credit unions, if they can effectively pool their resources to form new technology. The Board also believes the final rule would likely be a net benefit to the entire system. The Board acknowledges there would likely be additional competition for credit unions, particularly certain smaller credit unions, but this rule provides additional flexibilities to permit the credit union system to offer enhanced lending products. The Board believes that under the final rule, credit unions will have an enhanced ability to collaborate and create better lending products for their members.

For each of these reasons on their own, and in their totality, the Board finds that it is prudent to proceed with this final rule despite this objection.

Types of Loans

Some of the commenters who favor the rule encouraged the NCUA to finalize expansive lending authorities for CUSOs as lending opportunities are always evolving. Several commenters stated that there are currently companies looking for FCU partners that originate solar, renovation, boat, and airplane loans. One commenter expressed concern that these types of loans might cause credit unions to focus on loans for luxury items to the detriment of low- and moderate-income members.

The Board has not limited the types of loans a CUSO can originate provided that the loans are the type of loan an FCU is able to originate. Contrary to the concern of one commenter, the Board does not believe that focused CUSO activity would detract from individual credit unions' focus on providing financial services to all their members, as required by fair lending laws.

Auto Loans and National Lending

Several commenters who support the proposed rule stated that the proposal is necessary for FCUs to remain competitive as lending becomes more standardized and consumers move online for more of their financial services. Many commenters discussed a recent trend to point of sale financing. According to these commenters, consumers are acquiring credit at the point of sale, instead of acquiring credit through a credit union first. Commenters were particularly concerned about this trend for auto loans. These commenters expressed concerns that point of sale sellers are not interested in working with credit unions. The challenge, according to some commenters, is that a large, nationally focused seller is unlikely to secure relationships with thousands of individual credit unions. This presents an opportunity for CUSOs to help the credit union industry with their collaborative business model. Some commenters believed credit unions risk diminishing market share if CUSOs are not permitted to contract with national lenders. One CUSO commenter stated that CUSOs could easily use a common platform and participate out loans to credit unions within the geographic area in which members are located.

A few of the commenters who opposed the rule highlighted the established relationships some credit unions have with local dealers. These commenters were concerned that national lending CUSOs would threaten these existing relationships.

The Board finds that the comments on this issue generally support the regulatory changes. The Board agrees that expanding CUSO lending authority to cover auto loans may help credit unions compete at the point of sale. Existing data also supports the Board's belief that small credit unions are struggling to compete in auto lending and that the final rule may support small credit union auto lending efforts. The largest 150 credit unions have seen significant expansion of their auto lending market share over the prior two decades, while smaller credit unions have lost market share almost every year.[50] The data indicates that smaller credit unions are becoming increasingly less competitive in the auto lending space.

The Board also recognizes that, despite the stated intent of the proposal, some credit union relationships with local dealers could be displaced by this rule, as they equally could be by other market forces. As discussed previously in response to concerns regarding additional competition for some small

[48] *See Fed. Comm'cns Comm'n et al.* v. *Prometheus Radio Project et al.,* No. 19–1231 (Apr. 1, 2021), Thomas, J., concurring (discussing whether the FCC should have considered a non-statutory factor in its rulemaking).

[49] *See,* 12–FCU–03 (2012).

[50] The Board notes, however, that during this period, the number of credit unions with less than $1 billion in assets also decreased by over fifty percent.

credit unions, the Board believes it would be inappropriate for the Board to attempt to restrain competition. The Board also believes that in the long-term, the benefits to the entire credit union system through this enhanced authority and competition will exceed costs associated with disruption to existing credit union-dealer relationships. Indeed, these costs are not certain or inevitable to occur.

Impact Analysis

Several commenters who were opposed to the proposed rule requested that the NCUA conduct an independent economic analysis to weigh the advantages and disadvantages of the proposal. Other commenters recommended an impact analysis specifically to determine the impact on small credit unions.

The Board is aware of the challenges that face small credit unions. As discussed previously regarding growth and competition, the Board does not believe it is prudent or necessary to adopt rules that prevent market-based competition. In response to this specific recommendation for an impact study, the Board also notes that the Administrative Procedure Act does not require agencies to engage in studies before adopting regulatory changes.[51] The Board also believes an impact analysis is unnecessary. The Board believes the final rule will likely benefit credit unions. In the Board's experience, CUSOs generally benefit credit unions through additional capital and the sale of CUSO-originated loans to credit unions. For these reasons, the Board will proceed with the proposed changes without delaying them further to conduct a general impact study. As a separate reason to decline taking this step now, the Board observes that the commenters did not provide any specific studies of their own that would give the Board empirical evidence to support delaying these regulatory changes now.

Loan Pools, Aggregation, and Securitization

A few commenters discussed the issue of securitization and whether the proposed rule would facilitate credit union securitizations. A few commenters asked for the NCUA to specifically permit CUSOs to aggregate credit union loans and issue securities on the secondary market as many credit unions do not have the available resources and volume necessary to originate the requisite amount of loans to securitize assets on their own. The Board will take this comment into consideration for future action.

Another commenter expressed concerns about CUSOs aggregating loans for sale to credit unions. The commenter stated that CUSO-generated loan pools may increase short-term operational efficiency; however, it also transfers the credit risk to smaller credit unions while the ancillary income is generated and retained by the CUSO. This commenter stated that the low margin and credit risk would be passed to the credit union with the higher margin income retained at the CUSO and ultimately benefit the largest credit union equity partners of the CUSO. This commenter added that historically, when there is market disintermediation, risk and credit losses are passed back to the passive participants with a disproportionate impact. The Board does not believe it is good policymaking to restrict credit union authorities on the potential for credit unions to enter unfavorable business deals. The Board does not believe that a few examples of unfavorable contracts with CUSOs sufficiently justify reducing the flexibilities afforded to the credit union system as a whole. Each credit union is responsible for its own due diligence prior to purchasing assets and entering into a contractual arrangement. Credit unions should exercise business judgment before making purchases and entering any contractual arrangement, even for counterparties that are part of the credit union industry. As part of good governance, credit unions with ownership in a CUSO are encouraged to monitor the length of time all loans remain on the books of the CUSO.

Accordingly, for the reasons discussed in the proposed rule and this final rule, the final rule is adopting the proposed rule without substantive change. Under the final rule, CUSOs are permitted to originate, purchase, sell, and hold any type of loan permissible for FCUs to originate, purchase, sell, and hold. CUSOs, therefore, could originate types of loans previously prohibited by the CUSO rule, including general consumer loans, direct auto loans, and unsecured loans and lines of credit. CUSOs could also purchase vehicle-secured retail installment sales contracts (RICs) from vehicle dealers.

Under the final rule, CUSO originated loans are not subject to the same restrictions as loans originated by FCUs. For example, part 701 of the NCUA's regulations imposes conditions on FCU lending relating to loan terms such as interest rate, maturity, and prepayment.[52] These restrictions would not apply to CUSO-originated loans because CUSOs, even wholly owned CUSOs, are separate entities from FCUs and are not subject to direct NCUA supervision. However, an FCU may not purchase a loan from a CUSO unless the loan meets the requirements of the NCUA's eligible obligations rule.[53] Similarly, an FCU may not purchase a loan participation from a CUSO unless it complies with the NCUA's loan participations rule.[54]

Loan Participations

Besides specifically permitting CUSOs to engage in consumer mortgage, business, and student loan origination, the current CUSO rule also permits CUSOs to buy and sell participation interests in such loans. The inclusion of this authority to buy and sell participation interests in such loans stems from the FCU Act and the NCUA's loan participation rule, which classifies a CUSO as a ''credit union organization'' authorized to engage in the purchase and sale of loan participations.[55] The NCUA's loan participation rule, however, does not permit the sale to FCUs of participation interests in open-end, revolving credit.[56] Therefore, the current CUSO rule only permits CUSOs to originate credit card loans, but not the authority to buy and sell participation interests in credit card loans. To remain consistent with the NCUA's loan participation rule, this final rule grants CUSOs the authority to only purchase and sell participation interests that are permissible for FCUs to purchase and sell. There were no comments specifically objecting to this provision, and the Board adopts it without change.

CUSO Registry

Under the current CUSO rule, a FICU must obtain a written agreement from a CUSO the FCU loans to or invests in that the CUSO will annually submit to the NCUA a report containing basic registration information for inclusion in the NCUA's CUSO registry (CUSO Registry).[57] CUSOs that are engaged in complex or high-risk activities have additional obligations with respect to the CUSO Registry.[58] Under the current

[51] *Fed. Comm'cns Comm'n et al.* v. *Prometheus Radio Project et al.,* No. 19–1231 (Apr. 1, 2021), slip op. at 12 (holding that the Administrative Procedure Act imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies).

[52] 12 CFR part 701.

[53] *See,* 12 CFR 701.23(b).

[54] 12 CFR 701.22.

[55] 12 U.S.C. 1757(5)(E); 12 CFR 701.22(a).

[56] 73 FR 79307 (Dec. 29, 2008).

[57] 12 CFR 712.3(d).

[58] *Id.* Complex or high-risk CUSOs must agree to include in their report: (1) A list of services provided to certain credit unions, and (2) the investment amount, loan amount, or level of

CUSO rule, complex or high-risk activities are defined to include credit and lending, including business loan origination, consumer mortgage loan origination, loan support services, student loan origination, and credit card loan origination.[59] For consistency, the final rule removes the specific subcategories of lending and instead refers to all loan originations as complex or high risk. Lending activities are considered complex or high risk because they can present a high degree of operational or financial risk.[60] Specifically, FICUs making loans to and investments in CUSOs engaged in credit and lending activities may be exposed to significant levels of credit, strategic, and reputation risks.[61]

Commenters also noted that the CUSO Registry requires all CUSOs to provide data to the NCUA. Several commenters stated that the current reporting requirements are sufficient and the NCUA should not expand reporting requirements, as proposed. The Board is not expanding what must be reported by CUSOs engaging in complex or high-risk activities, but as proposed is incorporating all types of lending in the definition of complex or high-risk activities.

An association of state credit union supervisors expressed concern that state CUSOs with authority to engage in all forms of lending would be required to report additional information under the proposed rule. The organization requested that the NCUA consult with state regulators. The Board notes that when it adopted this provision in 2013, it broadly described credit and lending activities as complex or high-risk and applied this requirement to FICUs.[62] Further, some FISCU-owned CUSOs are reporting the number and dollar amount of their lending activities, even if those lending activities are not explicitly listed in § 712.3(d). The Board, therefore, does not believe the effect of this rule on CUSOs in which only FISCUs have an ownership interest represents a policy change from that final rule.

Expansion of Permissible CUSO Activities to Other Activities as Approved by the Board in Writing

Currently, the list of permissible CUSO activities in § 712.5 includes many of the core services and activities associated with the daily and routine operations of credit unions. The list, however, does not provide the Board flexibility to consider additional activities and services without engaging in notice and comment rulemaking. In contrast, part 704 permits corporate CUSOs to engage in any category of activity as approved in writing by the NCUA and published on the NCUA's website.[63] Amending part 712 to be similar to part 704 has the potential to reduce regulatory burden by allowing the rule to expand as technology shapes the routine and daily operations of credit unions.

Several commenters supported the proposed change to permit the NCUA to approve of new activities outside of notice-and-comment rulemaking. Commenters mentioned the current authority in part 704 for corporate CUSOs. Other commenters generally stated that the proposed process would be more efficient and that the advantages outweigh the public input received through notice-and-comment rulemaking. One commenter stated that the change would allow the Board to be more responsive to shifting market dynamics. Another commenter encouraged the NCUA to periodically review the list for updates and to post any additional activities on its website. A few commenters noted that a technical change is necessary in the regulatory text.

A few commenters who opposed the proposed rule generally discussed that enabling the Board to approve new activities without notice-and-comment rulemaking would eliminate regulatory transparency and opportunity for the public to review and comment on newly proposed CUSO activities. One banking trade organization stated that the authority to approve rules without notice and comment is exacerbated by requiring formal rulemaking to revoke or reform the approved activity, but not adding the same activity. The commenter stated that this policy places a regulatory obstacle to address potentially unsafe and unsound activities, or activities that may be harming consumers, members, and underserved areas and low-to-moderate income communities. One credit union trade organization that supported the rule overall nonetheless encouraged the NCUA to do notice-and-comment rulemaking to add approved activities and suggested limiting the comment period to thirty days as a balance between speed and transparency. Another consumer stated that emerging technologies often pose risks to members and other consumers that should be evaluated through the public notice and comment process.

The Board has considered the comments on this issue and is finalizing the changes to the approval process as proposed. As commenters supporting the change observed, a streamlined process may help CUSOs keep pace with innovation. The Board has considered the opposing comments and notes that its intent is to use this authority only for approving activities that are related to the existing authorities in § 712.5. If the Board believes a new authority is sufficiently novel, and that notice and comment is advisable or required under the Administrative Procedures Act, then the Board would use notice and comment rulemaking.

The Board also believes it is reasonable to add new approved activities without issuing the matters for public comment but to solicit public comment before removing activities. The Board has had this process in place in part 704 for corporate credit unions since 2011 without any indication that the process is unworkable or leads to inadequately considered policy choices. Using notice-and-comment procedures when removing an approved activity is sound policy to ensure that the Board considers parties' serious reliance interests when changing a policy.[64] While the removal of any given approved activity may not rise to the level requiring an in-depth analysis of reliance interests before removing it, the general policy of following this process will help the Board ensure it conducts this analysis in appropriate cases.

Second, the Board has considered, but disagrees with, the suggestion to use a 30-day comment period when adding new activities as a blanket policy. While a 30-day comment period would naturally tend to lead to a prompter conclusion than a 60-day comment period, it would still generally result in several months or more from the time the activity is proposed until it is

activity of certain credit unions. Complex or high-risk CUSOs must also agree to provide the CUSO's most recent year-end audited financial statements to the NCUA. CUSOs engaged in credit and lending services are also required to report the total dollar amount of loans outstanding, the total number of loans outstanding, the total dollar amount of loans granted year-to-date, and the total number of loans granted year-to-date.

[59] 12 CFR 712.3(d)(5)(i).

[60] 78 FR 72537 (Dec. 3, 2013).

[61] *Id.*

[62] 78 FR 72537, 72542 (Dec. 3, 2013).

[63] 12 CFR 704.11(d)(3)(ii). Approved activities are listed on the NCUA's website at: *https://www.ncua.gov/regulation-supervision/corporate-credit-unions/corporate-cuso-activities/approved-corporate-cuso-activities.*

[64] *See Dep't of Homeland Sec.* v. *Regents of the Univ. of Calif. et al.,* 591 U.S. ____((2020), slip. op. at 23 (holding that, when an agency changes course, it must recognize that longstanding policies may have engendered serious reliance interests that must be taken into account).

approved by the Board when taking into account the need to review and respond to public comments and prepare a final Board action in response. The Board, therefore, finds this suggestion would not implement the proposal as it was intended. Regarding the commenter's transparency concern, the Board notes that it would have discretion to take action to add activities in a public forum, such as open Board meetings, or alternatively, undertake notice-and-comment proceedings if it deems them appropriate or desirable under the circumstances of any particular request to approve a new activity.

Accordingly, under the final rule, the list of permissible activities in § 712.5 includes a catchall category for other activities as approved in writing by the NCUA and published on the NCUA's website. The final rule also provides that once the NCUA has approved an activity and published that activity on its website, the NCUA would not remove that particular activity from the approved list, or make substantial changes to the content or description of that approved activity, except through formal rulemaking procedures.

IV. Investment Authority

An FCU's authority to lend to and invest in a credit union organization is provided for in two separate provisions of the FCU Act. The NCUA has historically interpreted the lending and investment authority under the FCU Act as referring to the same types of organizations.[65] The Board solicited comment about adopting separate definitions for the types of organizations that an FCU may invest in or lend to, which potentially would expand the types of organizations eligible for FCU investment. Several commenters supported the Board's decision to reconsider its longstanding interpretation of FCU investment and lending authority. Commenters in support of the reinterpretation generally discussed the benefit of broadly permitting FCUs to invest in financial technology companies. Several commenters stated that FCUs can get left out of the development of new financial technology because of the requirement to primarily serve members. Some commenters stated that additional investment authority would ensure the industry has better leverage, control, and influence in the development of new technologies. Three commenters provided sample safety and soundness conditions that could be applied to these lending authorities.

[65] 12 U.S.C. 1757(5)(D).

One commenter recommended that certain de minimis investments be exempt from CUSO requirements. This commenter recommended that the NCUA permit FCUs to make a 25 percent investment in CUSOs of FISCUs without those CUSOs being subject to part 712. Currently, the preapproved activities and most other requirements of part 712 do not apply to CUSOs with only FISCU investment. Accordingly, if the only credit unions that have an ownership in a CUSO are state-chartered, then the CUSO may be able to engage in activities beyond those that are preapproved in § 712.5. Thus, any investment in, or loan to, a CUSO (which § 712.1 generally describes as ownership interests) from an FCU subjects the CUSO to all of part 712's requirements. The commenter's suggestion is that some amount of such investment should be allowed without invoking those requirements. The Board appreciates this recommendation and will take it into consideration when evaluating future action on the investment issue. The Board observes, however, that any future expansion of FCU investment authority would need to be in organizations providing services associated with the routine operations of credit unions, which could vary from some types of entities in which state-chartered credit unions may invest.

Another commenter recommended that the proposed interpretation be adopted and extended to corporate credit unions.

In contrast, one banking trade organization stated that expanding FCU investment authority in CUSOs would be outside the routine operations of credit unions, which are statutorily confined to serving their fields of membership. The commenter stated that the NCUA's position would exceed the agency's legal authority under the FCU Act.

The Board will consider these comments in determining whether to propose any change to its existing interpretation and regulatory definition of a CUSO. The Board notes, however, that it does not find persuasive the contention that the possible reinterpretation is inconsistent with the FCU Act. As set forth in the preamble to the proposed rule, the investment provision of the FCU Act contains distinct wording from the loan provision. The preamble discussion in the proposed rule discussed the statutory wording and possible interpretation in careful detail. The Board, therefore, declines to withdraw this portion of the proposed rule, as recommended by the commenter, and will consider this issue for potential future action.

V. Other Comments

The Board also received other comments outside the scope of the proposed rule, which are discussed briefly in this section.

One commenter recommended that where a CUSO is making a loan that involves tax credits the CUSO should be permitted to acquire and syndicate the tax credits, whether among taxable (non-credit union) members of the CUSO and/or third-party investors. The Board will consider this issue for potential future action for CUSO investment authorities but notes that these authorities have historically been narrow.[66] The NCUA has, however, previously found a CUSO's proposed acquisition and sale of tax credits in connection with approved lending activity to be permissible.[67]

One commenter asked that CUSOs be permitted to engage in both debt and equity aspects of financing sale-leaseback transactions for credit unions, whether those credit unions are members of the CUSO or not. The Board will consider this request in connection with future action on CUSO authorities.

One commenter suggested the NCUA offer periodic dialogue sessions akin to those recently launched by the Federal Deposit Insurance Corporation, and recommended a CUSO compliance guide. The Board will consider these suggestions as part of its ongoing supervisory program.

VI. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires that, in connection with a final rulemaking, an agency prepare and make available for public comment a final regulatory flexibility analysis that describes the impact of a rule on small entities (defined for purposes of the RFA to include credit unions with assets less than $100 million).[68] A regulatory flexibility analysis is not required, however, 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.

[66] *See* 12 CFR 712.5(r), 712.6.

[67] OGC Op. Ltr. 03–0647, FCU and CUSO Participation in New Markets Tax Credit Program (July 2003), *available at https://www.ncua.gov/regulation-supervision/legal-opinions/2003/federal-credit-union-and-credit-union-service-organization-participation-newmarkets-tax-credits.*

[68] *See* 80 FR 57512 (Sept. 24, 2015).

This rule does not have a significant economic impact on a substantial number of small entities. The rule imposes no requirement or costs on small entities and only expands the list of permissible activities for CUSOs. The rule expands the list of activities that are considered complex or high risk for purposes of the CUSO Registry, however, the Board does not expect the additional reporting requirements to entail substantial regulatory burden. Accordingly, the NCUA certifies that the final rule does not have a significant economic impact on a substantial number of small FICUs.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current, valid OMB control number.

Consistent with the PRA, the information collection requirements included in this final rule has been submitted to OMB for approval under control number 3133–0149.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. Per fundamental federalism principles, the NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the principles of the Executive order. This rulemaking will not have a substantial direct effect on the states, on the connection between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government. The NCUA has determined that this rule does not constitute a policy that has federalism implications for purposes of the Executive order.

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, 1999, Public Law 105–277, 112 Stat. 2681 (1998).[69]

[69] Public Law 105–277, 112 Stat. 2681 (1998).

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) generally provides for congressional review of agency rules.[70] A reporting requirement is triggered in instances where the NCUA issues a final rule as defined in the Administrative Procedure Act.[71] An agency rule, besides being subject to congressional oversight, may also be subject to a delayed effective date if the rule is a ''major rule.'' The NCUA does not believe this rule is a ''major rule'' within the meaning of the relevant sections of SBREFA. As required by SBREFA, the NCUA will submit this final rule to OMB for it to determine if the final rule is a ''major rule'' for purposes of SBREFA. The NCUA also will file appropriate reports with Congress and the Government Accountability Office so this rule may be reviewed.

List of Subjects in 12 CFR Part 712

Administrative practices and procedure, Credit, Credit unions, Insurance, Investments, Reporting and recordkeeping requirements.

By the National Credit Union Administration Board on October 21, 2021.

Melane Conyers-Ausbrooks,

Secretary of the Board.

For the reasons stated in the preamble, the Board amends 12 CFR part 712 as follows:

PART 712—CREDIT UNION SERVICE ORGANIZATIONS (CUSOs)

■ 1. Amend the authority for part 712 by revising the citation to read as follows:

Authority: 12 U.S.C. 1756, 1757(5)(D) and (7)(I), 1766, 1782, 1784, 1785, 1786, and 1789(a)(11).

■ 2. Amend § 712.3 by revising paragraphs (d)(5)(i), (d)(5)(ii) introductory text, and (d)(5)(iii) to read as follows:

§ 712.3 What are the characteristics of and what requirements apply to CUSOs?

* * * * *

(d) * * *

(5) * * *

(i) Credit and lending:

(A) Loan support services, including servicing; and

(B) Loan origination, including originating, purchasing, selling, and holding any loan as described in § 712.5(q).

(ii) Information technology:

* * * * *

[70] 5 U.S.C. 551.

[71] *Id.*

(iii) Custody, safekeeping, and investment management services for credit unions.

* * * * *

■ 3. Amend § 712.5 as follows:

■ a. Revise paragraph (a) introductory text;

■ b. In paragraph (a)(4), add a semicolon at the end of the paragraph;

■ c. Revise paragraph (b) introductory text;

■ d. In paragraph (b)(11), remove the period and add a semicolon in its place;

■ e. Remove paragraphs (c), (d), (n), and (s);

■ f. Redesignate paragraphs (e) through (t) as paragraphs (c) through (p);

■ g. Revise newly redesignated paragraphs (c) introductory text, (d) introductory text, (e) introductory text, (f) introductory text, (g) introductory text, and (h) introductory text;

■ h. In newly redesignated paragraph (h)(3), remove the word ''and'';

■ i. Revise newly redesignated paragraphs (i) introductory text, (j), (k), (l), and (m) introductory text;

■ j. In newly redesignated paragraph (m)(3), remove the period and add a semicolon in its place;

■ k. Revise newly redesignated paragraph (n);

■ l. In newly redesignated paragraph (o), remove ''*CUSO investments in non-CUSO service providers:*'' and remove the last period and add a semicolon in its place;

■ m. In newly redesignated paragraph (p), remove the period and add a semicolon in its place; and

■ n. Add new paragraphs (q) and (r).

The additions read as follows:

§ 712.5 What activities and services are preapproved for CUSOs?

* * * * *

(a) Checking and currency services:

* * * * *

(b) Clerical, professional and management services:

* * * * *

(c) Electronic transaction services:

* * * * *

(d) Financial counseling services:

* * * * *

(e) Fixed asset services:

* * * * *

(f) Insurance brokerage or agency:

* * * * *

(g) Leasing:

* * * * *

(h) Loan support services:

* * * * *

(i) Record retention, security and disaster recovery services:

* * * * *

(j) Securities brokerage services;

(k) Shared credit union branch (service center) operations;

(l) Travel agency services;

(m) Trust and trust-related services:

* * * * *

(n) Real estate brokerage services;

* * * * *

(q) Loan origination, including originating, purchasing, selling, and holding any type of loan permissible for Federal credit unions to originate, purchase, sell, and hold, including the authority to purchase and sell participation interests that are permissible for Federal credit unions to purchase and sell; and

(r) Other categories of activities as approved in writing by the NCUA and published on the NCUA's website. Once the NCUA has approved an activity and published that activity on its website, the NCUA will not remove that particular activity from the approved list or make substantial changes to the content or description of that approved activity, except through formal rulemaking procedures.

[FR Doc. 2021–23322 Filed 10–26–21; 8:45 am]

BILLING CODE 7535–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 570

[FR–6290–N–01]

Section 108 Loan Guarantee Program: Announcement of Fee To Cover Credit Subsidy Costs for FY 2022

AGENCY: Office of the Assistant Secretary for Community Planning and Development, Department of Housing and Urban Development (HUD).

ACTION: Announcement of fee.

SUMMARY: This document announces the fee that HUD will collect from borrowers of loans guaranteed under HUD's Section 108 Loan Guarantee Program (Section 108 Program) to offset the credit subsidy costs of the guaranteed loans pursuant to commitments awarded in Fiscal Year 2022 in the event HUD is required or authorized by statute to do so, notwithstanding subsection (m) of section 108 of the Housing and Community Development Act of 1974.

DATES: *Applicability date:* November 26, 2021.

FOR FURTHER INFORMATION CONTACT: Paul Webster, Director, Financial Management Division, Office of Block Grant Assistance, Office of Community Planning and Development, U.S. Department of Housing and Urban Development, 451 7th Street SW, Room 7282, Washington, DC 20410; telephone number 202–402–4563 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Relay Service at 800–877–8339. FAX inquiries (but not comments) may be sent to Mr. Webster at 202–708–1798 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

The Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2015 (division K of Pub. L. 113–235, approved December 16, 2014) (2015 Appropriations Act) provided that ''the Secretary shall collect fees from borrowers, notwithstanding subsection (m) of such section 108, to result in a credit subsidy cost of zero for guaranteeing . . .'' Section 108 loans. Section 108(m) of the Housing and Community Development Act of 1974 states that ''No fee or charge may be imposed by the Secretary or any other Federal agency on or with respect to a guarantee made by the Secretary under this section after February 5, 1988.'' Identical language was continued or included in the Department's continuing resolutions and appropriations acts authorizing HUD to issue Section 108 loan guarantees during Fiscal Years (FYs) 2016, 2017, 2018, 2019, 2020, and 2021. The Fiscal Year (FY) 2022 HUD appropriations bill under consideration [1] also has identical language suspending the prohibition against charging fees for loans issued with Section 108 guarantees after February 5, 1988, and requiring that the Secretary collect fees from borrowers to result in a credit subsidy cost of zero for the Section 108 Program.

On November 3, 2015, HUD published a final rule (80 FR 67626) that amended the Section 108 Program regulations at 24 CFR part 570 to establish additional procedures, including procedures for announcing the amount of the fee each fiscal year when HUD is required to offset the credit subsidy costs to the Federal Government to guarantee Section 108 loans. For FYs 2016, 2017, 2018, 2019, 2020, and 2021 HUD published notifications to set the fees.[2]

[1] Division G, Title II of H.R. 4502, 117th Cong., under the heading ''Community Development Loan Guarantees Program Account.''

[2] 80 FR 67634 (November 3, 2015), 81 FR 68297 (October 4, 2016), 82 FR 44518 (September 25, 2017), 83 FR 50257 (October 5, 2018), 84 FR 35299 (July 23, 2019), and 85 FR 52479 (August 26, 2020), respectively.

II. FY 2022 Fee: 2.00 Percent of the Principal Amount of the Loan

If authorized by statute, this document sets the fee for Section 108 loan disbursements under loan guarantee commitments awarded for FY 2022 at 2.00 percent of the principal amount of the loan. HUD will collect this fee from borrowers of loans guaranteed under the Section 108 Program to offset the credit subsidy costs of the guaranteed loans pursuant to commitments awarded in FY 2022 if the FY 2022 HUD appropriations bill under consideration is enacted, or if HUD is otherwise required or authorized by statute to collect fees from borrowers to offset the credit subsidy costs of the guaranteed loans, notwithstanding subsection (m) of section 108 of the Housing and Community Development Act of 1974 (42 U.S.C. 5308(m)). For this fee announcement, HUD is not changing the underlying assumptions or creating new considerations for borrowers. The calculation of the FY 2022 fee uses a similar calculation model as the FY 2016, FY 2017, FY 2018, FY 2019, FY 2020, and FY 2021 fee notifications, but incorporates updated information regarding the composition of the Section 108 portfolio and the timing of the estimated future cash flows for defaults and recoveries. The calculation of the fee is also affected by the discount rates required to be used by HUD when calculating the present value of the future cash flows as part of the Federal budget process.

As described in 24 CFR 570.712(b), HUD's credit subsidy calculation is based on the amount required to reduce the credit subsidy cost to the Federal Government associated with making a Section 108 loan guarantee to the amount established by applicable appropriation acts. As a result, HUD's credit subsidy cost calculations incorporated assumptions based on: (1) Data on default frequency for municipal debt where such debt is comparable to loans in the Section 108 loan portfolio; (2) data on recovery rates on collateral security for comparable municipal debt; (3) the expected composition of the Section 108 portfolio by end users of the guaranteed loan funds (*e.g.,* third-party borrowers and public entities); and (4) other factors that HUD determined were relevant to this calculation (*e.g.,* assumptions as to loan disbursement and repayment patterns).

Taking these factors into consideration, HUD determined that the fee for disbursements made under loan guarantee commitments awarded in FY 2022 will be 2.00 percent, which will be

applied only at the time of loan disbursements. Note that future notifications may provide for a combination of upfront and periodic fees for loan guarantee commitments awarded in future fiscal years but, if so, will provide the public an opportunity to comment if appropriate under 24 CFR 570.712(b)(2).

The expected cost of a Section 108 loan guarantee is difficult to estimate using historical program data because there have been no defaults in the history of the program that required HUD to invoke its full faith and credit guarantee or use the credit subsidy reserved each year for future losses.[3] This is due to a variety of factors, including the availability of Community Development Block Grant (CDBG) funds as security for HUD's guarantee as provided in 24 CFR 570.705(b). As authorized by Section 108 of the Housing and Community Development Act of 1974, as amended (42 U.S.C. 5308), borrowers may make payments on Section 108 loans using CDBG grant funds. Borrowers may also make Section 108 loan payments from other anticipated sources but continue to have CDBG funds available should they encounter shortfalls in the anticipated repayment source. Despite the program's history of no defaults, Federal credit budgeting principles require that the availability of CDBG funds to repay the guaranteed loans cannot be assumed in the development of the credit subsidy cost estimate (see 80 FR 67629, November 3, 2015). Thus, the estimate must incorporate the risk that alternative sources are used to repay the guaranteed loan in lieu of CDBG funds, and that those sources may be insufficient. Based on the rate that CDBG funds are used annually for repayment of loan guarantees, HUD's calculation of the credit subsidy cost must acknowledge the possibility of future defaults if those CDBG funds were not available. The fee of 2.00 percent of the principal amount of the loan will offset the expected cost to the Federal Government due to default, financing costs, and other relevant factors. To arrive at this measure, HUD analyzed data on comparable municipal debt over an extended period. The estimated rate is based on the default and recovery rates for general purpose municipal debt and industrial development bonds. The cumulative default rates on industrial development bonds were higher than the default rates on general purpose municipal debt during the period from which the data were taken. These two subsectors of municipal debt were chosen because their purposes and loan terms most closely resemble those of Section 108 guaranteed loans.

In this regard, Section 108 guaranteed loans can be broken down into two categories: (1) Loans that finance public infrastructure and activities to support subsidized housing (other than financing new construction) and (2) other development projects (*e.g.,* retail, commercial, industrial). The 2.00 percent fee was derived by weighting the default and recovery data for general purpose municipal debt and the data for industrial development bonds according to the expected composition of the Section 108 portfolio by corresponding project type. Based on the dollar amount of Section 108 loan guarantee commitments awarded from FY 2016 through FY 2020, HUD expects that 47 percent of the Section 108 portfolio will be similar to general purpose municipal debt and 53 percent of the portfolio will be similar to industrial development bonds. In setting the fee at 2.00 percent of the principal amount of the guaranteed loan, HUD expects that the amount generated will fully offset the cost to the Federal Government associated with making guarantee commitments awarded in FY 2022. Note that the FY 2022 fee represents a 0.15 percent decrease from the FY 2021 fee of 2.15 percent.

This document establishes a rate that does not constitute a development decision that affects the physical condition of specific project areas or building sites. Accordingly, under 24 CFR 50.19(c)(6), this document is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

James Arthur Jemison, II,

Principal Deputy, Assistant Secretary for Community Planning and Development.

[FR Doc. 2021–23365 Filed 10–26–21; 8:45 am]

BILLING CODE 4210–67–P

[3] U.S. Department of Housing and Urban Development, *Study of HUD's Section 108 Loan Guarantee Program,* (prepared by Econometrica, Inc. and The Urban Institute), September 2012, at pp. 73–74. This fact has not changed since the issuance of this report.

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 1 and 175

46 CFR Part 25

[Docket No. USCG–2018–0099]

RIN 1625–AC41

Fire Protection for Recreational Vessels

AGENCY: Coast Guard, Department of Homeland Security.

ACTION: Final rule; correction.

SUMMARY: The Coast Guard is correcting a final rule that appeared in the **Federal Register** on October 22, 2021. The document issued a final rule that amended fire extinguishing equipment regulations for recreational vessels that are propelled or controlled by propulsion machinery.

DATES: Effective April 20, 2022.

FOR FURTHER INFORMATION CONTACT: For information about this document, call or email Jeffrey Decker, Office of Auxiliary and Boating Safety, Boating Safety Division (CG–BSX–2), Coast Guard; telephone 202–372–1507, email *RBSinfo@uscg.mil.*

SUPPLEMENTARY INFORMATION: In FR Doc. 2021–22578 appearing on pages 58560–58573 in the **Federal Register** of Friday, October 22, 2021, the following correction is made:

33 CFR 175.320 [Corrected]

■ 1. On page 58573, in the first column, in table 3 to § 175.320(a)(2), the header for the second column is corrected to read ''Conditions that do not in themselves require fire extinguishers''.

Michael Cunningham,

Chief, Office of Regulations and Administrative Law, U.S. Coast Guard.

[FR Doc. 2021–23403 Filed 10–26–21; 8:45 am]

BILLING CODE 9110–04–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket No. 18–89; DA 21–1234; FR ID 54036]

Wireline Competition Bureau Announces Best Practices for Equipment Disposal and Revises FCC Form 5640 Certifications for the Secure and Trusted Communications Networks Reimbursement Program

AGENCY: Federal Communications Commission.

ACTION: Final action.

SUMMARY: In this document, the Wireline Competition Bureau (Bureau) provides guidance and voluntary best practices regarding the Secure and Trusted Communications Networks Reimbursement Program (Reimbursement Program) disposal and verification requirements to assist providers of advanced communications services participating in the Reimbursement Program; revises the certification language in the FCC Form 5640, which participants must submit to request funding allocations and disbursements from the Reimbursement Program; and makes minor corrections to the Catalog of Eligible Expenses and Estimated Costs that is used by Reimbursement Program applicants to assist with reporting cost estimates for funding allocation requests.

DATES: The guidance and voluntary best practices provided in this document are applicable beginning October 27, 2021.

FOR FURTHER INFORMATION CONTACT: Christopher Koves, Wireline Competition Bureau, 202–418–7400 or by emailing *SupplyChain@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document (Public Notice), in WC Docket No. 18–89; DA 21–1234, released on September 30, 2021. The full text of this document is available at the following internet address: *https://docs.fcc.gov/public/attachments/DA-21-1234A1.pdf.* Due to the COVID–19 pandemic, the Federal Communications Commission's headquarters will be closed to the general public until further notice. See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy, Public Notice, DA 20–304 (March 19, 2020), *https://www.fcc.gov/document/fcccloses-headquarters-open-window-andchanges-hand-delivery-policy.*

1. By this document, the Bureau provides guidance and voluntary best practices regarding the Secure (Reimbursement Program disposal and verification requirements to assist providers of advanced communications services participating in the Reimbursement Program. The Bureau finds that the best practices set forth in this guidance comply with the requirements in § 1.50004(j) of the Commission's rules. Reimbursement Program participants are free to choose alternative approaches to comply with the Reimbursement Program's disposal and verification requirements. In such instances, the Commission will review the specific circumstances to determine whether or not the alternative approach selected by the provider complies with the disposal and verification requirements set forth in § 1.50004(j) of the Commission's rules.

2. Separately, pursuant to § 1.108 of the Commission's rules, the Bureau reconsiders and revises, on its own motion, the certifications contained in FCC Form 5640 Application Request for Funding Allocation and the Reimbursement Claim Request that the Bureau adopted in the *Finalized Reimbursement Process Public Notification (PN),* 86 FR 48521, August 31, 2021. These revised certifications will further protect the Reimbursement Program against waste, fraud, and abuse. The Bureau also makes minor corrections to certain cost estimates incorrectly identified in the Final Catalog of Eligible Expenses and Estimated Costs (Cost Catalog) adopted in the *Finalized Reimbursement Process PN.*

3. *Disposal and Verification Obligations.* In accordance with the Secure and Trusted Communications Networks Act of 2019 (Secure Networks Act), the Commission adopted a rule requiring Reimbursement Program participants to: (1) ''dispose of the covered communications equipment and services in a manner to prevent the equipment or service from being used in the networks of other advanced communications service providers;'' and (2) ''retain documentation demonstrating compliance with this requirement.'' The disposal, according to the Commission, ''must result in the destruction of the covered communications equipment or service, making the covered communications equipment or service inoperable permanently,'' and participants ''must retain documentation demonstrating compliance with this requirement.'' The Commission also specifically prohibited the ''transfer of covered communications equipment or service to non-U.S. providers in an operable state that would allow for use of the equipment or service in another provider's network, foreign or domestic.'' The Commission expected the Bureau to provide participants with additional guidance with the disposal and verification process.

4. *Best Practices Overview.* Based on comments addressing the disposal process filed in this docket, presentations from entities with disposal experience, and Bureau staff's review of similar disposal processes, it identifies certain voluntary ''best practices,'' in the released document, to help guide participants as they fulfill their Reimbursement Program disposal and verification obligations. These best practices include procedures to effectuate equipment removal, data destruction, media sanitization, storage, transportation, physical destruction and recycling, and also cover the selection of certified data sanitization services, equipment destruction services, and electronic waste (e-waste) recycling services. The best practices further discuss documentation sufficient to demonstrate compliance, including the use of detailed equipment inventories, certificates of media disposition, and certificates of destruction. While the best practices are voluntary, the Bureau finds that these practices will help companies meet their disposal obligations efficiently, while also ensuring the safe and secure removal and disposal of covered communications equipment and services that pose a national security threat consistent with the Secure Networks Act and the Commission's rules.

5. Providers can employ alternative compliance measures, but risk the Commission subsequently finding that such measures are not in compliance with § 1.50004(j) of its rules. Non-compliance can result in the assessment of fines and forfeitures by the Commission and can also result in additional enforcement actions provided for in § 1.50005 of the Commission's rules, including the repayment of Reimbursement Program funding. The Commission directed the Office of Managing Director (OMD), or a third-party identified by OMD, to prepare a system to conduct audits and field investigations to ensure Reimbursement Program participants are acting in compliance with the Commission's rules. These audits and field investigations will include the inspection of documentation to verify compliance with the disposal and verification requirements in § 1.50004(j) of the Commission's rules.

6. Providers participating in the Reimbursement Program are likely to encounter different categories of

covered communications equipment and services. These different categories may pose different security threats based on their individual capabilities, including processing and/or retaining sensitive network or customer identifiable information. Therefore, as part of the best practices, the Bureau identifies recommended practices for treating covered communications equipment based on the category of equipment. The Bureau understands that it may be more efficient for a destruction company to destroy and recycle a large amount of equipment at once, for example, by destroying all equipment in a box at one time that may include a combination of the categories of equipment described in the following, and the Bureau defers to both the provider and the destruction company as to the most efficient process to achieve the required disposal obligation.

7. The categories are organized by level of risk, starting with equipment posing the highest risk, based on whether the equipment retains or processes data. Category 1 equipment is equipment that processes and retains data. Category 2 equipment is equipment that processes but does not retain data. Category 3 equipment is equipment that does not retain or process data. For category 1 equipment, the Bureau recommends the provider sanitize any media, followed by physical destruction and then recycling. For category 2 equipment, the Bureau recommends physical destruction and then recycling. For category 3 equipment, the Bureau recommends recycling this equipment. The Bureau will consider category 3 equipment as ''inoperable'' if permanently dismantled from other communications equipment and services and it is unable to be reconnected to any other communications equipment. Reimbursement Program participants are encouraged to retain certain documentation, based on the categories of covered communications equipment, including certificates of media disposition and certificates of destruction, which will help participants and the Bureau verify compliance with their disposal and verification obligations.

8. Guidance is also provided on selecting certified disposal services and e-waste recyclers. If using a third party, the Bureau recommends using a company that provides complete asset management solutions, from removal to destruction, including transportation and chain of custody tracking to avoid the potential for misplaced or lost equipment containing sensitive information. Providers may utilize one company for the entire disposal and recycling process, or different companies for different aspects of the disposal and recycling process based upon the categories of covered communications equipment outlined in this document. Because the Commission in the *2020 Supply Chain Order,* 86 FR 2904, January 13, 2021, prohibited the transfer of operable covered communications equipment or service to non-U.S. providers, the Bureau recommends providers use U.S. disposal companies that conduct the disposal process on U.S. soil. Equipment is still considered operable until it is properly disposed.

9. In particular, the Bureau recommends providers use a U.S. disposal company registered with the U.S. Department of State's Directorate of Defense Trade Controls pursuant to the International Traffic in Arms Regulations (ITAR). The Bureau agrees with Advanced Technology Recycling that ''utilizing ITAR processing guidelines is an ideal mechanism to ensure sensitive electronics as outlined in the [Secure Networks Act] are properly disposed of in a manner that protects national security.'' While the covered communications equipment may not fall within the scope of ITAR, the Bureau finds that an ITAR-registered disposal company will likely have the procedures in place and the facilities necessary to effectively handle the safe and secure destruction of covered communications equipment, including the most sensitive equipment. The Bureau finds that, based on the record, ITAR-registered companies likely can provide complete asset management services, including tracking equipment, maintaining records, and documentation and certifying destruction. According to Advanced Technology Recycling, ''ITAR registered service providers must follow strict disposal guidelines to ensure scrap materials generated throughout the disposal process remain on U.S. soil and be processed exclusively by U.S. persons.'' ITAR-registered companies are required to maintain records concerning manufacture, acquisition, and disposition of defense articles, including technical data, subject to ITAR, and are subject to civil and criminal penalties for violations. According to Advanced Technology Recycling and Gannon & Scott, ITAR-registered companies may also hold e-waste recycling or other certifications and provide media sanitization services, allowing for a one-stop disposal facility to handle the disposal of different categories of equipment according to the best practices outlined in the released document.

10. The Bureau agrees with Teltech Group that through the disposal process it should ''consider environmental issues'' so that the covered communications equipment ''do not create environmental problems.'' Accordingly, the Bureau recommends for providers to recycle covered communications equipment to ensure the secure and environmentally responsible disposal of equipment as recommended by the Environmental Protection Agency (EPA). Consistent with EPA guidelines, the Bureau recommends utilizing electronic waste (e-waste) recyclers that are certified by either the Responsible Recycling (R2) Standard for Electronics Recyclers or the e-Stewards Standard for Responsible Recycling and Reuse of Electronic Equipment (e-Stewards). As noted in this document, ITAR-registered companies may also hold R2 and e-Stewards certifications. For example, according to Advanced Technology Recycling, as an ITAR-registered disposal company, disposal processes are ''carried out . . . at R2 certified and ITAR registered facilities.''

11. The best practices also provide guidance on disposal verification documentation. The Bureau recommends providers retain shipping or transportation documentation, including detailed inventories supported by an affidavit, dates, locations, transportation service provider name, and means of transportation. These may be kept individually or as part of a larger asset management solution. Reimbursement Program participants are encouraged to retain documentation, including certificates of media disposition and certificates of destruction, that will help participants and the Bureau verify compliance with their disposal and verification obligations. These recommendations reflect input received from the Rural Wireless Association, Teltech Group, and the Competitive Carriers Association on the importance of tracking the removal and destruction of covered equipment and on clarifying the ''level of detail any documentation will need to contain to be compliant.''

12. In sum, these best practices will help ensure the security of sensitive data processed or retained by the covered equipment, including network and customer proprietary information, from unauthorized access. These best practices will also help participants comply with the requirements of § 1.50004(j) of the Commission's rules, to ensure that covered communications

equipment and service that pose an unacceptable risk to the national security of the United States or the security and safety of United States persons is made inoperable and recycled in an environmentally safe manner.

13. *Prospective-Only Guidance.* The Rural Wireless Association asserts that some of its ''members have already completed the destruction of, or are in the process of disposing of,'' covered communications equipment. Providers of advanced communications services that have already removed and disposed of covered communications equipment or services could not have known the best practices provided in the released document. Accordingly, the Bureau will take this into account when evaluating compliance with § 1.50004(j) for disposal occurring prior to the release of these best practices. The Bureau expects providers have acted reasonably, however, in carrying out the safe and secure disposal of covered communications equipment and have retained sufficient documentation to verify the disposal efforts taken. To the extent that covered communications equipment is still in a provider's custody and not destroyed, providers are encouraged to follow the disposal guidance provided herein going forward.

14. *Reimbursement Program Certifications.* Additionally, the Bureau, on its own motion pursuant to § 1.108 of the Commission's rules, hereby reconsiders and revises the certifications contained in the FCC Form 5640 Application Request for Funding Allocation and the Reimbursement Claim Request. These revised certifications, included in the release document, are consistent with the certifications recently employed for other funding programs implemented by the Commission and will further protect the Reimbursement Program from waste, fraud, and abuse.

15. The Commission directed the Bureau to ''create one or more forms to be used by entities to claim reimbursement from the Reimbursement Program, to report on their use of money disbursed and the status of their construction efforts, and for any other Reimbursement Program-related purposes.'' The Commission also delegated authority to the Bureau to ''adopt the necessary policies and procedures relating to allocations, draw downs, payments, obligations, and expenditures of money from the Reimbursement Program to protect against waste, fraud, and abuse . . . .'' In the *Reimbursement Process PN,* 86 FR 31464, June 14, 2021, the Bureau sought comment on the proposed information fields for FCC Form 5640, including the form certifications required by applicants. The Bureau finalized the FCC Form 5640 Application Request for Funding Allocation and Reimbursement Claim Request in the *Finalized Reimbursement Process PN.*

16. The Bureau, on its own motion, now reconsiders and revises these FCC Form 5640 certifications. The revised certifications largely track the substance of the prior certifications that were derived from the Secure Networks Act and the Commission's rules. However, to further protect the Reimbursement Program from waste, fraud, and abuse and to align the certifications with other recently implemented funding programs by the Commission, the Bureau has added additional certifications. For example, the Bureau now explicitly requires certifying officials to certify that they are authorized to certify on behalf of the applicant. The certifying official must also acknowledge that any false, fictitious, or fraudulent information or statement, or the omission of any material fact on the form or any other documents submitted may subject the participant to fine or forfeiture under the Communications Act, fine or imprisonment under Title 18 of the United States Code, or liability under the False Claims Act. The Bureau also requires certifying officials to acknowledge that failure to comply with the statute, rules, and orders governing the Reimbursement Program could result in civil and criminal prosecution by law enforcement authorities. The certifying official must further certify that the applicant will not use Reimbursement Program funds for any portion of expenses that have been or will be reimbursed by other sources of state or federal funding. This certification, in particular, is aimed at protecting against the receipt and use of duplicative funding from different state and federal sources. Finally, certifying officials will also need to certify that no ''kickbacks'' (*i.e.,* money or anything of value) were paid or received by the participant from a contractor or vendor in connection with the Reimbursement Program. Collectively, the revised and added certifications provide additional notice to certifying officials and applicants as to potential civil and criminal penalties for violating Reimbursement Program requirements and will strengthen the Commission's ability to investigate and hold applicants accountable for rule violations and fraudulent conduct. The text of the revised certifications can be found in Appendix B of the Public Notice, *https://www.fcc.gov/document/wcb-announces-best-practices-supply-chain-equipment-disposal.*

17. These revised certifications will become effective immediately upon publication in the **Federal Register**, pursuant to section 553(d)(3) of the Administrative Procedure Act. The Bureau finds good cause exists for an expedited effective date to ensure these certifications can be included in the forms necessary for the expeditious opening of the Reimbursement Program filing window, which is now scheduled to occur on October 29, 2021. An expedited effective date will further assist the Commission in speedily addressing the pressing national security concerns that prompted the establishment this Reimbursement Program.

18. *Cost Catalog Corrections.* Finally, the Bureau corrects cost estimates incorrectly identified in the Cost Catalog adopted on August 3, 2021, in the *Finalized Reimbursement Process PN.* Since the release of the Cost Catalog on August 3, 2021, the Bureau was made aware of a few instances where the cost estimate identified in that version of the Cost Catalog was listed incorrectly. Specifically, the average cost estimate reported for items 2.1.2 and, 2.2.3 was inaccurate given the range of cost estimates reported. In addition, the low-end cost range for item 5.16.5 was incorrectly listed as $1,7687.17 instead of $17,687.17. The average cost estimate for item 5.16.5 is, however, correct. Separately, the final version of the Cost Catalog incorrectly included a cost estimate for item 5.1.4 regarding ''Participation for FCC Rulemaking'' even though the Bureau explicitly called for the removal of this item in the *Finalized Reimbursement Process PN.* Accordingly, the Bureau will make these corrections to the Cost Catalog and publish a corrected version on the Commission's website.

A. Paperwork Reduction Act of 1995 Analysis

19. This document does not contain any new information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. The Commission has separately sought and obtained approval, per the PRA, from the Office of Management and Budget (OMB) for the information collection requirements contained in the *2020 Supply Chain Order* from which the rules and obligations discussed herein, where applicable, are derived. Therefore, this document 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. While the revised certifications adopted in this document for the FCC Form 5640 are exempt from the requirements of the PRA, pursuant to 5 CFR 1320.3(h)(1), we will update the information on file for OMB Control No. 3060–1270 to reflect the revised certifications adopted herein for the FCC Form 5640.

B. Congressional Review Act

20. The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs, that these modified certification requirements are non-major under the Congressional Review Act, 5 U.S.C. 804(2). The Bureau will send a copy of this document to Congress and the Government Accountability Office pursuant to 5 U.S.C. 801(a)(1)(A).

C. Final Regulatory Flexibility Certification

The Regulatory Flexibility Act of 1980, as amended (RFA), requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' 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 concerns'' under the Small Business Act. A ''small business concern'' is one that: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). The Commission prepared Initial Regulatory Flexibility Analyses (IRFAs) in connection with the *2020 Supply Chain Declaratory Ruling,* 85 FR 47211, August 4, 2020, and *Second Further Notice of Proposed Rulemaking (FNPRM),* 85 FR 48134, August 10, 2020, and the *2021 Supply Chain Third FNPRM,* 86 FR 15165, March 22, 2021. The Commission sought written public comment on the proposals in the *2020 Supply Chain Declaratory Ruling* and *Second FNPRM* and the *2021 Supply Chain Third FNPRM,* including comments on the IRFAs. No comments were filed addressing the IRFAs. The Commission included Final Regulatory Flexibility Analyses (FRFAs) in connection with the *2020 Supply Chain Order* and the *2021 Supply Chain Order,* 86 FR 46995, August 23, 2021.

21. This document provides: (1) Voluntary guidance on complying with the Reimbursement Program's disposal and verification requirements; (2) revises the certifications associated with the FCC Form 5640 application filings; and (3) corrects cost estimates identified in the Cost Catalog that were listed incorrectly. These actions flow from the proposals set forth in the *2020 Supply Chain Declaratory Ruling* and *Second FNPRM* and the *2021 Supply Chain Third FNPRM* and discussed in the IRFAs accompanying those Notices, and are consistent with the requirements established in the *2020 Supply Chain Order* and the *2021 Supply Chain Order* and addressed in the FRFAs accompanying those orders. Accordingly, no changes to the earlier analyses are required.

22. The Bureau has determined that the impact on the entities affected by the requirements contained in this document will not be significant. The effect of these measures is to establish for the benefit of those entities, including small entities, the procedures for filing an application consistent with existing rules, to participate in the Reimbursement Program to obtain funding support to remove from their networks, replace, and dispose of communications equipment and service considered a national security risk.

23. *Additional Information.* For additional information about the Reimbursement Program application and filing process, interested parties should review the *Finalized Reimbursement Process PN* and visit the Reimbursement Program web page: *https://www.fcc.gov/supplychain.* Questions specific to the Reimbursement Program or application process should be directed to the Reimbursement Program Fund Administrator by emailing *SCRPFundAdmin@fcc.gov* or by calling (202) 418–7540 from 9:00 a.m. ET to 5:00 p.m. ET, Monday through Friday, except for Federal holidays. For further information regarding this document, please contact *supplychain@fcc.gov.*

Federal Communications Commission.

Cheryl Callahan,

Assistant Chief, Telecommunications Access Policy Division, Wireline Competition Bureau.

[FR Doc. 2021–23213 Filed 10–26–21; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register

Vol. 86, No. 205

Wednesday, October 27, 2021

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

DEPARTMENT OF ENERGY

10 CFR Parts 429 and 431

[EERE–2021–BT–TP–0021]

Energy Conservation Program: Test Procedures for Fans and Blowers

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

ACTION: Request for information; extension of public comment period.

SUMMARY: On October 1, 2021, the U.S. Department of Energy (''DOE'') published a request for information (''RFI'') undertaking the preliminary stages of a rulemaking to consider potential test procedures for fans and blowers, including air circulating fan heads. The RFI provided an opportunity for submitting written comments, data, and information by November 1, 2021. DOE received requests from the Air Movement and Control Association (AMCA) International asking for a 21-day extension of the public comment period. DOE has reviewed this request and is granting an extension of the public comment period for 14 days to allow public comments to be submitted until November 15, 2021.

DATES: The comment period for the RFI published on October 1, 2021 (86 FR 54412) is extended. DOE will accept comments, data, and information regarding this RFI received no later than November 15, 2021.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *www.regulations.gov.* Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE–2021–BT–TP–0021, by any of the following methods:

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

2. *Email:* To *FansBlowers2021TP0021@ee.doe.gov.* Include docket number EERE–2021–BT–TP–0021 in the subject line of the message.

No telefacsimilies (''faxes'') will be accepted.

Although DOE has routinely accepted public comment submissions through a variety of mechanisms, including postal mail and hand delivery/courier, the Department has found it necessary to make temporary modifications to the comment submission process in light of the ongoing Covid–19 pandemic. DOE is currently accepting only electronic submissions at this time. If a commenter finds that this change poses an undue hardship, please contact Appliance Standards Program staff at (202) 586–1445 to discuss the need for alternative arrangements. Once the Covid–19 pandemic health emergency is resolved, DOE anticipates resuming all of its regular options for public comment submission, including postal mail and hand delivery/courier.

Docket: The docket for this activity, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at *www.regulations.gov.* All documents in the docket are listed in the *www.regulations.gov* index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

The docket web page can be found at: *www1.eere.energy.gov/buildings/appliance_standards/product.aspx/productid/65.* The docket web page contains instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT: Mr. Jeremy Dommu, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–9870. Email: *ApplianceStandardsQuestions@ee.doe.gov.*

Ms. Amelia Whiting, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–2588. Email: *Amelia.Whiting@hq.doe.gov.*

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

SUPPLEMENTARY INFORMATION: On October 1, 2021, DOE published a RFI undertaking the preliminary stages of a rulemaking to consider potential test procedures for fans and blowers, including air circulating fan heads. DOE is seeking data and information to evaluate whether new test procedures would accurately and fully comply with the requirement that a test procedure measures energy use during a representative average use cycle for the equipment without being unduly burdensome to conduct. Specifically, DOE is seeking information regarding the definition, scope, test procedure and metrics for air circulating fan heads. 86 FR 54412. On October 15, 2021, AMCA requested an extension of the public comment period for the RFI. AMCA commented that the extension is necessary to research the issues that DOE is asking about and to collaborate with other organizations responding to the RFI. AMCA stated that they believe an extension will serve the public interest through improving not only the quality of the information industry submits to the department, but also increasing the likelihood of presenting the department with consensus recommendations on many of the questions being asked. (AMCA, No. 2 at p. 1) [1]

DOE has reviewed the requests and is extending the comment period to allow additional time for interested parties to submit comments. As noted, the RFI was issued as part of the preliminary stages of a rulemaking to consider potential test procedures for fans and blowers, including air circulating fan heads. If DOE determines that test procedures may be appropriate, additional notifications will be published (*e.g.,* a notice of proposed rulemaking) providing interested parties with an additional opportunity to submit comment. DOE has determined

[1] The parenthetical reference provides a reference for information located in DOE's rulemaking docket. (Docket No. EERE–2021–BT–TP–0021, which is maintained at *www.regulations.gov/comment/EERE-2021-BT-TP-0021-0002*). The references are arranged as follows: (Commenter name, comment docket ID number, page of that document).

that an extension of 14 days is sufficient for this preliminary stage. Therefore, DOE is extending the comment period until November 15, 2021.

Signing Authority

This document of the Department of Energy was signed on October 19, 2021, by Kelly Speakes-Backman, Principal Deputy Assistant Secretary and Acting Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on October 20, 2021.

Treena V. Garrett,

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

[FR Doc. 2021–23229 Filed 10–26–21; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1910, 1915, 1917, 1918, 1926, and 1928

[Docket No. OSHA–2021–0009]

RIN 1218–AD39

Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Advance notice of proposed rulemaking (ANPRM).

SUMMARY: OSHA is initiating rulemaking to protect indoor and outdoor workers from hazardous heat and is interested in obtaining additional information about the extent and nature of hazardous heat in the workplace and the nature and effectiveness of interventions and controls used to prevent heat-related injury and illness. This ANPRM provides an overview of the problem of heat stress in the workplace and of measures that have been taken to prevent it. This ANPRM also seeks information on issues that OSHA can consider in developing the standard, including the scope of the standard and the types of controls that might be required.

DATES: Submit comments on or before December 27, 2021.

ADDRESSES: You may submit comments and attachments, identified by Docket No. OSHA–2021–0009, electronically at *www.regulations.gov,* which is the Federal e-Rulemaking Portal. Follow the instructions online for making electronic submissions.

Instructions: All submissions must include the agency's name and the docket number for this ANPRM (Docket No. OSHA–2021–0009). When submitting comments or recommendations on the issues that are raised in this ANPRM, commenters should explain their rationale and, if possible, provide data and information to support their comments or recommendations. Wherever possible, please indicate the title of the person providing the information and the type and number of employees at your worksite.

All comments, including any personal information you provide, will be placed in the public docket without change and will be publicly available online at *www.regulations.gov.* Therefore, OSHA cautions commenters about submitting information they do not want to be made available to the public or submitting materials that contain personal information (either about themselves or others) such as Social Security Numbers and birthdates.

Docket: To read or download comments or other material in the docket, go to Docket No. OSHA–2021–0009 at *www.regulations.gov.* All comments and submissions are listed in the *www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through that website. All submissions, including copyrighted material, are available for inspection at the OSHA Docket Office. Documents submitted to the docket by OSHA or stakeholders are assigned document identification numbers (Document ID) for easy identification and retrieval. The full Document ID is the docket number plus a unique four-digit code. OSHA is identifying supporting information in this ANPRM by author name and publication year, when appropriate. This information can be used to search for a supporting document in the docket at *www.regulations.gov.* Contact the OSHA Docket Office at 202–693–2350 (TTY number: 877–889–5627) for assistance in locating docket submissions.

FOR FURTHER INFORMATION CONTACT:

Press Inquiries: Contact Frank Meilinger, Director, Office of Communications, U.S. Department of Labor; telephone (202) 693–1999; email *meilinger.francis2@dol.gov.*

General and technical information: Contact Andrew Levinson, Acting Director, Directorate of Standards and Guidance, U.S. Department of Labor; telephone (202) 693–1950.

SUPPLEMENTARY INFORMATION: This ANPRM on Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings follows this outline:

Table of Contents

I. Background
A. Occupational Illnesses, Injuries, and Fatalities Due to Hazardous Heat
B. Under Reporting of Occupational Illnesses, Injuries, and Fatalities Due to Hazardous Heat
C. Scope
1. Industries, Occupations, and Job Tasks
2. Structure of Work and Work Arrangements
3. Business Size
D. Geographic Region
E. Inequality in Exposures and Outcomes
F. Climate Change
II. Existing Heat Illness Prevention Efforts
A. OSHA Efforts
1. OSHA's Heat Illness Prevention Campaign and Other Guidance Efforts
2. Stakeholder Engagement—NACOSH Work Group
3. General Duty Clause
4. Other Enforcement Efforts
5. Applicable OSHA Standards
B. Petitions for Rulemaking
C. NIOSH Criteria Documents
D. History and Requirements of State Standards
E. Other Standards
F. Employer Efforts
III. Key Issues in Occupational Heat-Related Illness
A. Determinants of Occupational Heat Exposure
1. Heat Exposure
2. Contributions to Heat Stress in the Workplace
B. Strategies To Reduce Occupational Heat-Related Injury and Illness
1. Heat Injury and Illness Prevention Programs
2. Engineering Controls, Administrative Controls, and Personal Protective Equipment
3. Acclimatization
4. Monitoring
5. Planning and Responding to Heat-Related Illness Emergencies
6. Worker Training and Engagement
IV. Costs, Economic Impacts, and Benefits
A. Overview
B. Impacts on Small Entities
V. References

I. Background

Heat is the leading cause of death among all weather-related phenomena (NWS, September 8, 2021a; NWS,

September 8, 2021b). Excessive heat exacerbates existing health problems like asthma, kidney failure, and heart disease, and can cause heat stroke and even death if not treated properly and promptly. Workers in both outdoor and indoor work settings without adequate climate-controlled environments are at risk of hazardous heat exposure. In an evaluation of 66 heat-related illness enforcement investigations from 2011–2016, 80% of heat-related fatalities occurred in outdoor work environments. However, 61% of non-fatal heat-related illness cases occurred during or after work in an indoor work environment (Tustin et al., August 2018). Pregnant workers (NIOSH, April 20, 2017) and workers of color are disproportionately exposed to hazardous levels of heat in essential jobs across these work settings (Gubernot et al., February 2015). In addition, climate change is increasing the frequency and intensity of extreme heat events, as well as increasing daily average daytime and nighttime temperatures. OSHA is initiating a rulemaking to protect both indoor and outdoor workers from hazardous heat, and as a first step is seeking additional information about the extent and nature of hazardous heat in the workplace and the nature and effectiveness of interventions and controls used to prevent heat-related illness. This ANPRM provides an overview of the problem of heat stress in the workplace and the measures that have been taken to prevent it. This ANPRM also seeks information on issues that may be considered in developing a standard, including the scope of the standard and the types of controls that might be required.

OSHA uses several terms related to excessive heat exposure throughout this document. Heat stress means the load of heat that a person experiences due to sources of heat or heat retention, or the presence of heat in a work setting. Heat strain means the physiological response to heat exposure (ACGIH, 2017). Heat-related illness means adverse clinical health outcomes that occur due to exposure to hazardous heat. Heat-related injury means an injury linked to heat exposure that is not considered one of the typical symptoms of heat-related illness, such as a fall or cut. The document also uses the combined terms of heat injury and illness when talking about prevention or programming to demonstrate that both injury and illness should be considered, with the exception of the names of existing programs.

A. Occupational Illness, Injuries, and Fatalities Due to Hazardous Heat

According to the Bureau of Labor Statistics (BLS) Census of Fatal Occupational Injuries, exposure to excessive environmental heat stress has killed 907 U.S. workers from 1992–2019, with an average of 32 fatalities per year during that time period (BLS, September 10, 2021a). In 2019, there were 43 work-related deaths due to environmental heat exposure (BLS, September 1, 2021). A recent analysis of BLS data by National Public Radio and Columbia Journalism Investigations found that the three-year average of heat-related fatalities among U.S. workers has doubled since the early 1990s (Shipley et al., August 17, 2021). The BLS Annual Survey of Occupational Injuries and Illnesses estimates that 31,560 work-related heat injuries and illnesses involving days away from work have occurred from 2011–2019, with an average of 3,507 injuries and illnesses of this severity occurring per year during this period (BLS, September 10, 2021b). However, the estimates provided here on occupational heat-related illnesses, injuries, and fatalities are likely vast underestimates, as discussed further in *Underreporting of occupational illnesses, injuries, and fatalities due to hazardous heat* (Section I.B. of this ANPRM).

In a warm environment, the human body maintains a healthy internal body temperature by getting rid of excess heat through mechanisms like sweating and increasing blood flow to the skin. This is especially true during physical activity or exertion. Briefly, if the body is not able to dissipate heat, the body temperature may rise, and symptoms of heat-related injury and illness can result. These can include heat rashes, heat syncope (fainting), heat cramps, heat exhaustion, rhabdomyolysis (a complex medical condition involving muscle breakdown), kidney injury, and even heat stroke (the inability of the body to cool which can lead to death) if the thermoregulatory capacity of the body is exceeded (Ebi et al., August 21, 2021; NIOSH, February 2016). A multi-country meta-analysis of dozens of studies involving thousands of workers globally found that of those exposed to hazardous heat during a single work shift, 35% experienced heat strain while 15% of those who frequently worked in hazardous heat experienced kidney disease or acute kidney injury (Flouris et al., December 2018).

Exposure to hazardous heat can also result in the exacerbation of pre-existing medical conditions, such as diabetes or cardiovascular disease. A study of U.S. Army personnel demonstrated that those who have been hospitalized in U.S. hospitals for heat-related illness may experience organ damage that can persist for years afterward, even resulting in an increased risk of death from cardiovascular disease and ischemic heart disease compared to those previously hospitalized for other reasons (Wallace et al., 2007). Recurrent exposure to hazardous heat, and resulting dehydration, has also been found to be associated with acute and chronic kidney disease and injury in agricultural workers and others performing manual labor in outdoor work settings, particularly in South America, central America and certain South Asian countries. These illnesses appear to be unrelated to traditional causes of the disease (Glaser et al., August 8, 2016; Johnson et al., May 9, 2019; Sorensen and Garcia-Trabanino, August 22, 2019). Although much of this research has focused on international populations, there is emerging evidence of this health hazard in occupational populations within the U.S. (Mix et al., 2019; Glaser et al., August 8, 2016).

The following questions are intended to solicit information on the topics related to assessing the nature and magnitude of occupational illness, injuries, and fatalities occurring due to hazardous heat.

(1) What are the occupational health or safety impacts of hazardous heat exposure?

(2) What sources of data are important to consider when evaluating occupational heat-related illnesses, injuries, and fatalities?

(3) Beyond the studies discussed in this ANPRM, are there other data that provide more information about the scope and magnitude of injuries, illnesses, and fatalities related to occupational heat exposure?

B. Underreporting of Occupational Illnesses, Injuries, and Fatalities Due to Hazardous Heat

Heat-related illnesses, injuries, and fatalites are underreported (EPA, April 2021; Popovich and Choi-Schagrin, August 11, 2021). Occupational heat-related illnesses, injuries, and fatalities may be underestimated for several reasons. First, the full extent of heat-related health outcomes is underreported generally because heat is not always recognized as a contributing factor and the criteria for defining a heat-related death or illness may vary by state, and among physicians, medical examiners, and coroners. (Gubernot et al., October 2014). Due to the varying

nature of heat-related illness symptoms, some of which (*e.g.,* headache, fatigue) may have other causes, not all cases of illness or injury are reported. Further, if the illness or injury does not require medical treatment beyond first aid, or result in restrictions or days away from work, loss of consciousness, diagnosis by a healthcare professional as a significant injury, or death, an employer is not required to report the incident under OSHA's existing injury reporting requirements (see 29 CFR 1904.7(a)). There may also be situations where an illness, injury, or fatality is deemed to be unrelated to work, but heat exposure at work may have contributed to that incident (Gubernot et al., October 2014; Shipley et al., August 17, 2021).

Second, hazardous heat can impair job tasks related to complex cognitive function (Ebi et al., August 21, 2021), and also reduce decision-making abilities and productivity. A recent global meta-analysis showed that 30% of workers who experienced hazardous heat during a single shift reported productivity losses (Flouris et al., December 2018). Additionally, a growing body of evidence has demonstrated that these heat-induced impairments may result in significant occupational injuries that are not currently factored into assessments of the health hazards resulting from occupational heat exposure (Park et al., July 2021). In California, the likelihood of same-day workplace injury risk significantly increased by approximately 5–7% when comparing a day that was 60–65 degrees Fahrenheit to a day that was 85–90 degrees Fahrenheit. Same-day workplace injury risk increased 10–15% when comparing a day that was 60–65 degrees Fahrenheit to a day that was above 100-degrees Fahrenheit. These increased risks were demonstrated in certain indoor and outdoor work environments, contributing to approximately 360,000 additional workplace injuries in California alone from 2001–2018 (Park et al., July 2021).

Third, self-reporting of health outcomes can result in bias which can lead to over- or under-estimates of health outcomes (Althubaiti, May 4, 2016). In 2009, the Government Accountability Office (GAO) reported that the BLS Survey of Occupational Injuries and Illnesses, which relies heavily on employer self-report of non-fatal injuries and illnesses, may underreport employer-reported injury and illness data (GAO, October 2009). This underreporting of non-fatal illnesses and injuries may be particularly present in some industries, like agriculture, where some employers (*e.g.,* employers with 10 or fewer employees) are excluded from reporting requirements (Leigh et al., April 2014). While there may be multiple factors influencing underreporting, BLS investigations of this issue have found that employers and employees may face disincentives for reporting injuries and illnesses (BLS, December 8, 2020). By reporting injuries and illness, employers may increase their workers' compensation costs and jeopardize their reputation. Employees may also face disincentives for reporting if they are reluctant to report for fear of retaliation or may not realize an illness or injury is heat-related. Employees may decide to continue working for economic incentives and to avoid losing wages. Employee fear of retaliation, including the potential loss of employment, may be of particular concern with heat-related illness and injuries given the disproportionate number of undocumented, migrant, low-wage, or other vulnerable workers that make up sectors that are at high risk of hazardous heat exposure such as agriculture and construction. These workers may lack the awareness of their right to, and perceived ability to, speak out about workplace conditions. Additional concerns related to the inequalities in hazardous heat exposure and resulting health outcomes are discussed below in more detail. Despite potential underreporting, these datasets are important indicators of occupational safety and health, and through the questions below, OSHA seeks additional information and data to better assess the fullest extent of occupational illnesses, injuries, and fatalities due to hazardous heat exposure in the workplace.

Finally, there are some health conditions associated with occupational heat exposure that may take many years to manifest in workers previously exposed to hazardous heat due to the latency period between exposure and symptom onset (Gubernot et al., October 2014). For these illnesses that develop over time, it is unlikely that the current national datasets of occupational illnesses and injuries associate those outcomes with hazardous heat exposure.

The following questions are intended to solicit information on the topics related to assessing and addressing underreporting of occupational illness, injuries, and fatalities occurring due to hazardous heat.

(4) Are there quantitative estimates of the magnitude of occupational illnesses, injuries, and fatalities related to hazardous heat, beyond what is described in this ANPRM?

(5) Are there quantitative estimates or other quantitative or non-quantitative examinations of the magnitude of underreporting of occupational illnesses, injuries, and fatalities related to hazardous heat?

(6) What factors lead to the underreporting of occupational heat-related illness, injuries, and fatalities of which OSHA should be aware?

(7) What datasets are available to address some of the limitations associated with the underreporting of occupational heat-related illnesses, injuries, and fatalities?

C. Scope

1. Industries, Occupations, and Job Tasks

Workers across hundreds of industries are at risk for hazardous heat exposure and resulting health impacts. Since 2018, 789 heat-related hospitalizations and 54 heat-related fatalities across nearly 275 unique industries have been documented by OSHA through workplace inspections and violations . During this time, hospitalizations occurred most frequently in postal and delivery service, landscaping, and commercial building, as well as highway, street, and bridge construction workers. Fatalities were reported in landscaping, masonry, and highway, street, and bridge construction workers (OSHA, August 20, 2021).

Also since 2018, over 230 unique industries (as identified by 6-digit NAICS codes) across indoor and outdoor work settings have had at least one heat-related inspection by OSHA. During 2019, for example, OSHA heat-related inspections occurred most often in industries and workplaces such as roofing, postal and delivery service, construction and contracting, masonry, landscaping, restaurants, and warehousing and storage (OSHA, August 20, 2021).

Further, multiple analyses of OSHA enforcement investigations and the Census of Fatal Occupational Injuries have found that Agriculture (NAICS code 11), Construction (NAICS code 23), Transportation and Warehousing (NAICS codes 48–49), and Administrative and Support and Waste Management and Remediation Services (NAICS code 56) experience the highest rates of heat-related mortality (Gubernot et al., February 2015; Tustin et al., August 2018). Compared to the average annual heat-related workplace fatality rate in all other industries of 0.09 deaths per 1 million workers, Agriculture, Forestry, Fishing, and Hunting was found to have 35 (95% confidence interval, 26.3–47.0) times the risk of

heat-related deaths with 3.06 deaths per 1 million workers from 2000–2010. Construction had 13 (95% confidence interval, 10.1–16.7) times the risk of heat-related deaths with 1.13 deaths per 1 million workers during that time period (Gubernot et al., February 2015).

Many job tasks, regardless of the industry in which they are performed, may also result in the risk of exertional heat stress in workers. The American Conference of Governmental Industrial Hygienists (ACGIH) has developed categories of work intensity based on their estimated metabolic rate, with the metabolic rate increasing across categories: rest (*e.g.,* sitting), light (*e.g.,* sitting, standing, light arm/handwork, occasional walking), moderate (*e.g.,* normal walking, moderate lifting), heavy (*e.g.,* heavy material handling, walking at a fast pace), very heavy (*e.g.,* pick and shovel work) (ACGIH, 2017; OSHA, September 15, 2017). In an evaluation of 14 heat-related workplace fatalities that occurred from 2011–2016, the workload was moderate, heavy, or very heavy in 13 of the incidents (Tustin et al., July 6, 2018). Of 20 enforcement cases from 2012–2013 that resulted in heat-related citations under the Occupational Safety and Health Act's General Duty Clause, all fatalities and non-fatal heat-related illnesses occurred under moderate or heavy workloads (Arbury et al., April 2016).

The following questions are intended to solicit information about how hazardous heat exposure and risk varies across industries, occupations, and job tasks.

(8) Are there industries, occupations, or job tasks that should be considered when evaluating the health and safety impacts of hazardous heat exposure in indoor and outdoor work environments? Please provide examples and data.

(9) Are there any industries, occupations, or job tasks that are facing changes in the rate or frequency of occupational heat-related illness? Please provide examples and data.

2. Structure of Work and Work Arrangements

The structure of work and various work arrangements, such as the use of temporary, gig, or contingent workers, has been found in some studies, including of non-US workers, to be associated with increased health and safety risks to workers (Caban-Martinez et al., April 2018; Virtanen et al., 2005). This may be due to a variety of reasons, including workers in these work arrangements being assigned more hazardous work tasks, being less aware of their ability to report unsafe work conditions, being less acclimatized to the heat conditions of the work environment, or not receiving adequate personal protective equipment (PPE) or training for the job duties they are conducting. These work arrangements are present in a variety of industries where workers face hazardous heat exposure, such as construction, agriculture, and landscaping, in part due to outdoor work settings and seasonality of work.

Additionally, multi-employer contexts may impact the health and safety of workers due to the need for and challenges associated with close coordination across employers on health and safety issues such as training and monitoring safe work practices (OSHA, October 6, 2021a; OSHA and NIOSH, October 6, 2021). OSHA recognizes that any rulemaking will need to consider the challenges for employers and employees related to protecting those in non-traditional, variable, and multi-employer work arrangements.

The following questions are intended to solicit information about how unique and non-traditional work arrangements contribute to workers' risk of heat-related injuries and illnesses, as well as the best practices and challenges for reducing those risks in these work settings.

(10) In addition to traditional work arrangements, are there specific types of work arrangements or multi-employer work arrangements that should be considered when evaluating the health and safety impacts of hazardous heat exposure in indoor and outdoor work environments?

(11) What are current and best practices for protecting workers in various types of work arrangements, including temporary and multi-employer work arrangements, from hazardous heat exposure?

(12) What are current challenges in and limitations of protecting workers in various types of work arrangements, including temporary and multi-employer work arrangements, from hazardous heat exposure?

3. Business Size

Heat-related illnesses can occur in businesses of all sizes. An evaluation of 38 enforcement investigations involving 66 incidents of fatal and non-fatal heat-related illness from 2011–2016 found that 92% of workplaces investigated had less than 250 employees (Tustin et al., August 2018). In a different assessment of workplace heat-related fatalities from 2000–2010, almost half of all fatalities where establishment size was known (244 cases out of 359 fatalities) occurred in what the authors termed ''very small establishments,'' or those with fewer than 10 employees (Gubernot et al., February 2015). However, approximately a quarter of fatalities during that time period occurred in ''very large establishments'' with more than 100 employees (Gubernot et al., February 2015).

The following questions are intended to solicit information about how business size may influence the practices and interventions implemented to prevent heat-related injuries and illnesses and the challenges experienced by businesses of varying sizes when implementing these prevention strategies. There are additional questions on the economic considerations for small entities included in *Impacts on Small Entities* (Section IV.B. of this ANPRM).

(13) How are employers in businesses of various sizes currently preventing heat-related injury and illness in workers?

(14) Are there limitations or concerns in preventing heat-related injury and illness in workers that vary among businesses of various sizes?

D. Geographic Region

Heat-related injury and illness among workers can occur anywhere in the United States. In 2015, Texas and California had the highest number of nonfatal injuries and illnesses with days away from work (BLS, August 30, 2017). Texas and California also accounted for a quarter of all heat-related workplace fatalities from 2000–2010 (Gubernot et al., February 2015).

However, when the size of the worker populations are taken into account, states across the southern United States, including Mississippi, Arkansas, Nevada, West Virginia, and South Carolina, have been found to have the highest rates of heat-related workplace fatalities from 2000–2010 (Gubernot et al., February 2015). In 2015, Kansas and South Carolina had the highest rates of heat-related nonfatal injuries and illnesses with days away from work, at 1.3 and 1.0 per 10,000 workers, respectively (BLS, August 30, 2017). Recent evidence also shows that the Southeast United States accounts for the most cases officially reported to OSHA.

As discussed in *Under-reporting of Occupational Illnesses, Injuries, and Fatalities due to Hazardous Heat* (Section I.B. of this ANPRM), significant underreporting of workplace heat-related injury and illness limits the understanding of the full geographic scope of outcomes. Additionally, populations that are less accustomed to hazardous heat, such as those in the Northeast or Midwest U.S., may be at increased risk of health impacts from

extreme heat, particularly during early season high heat events (Anderson and Bell, February 2011).

The following questions are intended to solicit information, relevant data sources, and considerations related to occupational heat exposure and outcomes based on geographic region.

(15) How does geographic region contribute to occupational heat hazards and the outcomes experienced by workers? Please provide examples and data.

(16) Are there regions with improving or worsening occupational heat hazards and associated outcomes? Please provide examples and data.

(17) Do regions with traditional and pervasive heat hazards address the hazard differently than regions with more episodic exposures (*e.g.,* heat waves in a normally temperate region)?

(18) What regional differences should be considered or accounted for when determining the appropriate interventions and practices to prevent heat-related injuries and illnesses among workers?

E. Inequality in Exposures and Outcomes

Disproportionate exposure to hazardous working conditions and their resulting health and safety impacts on workers exacerbates socioeconomic and racial inequalities in the U.S. In assessments of national work-related injuries, illnesses, and fatalities, employment in high-risk occupations has been disproportionately held by those who are Black, foreign-born, or low wage-earners, after adjusting for other demographic characteristics like sex and education (Steege et al., 2014). Non-Hispanic Black workers and foreign-born Hispanic workers tend to work in jobs with the highest injury risks even after adjusting for sex and education (Seabury et al., February 2017). Sociodemographic disparities in hazardous occupational exposures to dust and chemicals, noise, musculoskeletal hazards, and strain have been found to persist even after accounting for industry and job (Quinn et al., 2007).

These disparities are also present when focusing on health and safety outcomes that result from hazardous heat exposure. Black and Hispanic workers had higher relative risks of heat-related fatalities compared to white workers from 2000–2010 (Gubernot et al., February 2015), and one-third of workplace heat-related fatalities since 2010 have occurred in Hispanic workers (Shipley et al., August 17, 2021). From 1992–2006, agricultural crop workers were estimated to be 20 times more likely to suffer a heat-related fatality at work when compared to all other civilian occupations, with the majority of fatalities occurring among immigrant workers (CDC, June 20, 2008), and from 2000–2010, agricultural workers had 35 (95% confidence interval, 26.3–47.0) times the risk of dying from heat-related causes compared to all other industries (Gubernot et al., February 2015). Lower-wage workers are more likely to live and work in areas facing greater exposure to hazardous heat, to work in dangerous occupations, and to have limited access to air conditioning at home or other housing which may limit the ability to recover from occupational and non-occupational heat exposures. In California, lower-wage workers experienced five times as many heat-related injuries compared to the highest-wage workers between 2001 and 2018 (Park et al., July 2021). As climate change increases extreme heat events, Hispanic and Latino individuals, as well as American Indian and Alaska Native individuals, individuals with low income, and individuals lacking a high school diploma are more likely to live in areas with the highest projected labor hour losses (EPA, September 2, 2021).

The following questions are intended to solicit information, relevant data sources, and considerations related to inequalities in occupational heat exposure and disproportionate outcomes experienced by vulnerable occupational populations.

(19) Are there specific populations facing disproportionate exposure to or outcomes from hazardous heat in indoor or outdoor work settings? Please provide examples and data.

(20) Are there data sources available to assess inequalities in exposure to or outcomes from hazardous heat in indoor or outdoor work settings?

(21) Are there industries or employers who are addressing occupational heat-related illness with an environmental justice approach (*i.e.,* with a focus on fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income) to appropriately address the disproportionate exposures and outcomes faced by workers of color, low-wage workers, immigrant workers, or pregnant workers (NIOSH, April 20, 2017)? Please provide examples and data.

F. Climate Change

Climate change is increasing the frequency and intensity of extreme heat events, as well as increasing daily average daytime and nighttime temperatures. The National Climate Assessment, the United States' quadrennial report assessing climate change science and impacts and published by the U.S. Global Change Research Program, states that high summer temperatures are linked to increased illness and death, that hot days are associated with increased heat-related illnesses, that health risks may be higher earlier in warmer seasons before people have had time to acclimatize, and that workers will face an increased risk of heat-related illness due to heat exposure. This will be especially true in rural areas, particular sectors and occupations such as agriculture, forestry, construction, utilities, warehousing, manufacturing, and indoor workplaces producing additional heat or lacking adequate cooling, such as steel mills, dry cleaning, and others, and for workers of color, those who are older, and of lower socioeconomic status (USGCRP, 2016; USGCRP, 2018). It is estimated that under a high emissions scenario, climate change will result in the annual loss of almost 2 billion labor hours with an annual cost of an estimated $160 billion in lost wages (in 2015 dollars) due to extreme temperatures alone, the vast majority of which is due to heat (EPA, May 2017; USGCRP, 2018). As the number of days above 90 degrees Fahrenheit increases due to climate change, so do lost hours of work. Nationally, the average losses are projected to be 14 to 34 hours annually per ''weather-exposed'' worker due to high temperature days. Weather-exposed workers in parts of the Southwest and Southern Great Plains could lose up to 84 hours per worker annually, depending on the level of temperature increases (EPA, September 1, 2021).

The following questions are intended to solicit information, relevant data sources, and considerations to further assess the impact of climate change on occupational heat exposure and outcomes.

(22) Are there data sources available to assess how climate change is altering hazardous heat exposure in outdoor and indoor work environments?

(23) How will climate change affect existing inequities in occupational heat exposure and related health outcomes? Please provide relevant data.

(24) How will climate change affect the risk of occupational heat-related illness and mortality in the different regions of the United States?

(25) How should climate change be factored into an OSHA heat illness and injury prevention standard?

(26) What efforts are employers currently taking to prepare for and respond to the ways that climate change

is altering hazardous heat exposure in their workplaces?

II. Existing Heat Injury and Illness Prevention Efforts

A. OSHA Efforts

OSHA has taken a multi-pronged approach to address hazardous heat among both indoor and outdoor workers. This includes efforts ranging from education and awareness building, guidance, compliance assistance, stakeholder engagement, and enforcement.

1. OSHA's Heat Illness Prevention Campaign and Other Guidance Efforts

OSHA has a long-running Heat Illness Prevention Campaign (*https://www.osha.gov/heat*), which was initiated in 2011 to build awareness of prevention strategies and tools for employers and workers to reduce occupational heat-related illness. Historically, the Campaign has utilized the slogan ''Water. Rest. Shade.'' The agency updated Campaign materials in 2021 to recognize both indoor and outdoor heat hazards, as well as the importance of protecting new and returning workers from hazardous heat. These efforts, which are ongoing, incorporate stakeholder feedback and feature materials available in an increasing number of languages. Despite the strengths and reach of the Campaign, these guidance and communication materials are not legally enforceable requirements.

In addition to the Heat Illness Prevention Campaign materials, OSHA publishes a heat specific Safety and Health Topics page (*https://www.osha.gov/heat-exposure*), which provides additional information and resources on heat topics. The page provides information on planning and supervision in hot environments, identification of heat-related illness and first aid, information on prevention such as training, calculating heat stress and controls, personal risk factors, descriptions of other heat standards and case study examples of situations where workers developed heat-related illness. OSHA and the National Institute for Occupational Safety and Health (NIOSH) also co-developed a Heat Safety Tool Smartphone App for both Android and iPhone devices. The app provides outdoor location sensitive temperature, humidity, and heat index readings, as well as provides a corresponding risk level for ranges of heat index. The app is not for indoor use if using automatically downloaded data for the heat index calculation. Each risk level provides relevant information on identifying signs and symptoms of heat-related illness and steps that should be taken at that risk level to prevent heat-related illness.

2. Stakeholder Engagement—NACOSH Work Group

On June 22, 2021, at a meeting of the National Advisory Committee for Occupational Safety and Health (NACOSH), the agency announced its intention to form a NACOSH work group to engage stakeholders and better understand current best practices and challenges in occupational heat-related illness prevention across a variety of industries to inform OSHA's response to this important hazard. This NACOSH Heat Illness Prevention Work Group (WG) will consist of experts who have extensive knowledge and experience in causes of, identification of, and factors that affect heat-related illness hazards in the workplace, as well as best practices and interventions for mitigating occupational heat-related illness. OSHA intends to initially convene the work group in late fall 2021.

3. General Duty Clause

Although OSHA does not have a specific standard governing hazardous heat conditions at workplaces, the agency currently enforces Section 5(a)(1) (General Duty Clause) of the OSH Act against employers that expose their workers to this recognized hazard. Section 5(a)(1) states that employers have a general duty to furnish to each of their employees employment and a place of employment free from recognized hazards that cause or are likely to cause death or serious physical harm to employees (29 U.S.C. 654(a)(1)). To prove a violation of the General Duty Clause, OSHA needs to establish—in each individual case—that: (1) The employer failed to keep the workplace free of a hazard to which its employees were exposed; (2) the hazard was recognized; (3) the hazard was causing or likely to cause death or serious injury; and (4) a feasible means to eliminate or materially reduce the hazard existed. (See, *e.g.,* A.H. Sturgill Roofing, Inc., 2019 O.S.H. Dec. (CCH) ¶ 33712, 2019 WL 1099857, (No. 13–0224, 2019)).

OSHA has relied on the General Duty Clause to cite employers for heat-related hazards for decades. Additionally, OSHA has issued various forms of guidance for employers and employees whose work occurs in indoor and outdoor heat environments and has addressed heat-related illness in Regional Emphasis Programs in an attempt to protect workers from heat-related injury. (Please see *OSHA Heat Illness Prevention Campaign and Guidance Efforts and Other Enforcement Efforts,* Sections II.A.1 and II.A.4 of this ANPRM, respectively.) However, the General Duty Clause does not specifically prescribe hazardous heat exposure thresholds or provide specifics on how employers are to eliminate or reduce their employees' exposure to hazardous heat. A standard specific to heat-related injury and illness prevention would more clearly set forth employer obligations and help employers to identify the measures necessary to more effectively protect employees from hazardous heat.

OSHA's enforcement efforts to protect employees from hazardous heat conditions using the General Duty Clause, although important, have been met with significant legal challenges, leaving many workers vulnerable to heat-related hazards. Because there are no specific, authoritative exposure thresholds for OSHA to rely on, it has been challenging for the agency to prove the existence of a recognized hazard, even in cases in which a heat-related fatality has occurred. (See, *e.g.,* A.H. Sturgill Roofing, Inc., 2019 O.S.H. Dec. (CCH) ¶ 33712, 2019 WL 1099857, (No. 13–0224, 2019); Aldridge Elec., Inc., 26 BNA OSHC 1449, 2016 WL 8581709, (No. 13–2119, 2016)).

Moreover, in litigated cases OSHA has been largely unsuccessful in relying on third-party scientific documents—such as ACGIH exposure thresholds and NIOSH criteria—to prove the existence of a recognized hazard. (See Aldridge Elec., Inc., 2016 WL 8581709 at *14 (noting that ''none of these documents is a mandatory document that [employers] must follow akin to an OSHA regulation.''); Industrial Glass, 15 BNA OSHC 1594, 1992 WL 88787, at *12 n. 10, (No. 88–348, 1992) (noting that the NIOSH criteria ''[do] not have the force or effect of law.'')). Additionally, because the available scientific information is not currently defined in terms of a workplace hazard standard, adjudicators have found that crucial terms and methods for determining the severity of risk for heat-related illness are too vague or insufficiently defined to effectively determine the existence of a recognized hazard in the context of a particular case. (See, *e.g.,* A.H. Sturgill Roofing, Inc., 2019 WL 1099857 at *4 (noting that the National Oceanic and Atmospheric Administration's (NOAA) National Weather Service Heat Index chart does not define ''prolonged exposure'' or explain what factors must be considered to increase heat index values; only stating that ''exposure to full sunshine

can increase heat index values by up to 15 °F.'')).

Under the General Duty Clause, OSHA cannot require abatement before proving in an enforcement proceeding that specific workplace conditions are hazardous; whereas a standard would establish the existence of the hazard at the rulemaking stage, thus allowing OSHA to identify and require specific abatement measures without having to prove the existence of a hazard in each case. Given OSHA's burden under the General Duty Clause, it is currently difficult for OSHA to ensure necessary abatement before employee lives and health are unnecessarily endangered. Moreover, under the General Duty Clause OSHA must largely rely on expert witness testimony to prove both the existence of a hazard and the availability of feasible abatement measures that will materially reduce or eliminate the hazard in each individual case. (See, *e.g.,* Industrial Glass, 1992 WL 88787 at *4–7).

4. Other Enforcement Efforts

In 2019, OSHA conducted 289 heat-related inspections (OSHA, August 20, 2021). More than 110 of these were initiated by complaints and 20 were due to the occurrence of a fatality or catastrophe. As a result of these inspections, OSHA issued 155 Hazard Alert Letters (HALs), which provide employers with information to mitigate hazards and resources to assist in this process when OSHA determines a formal citation cannot be issued. OSHA issued only 31 General Duty Clause citations during the same period (OSHA, August 20, 2021). Thus, HALs were issued at five times the rate of 5(a)(1) citations in 2019.

On September 1, 2021, OSHA's Directorate of Enforcement Programs issued an Inspection Guidance for Heat-Related Hazards, which establishes a new enforcement initiative to prevent heat-related illnesses and fatalities while working in hazardous hot indoor and outdoor environments (OSHA, September 1, 2021). The guidance provides that days when the heat index exceeds 80 degrees Fahrenheit will be considered heat priority days. Enforcement efforts will be increased on heat priority days for a variety of indoor and outdoor industries, with the aim of identifying and mitigating potential hazards and preventing heat-illnesses before they occur.

OSHA's Region VI regional office, located in Dallas, TX, has a heat-related special Regional Emphasis Program (REP) (OSHA, October 1, 2019). This region covers Texas, New Mexico, Oklahoma, Arkansas, and Louisiana, which have a high number of heat-related injuries, illnesses, and fatalities. This REP allows field staff to conduct heat illness inspections of outdoor work activities on days when the high temperature is forecast to be above 80 degrees Fahrenheit. This REP includes employers with fewer than 11 employees. Under the authority of this REP, Region VI conducted 78 inspections on heat-related illness, which identified 89 violations, in 2019 alone.

Heat-related inspections are also initiated by heat-related complaints, hospitalizations or fatalities, and during an unrelated programmed or unprogrammed inspection where a heat hazard is identified. In addition, OSHA Area Offices can initiate heat interventions or inspections based on local knowledge of establishments, referrals from the local health department, or from other Federal agencies with joint jurisdictions, such as U.S. Department of Agriculture (USDA), Environmental Protection Agency (EPA), media referrals or previous OSHA inspection history.

5. Applicable OSHA Standards

OSHA currently has other existing standards that, while applicable to some issues related to hazardous heat, have not proven to be adequate in fully protecting workers. OSHA's Recordkeeping standard (29 CFR 1904.7) requires employers to record and report injuries and illnesses that meet recording criteria. If an injury or illness does not require medical treatment beyond the provision of first aid, it does not need to be reported. Some actions that a worker may be recommended to take when experiencing heat-related illness, such as hydration, are considered to be first aid, and therefore are not recordable.

The agency's Sanitation standards (29 CFR 1910.141, 29 CFR 1915.88, 29 CFR 1917.127, 29 CFR 1926.51, and 29 CFR 1928.110) require employers to provide potable water readily accessible to workers. While these standards require that drinking water be made available in ''sufficient amounts,'' it does not specify what those amounts are, and employers are only mandated to encourage workers to frequently hydrate on hot days.

OSHA's Safety Training and Education standard (29 CFR 1926.21) requires employers in the construction industry to train employees in the recognition, avoidance, and prevention of unsafe conditions in their workplaces. OSHA's PPE standards (29 CFR 1910.132, 29 CFR 1915.152, 29 CFR 1917.95, and 29 CFR 1926.28) require employers to conduct a hazard assessment to determine the appropriate PPE to be used to protect employees from the hazards identified in the assessment. However, hazardous heat is not specifically identified as a hazard for which workers need training or PPE, complicating the application of these requirements to hazardous heat.

The following questions are intended to solicit information related to the existing efforts OSHA has undertaken to prevent occupational heat-related illness, injuries, and fatalities.

(27) Are OSHA's existing efforts and authorities adequate or effective in protecting workers from hazardous heat in indoor and outdoor work settings?

(28) What additional efforts or improvements should be undertaken by OSHA to protect workers from hazardous heat in indoor and outdoor work settings?

(29) What are the gaps and limitations of existing applicable OSHA standards, as well as existing campaign, guidance, enforcement, and other efforts for preventing occupational heat-related illness in indoor and outdoor work settings?

B. Petitions for Rulemaking

OSHA has received three petitions from Public Citizen and supporting organizations, in 2011, 2018, and 2021, to implement a heat standard. The petitions presented data on the impacts of heat on workers' morbidity and mortality. The 2011 petition was for an Emergency Temporary Standard under section 6(c) of the OSH Act and was denied for failing to meet the grave danger requirement of the Act. The 2018 petition asked for an OSHA heat standard under section 6(b) of the OSH Act and was co-signed by over 130 organizations and nearly 100 individuals. The 2021 petition again requested that OSHA issue an Emergency Temporary Standard. The agency has not yet responded to the 2018 and 2021 petitions.

Over the last several years, many members of Congress have also urged OSHA to initiate rulemaking for a Federal heat standard. In 2019, OSHA received a request for rulemaking from members of the Senate (Brown et al., November 18, 2019). In August 2021, OSHA received a request for rulemaking from members of both the Senate and the House of Representatives (Padilla et al., August 3, 2021; Chu et al., August 6, 2021). Both chambers of Congress also have pending legislation in the 2021–2022 legislative session that would order OSHA to develop and implement a Federal heat standard (U.S. Senate, 117th Congress, April 12, 2021; U.S. House of Representatives, 117th

Congress, March 26, 2021). This legislation has also been considered in past legislative sessions.

C. NIOSH Criteria Documents

NIOSH first proposed details of a potential Federal heat standard in 1972 in its *Criteria for a Recommended Standard* (NIOSH, 1972). Criteria documents, issued under the authority of section 20(a) of the Occupational Safety and Health Act of 1970, recommend occupational safety and health standards based on exposure limits and work intensity that are safe for various periods of employment as established by a critical review of scientific and technical information. NIOSH's criteria for a recommended standard have since been updated in 1986 (NIOSH, April 1986) and again in 2016 (NIOSH, February 2016). The 2016 criteria recommend that a Federal heat standard include provisions for medical screening and physiological monitoring, heat stress thresholds, rest breaks, hydration, shade, acclimatization plans, engineering controls (*e.g.,* air conditioners, fans, tents), administrative controls (*e.g.,* rest breaks and altered work schedules), PPE and auxiliary body cooling (*e.g.,* cooled or iced vests, jackets, or other wearable garments), exposure and medical monitoring, hazard notification alerts, worker training and education, medical surveillance, and recordkeeping (NIOSH, February 2016).

The 2016 criteria document recommends occupational exposure limits for heat stress, such that no worker be ''exposed to combinations of metabolic and environmental heat greater than'' the recommended alert limit (RAL, for unacclimatized workers) or the recommended exposure limit (REL, for acclimatized workers). The NIOSH criteria recommend that environmental heat should be assessed with hourly measurements of Wet Bulb Globe Temperature (WBGT) (NIOSH, February 2016), and metabolic heat should be assessed using the metabolic-work-rates set by ACGIH (ACGIH, 2017). There are lower recommended exposure limits for unacclimatized workers, workers who are wearing work clothing that minimizes heat dissipation from the body, and those who have underlying personal risk factors. These exposure limits were highly sensitive, meaning the exposure limits were met or exceeded, in an investigation of a subset of 14 cases of fatal (100% sensitivity) and 11 nonfatal (72% sensitivity) heat-related illness in workers that occurred during outdoor work (Tustin et al., July 6, 2018).

D. History and Requirements of State Standards

As of October 2021, four states have promulgated hazardous heat standards requiring employers in various industries and workplace settings to provide protections and abatement measures to reduce the risk of heat-related illness for their employees: California, Minnesota, Oregon, and Washington. Oregon issued a temporary rule in July of 2021 after experiencing temperatures well above 100 °F for an extended period. Washington State also issued emergency heat rules during the summer of 2021 that provide additional worker protections to its previously promulgated heat rule. Additionally, since 2020, three more states, Colorado, Maryland, and Nevada, have passed laws requiring state health and safety administrators to promulgate rules related to hazardous heat in the workplace. Virginia's Safety and Health Codes Board is also considering a standard on this topic.

State standards differ in the scope of coverage. For example, Minnesota's standard covers only indoor workplaces. California and Washington standards cover only outdoor workplaces, although California is engaged in rulemaking for a potential indoor heat standard. Oregon's emergency rule covers both indoor and outdoor workplaces. California, Washington, and Oregon all have additional protections that are triggered by high heat, however, they differ as to the trigger for these additional protections: In California it is at a temperature reading of 95 °F (and only includes certain industries), in Washington it is at a temperature reading of 100 °F, and in Oregon it is at a heat index of 90 °F. State rules also differ in the methods used for triggering the heightened protections against hazardous heat. Minnesota's standard considers the type of work being performed (light, moderate, or heavy) and has calculated a threshold WBGT for each work activity. California's heat-illness prevention protections go into effect at 80 °F, ambient temperature. Washington's rule also relies on ambient temperature readings combined with considerations for the weight and breathability of workers' clothing. Oregon's emergency rule relies on the heat index as calculated by NOAA's National Weather Service.

All of the state standards require training for employees and supervisors. All of the state standards except for Minnesota require employers to provide at least 1 quart of water per hour for each employee, require some form of emergency response plan, mention the importance of acclimatization for workers, and require access to shaded break areas. Washington and Oregon require that employers provide training in a language that the workers understand. Similarly, California's standard requires that employers create a written heat-illness prevention plan in English as well as in whatever other language is understood by the majority of workers at a given workplace. California has the most robust acclimatization program, which requires close monitoring of new employees for up to fourteen days and monitoring of all employees during a heat wave. Table II.D.1, below, highlights these and additional similarities and differences between the existing state standards on hazardous heat.

TABLE II.D.1—STATE RULES ON HAZARDOUS HEAT AS OF AUGUST 2021

Standard requirements	CA *	MN **	OR ***	WA **** (*emergency rule additions in italics*)
Worksite coverage	Outdoor, year-round	Indoor, year-round	Indoor and outdoor, emergency rule.	Outdoor, May 1–Sept. 30.
Thresholds triggering protection requirements.	80 °F (ambient temp.)	Between 77 °F–86 °F (WBGT) based on workload.	80 °F (NOAA NWS Heat Index).	89 °F (ambient temp.); lower if wearing heavy clothing/PPE.
Add'l high heat protections	At 95 °F (certain industries only).	No	At 90 °F	*At 100 °F.*
Water/Hydration	1 qt./hr./worker	No	1 qt./hr./worker, cool or cold.	1 qt./hr./worker *Suitably cool.*
Shade	Yes	N/A	Yes	*Yes.*

TABLE II.D.1—STATE RULES ON HAZARDOUS HEAT AS OF AUGUST 2021—Continued

Standard requirements	CA *	MN **	OR ***	WA **** (*emergency rule additions in italics*)
Training	Yes (new hire)	Yes (new hire and annual)	Yes	Yes (new hire and annual).
Breaks	Yes (Encouraged generally, mandatory if symptoms).	Yes (After two hours exposure at threshold).	Yes (Mandatory if symptoms at any temp. every 2 hours for all at 90 °F).	Yes. (*Encouraged preventative and must be paid;* Mandatory if symptoms; Mandatory at 100 °F).
Acclimatization Plan	Yes	No	Yes (in practice at 90 °F)	No (only included in training).
Heat Illness Prevention Plan.	Yes	No	No	Yes (as part of accident prevention plan).
Emergency Medical Response Plan.	Yes	No	Yes	Yes.
Medical Monitoring	Reactive, Proactive when above 95 °F.	Reactive	Reactive	Reactive.
Record-keeping requirements.	Yes	Yes	No	Yes.

* CAL/OSHA, Title 8, section 3395. Heat Illness Prevention. *https://www.dir.ca.gov/Title8/3395.html.*

** Minnesota Administrative Rules. Section 5205.0110 Indoor ventilation and temperature in places of employment. *https://www.revisor.mn.gov/rules/5205.0110/.*

*** Oregon Administrative Rules. 437-002-0155 Temporary Rule Heat Illness Prevention. *https://osha.oregon.gov/OSHARules/div2/437-002-0155-temp.pdf.*

**** Washington Administrative Code (WAC) Title 296, General Occupational Health Standards. Sections 296-62-095 through 296-62-09560. Outdoor Heat Exposure. *https://app.leg.wa.gov/WAC/default.aspx?cite=296-62&full=true#296-62-095;* Emergency Rule 2125 CR103E. *https://lni.wa.gov/rulemaking-activity/AO21-25/2125CR103EAdoption.pdf.*

The following questions are intended to solicit information related to the existing efforts at the state level to prevent occupational heat-related illness, injuries, and fatalities.

(30) What are the most effective aspects of existing state standards aimed at preventing occupational heat-related illness?

(31) What are the challenges with the implementation of existing state standards aimed at preventing occupational heat-related illness?

(32) Of the existing state standards, have any been more effective or challenging in their implementation than others? Why?

(33) What components of a state standard or program should be included in Federal guidance or regulatory efforts on heat-related illness prevention?

(34) Would any of the elements of the state standards not be feasible to include at the Federal level?

E. Other Standards

Various other organizations have also either identified the need for standards to prevent heat-related injury and illness or published their own standards. In 2019, the American National Standards Institute/American Society of Safety Professionals A10 Committee (ANSI/ASSP) announced a proposed consensus standard on heat stress management. The International Organization for Standardization has a standard estimating heat stress: ISO 7243: Hot Environments—Estimation of Heat Stress on Working Man, Based on the WBGT-Index (ISO, 2017). Additional standards address predicting sweat rate and core temperature (ISO 7933), methods for determining metabolic rate (ISO 8996), physiological strain (ISO 9886), and thermal characteristics for clothing (ISO 9920) (NIOSH, February 2016). The ISO heat stress standard uses WBGT values to assess hot environments and assumes workforces to which thresholds are applied are healthy, physically fit, and are wearing standard clothing.

ACGIH has identified Threshold Limit Values or TLVs for heat stress and heat strain (ACGIH, 2017). The TLVs utilize WBGT and take into consideration metabolic rate or work load categories: Light (sitting, standing, light arm/handwork, occasional walking), moderate (normal walking, moderate lifting), heavy (heavy material handling, walking at a fast pace), very heavy (pick and shovel work). Additionally, ACGIH provides clothing adjustment factors in degrees Celsius that should be added to the assessed WBGT for certain types of work clothing. The TLVs range from WBGTs of approximately 24.5 degrees Celsius at the highest level of work to just under 34 degrees Celsius at light work and low metabolic rates (ACGIH, 2017). ACGIH emphasizes that the TLVs are appropriate for healthy, acclimatized workers and they encourage screening of workers for potential sensitivities to heat and provide guidelines for physiological monitoring for heat strain. An action limit that is below the level of the TLV is identified for unacclimatized workers.

The U.S. Armed Forces has developed extensive heat-related illness prevention and management strategies. The Warrior Heat and Exertion Related Events Collaborative is a tri-service group of military leaders focused on clinical, educational, and research efforts related to exercise and exertional heat-related illnesses and medical emergencies (HPRC, October 6, 2021). The U.S. Army has a Heat Center at Fort Benning which focuses on management, research, and prevention of heat-related illness and death (Galer, April 8, 2019). In 2016, the U.S. Army updated its Training and Doctrine Command (TRADOC) Regulation 350–29 addressessing heat and cold casualties. The regulation includes requirements for rest and water consumption according to specific WBGT levels and work intensity (Department of the Army, July 18, 2016). The U.S. Navy has developed Physiological Heat Exposure Limit curves based on metabolic and environmental heat load and represent the maximum allowable heat exposure limits, which were most recently updated in 2009. The Navy monitors WBGT, with physical training diminishing as WBGTs increase and all nonessential outdoor activity stopped when WBGTs exceed 90 degrees Fahrenheit (Department of the Navy, February 12, 2009). The U.S. Marine Corps follows the Navy's guidelines for implementation of the Marine Corps Heat Injury Prevention Program (Commandant of the Marine Corps, June 6, 2002). The U.S. Army and U.S. Air

Force issued a technical heat stress bulletin in 2003 with measures to prevent indoor and outdoor heat-related illness in soldiers, with recommended limitations of continuous work at ''moderate'' or ''hard'' intensities, acclimatization planning, work-rest cycles, and fluid and electrolyte replacement (Department of the Army and Air Force, March 7, 2003).

The following questions are intended to solicit information related to the existing efforts undertaken to prevent occupational heat-related illness, injuries, and fatalities by other entities.

(35) Do any of these existing standards contain elements that should be considered for a Federal standard?

(36) Are there other industry standards that contain elements that should be considered for a Federal standard?

(37) Are there elements of these standards that would not be appropriate or feasible for a Federal heat standard?

F. Employer Efforts

While this section has primarily detailed efforts undertaken by OSHA, other Federal agencies, states, and industry trade associations, OSHA also recognizes that some employers may be engaged on this topic and implementing their own heat-related illness prevention efforts.

The following questions are intended to solicit information, relevant data sources, and considerations to further assess the current employer efforts to prevent heat-related illness and their efficacy in preventing heat-related illnesses.

(38) What efforts are employers currently taking to prevent occupational heat-related illness in their workplace? Please provide examples and data.

(39) How effective have employers been in preventing occupational heat-related illness in their workplaces, and how are employer-driven heat injury and illness prevention programs being evaluated?

III. Key Issues in Occupational Heat-Related Illness

A. Determinants of Occupational Heat Exposure

1. Heat Exposure

Workers in both indoor and outdoor occupations in a variety of sectors are exposed to heat at work through process, exertional, and/or environmental heat. Hazardous heat exposure can reduce the body's ability to regulate physiological processes and can result in heat-related injury or illness, heat stroke, or death. Determining when heat becomes hazardous is complex. Heat exposure and its resultant health effects depend on multiple factors, such as heat-generating practices within a workplace, level of exertion during work, air temperature, humidity, whether work is occurring in direct sunlight or shade, wind, and cloud cover (OSHA, September 2, 2021). Individual-level factors such as age, pharmaceutical use, underlying health conditions (such as cardiovascular diseases), and the ability to cool at night (during heat waves or access to night time air conditioning, for example) also play a role (Kilbourne, 1997; Quandt et al., 2013; OSHA, October 6, 2021b).

Multiple metrics and thresholds exist for measuring heat and identifying when it may become hazardous to a population. Ambient temperature, heat index, and WBGT are available metrics for measuring environmental heat and identifying conditions that may lead to heat-related injury or illness. Ambient temperature, which can be calculated using a common thermometer, is the most accessible and understandable metric that most people are familiar with. However, ambient temperature measurements alone do not take into consideration humidity, which is an important factor that influences the body's ability to cool. Heat index combines air temperature and humidity and is a widely reported weather statistic that many people are familiar with and is often referred to as the ''feels like'' or ''apparent'' temperature. Heat index is used for setting heat advisories (NWS, September 2, 2021) but does not take into consideration radiant heat or wind speed, which the more health-relevant WBGT does. WBGT is a health-relevant measurement that incorporates air temperature, wind, radiant heat, and humidity (Budd, 2008; OSHA, September 15, 2017; Oliveira et al., 2019). Measuring WBGT requires specialized thermometers or equipment, and may not always be available as a forecast through the National Weather Service. Additionally, WBGT may require guidance and training to avoid confusion with more well-known scales like temperature or heat index.

Another challenge with each of these metrics is identifying appropriate thresholds for each metric that will prevent adverse health impacts due to hazardous heat exposure. There is no universally accepted threshold for ambient temperature, heat index, or WBGT at which heat is considered hazardous. Determining thresholds is complicated by differences in regional climatology, where one region's population may become vulnerable to heat-related illness at lower heat levels (Grundstein et al., January 2015; NWS, August 25, 2021). NOAA, NIOSH, OSHA, the U.S. Military, and other organizations currently offer differing thresholds and metrics for the identification of hazardous heat (Department of the Army and Air Force, March 2007; NIOSH, 2016; NWS, August 25, 2021; OSHA, September 2021; NWS, September 1, 2021). Existing state standards also apply different thresholds and metrics. Further, existing thresholds for various metrics may not be protective in the occupational setting because injuries and illnesses have been reported below these existing thresholds (Morris et al., January 28, 2019; Park et al. July 2021), and many of the thresholds indicating the potential for heat-related injury or illness are based on older data or studies that included populations that may not be most appropriate for evaluating heat stress or strain in the occupational setting, such as military populations (Steadman, April 11, 1979; Rothfusz, July 1, 1990; Budd, 2008).

The following questions are intended to solicit information, relevant data sources, and considerations to further assess the application of various heat metrics and the identification and definition of hazardous heat using metric thresholds.

(40) What metrics are currently being used to monitor and assess hazardous heat exposure in the workplace (*e.g.,* heat index, ambient temperature, WBGT)?

(41) What are the advantages and disadvantages of using each of these metrics (*e.g.,* heat index, ambient temperature, WBGT) in indoor and outdoor work settings? Are there any challenges associated with training employers and employees on these different metrics?

(42) Are there other metrics used to assess hazardous heat exposure in the workplace that are not discussed here?

(43) What are current and best practices in defining hazardous heat exposure in outdoor and indoor workplaces, and what are the limitations or challenges associated with those practices?

(44) Are there industries implementing exposure monitoring for heat? Please provide examples and data.

(45) What thresholds are utilized for various metrics implemented in existing occupational heat prevention plans or activities? Are these thresholds effective for preventing heat-related illness and fatalities?

(46) Which metrics and accompanying thresholds are both feasible and health-protective in both

indoor and outdoor occupational settings?

(47) Does application of certain heat metrics require more training than the use of other heat metrics?

2. Contributions to Heat Stress in the Workplace

Air temperature, humidity, wind, and whether work occurs in direct sunlight all contribute to the potential for heat stress for outdoor workers. Additionally, physical exertion contributes to heat stress by increasing metabolic heat production. Exertion is an important consideration for the development of heat stress especially since physical activities may take place over prolonged periods of time in a work setting and in environmental conditions that limit the body's ability to cool, such as working in direct sunlight or under warm and humid conditions. These factors that contribute to heat stress can lead to heat strain and heat-related illness when the body fails to lose heat. Some surfaces, such as asphalt, absorb heat and can add to heat exposure. The urban heat island effect is a well-studied phenomenon that can elevate temperatures in areas concentrated with heat absorbent surfaces. For example, dense urban areas may experience afternoon temperatures 15–20 degrees higher than surrounding areas with more natural land cover and vegetation (NIHHIS, August 25, 2021). PPE can also contribute to heat stress by interfering with the body's ability to cool. PPE intended to protect workers from chemical, physical, or biological hazards can reduce sweat evaporation and subsequent cooling (*i.e.,* limit the body's ability to sweat), can trap heat and moisture next to the skin, and can increase the level of exertion required to complete a task (NIOSH, February 2016).

The factors that contribute to heat stress in outdoor settings contribute to heat stress in indoor settings as well, especially in buildings that lack adequate climate control. Additionally, heat-producing processes and equipment such as those that generate steam, generate heat, or use certain tools and combustion, can increase ambient temperature and contribute to heat stress in indoor work settings. Lack of adequate climate control in indoor work settings can also contribute to occupational heat stress since indoor settings can increase in temperature and humidity as outdoor temperatures increase, and there is no relief for process or task-related heat production. Additionally, buildings with windows may be further heated by sunlight that enters windows and warms the workspace.

The vulnerability of the energy grid is another variable that may place many workers at risk of experiencing heat-related illness. In many areas of the country, energy grids are vulnerable to brownouts and blackouts in conditions of high heat due to the increased demand and stress placed on the energy infrastructure (Stone, Jr., et al., 2021). Because of this vulnerability of a key cooling mechanism, more workers in more industries may be at risk for experiencing heat stress, strain, and heat-related illness than is currently realized, especially during heat waves or during other natural disasters that impact the functionality of energy grids.

In both indoor and outdoor settings, individual risk factors contribute to the risk of heat-related illness as some individuals are more susceptible to the detrimental effects of heat. Occupational heat-related fatalities have been found to occur more frequently in men than in women, in those with preexisting conditions (*e.g.,* obesity, diabetes, hypertension, cardiac disease), and in those with a preexisting use of certain medications or illicit drugs that predispose individuals to heat-related illness (Gubernot et al., February 2015; Tustin et al., July 6, 2018; Tustin et al., August 2018). Other factors, such as age, fitness level, alcohol consumption, prior heat-related illness, and lack of access to air conditioning in housing, also reduce the body's ability to regulate heat and can increase individual risk of heat-related illness. Workplace controls should focus on making indoor and outdoor work safe for all employees, while also complying with the Americans with Disabilities Act and the Age Discrimination in Employment Act.

The following questions are intended to solicit information, relevant data sources, and considerations to further assess contributions to heat stress in indoor and outdoor work settings as well as individual risk factors that may contribute to heat-related illness in occupational settings.

(48) What factors, beyond those discussed above, contribute to heat stress in outdoor and/or indoor occupational settings?

(49) Is air conditioning provided in employer-provided or sponsored housing?

(50) Are there existing employer efforts or programs to ensure that employees have the ability to adequately cool at night in order to recover from occupational heat exposure?

(51) What factors are the most important contributors to heat-related illness risk?

(52) Are there other individual risk factors that contribute to the risk of heat-related illness?

(53) What individual risk factors are the most important contributors to heat-related illness risk?

(54) Are there existing employer-led heat prevention programs that consider individual-level risk factors in their prevention guidance? If so, how are they implemented? What are the challenges associated with this?

B. Strategies To Reduce Occupational Heat-Related Injury and Illness

Workplace heat-related injury and illness is preventable, and many effective controls can be implemented. The following sections provide a brief overview and targeted questions about controls that would be important to consider as part of an effective heat injury and illness prevention program.

1. Heat Injury and Illness Prevention Programs

Safety and health programs aim to prevent workplace injuries, illnesses, and fatalities by using a proactive approach to managing workplace safety and health. An effective heat injury and illness prevention program would include elements on: Assessing heat hazards that may occur at the workplace, acclimatizing new and returning workers, evaluating how and when heat will be measured, and determining what controls will be put into place and what training will be provided to workers and supervisors. Evaluations of heat-related enforcement cases have shown that in investigations of heat-related fatalities or heat-related illness that resulted in 5(a)(1) violations from 2012–2013, no employer had a complete heat illness prevention program that addressed all of the recommended components, and 12 of the 20 cases evaluated had no heat illness prevention program at all (Arbury et al., April 2016). In one study, the implementation of a heat illness prevention program was found to decrease workers' compensation costs associated with heat-related illness incidents and reduce the total number of heat-related illnesses experienced by outdoor municipal workers in Texas (McCarthy et al., September 2019).

The following questions are intended to solicit information and relevant data sources that OSHA should consider when evaluating the need for and elements of a heat injury and illness prevention program for indoor and outdoor work environments.

(55) What are the elements of a successful employer-led heat injury and illness prevention program? How are these programs implemented? What are the challenges associated with them? Please provide examples and data.

(56) Are there other elements of a heat injury and illness prevention program that are important to consider?

(57) Are there limitations associated with implementing a heat injury and illness prevention program across indoor or outdoor work settings, or across businesses of various sizes? If so, what are they?

(58) Are there demonstrated evaluations on the successes or limitations of various components of any existing state or employer heat injury and illness prevention program, including quantitative or qualitative evaluations?

2. Engineering Controls, Administrative Controls, and Personal Protective Equipment

Engineering controls, such as air conditioning or increased ventilation, increase evaporative cooling and can keep body temperatures at safe levels. Other examples of engineering controls that may reduce the amount of hazardous heat present could include the use of local exhaust ventilation at points of high heat production, insulating hot surfaces or equipment (*e.g.,* furnaces), and providing shade tents, or other building modifications where appropriate.

Administrative controls, such as making changes to workloads or work schedules, can be useful in keeping workers cool during hazardous heat exposure. For example, work schedules may shift from the hottest parts of the day to cooler times of the day, like overnight or early in the morning. Employers may implement work-rest cycles by adding additional rest breaks in the shade or air conditioning away from heat sources as environmental and exertional heat increases. Some employers have implemented self-pacing for workers as an alternative to work-rest cycles, allowing employers to pace themselves throughout the work shift when heat is hazardous. Other examples of administrative controls could include reducing physical demands during the hottest times of the day or implementing buddy systems to ensure workers are watching out for signs and symptoms of heat-related illness in each other.

OSHA's Heat Illness Prevention Campaign has historically recommended the implementation of ''Water. Rest. Shade.,'' which is a combination of engineering and administrative controls to provide workers with adequate amounts of water, rest, and shade. As discussed above in more detail, because the Campaign is not mandatory, these controls are not always implemented in workplaces. An evaluation of 38 enforcement investigations from 2011–2016 found that while nearly 85% of the inspected employers provided accessible water, none of them enforced or required rest breaks during periods of hazardous heat (Tustin et al., August 2018). In some work settings, such as in agricultural workplaces, workers may be paid piecemeal or receive wages based on their productivity or output. These payment schemes can result in workers making tradeoffs between reduced productivity and lost wages versus taking breaks to rest or drink water (Wadsworth et al., 2019). However, without breaks, overall productivity can decline during hazardous heat due to workers being less able to work efficiently, as well as from higher rates of accidents and heat-related illnesses (Ebi et al., August 21, 2021).

In some situations, PPE and auxiliary body cooling methods (*e.g.,* cooled or iced vests, jackets, or other wearable garments) may further reduce the risk of heat strain in those working in hazardous heat conditions. For example, reflective and breathable clothing, cooling neck wraps, and cooling vests or jackets may provide enhanced protection to some workers.

The following questions seek to solicit additional information, data sources, and considerations for engineering and administrative controls, as well as PPE, and their use in preventing heat-related illness in indoor and outdoor work settings.

(59) What engineering controls, administrative controls, or PPE can be used to prevent heat-related illness in indoor and outdoor work settings? Have the qualitative or quantitative effectiveness of these controls been evaluated?

(60) Are there data that demonstrate the role of facility energy efficiency in maintaining optimal thermal conditions, optimizing worker performance, and cost-effectiveness of cooling strategies?

(61) Are certain controls that are more effective or more feasible than others? If so, which ones? Do effectiveness and feasibility of controls differ due to setting (indoor/outdoor, business size, arrangement of work, etc.)?

(62) What are the limitations associated with implementing water, rest, and shade effectively in indoor and outdoor work settings?

(63) How are work-rest cycles currently implemented in indoor and outdoor work settings? What are the limitations for implementation?

(64) Are there additional sources of data or evidence that describe the quantitative or qualitative impacts of work-rest cycles on productivity?

(65) How do productivity or output based payment schemes affect the ability of workers to follow heat illness and injury prevention training, guidance or requirements?

(66) How do productivity or output based payment schemes affect employer implementation of heat illness and injury prevention training, guidance or requirements?

(67) Are there additional sources of data or evidence that describe the quantitative or qualitative impacts of self-pacing as an alternative to work-rest cycles to prevent occupational heat-related illness?

3. Acclimatization

Acclimatization refers to the process of the human body becoming accustomed to new environmental conditions by gradually adapting to the conditions over time. Gradual exposure to the condition of concern (*e.g.,* heat) allows the body to develop more robust physiological responses, such as a greater sweat response, to adapt to heat more efficiently. Workers who are new to working in warm environments may not be acclimatized to heat, and their bodies need time to gradually adapt to working in hot environments. Evaluations of workplace fatalities have shown that approximately 70% of deaths occur within the first few days of work, and upwards of 50% occur on the first day of work (Arbury et al., August 8, 2014; Tustin et al., August 2018), highlighting the consequences of workers not becoming acclimatized to the environmental conditions of the workplace. Acclimatization is also important for those who may have been previously acclimatized but were out of the workforce or hot environment of the workplace for more than 2 weeks (*e.g.,* due to vacation or sick leave). All outdoor workers may need time to acclimatize to heat during early season hazardous heat, or during particularly severe or long-lasting heat events, which are associated with higher mortality in the general population (Anderson and Bell, February 2011). During a heat wave, environmental conditions may become extremely hazardous, even to workers who may have been previously acclimatized.

OSHA and NIOSH have historically recommended the ''Rule of 20 Percent'' for acclimatizing workers. Under this regimen, workers would only work 20 percent of the normal duration of work

on their first day in hazardous heat conditions performing job tasks similar in intensity to their expected work, increasing the work duration by 20 percent on each subsequent day until performing a normal work schedule. For example, if the normal workday lasts 8 hours, then new workers should work no more than 1 hour and approximately 40 minutes (20 percent of 8 hours) on their first day in the heat, and spend the remainder of the workday doing work tasks without heat stress (OSHA, October 7, 2021). They should be given at least one rest break during the period when they are working. Workers with underlying medical conditions may need more time to fully adapt to the heat.

The following questions aim to solicit additional information, relevant data sources, and considerations on the design and implementation of acclimatization plans for workers in indoor and outdoor work settings.

(68) What are current and best practices for implementing acclimatization in various industries and across businesses of various sizes?

(69) What are the challenges with acclimatizing workers, including workers in non-traditional/multi-employer work arrangements (*e.g.,* temporary workers)?

(70) Are there different challenges and best practices for acclimatization in indoor work settings versus outdoor work settings?

(71) Are there unique concerns or approaches for implementing acclimatization for a small versus large business?

(72) Are there additional sources of data or evidence that describe the quantitative or qualitative impacts of acclimatization schedules on productivity?

4. Monitoring

Physiological, medical, and exposure monitoring of workers exposed to heat hazards can prevent heat strain from progressing to heat-related illness or death. Monitoring can alert both employees and employers when workers have been exposed to hazardous heat and are experiencing heat strain and should seek water, rest, shade, cooling, or medical attention. Monitoring activities may include monitoring environmental conditions regularly, self-monitoring of urine color, and monitoring of heart rate and core body temperature. Individual-level biomonitoring with wearable technologies may be an option in some occupational settings. Monitoring activities may also include buddy systems where workers are educated in signs and symptoms of heat-related illness and proactively look for signs and symptoms in fellow workers and encourage them to rest, hydrate, and find shade or seek emergency medical attention if the worker is experiencing signs of heat-related illness.

The following questions are intended to solicit information, relevant data sources, and considerations to further assess heat monitoring activities or programs in occupational settings.

(73) Are there industries or individual employers implementing exposure, medical, and/or physiological monitoring to assess workers' health and safety during hazardous heat events?

(74) What are the best practices for implementing a monitoring program? How effective are the monitoring activities in preventing heat-related illness in workers?

(75) If physiological and medical monitoring programs are used, who implements these programs? Does that individual(s) have specialized training or experience?

(76) If physiological and medical monitoring programs are used, are data protected by confidentiality or privacy requirements? Please describe how data are maintained to ensure employee privacy and to meet any confidentiality or privacy requirements.

(77) How is exposure, medical, or physiological monitoring currently implemented or tracked across various time scales (*e.g.,* hourly, daily) in an occupational setting?

(78) What are the risks or challenges with this type of medical or physiological monitoring in a workplace?

(79) Do you use physiological or medical monitoring to assist in identifying high risk employees?

(80) How do you use physiological monitoring data (*e.g.,* as a short term response to heat stress conditions, to address long term examination in protecting employees, to identify high risk categories of workers)?

(81) Do you require that notification of monitoring results be provided to employees?

(82) Do you use physiological monitoring to validate the effectiveness of recommended controls?

(83) Are there unique concerns or approaches in developing a monitoring program for small versus large businesses?

5. Planning and Responding to Heat-Illness Emergencies

A heat-illness emergency occurs when a worker is experiencing a health crisis due to over-exposure to hazardous heat. Workers and employers need to be able to identify a heat-illness emergency, know how to respond to an emergency to protect the health of the affected worker, to have materials on-site to respond to an emergency, and know how to contact emergency medical care when needed. Emergency response plans can ensure that workers understand how to respond in an emergency and can help prevent heat-related illness from progressing to heat stroke or death.

The following questions are intended to solicit information, relevant data sources, and considerations to further assess the role of heat-illness emergency planning and response in indoor and outdoor work settings in responding to heat stress in the workplace and preventing heat-related injury and illness from progressing to heat stroke or death.

(84) How do organizations in both indoor and outdoor work environments currently deal with heat-illness emergencies if they arise?

(85) What are current best practices in workplace response to occupational heat-illness emergencies?

(86) What are the challenges with responding to a heat-illness emergency in various work environments (*e.g.,* indoor settings, outdoor settings, remote locations)?

(87) What should be included in an employer's heat emergency response plan?

(88) What materials or supplies should employers have on-site to respond to a heat emergency?

(89) When should employers refer employees for medical treatment or seek medical treatment for an employee who is experiencing a heat-illness emergency?

(90) When and how do employers refer employees for medical treatment or seek medical treatment for them when experiencing a heat-illness emergency?

6. Worker Training and Engagement

Employers informing employees of the hazards to which employees may be exposed while working is a cornerstone of occupational health and safety (OSHA, 2017). Training is an effective tool to reduce injury and illness (Burke et al., February 2006). Employees must know what protective measures are being utilized and be trained in their use so that those measures can be effectively implemented. Training and education provide employees and managers an increased understanding of existing safety and health programs. Training provides managers, supervisors, and employees with the knowledge and skills needed to do their

work safely, as well as awareness and understanding of workplace hazards and how to identify, report, and control them.

Because OSHA has long recognized the importance of training in ensuring employee safety and health, many OSHA standards require employers to train employees (*e.g.,* the Bloodborne Pathogen standard at 29 CFR 1910.1030(g)(2)). When required as a part of OSHA standards, training helps to ensure that employees can conduct work safely and healthfully (OSHA, April 28, 2010). Training is essential to ensure that both employers and employees understand the sources of potential exposure to hazardous heat, control measures to reduce exposure to the hazard, signs and symptoms of heat-related illness, and how to respond in the event of an emergency. A 2018 analysis of OSHA enforcement investigations of 66 heat-related illnesses showed that nearly two-thirds of the employers did not provide employees with training on occupational heat-related illness (Tustin et al., August 2018).

The following questions are intended to solicit information, relevant data sources, and considerations to further assess existing worker training and engagement programs and their effectiveness for preventing occupational heat injury and illness.

(91) How do employers currently involve workers in heat injury and illness prevention?

(92) What types of occupational heat injury and illness prevention training programs have been implemented and how effective are they? What is the scope and format of these training programs? Are workers in non-traditional/multi-employer work arrangements included in these training programs?

(93) What are best practices in worker training and engagement in heat injury and illness prevention?

(94) How do employers involve workers in the design and implementation of heat injury and illness prevention activities?

(95) What challenges are there with worker training and engagement for heat injury and illness prevention?

IV. Costs, Economic Impacts, and Benefits

A. Overview

OSHA also seeks information on the costs, economic impacts, and benefits of heat injury and illness prevention practices. In addition to information regarding the costs and economic impacts of heat injury and illness prevention practices, OSHA is interested in the benefits of such practices in terms of reduced injuries, illnesses, deaths, and compromised operations (*i.e.,* emotional distress, staffing turnover, and unexpected reallocation of resources), as well as any other productivity effects. As discussed above in Part I of this ANPRM, millions of workers across hundreds of occupations are likely to be exposed to conditions that could lead to heat-related injury, illness, and death.

The effects of heat-related injury and illness can be significant to employers and workers alike. They harm workers financially, physically, and mentally, and employers also bear several costs and reduced revenue. A single serious injury or illness can lead to workers' compensation losses of thousands of dollars, along with thousands of dollars in additional costs for overtime, temporary staffing, or recruiting and training a replacement. Even if a worker does not have to miss work, heat stress can still lead to higher turnover and deterioration of productivity and morale.Globally, the International Labour Organization (ILO) has estimated that increased heat stress could result in a productivity decline by the equivalent of 80 million full-time jobs by the year 2030 (ILO, 2019).

According to BLS, as shown below in Table IV.A.1, exposure to environmental heat results in thousands of injury and illness cases and dozens of deaths per year (BLS, December 22, 2020 and BLS, January 28, 2021). Note that these data do not provide a comprehensive account of the number of heat-related injuries and fatalities, for a variety of reasons, such as employee reluctance to report and lack of awareness of the contributing effects of heat to symptoms.

TABLE IV.A.1—REPORTED OCCUPATIONAL INJURIES (INVOLVING DAYS AWAY FROM WORK) AND FATALITIES AS A RESULT OF EXPOSURE TO ENVIRONMENTAL HEAT

Year	Annual injuries	Annual fatalities
2011	4,420	61
2012	4,170	31
2013	3,160	34
2014	2,660	18
2015	2,830	37
2016	4,110	39
2017	3,180	32
2018	3,950	49
2019	3,080	43

Source: U.S. Bureau of Labor Statistics: Injuries, Illnesses, and Fatalities, (BLS, December 22, 2020 and BLS, January 28, 2021) (Accessed August 30, 2021).

The following questions are intended to solicit information on the topics covered in this section.

(96) OSHA requests any workers' compensation data related to heat-related injury and illness. Any other information on your workplace's experience would also be appreciated.

(97) Are there additional data (other than workers' compensation data) from published or unpublished sources that describe or inform about the incidence or prevalence of heat-related injuries, illness, or fatalities in particular occupations and industries?

(98) What are the potential economic impacts associated with the promulgation of a standard specific to the risk of heat-related injury and illness? Describe these impacts in terms of benefits, including reduction of incidents; effects on costs, revenue, and profit; and any other relevant impact measurements.

(99) If you utilize the WBGT method when making your work determinations, what were the costs of any associated equipment and/or training to implement this measurement method?

(100) If you utilize a temperature metric other than WBGT when making work determinations, what were the costs associated with measurement and/or training to implement this measurement method?

(101) Have you instituted programs or policies directed at mitigating heat-related injury and illness at your worksite? If so, what were the resulting benefits?

(102) If you have implemented a heat injury and illness program or policy, what was the cost of implementing the program or policy, in terms of both time and expenditures for supplies and equipment? Please describe in detail the resource requirements and associated costs expended to initiate the program(s) and to conduct the program(s) annually. If you have any other estimates of the costs of preventing or mitigating heat-related injury and illness, please provide them. It would be helpful to OSHA to learn both overall totals and specific components of the program (*e.g.,* cost of equipment, equipment installation, equipment maintenance, training programs, staff time, facility redesign).

a. What are the ongoing operating and maintenance costs for the program?

b. Has your program reduced incidents of heat-related injury and illness and by how much? Can you identify which elements of your program most reduced incidents? Which elements did not seem effective?

c. Has your program reduced direct costs for your facility (*e.g.,* workers' compensation costs, fewer lost workdays)? Please quantify these reductions, if applicable.

d. Has your program reduced indirect costs for your facility (*e.g.,* reductions in absenteeism and worker turnover; increases in reported productivity, satisfaction, and level of safety in the workplace)?

(103) Do you provide wearable devices (specific to heat) to workers? Does each worker get a device or only specific members of the crew?

a. If wearables are provided, what were the associated upfront costs of the equipment and how often do they need to be replaced?

b. Which specific wearable did you choose? What were your deciding factors (*i.e.,* price, ease of use)?

(104) If you are in a state with standards requiring programs and/or policies to reduce heat stress, how did implementing the program and/or policy affect the facility's budget and finances?

(105) What changes, if any, in market conditions would reasonably be expected to result from issuing a standard on heat stress prevention? Describe any changes in market structure or concentration, and any effects on the prices of products and services to consumers, that would reasonably be expected from issuing such a standard.

(106) If you have implemented acclimatization practices in your workplace, were there any associated costs?

(107) How does your workplace address the costs of any rest breaks necessary to prevent heat-related injury and illness?

B. Impacts on Small Entities

As part of the agency's consideration of a heat stress standard, OSHA is concerned about whether its actions will have a significant economic impact on a substantial number of small entities. Small entities included small businesses, small non-profit organizations, and small governmental jurisdictions with a population of less than 50,000. These other small employer organizations may experience heat stress issues in much the same manner as small businesses. Injury and illness incidence rates are known to vary by establishment size. In the construction industry, for example, across all nonfatal occupational injuries and illnesses, establishments between 11 and 49 employees had an average incidence rate of 3.3 per 100 Full Time Equivalent (FTE) workers, whereas establishments with 1,000 or more employees had an average incidence rate of 0.9 per 100 FTE workers. (BLS, August 31, 2021). If the agency pursues the development of a standard that would have such impacts on small businesses, OSHA is required to develop a regulatory flexibility analysis and convene a Small Business Advocacy Review panel under the Small Business Regulatory Enforcement Fairness Act (before publishing a proposed rule (see Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*)). Regardless of the significance of the impacts, OSHA seeks ways of minimizing the burdens on small businesses consistent with OSHA's statutory and regulatory requirements and objectives.

The following questions are intended to solicit information on the topics covered in this section.

(108) How many, and what type of small firms, or other small entities, have heat-related injury and illness training, or a heat injury and illness program, and what percentage of their industry (NAICS code) do these entities comprise? Please specify the types of heat stress risks employees in these firms face.

(109) How, and to what extent, would small entities in your industry be affected by a potential OSHA standard to prevent heat stress? Do special circumstances exist that make preventing heat stress more difficult or more costly for small entities than for large entities? Please describe these circumstances.

(110) How many, and in what type of small entities, is heat-related injury and illness a threat, and what percentage of their industry (by NAICS codes) do these entities comprise?

(111) Are there alternative regulatory or non-regulatory approaches OSHA could use to mitigate possible impacts on small entities?

(112) For very small entities (historically defined by OSHA as those with fewer than 20 employees), what types of heat-related injury and illness threats are faced by workers? Does your experience with heat-related injury and illness reflect the lower rates reported by BLS?

(113) For very small entities, what are the unique challenges establishments face in addressing heat-related injury and illness?

(114) If you are in a jurisdiction with standards requiring programs and/or policies to reduce heat stress, how did implementing the program and/or policy affect your small entity or other small entities in your jurisdiction?

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Authority and Signature

James S. Frederick, Acting Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, authorized the preparation of this document pursuant to the following authorities: 29 U.S.C. 653, 655, and 657, Secretary's Order 8–2020 (85 FR 58393; Sept. 18, 2020), and 29 CFR part 1911.

James S. Frederick,

Acting Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2021–23250 Filed 10–26–21; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 167

[USCG–2018–1058]

Port Access Route Study: Alaskan Arctic Coast; Reopening of Comment Period

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Notification of reopening of commend period.

SUMMARY: The United States Coast Guard is reopening the comment period for the notice of study and request for comments for the Port Access Route Study: Alaskan Arctic Coast that we published on December 21, 2018. This action will provide the public with additional time and opportunity to provide the Coast Guard with information regarding the Port Access Route Study: Alaskan Arctic Coast. The comment period is reopened until March 31, 2022.

DATES: The comment period for the document published on December 21, 2018 (83 FR 65701), which was extended on September 4, 2019 (84 FR 46501), and January 13, 2020 (85 FR 1793), and reopened on July 6, 2020 (85 FR 40155), is reopened again. Comments and related material must be received by the Coast Guard on or before March 31, 2022.

ADDRESSES: You may submit comments identified by docket number USCG–2018–1058 using the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

FOR FURTHER INFORMATION CONTACT: If you have questions about this document, please contact LCDR Michael Newell, Seventeenth Coast Guard District (dpw), at telephone number (907) 463–2263 or email *Michael.D.Newell@uscg.mil,* or Mr. David Seris, Seventeenth Coast Guard District (dpw), at telephone number (907) 463–2267 or email to *David.M.Seris@uscg.mil,* or LT Stephanie Alvarez, Seventeenth Coast Guard District (dpw), at telephone number (907) 463–2265 or email to *Stephanie.M.Alvarez@uscg.mil.*

SUPPLEMENTARY INFORMATION: On December 21, 2018, the Coast Guard published a notice of study and request for comments for the Port Access Route Study: Alaskan Artic Coast (83 FR 65701). The comment period in that document closed September 1, 2019. On September 4, 2019 (84 FR 46501), the Coast Guard published a document extending the public comment period until January 30, 2020. On January 13, 2020 (85 FR 1793), the Coast Guard published a document extending the public comment period until June 30, 2020. On July 6, 2020 (85 FR 40155), the Coast Guard published a document reopening the public comment period until September 30, 2021. In this action, the Coast Guard is providing notice that the public comment period is reopened until March 31, 2022. The Coast Guard has reopened the comment period to provide adequate opportunity for public meetings in impacted Arctic communities, given COVID–19 impacts to travel. These discussions are vital to the Port Access Route Study and necessary to creating a well-informed proposal. The Port Access Route Study remains a high priority for the Coast Guard, critical to maintaining waterway safety in the Arctic. Documents mentioned in this notification, and all public comments, are in our online docket at *https://www.regulations.gov*

and can be viewed by searching the docket number ''USCG–2018–1058''.

This notification is issued under authority of 33 U.S.C. 1223(c) and 5 U.S.C. 552.

Dated: September 27, 2021.

Nathan A. Moore,

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

[FR Doc. 2021–23389 Filed 10–26–21; 8:45 am]

BILLING CODE 4910–15–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Parts 201, 220, 222, 223 and 224

[Docket No. 2021–6]

Copyright Claims Board: Initiation of Proceedings and Related Procedures

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking; extension of comment period.

SUMMARY: The U.S. Copyright Office is extending the deadline for the submission of written comments in response to its September 29, 2021, notification of proposed rulemaking regarding initiating proceedings before the Copyright Claims Board.

DATES: The comment period for the notice of proposed rulemaking published September 29, 2021, at 86 FR 53897, is extended. Initial written comments must be received no later than 11:59 p.m. Eastern Time on November 12, 2021. Written reply comments must be received no later than 11:59 p.m. Eastern Time on November 30, 2021.

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 website at *https://copyright.gov/rulemaking/case-act-implementation/initiating-proceedings/.* 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: Kevin R. Amer, Acting General Counsel and Associate Register of Copyrights, by email at *kamer@copyright.gov,* or Whitney Levandusky, Supervisory Attorney-Advisor, by email at *wlev@copyright.gov.* Both can be reached by telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION: On September 29, 2021, the U.S. Copyright Office issued a notice of proposed rulemaking (''NPRM'') regarding initiating proceedings before the Copyright Claims Board (''CCB''). The Office solicited public comments on a broad range of procedures governing the initial stages of a CCB proceeding, including filing the initial claim, opting out of a proceeding, and filing a response and any counterclaims.

To ensure that members of the public have sufficient time to comment, and to ensure that the Office has the benefit of a complete record, the Office is extending the deadline for the submission of initial comments to no later than 11:59 p.m. Eastern Time on November 12, 2021. The Office is also extending the deadline for the submission of reply comments to no later than 11:59 p.m. Eastern Time on November 30, 2021.

Dated: October 21, 2021.

Kevin R. Amer,

Acting General Counsel and Associate Register of Copyrights.

[FR Doc. 2021–23351 Filed 10–26–21; 8:45 am]

BILLING CODE 1410–30–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2021–0451; FRL–9166–01–R5]

Air Plan Approval; Michigan and Wisconsin; Finding of Failure To Attain the 2010 Sulfur Dioxide Primary National Ambient Air Quality Standard for the Detroit and Rhinelander Nonattainment Areas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to determine that the Detroit and Rhinelander sulfur dioxide (SO_2) nonattainment areas failed to attain the 2010 primary 1-hour SO_2 national ambient air quality standard (NAAQS or ''standard'') by the applicable attainment date of October 4, 2018. This proposed determination is based upon air quality modeling using actual and allowable emissions for the Detroit area and monitored air quality data from January 2015 to December 2017 for the Rhinelander area. If EPA finalizes these determinations as proposed, within one year after EPA publishes a final rule the States of Michigan and Wisconsin will be required to submit revisions to their State Implementation Plans (SIPs) that, among other elements, provide for expeditious attainment of the 2010 SO_2 standard. However, for the Rhinelander area, if EPA approves the recent revised SIP submission submitted by the State of Wisconsin, EPA is proposing to treat that submission as satisfying the requirement to submit revisions to the SIP to address the failure to timely attain the 2010 SO_2 NAAQS.

DATES: Comments must be received on or before November 26, 2021.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2021–0451 at *https://www.regulations.gov,* or via email to *blakley.pamela@epa.gov.* For comments submitted at *Regulations.gov,* follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Melissa Sheffer, Meteorologist, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–1027, *sheffer.melissa@epa.gov.* The EPA Region 5 office is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID–19.

SUPPLEMENTARY INFORMATION:

I. Background

A. The 2010 SO_2 NAAQS

Under section 109 of the Clean Air Act (CAA), EPA has established NAAQS for certain pervasive air pollutants (referred to as ''criteria pollutants'') and conducts periodic reviews of the NAAQS to determine whether they should be revised or whether new NAAQS should be established.

Under the CAA, EPA must establish a NAAQS for SO_2. SO_2 is primarily released to the atmosphere through the burning of fossil fuels by power plants and other industrial facilities. SO_2 is also emitted from industrial processes including metal extraction from ore and heavy equipment that burn fuel with a high sulfur content. Short-term exposure to SO_2 can damage the human respiratory system and increase breathing difficulties. Small children and people with respiratory conditions, such as asthma, are more sensitive to the effects of SO_2. Sulfur oxides at high concentrations can also react with compounds to form small particulates that can penetrate deeply into the lungs and cause health problems.

EPA first established primary, health-based SO_2 standards in 1971 at 0.14 parts per million (ppm) over a 24-hour averaging period and 0.3 ppm over an annual averaging period (36 FR 8186, April 30, 1971). In June 2010, EPA revised the NAAQS for SO_2 to provide increased protection of public health, providing for revocation of the 1971 primary annual and 24-hour SO_2 standards for most areas of the country following area designations under the new NAAQS.[1] The 2010 NAAQS is 75 parts per billion (ppb) (equivalent to 0.075 ppm) over a 1-hour averaging period (75 FR 35520, June 22, 2010). A violation of the 2010 1-hour SO_2 NAAQS occurs when the annual 99th percentile of ambient daily maximum 1-hour average SO_2 concentrations, averaged over a 3-year period, exceeds 75 ppb.[2]

B. Designations, Classifications, and Attainment Dates for the 2010 SO_2 NAAQS

Following promulgation of any new or revised NAAQS, EPA is required by CAA section 107(d) to designate areas throughout the nation as attaining or not attaining the NAAQS. On August 5, 2013, EPA finalized its first round of designations for the 2010 primary SO_2 NAAQS (78 FR 47191). In the 2013 action, EPA designated 29 areas in 16 states as nonattainment for the 2010 SO_2 NAAQS, including the Detroit area in Michigan and the Rhinelander area in Wisconsin.[3] EPA's initial round of designations for the 2010 SO_2 NAAQS, including the Detroit and Rhinelander areas, became effective on October 4, 2013. Pursuant to CAA sections 172(a)(2) and 192(a), the maximum attainment date for the Detroit and Rhinelander areas was October 4, 2018, five years after the effective date of the final action designating each area as nonattainment for the 2010 SO_2 NAAQS.

For a number of nonattainment areas, including the Detroit area, EPA published an action on March 18, 2016, effective April 18, 2016, finding that Michigan and other pertinent states had failed to submit the required SO_2 nonattainment plan by the submittal deadline (81 FR 14736). Under CAA section 110(c), the finding triggered a requirement that EPA promulgate a Federal implementation plan (FIP) within two years of the finding unless, by that time (a) the state had made the necessary complete submittal and (b) EPA had approved the submittal as meeting applicable requirements. Michigan submitted a complete nonattainment plan on May 31, 2016 and submitted associated final enforceable measures on June 30, 2016. However, on March 19, 2021, EPA partially approved and partially disapproved Michigan's SO_2 plan as submitted in 2016 (86 FR 14827). Therefore, the FIP clock was not stopped. EPA disapproved the attainment demonstration, in part because it relied on an invalidated rule (Michigan Administrative Code 336.1430) that was no longer enforceable. EPA also disapproved the plan for failing to meet the requirements for meeting reasonable further progress (RFP) toward attainment of the NAAQS, reasonably available control measures and reasonably available control technology (RACM/RACT), and contingency measures. To date, Michigan has not submitted an approvable plan for the Detroit area, and EPA is currently working on a FIP.

For the Rhinelander area, Wisconsin submitted a nonattainment plan on January 22, 2016, and supplemented it on July 18, 2016, and November 29, 2016. On March 23, 2021, EPA partially approved and partially disapproved Wisconsin's Rhinelander SO_2 plan as submitted and supplemented in 2016 (86 FR 15418). EPA disapproved the attainment demonstration for failing to comply with EPA's stack height regulations. Additionally, EPA disapproved the plan for failing to meet the requirements for meeting RFP toward attainment of the NAAQS, RACM/RACT, emission limitations and control measures as necessary to attain the NAAQS, and contingency measures. Under CAA section 110(c), the partial disapproval triggered a requirement that EPA promulgate a FIP within two years of the finding unless, by that time (a) the state had made the necessary complete submittal and (b) EPA had approved the submittal as meeting applicable requirements. On March 29, 2021, Wisconsin submitted a permit containing a more stringent emission limit for Ahlstrom-Munksjö's Rhinelander facility, the main SO_2 source in the area, along with supplemental information in order to remedy the plan's deficiencies specified in EPA's March 23, 2021 rulemaking. EPA proposed to approve Wisconsin's revised plan for the Rhinelander SO_2 nonattainment area on July 22, 2021 (86 FR 38643).

On August 6, 2020, the Center for Biological Diversity, the Center for Environmental Health, and the Sierra Club filed a complaint in the United States District Court (amended October 29, 2020), alleging that EPA failed to perform certain non-discretionary duties in accordance with the CAA, including to make timely findings that the Detroit and Rhinelander areas attained the 2010 SO_2 NAAQS by the attainment date. Under court order, EPA must determine whether Detroit and Rhinelander areas have attained the SO_2 NAAQS by January 31, 2022. The court order provides that if a covered nonattainment area is redesignated to attainment before the applicable deadline for EPA's determination, then EPA's duty to make the determination for that area is automatically terminated. Therefore, EPA may not finalize this action if either area is redesignated to attainment of the 2010 SO_2 NAAQS before January 31, 2022.

II. Proposed Determinations and Consequences

Section 179(c)(1) of the CAA requires EPA to determine whether a nonattainment area attained an applicable standard by the applicable attainment date based on the area's air quality as of the attainment date. In determining the attainment status of SO_2 nonattainment areas, EPA may consider ambient monitoring data, air quality dispersion modeling, and/or a

[1] 40 CFR 50.4(e).

[2] 40 CFR 50.17.

[3] For exact descriptions of the Detroit and Rhinelander areas, refer to 40 CFR 81.303.

demonstration that the control strategy in the SIP has been fully implemented.[4]

Under EPA regulations in 40 CFR 50.17 and in accordance with 40 CFR part 50, appendix T, the 2010 1-hour annual SO_2 standard is met at a monitoring site when the design value is less than or equal to 75 ppb. Design values are calculated by computing the three-year average of the annual 99th percentile daily maximum 1-hour average concentrations.[5] When calculating 1-hour primary standard design values, the calculated design values are rounded to the nearest whole number or 1 ppb by convention. A SO_2 1-hour primary standard design value is valid if it encompasses three consecutive calendar years of complete monitoring data or modeling data.

A. Detroit Area Determination

The determination of failure to attain for the Detroit area was based on air quality dispersion modeling, using actual and allowable emissions from the most recent three complete calendar years, prior to the attainment date of October 4, 2018 (*i.e.,* from 2015–2017).

As previously noted, EPA may consider air quality dispersion modeling in addition to monitoring data when determining the attainment status of SO_2 nonattainment areas. EPA's 2014 SO_2 Guidance states that ''[i]f the EPA determines that the air quality monitors located in the affected area are located in the area of maximum concentration, the EPA may be able to use the data from these monitors to make the determination of attainment without the use of air quality modeling data.'' [6] Although all the monitors in the Detroit area are showing values below the NAAQS, EPA may not use the monitoring data for this proposed determination of failure to attain because the modeling results show that the monitors are not in the area of maximum ambient SO_2 concentration. The modeling data show that SO_2 concentrations near the monitors are below the NAAQS while showing concentrations that violate the NAAQS at other modeling receptors in the Detroit area.

EPA's modeling requirements to support SIP attainment demonstrations are specified by regulation in appendix W of 40 CFR part 51 (*Guideline on Air Quality Models*), as referenced by 40 CFR 51.112. Additionally, specific SO_2 modeling guidance can be found in EPA's document titled, ''SO_2 NAAQS Designations Modeling Technical Assistance Document'' (Modeling TAD), which was most recently updated in August 2016. EPA conducted a modeling demonstration, based on guidelines from appendix W and the Modeling TAD, that contained an assessment of the air quality impacts from the following sources: U.S. Steel Ecorse, U.S. Steel Zug Island, EES Coke, DTE Energy (DTE) River Rouge, DTE Trenton Channel, Carmeuse Lime, DTE Monroe, Severstal Steel, Dearborn Industrial Generation (DIG), and Marathon Refinery.

1. Model Selection and Modeling Components

EPA's Modeling TAD notes that for area designations under the 2010 SO_2 NAAQS, the American Meteorological Society/Environmental Protection Agency Regulatory Model (AERMOD) modeling system should be used, unless use of an alternative model can be justified. In some instances, the recommended model may be a model other than AERMOD, such as the BLP model for buoyant line sources. The AERMOD modeling system contains the following components: AERMOD (the dispersion model), AERMAP (the terrain processor for AERMOD), AERMET (the meteorological data processor for AERMOD), BPIPPRIME (the building input processor), AERMINUTE (a pre-processor to AERMET incorporating 1-minute automated surface observation system (ASOS) wind data), AERSURFACE (the surface characteristics processor for AERMET), and AERSCREEN (a screening version of AERMOD).

EPA conducted its air dispersion modeling demonstration with AERMOD, the preferred model for this application. EPA used version 19191 of AERMOD, which was the most recent version at that time.

2. Modeling Parameter: Rural or Urban Dispersion

EPA's recommended procedure for characterizing an area by prevalent land use is based on evaluating the dispersion environment within 3 kilometers of the facility. According to EPA's modeling guidelines contained in documents such as the Modeling TAD, rural dispersion coefficients are to be used in the dispersion modeling analysis if more than 50% of the area within a 3 kilometer radius of the facility is classified as rural. Conversely, if more than 50% of the area is urban, urban dispersion coefficients should be used in the modeling analysis.

Although EPA's modeling guidelines recommend that areas such as Detroit should be modeled using urban dispersion coefficients, it was found that using urban dispersion coefficients caused the model to overpredict monitored concentrations by 2–3 times due to emissions from the tall stacks becoming trapped in the nighttime boundary layer. Section 5.1 of the AERMOD Implementation Guide [7] describes how prior to AERMOD version 15181, the application of the urban option on tall stacks in small to moderate size urban areas may have limited the plume height resulting in high concentrations. While this issue was mitigated beginning with bug fixes in version 15181 of AERMOD, a model to monitor comparison conducted by EPA determined that modeled concentrations at the monitor receptor locations correlated with monitoring concentrations when the tall stacks were modeled with the rural dispersion option instead of urban. In addition, peak monitored concentrations occur during the daytime. When modeling the tall stacks with the rural dispersion option the peak modeled concentrations occurred during the daytime hours, while using the urban option resulted in peak modeled concentrations during the nighttime hours. Therefore, the rural dispersion option was used for the tall stacks at EES Coke, DTE River Rouge, DTE Trenton Channel, and DTE Monroe, and the urban dispersion option was used for the remaining modeled sources with a population of 1,000,000.

3. Modeling Parameter: Area of Analysis (Receptor Grid)

EPA believes that a reasonable first step towards characterization of air quality in the Detroit area is to determine the extent of the area of analysis, *i.e.,* receptor grid. Considerations presented in the Modeling TAD include but are not limited to: The location of the SO_2 emission sources or facilities considered for modeling; the extent of significant concentration gradients of nearby sources; and sufficient receptor coverage and density to adequately capture and resolve the model predicted maximum SO_2 concentrations.

[4] EPA, Guidance for 1-Hour SO_2 Nonattainment Area SIP Submissions (April 2014) (''2014 SO_2 Guidance''), 49.

[5] As defined in 40 CFR part 50, appendix T, section 1(c), daily maximum 1-hour values refer to the maximum 1-hour SO_2 concentration values measured from midnight to midnight that are used in the NAAQS computations.

[6] Id., 50.

[7] U.S. Environmental Protection Agency, 2021. AERMOD Implementation Guide, section 5.1. Publication No. 454–B–21–002. Office of Air Quality Planning and Standards, Research Triangle Park, NC. *https://gaftp.epa.gov/Air/aqmg/SCRAM/models/preferred/aermod/aermod_implementation_guide.pdf.*

For the Detroit area modeling analysis, a uniform Cartesian receptor grid was used with receptor spacing of 100 meters throughout the modeled domain. The receptor network contained 5,432 receptors and covered 12 kilometers by 12 kilometers area over the city of Detroit. EPA determined that this was the appropriate distance in order to adequately characterize air quality from the sources in the Detroit area which may have a potential impact in the area of analysis where maximum concentrations of SO_2 are expected.

4. Modeling Parameter: Source Characterization

EPA characterized the sources within the area of analysis in accordance with practices outlined as acceptable in the Modeling TAD. Specifically, EPA used actual stack heights in conjunction with actual or allowable emissions. EPA also adequately characterized the sources' building layouts and locations, as well as the stack parameters, *e.g.,* exit temperature, exit velocity, location, and diameter.

5. Modeling Parameter: Emissions

Guidance on modeling SO_2 actual emissions is provided in section 5.2 of EPA's Modeling TSD. EPA believes that continuous emissions monitoring systems (CEMS) data provide acceptable historical emissions information when it is available and that these data are available for many electric generating units. The Modeling TAD also provides for the flexibility of using allowable emissions.

EPA ran AERMOD using 2015–2017 actual average CEMS emissions data for DTE River Rouge and Trenton Channel, and 2016 actual emissions data for U.S. Steel, the source with the most significant contribution to the maximum NAAQS violations in the area, from Michigan's annual emissions database. Table 1 shows the actual emissions used for this analysis.

TABLE 1—ACTUAL SO_2 EMISSIONS USED IN THE MODELING ANALYSIS

Facility name	SO_2 emissions (tons per year)
DTE River Rouge	4,383
DTE Trenton Channel	11,303
U.S. Steel	1,480

For EES Coke, Carmeuse Lime, DTE Monroe, Severstal Steel, DIG, and Marathon Refinery in the area of analysis, EPA modeled the facilities using the most recent federally enforceable allowable limits for SO_2. The facilities in EPA's area of analysis and their associated allowable rates are summarized in Table 2 below.

TABLE 2—ALLOWABLE SO_2 EMISSIONS USED IN THE MODELING ANALYSIS

Facility name	SO_2 allowable emissions (tons per year)
EES Coke	4,067
Carmeuse Lime	2,059
DTE Monroe	13,403
Severstal Steel	2,119
DIG	2,335
Marathon Refinery	401

6. Modeling Parameter: Meteorology and Surface Characteristics

As noted in the Modeling TAD, the selection of meteorological data should be based on spatial and climatological (temporal) representativeness. The representativeness of the data are based on: (1) The proximity of the meteorological monitoring site to the area under consideration, (2) the complexity of terrain, (3) the exposure of the meteorological site, and (4) the period of time during which data are collected. Sources of meteorological data include National Weather Service stations, site-specific or onsite data, and other sources such as universities, the Federal Aviation Administration, and military stations.

EPA used the Detroit Metropolitan Wayne County Airport's meteorological surface data and the White Lake meteorological upper air data for the years 2013–2017 for modeling the Detroit area. This meteorological data set was processed by Michigan and obtained from its website.

Meteorological data from the above surface and upper air stations were used in generating AERMOD-ready files with the AERMET processor. The output meteorological data created by the AERMET processor is suitable for being applied with AERMOD input files for AERMOD modeling runs. EPA followed the methodology and settings presented in appendix W in the processing of the raw meteorological data into an AERMOD-ready format and used AERSURFACE to best represent surface characteristics.

7. Modeling Parameter: Geography and Terrain

The terrain in the area of analysis is best described as generally flat. To account for these terrain changes, the AERMAP terrain program within AERMOD was used to specify terrain elevations for all the receptors. The source of the elevation data incorporated into the model was the U.S. Geological Survey National Elevation Database.

8. Modeling Parameter: Background Concentrations

The Modeling TAD offers two mechanisms for characterizing background concentrations of SO_2 that are ultimately added to the modeled design values: (1) A ''first tier'' approach, based on monitored design values, or (2) a temporally varying approach, based on the 99th percentile monitored concentrations by hour of day and season or month. For the Detroit area modeling analysis, hourly SO_2 data from 2015–2017 at the Allen Park monitor, which is approximately 17 kilometers southwest of Detroit, along with Allen Park wind data was used to generate Season/Hour-of-Day concentrations. Monitored concentrations associated with wind directions between and including 40 to 205 degrees were excluded to avoid concentrations associated with sources explicitly modeled in the demonstration. The Season/Hour-of-Day background concentrations for this area of analysis were determined by EPA to be between 0.9 and 13.2 ppb, and these values were incorporated into the final AERMOD results.

8. Summary of Results and Proposed Determination

EPA's modeling analysis indicated that the highest predicted 3-year average 99th percentile 1-hour average concentration within the chosen modeling domain is 139 ppb or 363.3 micrograms per cubic meter. The AERMOD analysis included an output unit factor of 381,680 to convert the model results from grams per second to ppb. This modeled concentration included the background concentration of SO_2, and is based on actual and allowable emissions from the facilities in the Detroit area.

For an area to attain the 2010 SO_2 NAAQS by the October 4, 2018 attainment date, the design value based upon modeled actual and allowable air quality data from 2015–2017 at the area of maximum ambient SO_2 concentration must be equal to or less than 75 ppb for the 1-hour standard. EPA's modeling results show that the maximum modeled design concentration in the Detroit area exceeds 75 ppb. Therefore, based on modeled actual and allowable emissions for the 2015–2017 period, EPA is proposing to determine that the Detroit area failed to attain the 2010 1-hour SO_2 standard by the October 4, 2018 attainment date.

B. Rhinelander Area Determination

The determination of failure to attain for the Rhinelander area was based

upon the most recent three complete calendar years, prior to the attainment date of October 4, 2018, of complete, quality-assured measured data gathered at an established state and local air monitoring station (SLAMS) in the nonattainment area and entered into EPA's Air Quality System (AQS) database.[8] A year is considered complete when all four quarters are complete, and a quarter is complete when at least 75 percent of the sampling days are complete. A sampling day is considered complete if 75 percent of the hourly concentration values are reported; this includes data affected by exceptional events that have been approved for exclusion by the Administrator.[9] Data from ambient air monitors operated by state and local agencies in compliance with EPA monitoring requirements must be submitted to AQS.[10] Monitoring agencies annually certify that these data are accurate to the best of their knowledge.[11] All data are reviewed to determine the area's air quality status in accordance with 40 CFR part 50, appendix T.

With regard to the use of monitoring data for determining the attainment status of SO_2 nonattainment areas, EPA's 2014 SO_2 Guidance specifically notes that ''[i]f the EPA determines that the air quality monitors located in the affected area are located in the area of maximum concentration, the EPA may be able to use the data from these monitors to make the determination of attainment without the use of air quality modeling data.'' [12] This language might be read to suggest that EPA must always assess whether the air quality monitors in the affected area are located in the area of maximum concentration prior to using monitoring data to determine an SO_2 nonattainment area's attainment status. However, this language was intended to refer to a situation where EPA is considering making a determination that the area has attained the NAAQS based on a finding that all of the monitoring sites within the affected area had an attaining design value for the relevant period. As described in section II.B of this action, in this instance, the monitoring site in the Rhinelander area did not have attaining design values for the relevant period. Consequently, even if the monitoring sites are not located in the area of maximum concentration, any monitors that would be located in the area of maximum concentration could not record concentrations lower than those recorded at the existing monitor at the Rhinelander site. Accordingly, since the Rhinelander Tower monitor design value for the 2015–2017 period was above the NAAQS, it is not necessary to consider whether the monitor is located in the area of maximum concentration in order to determine that the Rhinelander area did not attain the 2010 SO_2 NAAQS by the October 4, 2018 attainment date.

1. Monitoring Network Considerations

Section 110(a)(2)(B)(i) of the CAA requires states to establish and operate air monitoring networks to compile data on ambient air quality for all criteria pollutants. EPA's monitoring requirements are specified by regulation in 40 CFR part 58. These requirements are applicable to state, and where delegated, local air monitoring agencies that operate criteria pollutant monitors.

In section 4.4 of appendix D to 40 CFR part 58, EPA specifies minimum monitoring requirements for SO_2 to operate at SLAMS. SLAMS produce data that are eligible for comparison with the NAAQS, and therefore, the monitor must be an approved Federal reference method (FRM), Federal equivalent method (FEM), or approved regional method (ARM) monitor.

The minimum number of required SO_2 SLAMS is described in sections 4.4.2 and 4.4.3 of appendix D to 40 CFR part 58. According to section 4.4.2, the minimum number of required SO_2 monitoring sites is determined by the population weighted emissions index for each state's core based statistical area. Section 4.4.3 describes additional monitors that may be required by an EPA regional administrator.

Under 40 CFR 58.10, states are required to submit annual monitoring network plans (AMNP) for ambient air monitoring networks for approval by EPA. Within the Rhinelander area, Wisconsin is responsible for ensuring that the area meets air quality monitoring requirements. Wisconsin submits annual monitoring network plans to EPA that describe the various monitoring sites that it operates.[13] Each AMNP discusses the status of the air monitoring network as required under 40 CFR 58.10 and addresses the operation and maintenance of the air monitoring network in the previous year. EPA regularly reviews these AMNPs for compliance with the applicable reporting requirements in 40 CFR part 58.[14]

EPA also conducts regular ''technical systems audits'' (TSAs) during which EPA reviews and inspects ambient air monitoring programs to assess compliance with applicable regulations concerning the collection, analysis, validation, and reporting of ambient air quality data.[15] As part of its 2018 TSA of Wisconsin, EPA required Wisconsin to prepare and submit a corrective action plan, and EPA accepted Wisconsin's TSA finding response forms in 2019.[16]

During the 2015–2017 data period, Wisconsin operated one SO_2 SLAMS in the Rhinelander area: Rhinelander Tower monitor (AQS ID 55–085–0996). The Rhinelander Tower monitor site is located at 434 High Street under the Rhinelander municipal water tower. The primary monitor at this site is an FEM monitor.

Based on EPA's review of Wisconsin's AMNPs for the years 2016–2018 [17] and the 2018 TSA of Wisconsin's monitoring program, EPA proposes to find that the monitoring network in the Rhinelander area is adequate for the purpose of collecting ambient SO_2 concentration data for use in determining whether the nonattainment area attained the 2010 SO_2 NAAQS by the October 4, 2018 attainment date.

2. SO_2 Data Considerations

Under 40 CFR 58.15, monitoring agencies must certify, on an annual basis, data collected at all SLAMS and at all FRM, FEM, and ARM special purpose monitor stations that meet EPA quality assurance requirements. In doing so, monitoring agencies must certify that the previous year of ambient concentration and quality assurance data are completely submitted to AQS and that the ambient concentration data are accurate to the best of their knowledge. Wisconsin annually certifies that the data it submits to AQS are quality assured, including data collected

[8] AQS is EPA's repository of ambient air quality data.

[9] *See* 40 CFR part 50, appendix T, sections 1(c), 3(b), 4(c), and 5(a).

[10] 40 CFR 58.16.

[11] 40 CFR 58.15.

[12] Id., 50.

[13] *See, e.g.,* ''Wisconsin Department of Natural Resources 2018 Air Monitoring Network Plan,'' which is included in the docket for this action.

[14] *See, e.g.,* letter dated September 1, 2017 from Edward Nam, Director, Air and Radiation Division, EPA Region V, to Gail Good, Director, Bureau of Air Management, Wisconsin Department of Natural Resources, which is included in the docket for this action.

[15] *See* 40 CFR part 58, appendix A, section 2.5.

[16] *See* letter dated June 24, 2019 from Michael Compher, Chief, Air Monitoring and Analysis Section, Air and Radiation Division, EPA Region V, to Katie Praedel, Chief, Air Monitoring Section, Bureau of Air Management, Wisconsin Department of Natural Resources, which is included in the docket for this action.

[17] Wisconsin's ANPs for 2016–2018 address the operation and maintenance of its air monitoring network for 2015–2017.

by Wisconsin at the monitoring site in the Rhinelander area.

For the Rhinelander area, for reasons discussed in section I.B of this action, the applicable attainment date was October 4, 2018. In accordance with appendix T to 40 CFR part 50, determinations of SO_2 NAAQS compliance are based on three consecutive calendar years of data. To determine the air quality as of the attainment date in the Rhinelander area, EPA must review the data collected during the three calendar years immediately preceding the attainment date, or January 1, 2015–December 31, 2017.

The SO_2 data for the Rhinelander area from January 1, 2015–December 31, 2017, have been certified by Wisconsin. EPA has also evaluated the completeness of these data in accordance with the requirements of 40 CFR part 50, appendix T. The data collected by Wisconsin meet the quarterly completeness criterion for all 12 quarters in the three calendar years preceding the attainment date at the Rhinelander Tower SO_2 monitoring site.

3. Rhinelander SO_2 Data and Proposed Determination

The 1-hour SO_2 design values at the Rhinelander Tower monitor for the 2015–2017 period are presented in Table 3. Table 3 demonstrates that the 1-hour SO_2 design values for the 2015–2017 period are greater than 75 ppb at the eligible monitoring site.

TABLE 3—2015–2017 1-HOUR DESIGN VALUES FOR THE RHINELANDER AREA

Site (AQS ID)	Annual 99th percentile daily maximum 1-hour average			1-hour design value (ppb)	Design value valid?
	2015	2016	2017		
Rhinelander Tower (55–085–0996)	156	129	38	108	Yes

Source: EPA, Design Value Report, August 26, 2020.

The data in Table 3 demonstrates that the monitoring site in the Rhinelander area failed to attain the 2010 1-hour SO_2 NAAQS by the applicable attainment date of October 4, 2018. The 3-year design value for the Rhinelander Tower monitor was deemed valid due to meeting the criteria in 40 CFR part 50, appendix T, section 3(c)(i), which requires that ''at least 75 percent of the days in each quarter of each of three consecutive years have at least one reported hourly value, and the design value calculated according to the procedures specified in section 5 is above the level of the primary 1-hour standard.''

For an area to attain the 2010 SO_2 NAAQS by the October 4, 2018 attainment date, the design value based upon monitored air quality data from 2015–2017 at each eligible monitoring site must be equal to or less than 75 ppb for the 1-hour standard. Table 3 shows that the design value at the monitoring site in the Rhinelander area exceeds 75 ppb. Therefore, based on quality-assured and certified data for the 2015–2017 data period, EPA is proposing to determine that the Rhinelander area failed to attain the 2010 1-hour SO_2 standard by the October 4, 2018 attainment date.

C. Consequences for SO_2 Nonattainment Areas Failing To Attain Standards by Attainment Dates

The consequences for SO_2 nonattainment areas for failing to attain the standards by the applicable attainment date are set forth in CAA section 179(d). Under section 179(d), a state must submit a SIP revision for the area meeting the requirements of CAA sections 110 and 172, the latter of which requires, among other elements, a demonstration of attainment and reasonable further progress and contingency measures. In addition, under CAA section 179(d)(2), the SIP revision must include such additional measures as EPA may reasonably prescribe, including all measures that can be feasibly implemented in the area in light of technological achievability, costs, and any non-air quality and other air quality-related health and environmental impacts. The state is required to submit the SIP revision within one year after EPA publishes a final action in the **Federal Register** determining that the nonattainment area failed to attain the SO_2 NAAQS.

On March 19, 2021 (86 FR 14827), and March 23, 2021 (86 FR 15418), EPA published actions partially disapproving the 2010 SO_2 attainment plans for the Detroit and Rhinelander areas, respectively, as submitted and supplemented in 2016. Although final findings of failure to attain will not eliminate each state's obligation to address the disapproved elements of its prior plan submittal, EPA anticipates that the submission of a new, approvable attainment plan in response to these findings would also satisfy these obligations for Michigan and Wisconsin.

On July 22, 2021 (86 FR 38643), EPA proposed to approve Wisconsin's revised plan, submitted to EPA on March 29, 2021. If EPA takes final action to approve that revised SIP submission from Wisconsin, EPA is proposing to find that the State has also satisfied the requirement to submit a SIP revision to address the finding, if finalized, that the area failed to timely attain the 2010 SO_2 NAAQS.

Under CAA sections 179(d)(3) and 172(a)(2), the new attainment date for each nonattainment area is the date by which attainment can be achieved as expeditiously as practicable, but no later than five years after EPA publishes a final action in the **Federal Register** determining that the nonattainment area failed to attain the SO_2 NAAQS. In the meantime, EPA's FIP obligations for both the Detroit and Rhinelander areas remain in force, and this finding, if finalized, would not negate EPA's FIP deadlines. For the Detroit area, the statutory deadline for EPA to promulgate a FIP has passed, and EPA is actively working on a FIP.

In addition to triggering requirements for a new SIP submittal, a final determination that a nonattainment area failed to attain the NAAQS by the attainment date would trigger the implementation of contingency measures adopted under 172(c)(9).

III. What action is EPA taking?

EPA is proposing under CAA section 179(c)(1) to determine that the Detroit and Rhinelander areas failed to attain the 2010 1-hour SO_2 standard by the applicable attainment date of October 4, 2018. If finalized as proposed, Michigan and Wisconsin would be required under CAA section 179(d) to submit revisions to the SIP for the Detroit and Rhinelander SO_2 nonattainment areas, respectively. The required SIP revision for each area must, among other elements, demonstrate expeditious attainment of the standards within the time period prescribed by CAA section 179(d). If finalized as proposed, the SIP

revisions required under CAA section 179(d) would be due for submittal to EPA no later than one year after the publication date of the final action. However, for the Rhinelander area, if EPA approves the recently revised SIP submission submitted by the State of Wisconsin, EPA is proposing to treat that submission as satisfying the requirement to submit revisions to the SIP to address the failure to timely attain the 2010 SO_2 NAAQS.

EPA is soliciting public comments on the issues discussed in this action. EPA will accept comments from the public on this proposal for the next 30 days and will consider these comments before taking final action.

IV. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *https://www2.epa.gov/laws-regulations/laws-and-executive-orders.*

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

This action is not a significant regulatory action and therefore was not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the provisions of the PRA because it does not contain any information collection activities.

C. Regulatory Flexibility Act (RFA)

EPA certifies that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This proposed action, if finalized, would require the State to adopt and submit SIP revisions to satisfy CAA requirements and would not itself directly regulate any small entities.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate of $100 million or more, as described in UMRA (2 U.S.C. 1531–1538) and does not significantly or uniquely affect small governments. This action itself imposes no enforceable duty on any state, local, or tribal governments, or the private sector. This action proposes to determine that the Detroit and Rhinelander SO_2 nonattainment areas failed to attain the NAAQS by the applicable attainment dates. If finalized, this determination would trigger existing statutory timeframes for the State to submit SIP revisions. Such a determination in and of itself does not impose any Federal intergovernmental mandate.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government.

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

This action does not have tribal implications as specified in Executive Order 13175. The proposed finding of failure to attain the SO_2 NAAQS does not apply to tribal areas, and the proposed rule would not impose a burden on Indian reservation lands or other areas where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction within the Detroit and Rhinelander SO_2 nonattainment areas. Thus, this proposed 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.

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

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive order. This proposed action is not subject to Executive Order 13045 because the effect of this proposed action, if finalized, would be to trigger additional planning requirements under the CAA. This proposed action does not establish an environmental standard intended to mitigate health or safety risks.

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

This proposed rule is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). The effect of this proposed action, if finalized, would be to trigger additional planning requirements under the CAA.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Sulfur oxides.

Dated: October 20, 2021.

Cheryl Newton,

Acting Regional Administrator, Region 5.

[FR Doc. 2021–23274 Filed 10–26–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2021–0621; FRL–9085–01–R6]

Air Plan Approval; Oklahoma; Updates to the General SIP and Incorporation by Reference Provisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is proposing to approve identified portions of two revisions to the Oklahoma State Implementation Plan (SIP) submitted by the State of Oklahoma designee on May 15, 2020, and February 9, 2021. This action addresses the revisions submitted to the Oklahoma SIP pertaining to the general SIP definitions and the incorporation by reference of Federal requirements under Oklahoma Administrative Code (OAC).

DATES: Written comments must be received on or before November 26, 2021.

ADDRESSES: Submit your comments, identified by Docket No. EPA–R06–OAR–2021–0621, at *https://www.regulations.gov* or via email to

wiley.adina@epa.gov. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact Adina Wiley, (214) 665–2115, *wiley.adina@epa.gov.* For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

Docket: The index to the docket for this action is available electronically at *www.regulations.gov.* While all documents in the docket are listed in the index, some information may not be publicly available due to docket file size restrictions or content (*e.g.,* CBI).

FOR FURTHER INFORMATION CONTACT: Ms. Adina Wiley, EPA Region 6 Office, Air Permits Section, 214–665–2115, *wiley.adina@epa.gov.* Out of an abundance of caution for members of the public and our staff, the EPA Region 6 office will be closed to the public to reduce the risk of transmitting COVID–19. We encourage the public to submit comments via *https://www.regulations.gov,* as there will be a delay in processing mail and no courier or hand deliveries will be accepted. Please call or email the contact listed above if you need alternative access to material indexed but not provided in the docket.

SUPPLEMENTARY INFORMATION: Throughout this document wherever ''we,'' ''us,'' or ''our'' is used, we mean the EPA.

I. Background

Section 110 of the Act requires states to develop air pollution regulations and control strategies to ensure that air quality meets the EPA's National Ambient Air Quality Standards (NAAQS). These ambient standards are established under section 109 of the Act and they currently address six criteria pollutants: Carbon monoxide, nitrogen dioxide, ozone, lead, particulate matter, and sulfur dioxide. The state's air regulations are contained in its SIP, which is basically a clean air plan. Each state is responsible for developing SIPs to demonstrate how the NAAQS will be achieved, maintained, and enforced. The SIP must be submitted to the EPA for approval, and any changes a state makes to the approved SIP also must be submitted to the EPA for approval.

On December May 15, 2020, Mr. Kenneth Wagner, Secretary of Energy and Environment, submitted revisions to the Oklahoma SIP that included the annual SIP updates for 2019. The submittal included revisions to OAC 252:100, Subchapter 2 and Appendix Q to update the incorporation by reference of Federal requirements, which will be addressed in this proposal. The submittal also included revisions to OAC 252:100, Subchapter 39, to revise the regulations for control of volatile organic compounds (VOCs) in nonattainment areas and former nonattainment areas. The EPA has determined that the May 15, 2020, submitted revisions to OAC 252:100, Subchapter 39 will be addressed in a separate rulemaking.[1]

On February 9, 2021, Mr. Wagner, Secretary of Energy and Environment, submitted revisions to the Oklahoma SIP that included the annual SIP updates for 2020. The submittal included revisions to OAC 252:100, Subchapter 1 to update the definitions for the Oklahoma SIP and revisions to OAC 252:100, Subchapter 2 and Appendix Q to update the incorporation by reference of Federal requirements. This proposal will address the submitted revisions to OAC 252:100–1–3, Subchapter 2 and Appendix Q. We have determined that the revisions to the statutory definitions at OAC 252:100–1–2 should be reviewed in a separate action. The submittal also included revisions to OAC 252:100, Subchapter 13, to revise the open burning regulations; Subchapters, 37, 39, and Appendix N to revise the regulations for control of VOC emissions in nonattainment areas and former nonattainment areas from aerospace industries coating operations; and revisions to Subchapters 39–49 to revise the regulations for the control of VOC emissions in nonattainment areas and former nonattainment areas from manufacturing of fiberglass reinforced plastic products. The EPA has determined that the February 9, 2021, submitted revisions to OAC 252:100, Subchapters 13, 37, 39–49, and Appendix N will be addressed in a separate rulemaking action.

II. The EPA's Evaluation

The accompanying Technical Support Document for this action includes a detailed analysis of the submitted revisions to the Oklahoma SIP which are the subject of this proposed rulemaking. Our analysis indicates that the May 15, 2020, and the February 9, 2021, SIP revisions addressed in this proposed rulemaking action were developed in accordance with the CAA and the State provided reasonable notice and public hearing.

Updates to the Oklahoma SIP Definitions

The general SIP provisions of OAC 252:100, Subchapter 1, incorporate statutory definitions at OAC 252:100–1–2 and general definitions at OAC 252:100–1–3. On February 9, 2021, the ODEQ submitted revisions to OAC 252:100–1–2 and OAC 252:100–1–3 adopted on June 25, 2020, effective September 15, 2020. The EPA is only addressing the submitted revisions to OAC 252:100–1–3 at this time.

The revisions to OAC 252:100–1–3, update the definitions used throughout the Oklahoma SIP. The revisions to the definitions of ''Best available control technology'' and ''responsible official'' and the new definition for ''Title V permit'' are consistent with the underlying federal requirements.

Updates to the Oklahoma SIP Incorporation by Reference Provisions

The ODEQ submitted revisions on May 15, 2020 and February 9, 2021, to update the Incorporation by Reference provisions found in the Oklahoma SIP. These revisions ensure the Oklahoma SIP maintains consistency with current federal requirements.

On May 15, 2020, the ODEQ submitted revisions to OAC 252:100–2–3 and Appendix Q that were adopted on May 28, 2019 and effective September 15, 2019. These revisions updated the incorporation by reference date in the opening paragraph of OAC 252:100–2–3 and revoked and replaced the previous version of OAC 252, Chapter 100, Appendix Q.

On February 9, 2021, the ODEQ submitted another set of revisions to OAC 252:100–2–3 and Appendix Q that were adopted on June 25, 2020, and effective September 15, 2020. The February 9, 2021, revisions updated the opening paragraph of OAC 252:100–2–3 to include the current incorporation

[1] The EPA's action on the revisions to OAC 252:100, Subchapter 39 can be found at *www.regulations.gov,* Docket No. EPA–R06–OAR–2020–0437.

by reference date and revoked and replaced the prior version of Appendix Q that was submitted on May 15, 2020.

III. Impact on Areas of Indian Country

Following the U.S. Supreme Court decision in *McGirt* v. *Oklahoma*, 140 S. Ct. 2452 (2020), the Governor of the State of Oklahoma requested approval under Section 10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005: A Legacy for Users, Public Law 109–59, 119 Stat. 1144, 1937 (August 10, 2005) (''SAFETEA''), to administer in certain areas of Indian country (as defined at 18 U.S.C. 1151) the State's environmental regulatory programs that were previously approved by the EPA for areas outside of Indian country. The State's request excluded certain areas of Indian country further described below. In addition, the State only sought approval to the extent that such approval is necessary for the State to administer a program in light of *Oklahoma Dept. of Environmental Quality* v. *EPA,* 740 F.3d 185 (D.C. Cir. 2014).[2]

On October 1, 2020, the EPA approved Oklahoma's SAFETEA request to administer all the State's EPA-approved environmental regulatory programs, including the Oklahoma SIP, in the requested areas of Indian country. As requested by Oklahoma, the EPA's approval under SAFETEA does not include Indian country lands, including rights-of-way running through the same, that: (1) Qualify as Indian allotments, the Indian titles to which have not been extinguished, under 18 U.S.C. 1151(c); (2) are held in trust by the United States on behalf of an individual Indian or Tribe; or (3) are owned in fee by a Tribe, if the Tribe (a) acquired that fee title to such land, or an area that included such land, in accordance with a treaty with the United States to which such Tribe was a party, and (b) never allotted the land to a member or citizen of the Tribe (collectively ''excluded Indian country lands'').

EPA's approval under SAFETEA expressly provided that to the extent EPA's prior approvals of Oklahoma's environmental programs excluded Indian country, any such exclusions are superseded for the geographic areas of Indian country covered by the EPA's approval of Oklahoma's SAFETEA request.[3] The approval also provided that future revisions or amendments to Oklahoma's approved environmental regulatory programs would extend to the covered areas of Indian country (without any further need for additional requests under SAFETEA).

The EPA is proposing to approve revisions to the general definitions used in the Oklahoma SIP as well as updates to the incorporation by reference provisions to maintain consistency with federal requirements, which will apply statewide in Oklahoma. Consistent with the D.C. Circuit's decision in *ODEQ* v. *EPA* and with EPA's October 1, 2020 SAFETEA approval, if this approval is finalized as proposed, these SIP revisions will apply to all Indian country within the State of Oklahoma, other than the excluded Indian country lands, as described above. Because—per the State's request under SAFETEA—EPA's October 1, 2020 approval does not displace any SIP authority previously exercised by the State under the CAA as interpreted in *ODEQ* v. *EPA,* the SIP will also apply to any Indian allotments or dependent Indian communities located outside of an Indian reservation over which there has been no demonstration of tribal authority.[4]

IV. Proposed Action

We are proposing to approve under section 110 of the CAA, revisions to the Oklahoma SIP that update the definitions relied on throughout the SIP and update the incorporation by reference dates for Federal requirements. We have determined that the revisions submitted on May 15, 2020, and February 9, 2021, were developed in accordance with the CAA and EPA's regulations, policy, and guidance for SIP development.

The EPA proposes approval of the following revisions to the Oklahoma SIP adopted on May 28, 2019, effective September 15, 2019, and submitted to the EPA on May 15, 2020:

- Revisions to OAC 252:100–2–3, Incorporation by Reference,
- Repeal of OAC 252:100, Appendix Q, and
- Adoption of new OAC 252:100, Appendix Q.

The EPA proposes approval of the following revisions to the Oklahoma SIP adopted on June 25, 2020, effective September 15, 2020, and submitted to the EPA on February 9, 2021:

- Revisions to OAC 252:100–1–3, Definitions,
- Revisions to OAC 252:100–2–3, Incorporation by Reference,
- Repeal of OAC 252:100, Appendix Q, and
- Adoption of new OAC 252:100, Appendix Q.

V. Incorporation by Reference

In this action, we are proposing to include in a final rule regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, we are proposing to incorporate by reference revisions to the Oklahoma regulations as described in the Proposed Action section above. We have made, and will continue to make, these documents generally available electronically through *www.regulations.gov* (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 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 CAA. Accordingly, this action merely proposes to approve 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

[2] In *ODEQ* v. *EPA,* the D.C. Circuit held that under the CAA, a state has the authority to implement a SIP in non-reservation areas of Indian country in the state, where there has been no demonstration of tribal jurisdiction. Under the D.C. Circuit's decision, the CAA does not provide authority to states to implement SIPs in Indian reservations. *ODEQ* did not, however, substantively address the separate authority in Indian country provided specifically to Oklahoma under SAFETEA. That separate authority was not invoked until the State submitted its request under SAFETEA, and was not approved until EPA's decision, described in this section, on October 1, 2020.

[3] EPA's prior approvals relating to Oklahoma's SIP frequently noted that the SIP was not approved to apply in areas of Indian country (consistent with the D.C. Circuit's decision in *ODEQ* v. *EPA*) located in the state. *See, e.g.,* 85 FR 20178, 20180 (April 10, 2020). Such prior expressed limitations are superseded by the EPA's approval of Oklahoma's SAFETEA request.

[4] In accordance with Executive Order 13990, EPA is currently reviewing our October 1, 2020 SAFETEA approval and is engaging in further consultation with tribal governments and discussions with the State of Oklahoma as part of this review. EPA also notes that the October 1, 2020 approval is the subject of a pending challenge in federal court. (*Pawnee* v. *Regan*, No. 20–9635 (10th Cir.)). Pending completion of EPA's review, EPA is proceeding with this proposed action in accordance with the October 1, 2020 approval. EPA's final action on the approved revisions to the Oklahoma SIP that include revisions to OAC 252:100–1–3, 2–3, and Appendix Q will address the scope of the state's program with respect to Indian country, and may make any appropriate adjustments, based on the status of our review at that time. If EPA's final action on Oklahoma's SIP is taken before our review of the SAFETEA approval is complete, EPA may make further changes to the approval of Oklahoma's program to reflect the outcome of the SAFETEA review.

Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);

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

This proposal to approve revisions to the Oklahoma SIP that update the definitions relied on throughout the SIP and update the incorporation by reference dates for Federal requirements as discussed more fully elsewhere in this document will apply, if finalized as proposed, to certain areas of Indian country as discussed in the preamble, and therefore has tribal implications as specified in E.O. 13175 (65 FR 67249, November 9, 2000). However, this action will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. This action will not impose substantial direct compliance costs on federally recognized tribal governments because no actions will be required of tribal governments. This action will also not preempt tribal law as no Oklahoma tribe implements a regulatory program under the CAA, and thus does not have applicable or related tribal laws. Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), the EPA has offered consultation to tribal governments that may be affected by this action.

List of Subjects in 40 CFR Part 52

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

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

Dated: October 15, 2021.

David Gray,

Acting Regional Administrator, Region 6.

[FR Doc. 2021–23035 Filed 10–26–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA–R04–OAR–2021–0370; FRL–9092–01–R4]

Approval and Promulgation of State Plans for Designated Facilities and Pollutants; Florida; Control of Emissions From Existing Municipal Solid Waste Landfills

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a Clean Air Act (CAA) section 111(d) plan submitted by the Florida Department of Environmental Protection (FDEP) on December 22, 2020. This plan was submitted to fulfill the requirements of the CAA and is responsive to EPA's promulgation of Emissions Guidelines and Compliance Times for municipal solid waste (MSW) landfills. The Florida plan establishes emission limits for existing MSW landfills and provides for the implementation and enforcement of those limits.

DATES: Written comments must be received on or before November 26, 2021.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2021–0370 at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Katy Lusky, Air Analysis and Support Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth St. SW, Atlanta, Georgia 30303. The telephone number is (404) 562–9130. Ms. Lusky can also be reached via electronic mail at *lusky.kathleen@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On August 29, 2016, EPA finalized revised Standards of Performance for new MSW landfills and Emission Guidelines and Compliance Times for existing MSW Landfills in 40 CFR part 60, subparts XXX and Cf, respectively (81 FR 59331 and 81 FR 59275). These actions were taken in accordance with section 111 of the CAA.

Section 111(d) of the CAA requires EPA to establish a procedure for a state to submit a plan to EPA which establishes standards of performance for any existing source for any air pollutant: (1) For which air quality criteria have not been issued or which is not included on a list published under CAA section 108 or emitted from a source category which is regulated under CAA section 112, but (2) to which a standard of performance under CAA section 111 would apply if such existing source were a new source. EPA established these requirements for state plan submittals in 40 CFR part 60, subpart B. State submittals under CAA sections 111(d) must be consistent with the relevant emission guidelines, in this instance 40 CFR part 60, subpart Cf, and the requirements of 40 CFR part 60, subpart B, and 40 CFR part 62, subpart A. If the state plan is complete and approvable with reference to these requirements, EPA notifies the public, promulgates the plan pursuant to 40 CFR part 62, and delegates implementation and enforcement of the standards and requirements of the emission guidelines to the state under

the terms of the state plan as published in the CFR.

On December 22, 2020, the FDEP submitted to EPA a formal section 111(d) plan for existing MSW landfills. The section 111(d) plan was submitted in response to the August 29, 2016, promulgation of Federal New Source Performance Standards (NSPS) and emission guidelines requirements for MSW landfills, 40 CFR part 60, subparts XXX and Cf, respectively (81 FR 59331 and 81 FR 59275).

On July 7, 2021, the FDEP sent EPA a letter modifying its original plan. The modifications identified in the letter involve withdrawing the initial design capacity reporting requirement in 40 CFR 60.38f(a) and the initial nonmethane organic compound emission rate reporting requirement in 40 CFR 60.38f(c). The basis for withdrawing these reporting requirements is that, prior to the effective date of the Florida plan, owners and operators of existing municipal solid waste landfills in Florida, will have already satisfied these reporting requirements under provisions in the Federal plan for existing municipal solid waste landfills. Under the Federal plan in 40 CFR part 62, subpart OOO, the deadline for submitting initial design capacity and nonmethane organic emission rate reports is September 20, 2021.

II. Summary and Analysis of the Plan Submittal

EPA has reviewed the Florida section 111(d) plan submittal in the context of the plan completeness and approvability requirements of 40 CFR part 60, subparts B and Cf, and part 62, subpart A. EPA is proposing to determine that the submitted section 111(d) plan meets the above cited requirements. The Florida state plan submittal package includes all materials necessary to be deemed administratively and technically complete according to the criteria of 40 CFR 60.27. Included within the section 111(d) plan are regulations under the Florida Administrative Code (F.A.C.) specifically, F.A.C. 62–204.800(9)(h)—''Municipal Solid Waste Landfills, 40 CFR part 60, subpart Cf, Emissions Guidelines and Compliance Times for Municipal Solid Waste Landfills that Commenced Construction, Reconstruction, or Modification on or Before July 17, 2014.'' Florida houses its implementation and enforcement authority for the state plan requirements in these regulations. In this action, EPA is proposing to incorporate by reference F.A.C. 62–204.800(9)(h), which became effective in the State of Florida on June 15, 2020. A detailed explanation of the rationale behind this proposed approval is available in the Technical Support Document (TSD) included in the docket for this action.

III. Proposed Action

EPA is proposing to approve the Florida section 111(d) plan for MSW landfills pursuant to 40 CFR part 60, subparts B and Cf. Therefore, EPA is proposing to amend 40 CFR part 62, subpart K, to reflect this action. This approval is based on the rationale previously discussed and in further detail in the TSD associated with this action.

The EPA Administrator continues to retain authority for approval of alternative methods to determine the nonmethane organic compound concentration or a site-specific methane generation rate constant (k), as stipulated in 40 CFR 60.30f(c).

IV. Incorporation by Reference

In this document, EPA is proposing to include regulatory text that incorporates by reference the state plan. In accordance with requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference F.A.C. 62–204.800(9)(h), which became effective in the State of Florida on June 15, 2020. F.A.C. 62–204.800(9)(h) provides details regarding Florida's adoption of the applicability provisions, compliance times, emission guidelines, operational standards, test methods, compliance provisions, monitoring requirements, reporting guidelines, recordkeeping guidelines, specifications for active landfill gas collection systems and definitions contained in EPA's emission guidelines for existing municipal solid waste landfills (40 CFR part 60, subpart Cf). EPA has made, and will continue to make, these materials generally available through the docket for this action, EPA–R04–OAR–2021–0370, at *https://www.regulations.gov* and at EPA Region 4 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because this action is not significant 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, this proposed approval of Florida's State plan submittal for existing MSW landfills does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the State plan is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 62

Environmental protection, Air pollution control, Landfills, Incorporation by reference, Intergovernmental relations, Methane, Ozone, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: October 13, 2021.

John Blevins,

Acting Regional Administrator, Region 4.

[FR Doc. 2021–22914 Filed 10–26–21; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

48 CFR Parts 1426, 1452 and 1480

[DOI–2019–0012; 190D0102DM DS62500000 DLSN00000.000000 DX62501]

RIN 1090–AB21

Acquisition Regulations; Buy Indian Act; Procedures for Contracting

AGENCY: Assistant Secretary for Policy, Management and Budget, Interior.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of the Interior proposes to revise regulations implementing the Buy Indian Act, which provides the Department with authority to set aside procurement contracts for Indian-owned and controlled businesses. These revisions would eliminate barriers to Indian Economic Enterprises from competing on certain construction contracts, expand Indian Economic Enterprises' ability to subcontract construction work consistent with other socio-economic set-aside programs, and give greater preference to Indian Economic Enterprises when a deviation from the Buy Indian Act is necessary, among other updates.

DATES: Comments must be received on or before December 27, 2021. Consultation sessions with Tribes and Alaska Native corporations will be held on Wednesday, December 1, 2021, 2 p.m. to 4 p.m. ET.

ADDRESSES: You may submit comments on the rulemaking on Docket Number DOI–2019–0012 through the Federal eRulemaking Portal at *https://www.regulations.gov.* Please use Regulation Identifier Number (RIN) 1090–AB21 in your message. Follow the instructions on the website for submitting comments.

FOR FURTHER INFORMATION CONTACT: Mr. Christopher Bell, Senior Small Business Specialist, Office of Small and Disadvantaged Small Business, Department of the Interior, 1849 C Street NW, Mail Stop 4214 MIB, Washington, DC 20240; telephone (202) 208–3458 or email *christopher_bell@ios.doi.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Department of the Interior Acquisition Regulations (DIAR) are in title 48, chapter 14 of the Code of Federal Regulations (48 CFR parts 1401–1499) and include regulations implementing the Buy Indian Act (25 U.S.C. 47, as amended). The Department recently reviewed the DIAR consistent with Executive Order (E.O.) 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.* The Department has identified various aspects of parts 1426, 1452, and 1480 that are barriers to equal opportunity for Indians and Indian Tribes in the Department of the Interior (DOI) procurement process. These barriers inhibit job creation, are ineffective at promoting maximum economic development in Indian Country, and limit Indian country from fully participating in Interior procurements subject to the Buy Indian Act.

This rule supplements the Federal Acquisition Regulation (FAR) and revises the DIAR. For this reason, the rule is issued by the Assistant Secretary for Policy, Management and Budget and follows the numbering system established by the FAR and DIAR. The DIAR was last revised in 2013 and included the addition of a new part 1480 to address acquisitions under the Buy Indian Act. *See* 78 FR 34266 (June 7, 2013).

II. Description of Changes

This rule proposes to revise the DIAR in the following ways, as explained below: Eliminate the restriction on Indian Economic Enterprises (IEE) from competing on ''covered'' construction contracts issued under the Buy Indian Act; expand IEEs' ability to subcontract work subject to the Buy Indian Act consistent with other government socio-economic set-aside programs; give greater preference to IEEs; update the process and thresholds for deviations; and clarify applicability.

A. Elimination of Restriction for ''Covered'' Construction Contracts

Interior's review of DIAR parts 1426, 1480, and 1452 identified changes in law that affect how Interior applies the *Andrus* v. *Glover Construction Co.* Supreme Court decision, 446 U.S. 608 (1980). The case has underpinned the current language of the DIAR part 1480, which restricts IEE set-asides to ''covered'' construction. Interior has determined that the underlying law upon which the case was decided has significantly changed since the case was decided in 1980. The decision references 41 U.S.C. 252, which was amended by The Deficit Reduction Act of 1984 (Pub. L. 98–369) and moved to 41 U.S.C. 253. Interior has reviewed 41 U.S.C. 253 as currently codified (and now reclassified to 41 U.S.C. 3301 *et seq.* per Pub. L. 111–315) and has determined that the ''covered'' construction language in the regulation is no longer required by law. Interior has removed all references to ''covered'' construction throughout the regulation. Removal of this language will allow for the set-aside of construction contracts to IEEs.

B. Expansion of Indian Economic Enterprises' Ability To Subcontract

Since Interior proposes to remove references to ''covered'' construction and allow IEEs to compete for all construction contracts, Interior has identified restrictions on IEEs that exceed restrictions in other government socio-economic set-aside programs. Currently, 48 CFR 1452.280–3 restricts the ability of IEEs from subcontracting more than 50% of the work to firms other than IEEs. This rule does not change the 50% subcontract limitation for supplies and services. However, the 50% limitation is currently not consistent with FAR clause 52.219–14 Limitation on Subcontracting which has different limitations for construction awards. This rule ensures that the 48 CFR 1452.280–3 clause is consistent with the FAR 52.219–14 clause. The change will allow IEEs to subcontract up to 75% for construction by special trade contractors and 85% for general construction. Consistency with FAR clause 52.219–14 ensures equal treatment of IEEs in Federal procurement and removes subcontracting barriers for IEEs.

C. Preference for Indian Small Business Economic Enterprises

The proposed rule revises 48 CFR 1480.4 to clarify and simplify the preferences granted to IEEs under the Buy Indian Act. The current language of section 1480.403(b) directs Contracting Officers (CO) to solicit purchases as an unrestricted small business set-aside open to non-ISBEE firms when the CO determines two or more Indian Small Business Economic Enterprises (ISBEE) would not provide competitive offers and the CO has an approved deviation. The proposed rule would delete existing language, because it has been determined to not be fully compliant with the Buy Indian Act.

The revised section 1480.401(c) adds language that the CO will give priority to ISBEEs for all purchases subject to the Buy Indian Act. The current

language of 1480.4 only gives preference to ISBEEs when the purchase is commercial or a simplified acquisition. Section 1480.401(d) adds language that if a CO determines that there is not a reasonable expectation of obtaining competitive offers, then the CO will give priority to IEEs. The updated language would also allow sole source awards to an ISBEE or IEE authorized under the FAR to be compliant with the Buy Indian Act.

D. Updates to Thresholds and Process for Deviations

Interior has determined the existing deviation process at 48 CFR 1480.403 to be burdensome in implementation and not fully compliant with the Buy Indian Act. The proposed rule clarifies the deviation process by identifying acquisitions that do not require a deviation and streamlining the actions taken after a deviation is approved. As proposed at section 1480.403(b), if a contract follows the requirements of FAR 6.3 or is subject to a previously approved deviation, the contract no longer requires an approved deviation. As proposed at section 1480.403(f), acquisitions made under an authorized deviation from the Buy Indian Act must follow the FAR and DIAR unless specified otherwise.

Other changes to the deviation process include:

- Adding section 1480.403(a) which ensures sole source awards made to IEEs or ISBEEs comply with the requirements of the Buy Indian Act and do not require a deviation;
- Adding COs as authorized to approve deviations under $25,000 at section 1480.403(c);
- Updating deviation approval thresholds in section 1480.403(c) from $550,000 to $700,000 to be consistent with changes in FAR 6.304; and
- Adding ''one level above the CO'' to officials authorized to approve deviations for actions exceeding $25,000 but not exceeding $700,000 in section 1480.403(c).

E. Inapplicability to ISDEAA Contracts

The proposed rule removes language referencing the Indian Self Determination and Education Assistance Act (ISDEAA) (Pub. L. 93–638) in 48 CFR 1426.70 and 1480.504(b). Contracts issued under the authority of ISDEAA are not covered under the FAR and are codified separately under 25 CFR part 900. Since the contracts under ISDEAA are not a procurement action subject to the FAR and are separately codified, there is no need to address contracts subject to ISDEAA in the DIAR. This rule specifically removes 48 CFR 1426.70, 1452.226–70, 1452.226–71, and 1480.504(b) in their entirety and removes all other references to those sections.

III. Tribal Consultation

The Office of the Assistant Secretary—Indian Affairs will be hosting Tribal consultation and Alaska Native corporation consultation meetings addressing this rule on Wednesday, December 1, 2 p.m.–4 p.m. ET. Please register in advance at: *https://www.zoomgov.com/meeting/register/vJItduyhrDsqEqErEEGizgMi5rooyGrj12s.*

IV. Development of the Proposed Rule

This proposed rule has been developed with consideration of prior rule-making comments and from experience in implementing existing regulations. Prior comments on previous proposed rules were published in the **Federal Register** and may be viewed there. Previous proposed rules were published on October 8, 1982 (47 FR 44678), November 15, 1984 (49 FR 45187), June 30, 1988 (53 FR 24738), September 12, 1991 (56 FR 46468), and July 26, 2012 (77 FR 43782).

V. Required Determinations

1. *Regulatory Planning and Review (Executive Orders 12866 and 13563).* Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. OIRA has determined that this proposed rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public, where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

2. *Regulatory Flexibility Act.* The Secretary certifies that the adoption of this proposed rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Therefore, under 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

3. *Small Business Regulatory Enforcement Fairness Act.* This proposed rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2)). This rule does not have an annual effect on the economy of $100 million or more. This proposed rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. This proposed rule does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

4. *Unfunded Mandates Reform Act.* This proposed rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments, or the private sector nor does the rule impose requirements on State, local, or Tribal governments. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

5. *Takings (E.O. 12630).* This proposed rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630. A takings implication assessment is not required.

6. *Federalism (E.O. 13132).* Under the criteria in section 1 of E.O. 13132, this proposed rule does not have sufficient Federalism implications to warrant the preparation of a federalism summary impact statement. It would not substantially and directly affect the relationship between the Federal and State governments. A federalism summary impact statement is not required.

7. *Civil Justice Reform (E.O. 12988).* This proposed rule complies with the requirements of E.O. 12988. Specifically, this rule (1) meets the criteria of section 3(a) of this E.O. requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and (2) meets the criteria of section 3(b)(2) of this E.O. requiring that all regulations be written in clear language and contain clear legal standards.

8. *Consultation with Indian Tribes (E.O. 13175).* The Department of the

Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in E.O. 13175 and have determined there may be substantial direct effects on federally recognized Indian Tribes that will result from this rulemaking. The Department has invited Tribes by letter to consult on these proposed regulations and will hold consultation sessions with Tribes on October 15 and 20, 2021, 1 p.m. to 3 p.m. by webinar.

9. *Paperwork Reduction Act,* 44 U.S.C. 3501, *et seq.* This proposed rule requires offerors to certify whether they met the definition of an ''Indian Economic Enterprise''. These statements are considered simple representations that an offeror submitted to support its claim for eligibility to participate in contract awards under the authority of the Buy Indian Act (25 U.S.C. 47, as amended). Because these statements are a simple certification or acknowledgment related to a transaction, they do not qualify as a collection of information under the Paperwork Reduction Act. *See* 5 CFR 1320.3(h).

10. *National Environmental Policy Act.* This proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because the rule is covered by the categorical exclusion listed in 43 CFR 46.210(c). We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

11. *Effects on the Energy Supply (E.O. 13211).* This proposed rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

12. *Clarity of this Regulation.* We are required by Executive Orders 12866 (section 1(b)(12)), and 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must: (1) Be logically organized; (2) use the active voice to address readers directly; (3) use common, everyday words and clear language rather *than* jargon; (4) be divided into short sections and sentences; and (5) use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **FOR FURTHER INFORMATION CONTACT** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the number of section or paragraphs that you find unclear, which section or sentences are too long, the sections where you feel lists or tables would be useful, etc.

13. *Public availability of comments.* Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. When submitting comments please identify what topic your comment covers from the following list:

(1) Covered Construction

(2) Subcontract Limitations

(3) Buy Indian Act Deviations

(4) Other Topic Related to the Proposed Rule

This action is taken pursuant to delegated authority.

List of Subjects in 48 CFR Parts 1426, 1452, and 1480

Government procurement, Indians, Indians—business and finance, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, the DOI proposes to amend chapter 14 of title 48 CFR as follows:

PART 1426—OTHER SOCIOECONOMIC PROGRAMS

■ 1. The authority citation for part 1426 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

Subpart 1426.70—[Removed and Reserved]

■ 2. Remove and reserve subpart 1426.70.

PART 1452—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. The authority citation for part 1452 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

Subpart 1452.2—Text of Provisions and Clauses

1452.226–70 and 1452.226–71 [Removed and Reserved]

■ 4. Remove and reserve sections 1452.226–70 and 1452.226–71.

■ 5. Revise sections 1452.280–1 through 1452.280–4 to read as follows:

1452.280–1 Notice of Indian Small Business Economic Enterprise set-aside.

As prescribed in 1480.503(e)(1), and in lieu of the requirements of FAR 19.508, insert the following provision in each written solicitation of offers to provide supplies, general services, A–E services, or construction. If the solicitation is oral, information substantially identical to that contained in the provision must be given to potential offerors.

Notice of Indian Small Business Economic Enterprise Set-Aside (FEB 2021)

Under the Buy Indian Act, 25 U.S.C. 47, offers are solicited only from Indian Economic Enterprises (Subpart 1480.8) that are also small business concerns. Any acquisition resulting from this solicitation will be from such a concern. Offers received from enterprises that are not both Indian Economic Enterprises and small business concerns will not be considered and will be rejected.

(End of provision)

1452.280–2 Notice of Indian Economic Enterprise set-aside.

As prescribed in 1480.503(e)(2), insert the following clause in solicitations and contracts involving Indian Economic Enterprise set-asides. If the solicitation is oral, information substantially identical to that contained in the provision must be given to potential offerors.

Notice of Indian Economic Enterprise Set-Aside (FEB 2021)

(a) Definitions as used in this clause.

Alaska Native Claims Settlement Act (ANCSA) means Public Law 92–203 (December 18, 1971), 85 Stat. 688, codified at 43 U.S.C. 1601–1629h.

Indian means a person who is an enrolled member of a Federally Recognized Indian Tribe.

Indian Economic Enterprise means any business activity owned by one or more Indians or Federally Recognized Indian Tribes that is established for the purpose of profit, provided that:

(i) The combined Indian or Federally Recognized Indian Tribe ownership of the enterprise shall constitute not less than 51 percent;

(ii) The Indians or Federally Recognized Indian Tribes shall, together, receive at least 51 percent of the earnings from the contract; and

(iii) The management and daily business operations of an Indian Economic Enterprise must be controlled by one or more individuals who are Indians. To ensure actual control over the enterprise, the individuals must possess requisite management or technical capabilities directly related to the primary industry in which the enterprise conducts business.

The enterprise must meet the requirements of (i) through (iii) throughout the following time periods:

(1) At the time an offer is made in response to a written solicitation;

(2) At the time of contract award; and,

(3) During the full term of the contract.

Federally Recognized Indian Tribe means an Indian tribe, band, nation, or other Federally recognized group or community on the List of Federally Recognized Tribes. This definition includes any Alaska Native regional or village corporation under the Alaska Native Claims Settlement Act (ANCSA).

List of Federally Recognized Tribes means an entity appearing on the United States Department of the Interior's List of federally recognized Indian tribes published annually in the **Federal Register** pursuant to Section 104 of Public Law 103–454, codified at 25 U.S.C. 5131.

Representation means the positive statement by an enterprise of its eligibility for preferential consideration and participation for acquisitions conducted under the Buy Indian Act, 25 U.S.C. 47, in accordance with the procedures in Subpart 1480.8.

(b) General.

(1) Under the Buy Indian Act, offers are solicited only from Indian Economic Enterprises.

(2) The Contracting Officer (CO) will reject all offers received from ineligible enterprises.

(3) Any award resulting from this solicitation will be made to an Indian Economic Enterprise, as defined in paragraph (a) of this clause.

(c) Required Submissions. In response to this solicitation, an offeror must also provide the following:

(1) A description of the required percentage of the work/costs to be provided by the offeror over the contract term as required by section 1452.280–3, Subcontracting Limitations clause; and

(2) Qualifications of the key personnel (if any) that will be assigned to the contract.

(d) Required Assurance. The offeror must provide written assurance to the CO that the offeror is and will remain in compliance with the requirements of this clause. It must do this before the CO awards the Buy Indian contract and upon successful and timely completion of the contract, but before the CO accepts the work or product.

(e) Non-responsiveness. Failure to provide the information required by paragraphs (c) and (d) of this clause may cause the CO to find an offer non-responsive and reject it.

(f) Eligibility.

(1) Participation in the Mentor-Protégé Program established under section 831 of the National Defense Authorization Act for Fiscal Year 1991 (25 U.S.C. 47 note) does not render an Indian Economic Enterprise ineligible for contracts awarded under the Buy Indian Act.

(2) If a contractor no longer meets the definition of an Indian Economic Enterprise after award, the contractor must notify the CO immediately and in writing. The notification must include full disclosure of circumstances causing the contractor to lose eligibility status and a description of any actions that the contractor will take to regain eligibility. Failure to give the CO immediate written notification means that:

(i) The economic enterprise may be declared ineligible for future contract awards under this part; and

(ii) The CO may consider termination for default if it is in the best interest of the government.

(End of clause)

1452.280–3 Indian Economic Enterprise subcontracting limitations.

A contractor shall not subcontract more than the subcontract limitations specified under FAR 52.219–14 to other than responsible Indian Economic Enterprises when receiving an award under the Buy Indian Act. For this purpose, work to be performed does not include the provision of materials, supplies, or equipment. As prescribed in 1480.503(e)(3), insert the following clause in each written solicitation or contract to provide supplies, general services, A–E services, or construction:

Indian Economic Enterprise Subcontracting Limitations (FEB 2021)

(a) Definitions as used in this clause.

(1) *Concern* means any business entity organized for profit (even if its ownership is in the hands of a nonprofit entity) with a place of business located in the United States or its outlying areas and that makes a significant contribution to the U.S. economy through payment of taxes and/or use of American products, materials and/or labor, etc. It includes but is not limited to an individual, partnership, corporation, joint venture, association, or cooperative. For the purpose of making affiliation findings (see FAR 19.101), it includes any business entity, whether or not it is organized for profit or located in the United States or its outlying areas.

(2) *Subcontract* means any agreement (other than one involving an employer-employee relationship) entered into by a government prime contractor or subcontractor calling for supplies and/or services required for performance of the contract, contract modification, or subcontract.

(3) *Subcontractor* means a concern to which a contractor subcontracts any work under the contract. It includes subcontractors at any tier who perform work on the contract.

(b) Required Percentages of work by the concern. The contractor must comply with FAR 52.219–14 Limitations on Subcontracting clause in allocating what percentage of work to subcontract. The contractor shall not subcontract work exceeding the subcontract limitations in FAR 52.219–14 to a concern other than a responsible Indian Economic Enterprise.

(c) Any work that an IEE subcontractor does not perform with its own employees shall be considered subcontracted work for the purpose of calculating percentages of subcontract work in accordance with FAR 52.219–14 Limitations on Subcontracting.

(d) Cooperation. The contractor must:

(1) Carry out the requirements of this clause to the fullest extent; and

(2) Cooperate in any study or survey that the CO, Indian Affairs, or its agents may conduct to verify the contractor's compliance with this clause.

(e) Incorporation in Subcontracts. The contractor must incorporate the substance of this clause, including this paragraph (e), in all subcontracts for supplies, general services, A–E services, and construction awarded under this contract.

1452.280–4 Indian Economic Enterprise representation.

As prescribed in 1480.503(e)(4), insert the following provision in each written solicitation for supplies, services, A–E, or construction:

Indian Economic Enterprise Representation (FEB 2021)

(a) The offeror represents as part of its offer that it [ ] does [ ] does not meet the definition of Indian Economic Enterprise (IEE) as defined in DIAR 1480.201 and that it intends to meet the definition of an IEE throughout the performance of the contract. The offeror must notify the contracting officer immediately in writing if there is any ownership change affecting compliance with this representation.

(b) Any false or misleading information submitted by an enterprise when submitting an offer in consideration for an award set aside under the Buy Indian Act is a violation of the law punishable under 18 U.S.C. 1001. False claims submitted as part of contract performance are subject to the penalties enumerated in 31 U.S.C. 3729 to 3731 and 18 U.S.C. 287.

(End of provision)

■ 6. Under the authority of 25 U.S.C. 9, revise subchapter H to read as follows:

Subchapter H—Buy Indian Act

PART 1480—ACQUISITIONS UNDER THE BUY INDIAN ACT

Subpart 1480.1—General

1480.101 Scope of part.
1480.102 Buy Indian Act acquisition regulations.

Subpart 1480.2—Definitions

1480.201 Definitions.

Subpart 1480.3—Applicability

1480.301 Scope of part.
1480.302 Restrictions on the use of the Buy Indian Act.

Subpart 1480.4—Policy

1480.401 Requirement to give preference to Indian Economic Enterprises.
1480.402 Delegations and responsibility.
1480.403 Deviations.

Subpart 1480.5—Procedures

1480.501 General.
1480.502 [Reserved]
1480.503 Procedures for acquisitions under the Buy Indian Act.
1480.504 Other circumstances for use of other than full and open competition.
1480.505 Debarment and suspension.

Subpart 1480.6—Contract Requirements

1480.601 Subcontracting limitations.
1480.602 Performance and payment bonds.

Subpart 1480.7—[Reserved]

Subpart 1480.8—Representation by an Indian Economic Enterprise Offeror

1480.801 General.
1480.802 Representation provision.
1480.803 Representation process.

Subpart 1480.9—Challenges to Representation

1480.901 General.
1480.902 Receipt of challenge.
1480.903 Award in the face of challenge.
1480.904 Challenge not timely.

Authority: 25 U.S.C. 47, as amended, 41 U.S.C. 253(c)(5), and 5 U.S.C. 301.

PART 1480—ACQUISITIONS UNDER THE BUY INDIAN ACT

Subpart 1480.1—General

1480.101 Scope of part.

This part implements policies and procedures for the procurement of supplies, general services, architect and engineering (A&E) services, or construction while giving preference to Indian Economic Enterprises under authority of the Buy Indian Act (25 U.S.C. 47).

1480.102 Buy Indian Act acquisition regulations.

(a) This part supplements Federal Acquisition Regulation (FAR) and Department of the Interior Acquisition Regulation (DIAR) requirements in this chapter to meet the needs of the Department of Interior in implementing the Buy Indian Act.

(b) This part is under the direct oversight and control of the Chief Financial Officer, within the Office of the Assistant Secretary—Indian Affairs, Department of the Interior (CFO). The CFO is responsible for issuing and implementing this part.

(c) Acquisitions conducted under this part are subject to all applicable requirements of the FAR and DIAR, as well as internal policies, procedures, or instructions issued by Indian Affairs. After the FAR, this part would take precedence over any inconsistent Indian Affairs policies, procedures, or instructions.

Subpart 1480.2—Definitions

1480.201 Definitions.

Alaska Native Claims Settlement Act (ANCSA) means Public Law 92–203 (December 18, 1971), 85 Stat. 688, codified at 43 U.S.C. 1601–1629h.

Buy Indian Act means section 23 of the Act of June 25, 1910, codified at 25 U.S.C. 47.

Contracting Officer (CO) means a person with the authority to enter into, administer, or terminate contracts and make related determinations and findings on behalf of the U.S. Government.

Deviation means an exception to the requirement to use the Buy Indian Act in fulfilling an acquisition requirement subject to the Buy Indian Act.

Fair market price means a price based on reasonable costs under normal competitive conditions and not on lowest possible cost, as determined in accordance with FAR 15.404–1(b).

Federally Recognized Indian Tribe means an Indian tribe, band, nation, or other Federally recognized group or community on the List of Federally Recognized Tribes. This definition includes any Alaska Native regional or village corporation under the Alaska Native Claims Settlement Act (ANSCA).

Governing Body means the recognized entity empowered to exercise governmental authority over a Federally Recognized Indian Tribe.

Indian means a person who is an enrolled member of a Federally Recognized Indian Tribe.

Indian Affairs (IA) means all bureaus and offices under the Assistant Secretary—Indian Affairs.

Indian Economic Enterprise (IEE) means any business activity owned by one or more Indians or Federally Recognized Indian Tribes provided that:

(1) The combined Indian or Federally Recognized Indian Tribe ownership of the enterprise constitutes not less than 51 percent;

(2) The Indians or Federally Recognized Indian Tribes must, together, receive at least 51 percent of the earnings from the contract; and

(3) The management and daily business operations of an enterprise must be controlled by one or more individuals who are Indians. The Indian individual(s) must possess requisite management or technical capabilities directly related to the primary industry in which the enterprise conducts business.

Indian Small Business Economic Enterprise (ISBEE) means an IEE that is also a small business concern established in accordance with the criteria and size standards of 13 CFR part 121.

Interested Party means an IEE that is an actual or prospective offeror whose direct economic interest would be affected by the proposed or actual award of a particular contract set-aside pursuant the Buy Indian Act.

List of Federally Recognized Tribes means an entity appearing on the United States Department of the Interior's List of federally recognized Indian tribes published annually in the **Federal Register** pursuant to Section 104 of Public Law 103–454, codified at 25 U.S.C. 5131.

Subpart 1480.3—Applicability

1480.301 Scope of part.

Except as provided in 1480.302, this part applies to all acquisitions, including simplified acquisitions, made by IA and by any other bureau or office of the Department of the Interior conducting acquisitions on behalf of IA or otherwise delegated the authority to conduct acquisitions under the Buy Indian Act.

1480.302 Restrictions on the use of the Buy Indian Act.

IA must not use the authority of the Buy Indian Act and the procedures contained in this part to award intergovernmental contracts to Tribal organizations to plan, operate, or administer authorized IA programs (or parts thereof) that are within the scope and intent of the Indian Self-Determination and Education Assistance Act (ISDEAA) (Pub. L. 93–638). IA must use the Buy Indian Act solely to award procurement contracts to IEEs. Contracts subject to ISDEAA must follow 25 CFR part 900.

Subpart 1480.4—Policy

1480.401 Requirement to give preference to Indian Economic Enterprises.

(a) IA must use the negotiation authority of the Buy Indian Act to give preference to Indians or Federally Recognized Tribes whenever the use of that authority is practicable. The Buy Indian Act provides that so far as may be practicable, Indian labor shall be employed, and purchases of the products (including, but not limited to printing, notwithstanding any other law) of Indian industry may be made in open market at the discretion of the Secretary of the Interior. Thus, IA may use the Buy Indian Act to give preference to IEEs through set-asides when acquiring supplies, general services, A&E services, or construction to meet IA needs and requirements. All other FAR and DIAR requirements that

do not conflict with this part, such as requirements applicable to the acquisition of A&E and construction services, remain applicable.

(b) The Buy Indian Act does not apply when a supply requirement can be met by existing inventories of the requiring agency or excess from other agencies.

(c) The CO will give priority to ISBEEs for all purchases, regardless of dollar value. COs when prioritizing ISBEEs may consider either:

(1) A set-aside for ISBEEs; or

(2) A sole source award to an ISBEE, as authorized under the FAR.

(d) If the CO determines after market research that there is no reasonable expectation of obtaining offers that will be competitive in terms of market price, quality, and delivery, the CO may consider either:

(1) A set-aside for IEEs; or

(2) A sole source award to an IEE, as authorized under the FAR.

(e) If the CO determines after market research that there is no reasonable expectation of obtaining offers that will be competitive in terms of market price, quality, and delivery from ISBEEs or IEEs, then the CO must follow the Deviation process under 1480.403.

(f) When only one offer is received from a responsible IEE in response to an acquisition set-aside or direct negotiation under paragraph (c)(1) or (d)(1) of this section:

(1) If the offer is not at a reasonable and fair market price, then the CO may negotiate with that enterprise for a reasonable and fair market price.

(2) If the offer is at a reasonable and fair market price, then the CO must:

(i) Make an award to that enterprise;

(ii) Document the reason only one offer was considered; and

(iii) Initiate action to increase competition in future solicitations.

(g) If the offers received from one or more responsible IEEs in response to an acquisition set-aside under paragraph (c)(1) or (d)(1) of this section are not reasonable or otherwise unacceptable, then the CO must follow the deviation process under 1480.403. The CO must document in the deviation determination the reasons why the IEE offeror(s) were not reasonable or otherwise unacceptable.

(1) If a deviation determination is approved, the CO must cancel the set-aside solicitation and inform all offerors in writing.

(2) When the solicitation of the same requirement is posted, the CO must inform all previous offerors in writing of the solicitation number.

1480.402 Delegations and responsibility.

(a) The Secretary has delegated authority under the Buy Indian Act to the Assistant Secretary—Indian Affairs. IA exercises this authority in support of its mission and program activities and as a means of fostering Indian employment and economic development.

(b) The Secretary may delegate authority under the Buy Indian Act to a bureau or office within the Department of the Interior other than IA.

(c) The Chief Financial Officer of The Office of the Assistant Secretary—Indian Affairs is responsible for ensuring that all IA acquisitions under the Buy Indian Act comply with the requirements of this part.

1480.403 Deviations.

There are certain instances where the application of the Buy Indian Act to an acquisition may not be appropriate. In these instances, the Contracting Officer must detail the reasons in writing and make a deviation determination.

(a) Sole source acquisitions awarded to an ISBEE or IEE under 1480.401(c)(2) or (d)(2) do not require a deviation determination and comply with the requirements of the Buy Indian Act.

(b) Some acquisitions by their very nature would make such a written determination unnecessary. The following acquisitions do not require a written deviation from the requirements of the Buy Indian Act:

(1) Any sole source acquisition justified and approved in accordance with FAR 6.3 and DIAR 1406.3 constitutes an authorized deviation from the requirements of the Buy Indian Act.

(2) Any order or call placed against an indefinite delivery vehicle that already has an approved deviation from the requirements of the Buy Indian Act.

(c) Deviation determinations are required for all other acquisitions where the Buy Indian Act is applicable and must be approved as follows:

TABLE 1 TO PARAGRAPH (c)

For a proposed contract action	The following official may authorize a deviation
Up to $25,000	CO.
Exceeding $25,000 but not exceeding $700,000	One level above the CO or Chief of the Contracting Office (CCO) (or the IA Bureau Procurement Chief, absent a CCO).
Exceeding $700,000 but not exceeding $13.5 million.	IA Competition Advocate.
Exceeding $13.5 million but not exceeding $57 million.	The head of the procuring activity or a designee who is a civilian serving in a position in a grade above GS–15 under the General Schedule or in a comparable or higher position under another schedule.
Exceeding $57 million	Department of the Interior Senior Procurement Executive.

(d) Deviations may be authorized prior to issuing the solicitation when the CO makes the following determinations and takes the following actions:

(1) The CO determines after market research that there is no reasonable expectation of obtaining offers that will be competitive in terms of market price, quality, and delivery from two or more responsible ISBEE, IEEs, or direct negotiation with an IEE that is a certified 8a business.

(2) The deviation determination is authorized by the official listed at 1480.403(c) for the applicable contract action

(e) If a deviation determination has been approved, the CO must follow the FAR and DIAR unless specified otherwise.

(f) Acquisitions made under an authorized deviation from the requirements of the Buy Indian Act must be made in conformance with the order of precedence required by FAR 8.002.

Subpart 1480.5—Procedures

1480.501 General.

All acquisitions made in accordance with this part, including simplified or commercial item acquisitions, must conform to all applicable requirements of the FAR and DIAR.

1480.502 [Reserved]

1480.503 Procedures for acquisitions under the Buy Indian Act.

(a) Commercial items or simplified acquisitions under this section must

conform to the competition and price reasonableness documentation requirements of FAR 12.209 for commercial item acquisitions and FAR 13.106 for simplified acquisitions.

(b) When acquiring construction services, solicit proposals and evaluate potential contractors in accordance with FAR part 36 and DIAR subpart 1436.2.

(c) When acquiring A&E services, solicit proposals and evaluate potential contractors in accordance with FAR part 36 and DIAR subpart 1436.6.

(d) This paragraph (d) applies to solicitations that are not restricted to participation of IEEs.

(1) If an interested IEE is identified after a solicitation has been issued, but before the date established for receipt of offers, the contracting office must provide a copy of the solicitation to this enterprise. In this case, the CO:

(i) Will not give preference under the Buy Indian Act to the IEE; and

(ii) May extend the date for receipt of offers when practical.

(2) If more than one IEE is identified subsequent to the solicitation, but prior to the date established for receipt of offers, the CO may cancel the solicitation and re-compete it as an IEE set-aside.

(e)(1) Insert the clause at 1452.280–1, Notice of Indian Small Business Economic Enterprise set-aside, in accordance with 1480.401(c).

(2) Insert the clause at 1452.280–2, Notice of Indian Economic Enterprise set-aside, in accordance with 1480.401(d).

(3) Insert the clause at 1452.280–3, Indian Economic Enterprise subcontracting limitations, in accordance with 1480.601(b).

(4) Insert the clause at 1452.280–4, Indian Economic Enterprise representation, in accordance with 1480.801(a).

1480.504 Other circumstances for use of other than full and open competition.

(a) Other circumstances may exist where the use of an IEE set-aside in accordance with 1480.401(a) and FAR 6.302–5 is not feasible. In such situations, the requirements of FAR subparts 6.3 and 13.5 and DIAR subpart 1406.3 apply in justifying the use of the appropriate authority for other than full and open competition.

(b) Except as provided in FAR 5.202, all proposed acquisition actions must first be publicized in accordance with the requirements of FAR 5.2 and DIAR 1405.2.

(c) Justifications for use of other than full and open competition in accordance with this section must be approved in accordance with DIAR part 1406. These approvals are required for a proposed contract or for an out of scope modification to an existing contract.

1480.505 Debarment and suspension.

A misrepresentation by an offeror of its status as an IEE, failure to notify the CO of any change in IEE status that would make the contractor ineligible as an IEE, or any violation of the regulations in this part by an offeror or an awardee may be cause for debarment or suspension in accordance with FAR 9.406 and 9.407 and DIAR 1409.406 and 1409.407. IA must refer recommendations for debarment or suspension to the Director, Office of Acquisition and Property Management, Department of the Interior, in accordance with DIAR 1409.406 and 1409.407, through the Bureau Procurement Chief with the concurrence of the head of the contracting activity.

Subpart 1480.6—Contract Requirements

1480.601 Subcontracting limitations.

(a) In contracts awarded under the Buy Indian Act and this part, the CO must insert the clause FAR 52.219–14, Limitations on Subcontracting.

(b) The CO must also insert the clause at 1452.280–3, Indian Economic Enterprise subcontracting limitations, in all awards to ISBEEs and IEEs pursuant this part.

1480.602 Performance and payment bonds.

Solicitations requiring performance and payment bonds must conform to FAR part 28 and authorize use of any of the types of security acceptable in accordance with FAR subpart 28.2 or section 11 of Public Law 98–449, the Indian Financing Act Amendments of 1984. In accordance with FAR 28.102 and 25 U.S.C. 47a, the CO may accept alternative forms of security in lieu of performance and payment bonds if a determination is made that such forms of security provide the Government with adequate security for performance and payment.

Subpart 1480.7—[Reserved]

Subpart 1480.8—Representation by an Indian Economic Enterprise Offeror

1480.801 General.

(a) The CO must insert the provision at 1452.280–4, Indian Economic Enterprise representation, in all solicitations regardless of dollar value solicited under 1480.401(c) or (d) and in accordance with this part.

(b) To be considered for an award under 1480.401(c) or (d), an offeror must certify that it meets the definition of ''Indian Economic Enterprise'' (as defined in 1480.201) in response to a specific solicitation set-aside in accordance with the Buy Indian Act and this part; and

(c) The enterprise must meet the definition of ''Indian Economic Enterprise'' throughout the following time periods:

(1) At the time an offer is made in response to a solicitation;

(2) At the time of contract award; and

(3) During the full term of the contract.

(d) If, after award, a contractor no longer meets the eligibility requirements as it has certified and as set forth in this section, then the contractor must provide the CO with written notification within 3 days of its failure to comply with the eligibility requirements. The notification must include:

(1) Full disclosure of circumstances causing the contractor to lose eligibility status; and

(2) A description of actions, if any, that must be taken to regain eligibility.

(e) Failure to provide written notification required by paragraph (d) of this section means that:

(1) The economic enterprise may be declared ineligible for future contract awards under this part; and

(2) The CO may consider termination for default if it is determined to be in the best interest of the Government.

(f) A CO will investigate the representation if an interested party challenges the IEE representation or if the CO has any other reason to question the representation. The CO may ask the offeror for more information to substantiate the representation. Challenges of and questions concerning a specific representation must be referred to the CO or CCO in accordance with subpart 1480.9.

(g) Participation in the Mentor-Protégé Program established under section 831 of the National Defense Authorization Act for Fiscal Year 1991 (25 U.S.C. 47 note) does not render an IEE ineligible for contracts awarded under the Buy Indian Act.

1480.802 Representation provision.

(a) Contracting offices must provide copies of the IEE representation to any interested parties upon written request.

(b) The submission of a Solicitation Mailing List Application by an enterprise does not remove the requirement for it to provide representation as an IEE, as required by this part, if it wishes to be considered as an offeror for a specific solicitation. COs may determine the validity of the contents of the applicant's representation.

(c) Any false or misleading information submitted by an enterprise when submitting an offer in consideration for an award set aside under the Buy Indian Act is a violation of the law punishable under 18 U.S.C. 1001. False claims submitted as part of contract performance are subject to the penalties enumerated in 31 U.S.C. 3729 to 3731 and 18 U.S.C. 287.

(d) The CO will investigate and refer to the appropriate officials all IEE misrepresentation by an offeror or failure to provide written notification of a change in IEE eligibility.

1480.803 Representation process.

(a) Only IEEs may participate in acquisitions set aside in accordance with the Buy Indian Act and this part. These procedures support responsible IEEs and prevent circumvention or abuse of the Buy Indian Act.

(b) Eligibility is based on information furnished by the enterprise to a CO in the IEE representation at DIAR 1452.280–4 in response to a specific solicitation under the Buy Indian Act

(c) The CO may ask the appropriate Regional Solicitor to review the enterprise's representation.

(d) The CO may also request the Office of the Inspector General (on Form DI–1902 as part of a normal pre-award audit) to assist in determining the eligibility of the low responsive and responsible offerors on Buy Indian Act awards.

(e) The IEE representation does not relieve the CO of the obligation for determining contractor responsibility, as required by FAR subpart 9.1.

Subpart 1480.9—Challenges to Representation

1480.901 General.

(a) The CO can accept an offeror's written representation of being an IEE (as defined in 1480.201) only when it is submitted with an offer in response to a solicitation under the Buy Indian Act. Another interested party may challenge the representation of an offeror or contractor by filing a written challenge to the applicable CO in accordance with the procedures in 1480.902.

(b) After receipt of offers, the CO may question the representation of any offeror in a specific offer by filing a formal objection with the CCO.

1480.902 Receipt of challenge.

(a) An interested party must file any challenges against an offeror's representation with the cognizant CO.

(b) The challenge must be in writing and must contain the basis for the challenge with accurate, complete, specific, and detailed evidence. The evidence must support the allegation that the offeror fails to meet the definition of ''Indian Economic Enterprise'' or ''Indian Small Business Economic Enterprise'' as defined in 1480.201 or is otherwise ineligible. The CO will dismiss any challenge that is deemed frivolous or that does not meet the conditions in this section.

(c) To be considered timely, a challenge must be received by the CO no later than 10 days after the basis of challenge is known or should have been known, whichever is earlier.

(1) A challenge may be made orally if it is confirmed in writing within the 10-day period after the basis of challenge is known or should have been known, whichever is earlier.

(2) A written challenge may be delivered by hand, telefax, telegram, email, or letter postmarked within the 10-day period after the basis of challenge is known or should have been known, whichever is earlier.

(3) A CO's challenge to a certification is always considered timely, whether filed before or after award.

(d) Upon receiving a timely challenge, the CO must:

(1) Notify the challenger of the date it was received, and that the representation of the enterprise being challenged is under consideration; and

(2) Furnish to the offeror (whose representation is being challenged) a request to provide detailed information on its eligibility by certified mail, return receipt requested or electronic mail.

(e) Within 3 days after receiving a copy of the challenge and the CO's request for detailed information, the challenged offeror must file, as specified at paragraph (d)(2) of this section, with the CO a complete statement answering the allegations in the challenge and furnish evidence to support its position on representation. If the offeror does not submit the required material within the 3 days, or another period of time granted by the CO, the CO may assume that the offeror does not intend to dispute the challenge and must not award to the challenged offeror.

(f) Within 10 days after receiving a challenge, the challenged offeror's response, and any other pertinent information, the CO must determine the representation status of the challenged offeror and notify the challenger and the challenged offeror of the decision by certified mail, return receipt requested, and make known to all parties the option to appeal the determination to the Office of Acquisition and Property Management, Department of the Interior (PAM).

(g) If the representation accompanying an offer is challenged and subsequently upheld by the PAM, the written notification of this action must state the reason(s).

1480.903 Award in the face of challenge.

(a) Award of a contract in the face of challenge only may be made on the basis of the CO's written determination that the challenged offeror's representation is valid.

(1) This determination is final unless it is appealed to the PAM, and the CO is notified of the appeal before award.

(2) If an award was made before the CO received notice of appeal, the contract is presumed to be valid.

(b) After receiving a challenge involving an offeror being considered for award, the CO must not award the contract until the CO has determined the validity of the representation. Award may be made in the face of a timely challenge when the CO determines in writing that an award must be made to protect the public interest, is urgently required, or a prompt award will otherwise be advantageous to the Government.

(c) If a timely challenge on representation is filed with the CO and received before award in response to a specific offer and solicitation, the CO must notify eligible offerors within one day that the award will be withheld. The CO also may ask eligible offerors to extend the period for acceptance of their proposals.

(d) If a challenge on representation is filed with the CO and received after award in response to a specific offer and solicitation, the CO need not suspend contract performance or terminate the awarded contract unless the CO believes that an award may be invalidated and a delay would prejudice the Government's interest. However, if contract performance is to be suspended, a mutual no cost agreement will be sought.

1480.904 Challenge not timely.

If a CO receives an untimely filed challenge of a representation, the CO must notify the challenger that the challenge cannot be considered on the instant acquisition but will be considered in any future actions. However, the CO may question at any time, before or after award, the representation of an IEE.

Rachael S. Taylor,

Principal Deputy Assistant Secretary—Policy, Management and Budget.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–HQ–ES–2019–0115; FF09E23000 FXES1111090FEDR 212]

RIN 1018–BD84

Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat

AGENCY: U.S. Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The U.S. Fish and Wildlife Service (''the Service'') proposes to rescind the final rule titled ''Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat'' that published on December 18, 2020, and became effective January 19, 2021 (''the Final Rule''). The proposed rescission, if finalized, would remove the regulations established by that rule.

DATES: We will accept comments from all interested parties until November 26, 2021. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Standard Time on this date.

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

(1) *Electronically:* Go to the Federal eRulemaking Portal: *https://www.regulations.gov.* In the Search box, enter FWS–HQ–ES–2019–0115, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on ''Comment.''

(2) *By hard copy:* Submit by U.S. mail: Public Comments Processing, Attn: FWS–HQ–ES–2019–0115; U.S. Fish and Wildlife Service, MS:JAO (PRB/3W), 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *https://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Public Comments below for more information).

FOR FURTHER INFORMATION CONTACT: Bridget Fahey, U.S. Fish and Wildlife Service, Division of Conservation and Classification, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703/358–2171. If you use a telecommunications device for the deaf, call the Federal Relay Service at 800/877–8339.

SUPPLEMENTARY INFORMATION:

Background

Title 50 of the Code of Federal Regulations (CFR) pertains to Wildlife and Fisheries. Chapter I, which consists of parts 1 through 199, includes regulations administered by the Service. The implementing regulations for the designation of critical habitat for listed species are located in 50 CFR part 424. Relevant definitions are at 50 CFR 424.02, and the standards and procedures for identifying critical habitat are at 50 CFR 424.12. These regulations are jointly administered by the Service and the National Marine Fisheries Service (NMFS) (collectively, the Services). On February 11, 2016, the Services issued a joint policy describing how they implement the authority to exclude areas from critical habitat designations (Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 81 FR 7226; ''the Policy'').

On December 18, 2020, the Service (''we'' or ''our'') amended portions of our regulations that implement section 4 of the Endangered Species Act of 1973, as amended (codified at 16 U.S.C. 1531 *et seq.*) (''the Act''). The final regulation (85 FR 82376 (''the Final Rule'')) was incorporated into 50 CFR part 17 (at § 17.90) because the rule applied solely to critical habitat designated by the U.S. Fish and Wildlife Service. The Final Rule set forth a process for implementing section 4(b)(2) of the Act, which requires us to consider the impacts of designating critical habitat and allows us to exclude particular areas following a discretionary exclusion analysis subject to certain limitations (16 U.S.C. 1533(b)(2)). The Final Rule also summarized and responded to numerous public comments that we received on the proposed rule, which was published on September 5, 2020, (85 FR 55398). That proposed rule provided the background for proposed revisions in terms of the statute, legislative history, and case law.

Section 4(b)(2) of the Act requires that the Service consider the economic impact, the impact on national security, and any other relevant impact of designating any particular areas as critical habitat. It provides that the Service then may engage in a further discretionary consideration and exclude particular areas from the designation if the benefits of exclusion outweigh the benefits of inclusion and exclusion would not result in extinction of the species. In the Final Rule, we discussed our desire to articulate clearly when and how we will undertake such an exclusion analysis under section 4(b)(2), including identifying a non-exhaustive list of categories of potential impacts for the Service to consider (85 FR at 82376; December 18, 2020).

The Final Rule revisited certain language in the preamble of the Policy, as well as certain statements in the preamble to a 2013 rule that had revised the regulations on the timing of our economic analyses at 50 CFR 424.19 (78 FR 53058, August 28, 2013) (''the 2013 Rule'')). Our goal for the Final Rule was to clarify, based on agency experience, how the Service considers impacts caused by critical habitat designations and conducts our discretionary exclusion analyses, partially in light of the Supreme Court's recent decision in *Weyerhaeuser Co.* v. *U.S. FWS,* 139 S. Ct. 361 (2018) (*Weyerhaeuser).* The Final Rule also stated that the Service's implementation of the 2016 Policy would be superseded by implementation of the regulations at 50 CFR 17.90.

Rationale for Rescission

On January 20, 2021, the President issued Executive Order 13990 (86 FR 7037; ''the E.O.''), which, among other things, required all agencies to review agency actions issued between January 20, 2017 and January 20, 2021 to determine consistency with the purposes articulated in section 1 of the E.O. A ''Fact Sheet'' supporting the E.O. set forth a non-exhaustive list of specific agency actions that agencies were required to review. One of the agency actions included on the Fact Sheet was the December 18, 2020 Final Rule. Pursuant to the direction in the E.O., we have reviewed the Final Rule to assess whether to keep the rule in place or to revise any aspects of it. Our review included evaluating the benefits or drawbacks of the rule, the necessity of the rule, its consistency with applicable case law, its inconsistency with NMFS's process for applying section 4(b)(2) of the Act, and other factors. Based on our evaluation, we propose to rescind the Final Rule. If we make a final decision to rescind the Final Rule, the 2016 Policy will no longer be superseded, and we will resume full implementation of the Policy and the regulations at 50 CFR 424.19. In proposing the specific changes to the regulations in this document and setting out the accompanying clarifying discussion in this preamble, FWS is proposing prospective standards only. Nothing in this proposed rescission is intended to require (if this rule becomes final) that

any previously finalized critical habitat designations be reevaluated on the basis of the final decision.

In the preamble to the Final Rule, we explained that, in light of the Supreme Court's decision in *Weyerhaeuser,* we needed to revisit certain language in the preambles for the 2013 Rule and the Policy that asserted that exclusion decisions are committed to agency discretion and therefore judicially unreviewable. For example, in the preamble to the 2013 Rule, the Services had cited case law that supported their conclusion that exclusions are wholly discretionary and that the discretion not to exclude an area is judicially unreviewable (78 FR 53072; August 28, 2013). The Services also stated in the preamble to the Policy that then-recent court decisions resoundingly upheld the discretionary nature of the Secretaries' consideration of whether to exclude areas from critical habitat (81 FR 7226, 7233; February 11, 2016), and that, although the Services will explain their rationale for not excluding a particular area, that decision is judicially unreviewable because it is committed to agency discretion (*id.* at 7234).

The Supreme Court's opinion in *Weyerhaeuser* rendered inaccurate prior statements regarding judicial reviewability. Although the word ''may'' in the second sentence of section 4(b)(2) indicates discretionary authority, such that the Secretary is not required to exclude areas in any particular circumstances (16 U.S.C. 1533(b)(2)), the Court in *Weyerhaeuser* held that decisions not to exclude areas may be reviewed by courts for abuse of discretion under section 706(2) of the Administrative Procedure Act (APA, 5 U.S.C. 706(2)). 139 S. Ct. at 371. In response, we stated in our December 18, 2020, Final Rule that the ruling in *Weyerhaeuser* underscored the importance of being deliberate and transparent about how the Service goes about making exclusion decisions, such that we were proposing regulations to provide that ''transparency, clarity, and certainty to the public and other stakeholders'' (85 FR 82385).

During the comment period for the proposed rule, we received numerous public comments that provided both support and opposition for many of the provisions included in the proposed rule. At that time, we considered all of the comments and decided that finalization of the Final Rule was an appropriate policy decision. In issuing the Final Rule, we concluded that the criticisms brought forth by commenters were not sufficient to change our approach in that rulemaking.

We acknowledge that we are now adopting many of those criticisms as support for rescinding the Final Rule. Upon our reconsideration, we are now changing our view of the best way to provide a balance between transparency and predictability on the one hand, and flexibility and discretion on the other. We explain below why we have concluded that this changed approach is preferable to the Final Rule. We now find that the Final Rule is problematic because it unduly constrained the Service's discretion in administering the Act, potentially limiting or undermining the Service's role as the expert agency and its ability to further the conservation of endangered and threatened species through designation of their critical habitats. Our specific rationale for why we now find that the Final Rule does not achieve its stated goals or further the conservation of species is set forth below.

First, the Final Rule potentially limits or undermines the Service's role as the expert agency responsible for administering the Act because it potentially gives undue weight to outside parties in guiding the Secretary's statutory authority to exclude areas from critical habitat designations. Through the Secretary, Congress delegated the authority to designate critical habitat for listed species to the Service. Performance of parts of these responsibilities is outlined in section 4(b)(2) of the Act and includes evaluating information about the impacts of designating particular areas as critical habitat on economic, national security, and other considerations; determining which among competing data on potential impacts is the ''best available''; comparing the impacts of designation against the benefits of designating those areas and determining the weight that each should receive in the analysis; and making exclusion decisions based on the best scientific data available. The Final Rule potentially limits the Service from fulfilling aspects of this role by giving parties other than the Service, including proponents of particular exclusions, an outsized role in determining whether and how the Secretary will conduct exclusion analyses. This undue reliance on outside, directly affected parties in certain aspects of the process interferes with the Secretary's authority to evaluate and weigh the information provided by those parties, when determining what specific areas to designate as critical habitat for a species.

Second, the Final Rule employs a rigid ruleset in all situations regardless of the specific facts as to when and how the Secretary will exercise the discretion to exclude areas from critical habitat designations. Although the preamble and response to comments in the Final Rule refers to using the best available information and based on the case-specific information to support exclusions analyses, the regulatory text mandates a rigid process for when the Secretary will enter into an exclusion analysis, how weights are assigned to impacts, and when an area is excluded. Therefore, implementing the Final Rule undermines the Service's ability to further the conservation of the species because the ruleset applies in all situations regardless of the specific facts at issue or the conservation outcomes. We now recognize that keeping the Final Rule would result in competing and potentially conflicting legal requirements when we undertake an exclusion analysis and could increase our legal vulnerability. Prior to the Final Rule, we implemented the Policy and 2013 Rule—neither of which set forth a rigid ruleset regarding the level of information needed for us to consider excluding areas, the weight we would assign to the information about impacts of designation, or any requirement to exclude areas under certain circumstances. In the Service's view, this approach achieved the balance that Congress sought when it enacted section 4(b)(2): It furthered the conservation of the species while still allowing for exclusions of particular areas when the benefits of exclusion outweighed the benefits of inclusion.

Finally, we find that the Final Rule does not accomplish the goal of providing clarity and transparency. Section 4(b)(2) requires the Service to consider relevant information provided by other Federal agencies, Tribes, States, and other potentially affected stakeholders and members of the public about the economic, national security, and other relevant impacts of critical habitat designations. This responsibility makes it particularly important that potentially affected entities and other relevant stakeholders have a clear understanding of what information is relevant to the Secretary's evaluation of impacts of critical habitat designations and of how that information fits into the exclusion process. Thus, in this context it is preferable for the Service's section 4(b)(2) processes and standards to be consistent with those of NMFS. Having different regulations from those NMFS applies (*i.e.,* 50 CFR 424.19) could result in different outcomes in analogous circumstances or for species where the Services share jurisdiction and therefore

poses a significant risk of confusing other Federal agencies, Tribes, States, other potentially affected stakeholders and members of the public, and agency staff responsible for drafting critical habitat designations. We have not identified a science- or mission-based reason for separate regulations that would outweigh that risk. Thus, we find that the previous approach—in which both agencies follow the joint implementing regulations at 50 CFR 424.19 and the Policy—provides greater clarity for the public and Service staff. The *Weyerhaeuser* decision made clear that we now need to explain decisions not to exclude areas from critical habitat. Therefore, we will always explain our decisions not to exclude, with or without the Final Rule. Although we stated in the Final Rule that *Weyerhaeuser* was, in part, its impetus, even without the Final rule, and implementing the Final policy and 50 CFR 424.19, we will always explain our decisions not to exclude. We did not issue the final rule solely because of that decision. Rather, our intent was to provide greater clarity and transparency about the analyses we undertake and explain decisions not to exclude. However, the Policy and the regulations at 50 CFR 424.19 already provided that, and we have now concluded that the Final Rule was unnecessary and that it increased confusion and decreased clarity by articulating an approach that differed from both NMFS's approach and the jointly promulgated Policy. For these reasons, the Service now concludes that rescinding the Final Rule and resuming implementation of the 2013 Rule and the Policy will better enable the Service to ensure conservation of endangered and threatened species and the ecosystems on which they depend, as mandated by the Act. In addition to this overarching rationale, we explain below our basis for rescinding each of the primary substantive provisions contained in the Final Rule: The mandate to undertake a discretionary exclusion analysis whenever a proponent of an exclusion provides credible information supporting the exclusion; the generic prescription for weighing impacts; the mandate to exclude areas from a critical habitat designation whenever the benefits of exclusion outweigh the benefits of inclusion; the treatment of Federal lands; and the enumeration of factors to consider under section 4(b)(2).

Credible Information

The Final Rule commits the Secretary to conduct a discretionary exclusion analysis whenever a proponent of an exclusion presents ''credible information'' regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for that particular area (85 FR at 82388; December 18, 2020). The preamble describes ''credible information'' as information that constitutes a ''reasonably reliable indication'' regarding the impact, and stated that, in determining what constitutes ''credible information,'' we will look at whether the proponent presents factual information in support of the claimed impact (85 FR at 82380; December 18, 2020).

We find that the ''credible information'' standard is vague and does not accomplish the stated goal of improving transparency about what information will or will not trigger an exclusion analysis, potentially resulting in inefficiencies and wasting the Service's limited resources. A requirement to always undertake an exclusion analysis when this standard is met does not accomplish its stated goal of providing transparency and clarity as to when the Service would conduct an exclusion analysis because the standard is not clear. In the Final Rule, we did not define ''meaningful impact,'' but we stated our intention for the phrase to mean only more than a de minimis impact. The Act requires us to take into consideration the best available data about the impacts of specifying particular areas as critical habitat, including information that any proponents of exclusions provide about the impacts of the designation (See 16 U.S.C. 1533(b)(2)). In addition, the Supreme Court's opinion in *Weyerhaeuser* already made clear that decisions not to exclude areas from critical habitat designation are judicially reviewable for abuse of discretion. 139 S. Ct. at 371. In light of that opinion, and regardless of the Final Rule, we must provide an explanation and support for our decisions to exclude any particular area, as well as decisions not to exclude (where a request with specific and relevant information has been made), as part of our critical habitat designations. Regardless of the Final Rule, the statutory requirement to designate critical habitat on the basis of the best scientific data available requires the Service to consider any information submitted by the public, including proponents of exclusions. Moreover, multiple court decisions have outlined standards and requirements to guide the Service's compliance with the best-scientific-data-available requirement; these court decisions provide the Service with sufficient guidance on this topic. For example, the courts have held that, to comply with the requirement to designate critical habitat on the basis of the best scientific data available, the Service cannot ignore evidence just because it falls short of scientific certainty. Additionally, courts have held that, to comply with the requirement to designate critical habitat on the basis of the best scientific data available, the Service (1) must provide substantial evidence to support its designations of critical habitat, *Otay Mesa Property* v. *U.S. DOI,* 646 F.3d 914, 916–17 (D.C. Cir. 2011) (conclusion that San Diego fairy shrimp occupied an area at the time of listing was held to be invalid because it was not supported by substantial evidence); (2) may use flawed studies or data if the agency acknowledges and explains the limitations, *In re Polar Bear ESA Listing and Section 4(d) Rule Litigation,* 709 F.3d 1, 13 (D.C. Cir. 2013) (listing of the polar bear was valid even though it relied on flawed climate models because the Service explained the methodology of the models, acknowledged their limitations, and only used the models for the limited purpose of confirming the ''general direction and magnitude'' of the population trends; but (3) may reject studies if they are not reliable, *Home Builders Ass'n of Cal.* v. *U.S. FWS,* 529 F. Supp. 2d 1110, 1121 (N.D. Cal. 2007) (listing of the California tiger salamander, after rejecting a population estimate study as not being the best scientific data available, was valid because FWS had evaluated the study and founds its methodology to be flawed to the point of not being reliable), *aff'd,* 321 Fed. Appx. 704 (9th Cir. 2009); and (4) cannot ignore information if it is in some way better than the evidence on which it relies, *Kern County Farm Bureau* v. *Allen,* 450 F.3d 1072, 1080–81 (9th Cir. 2006) (listing of the Buena Vista lake shrew was valid because the agency did not ignore three studies that were inconsistent with the final rule and instead evaluated and incorporated the studies into its analysis); (5) even if the information falls short of scientific certainty, *Alabama-Tombigbee Rivers Coal.* v. *Kempthorne,* 477 F.3d 1250, 1260 (11th Cir. 2007) (listing of Alabama sturgeon as an endangered species was valid despite taxonomic uncertainty as to whether it is a separate species from the shovelnose sturgeon; ''[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts''). The ''credible information'' provision is not necessary for improving clarity, and, to the contrary, it creates confusion by

deviating from both the statutory standard and the Service's longstanding approach and practice.

Prior to the Final Rule, under the Policy, the Service always considered requests for exclusion; in fact, in a response to a comment on the Policy, the Services stated that if a commenter provided a reasoned rationale for an exclusion, including measures undertaken to conserve species and habitat on the land at issue (such that the benefit of inclusion is reduced), the Services would consider exclusion of those lands. However, that provision retained the Secretaries' discretion to decide not to conduct exclusion analyses in appropriate circumstances. The Final Rule, on the other hand, makes a commitment to undertake exclusion analyses whenever proponents of an exclusion submit ''credible information'' of a meaningful impact. This commitment reduces the Secretary's discretion not to conduct exclusion analyses in individual circumstances, even in situations in which it is clear to the Service, in its expert judgment and experience, that the benefits of exclusions are not going to outweigh the benefits of inclusion, thereby likely leading to unnecessary and time-consuming analyses. Because Congress appropriates a finite amount of funding for completing listing and critical habitat actions to protect endangered and threatened species, any resources that the Service expends on undertaking, and then potentially defending, unnecessary exclusion analyses for one species will reduce the Service's capacity to make listing and critical habitat decisions to protect other species.

Furthermore, NMFS applies the Policy to guide the exercise of the Secretary's discretion in implementation of section 4(b)(2) of the Act. This significant difference in implementation of the same provision of the Act is likely to be confusing to other Federal agencies, Tribes, States, and other potentially affected stakeholders and members of the public, particularly in situations where fact patterns are largely similar. Implementing the Policy instead of the Final Rule would provide for a consistent approach between the Service and NMFS as to when we undertake an exclusion analysis at the request of a landowner, land manager, or other entity without compromising transparency or clarity in our implementation of section 4(b)(2) of the Act.

Assigning Weights According to Who Has the Expertise

The Final Rule (85 FR 82380) states that, for impacts outside the scope of the Service's expertise, which was narrowly defined to extend only to biological issues, the Secretary will assign weights to the benefits of inclusion or exclusion consistent with the available information from experts and parties with firsthand knowledge, unless the Secretary has knowledge or material evidence that rebuts that information. ''Impacts that are outside the scope of the Service's expertise,'' according to the Final Rule, expressly include nonbiological impacts identified by States or local governments.

After reconsidering the Final Rule, we find the provision to automatically assign weights based on the nonbiological impacts identified by entities outside the agency does not advance the conservation goals of the Act. Not only does it unduly constrain our authority and responsibility as the agency with the expert judgment in implementation of the Act, but it could also be at odds with the Act's mandate to base designations on the best scientific data available. Although the preamble and response to comments in the Final Rule addressed this concern by pointing out that we would make exclusion decisions on a case-by-case basis using the best available information, the regulatory text mandates a rigid process for how weights are assigned to impacts. We now recognize that keeping the Final Rule would result in competing and potentially conflicting legal requirements when we undertake an exclusion analysis and could increase our legal vulnerability. In section 4(b)(2) of the Act, Congress vested in the Secretary the authority and responsibility to assign weights to the impacts of designating particular areas as critical habitat. Automatically assigning weights based on information from parties other than the Secretary or their chain of command, including to parties that may have direct economic or other interests in the outcome of the exclusion analysis, regardless of whether those parties have expert or firsthand information, is in tension with Congress's decision to place that authority with the Secretary. Furthermore, the requirement that, unless we have rebutting information, the Secretary must assign weights to non-biological impacts based strictly on information from those entities constrains the Secretary's discretion to use their expert judgment and mandate to base designations on the best scientific data available.

In addition, the requirement to assign weights consistent with expert or firsthand information submitted by proponents of exclusions was unnecessary. Even without that provision, the Service was already required to, and did, take into consideration expert and firsthand information submitted by proponents when it assigned weights to the impacts of designation. The Service applied the Policy, which states that the Secretary will assign weights to the benefits of inclusion and exclusion when conducting an exclusion analysis. Without the Final Rule, our consideration of impacts, including the weights we assigned to the impacts and identification of the best available data, would still be subject to judicial review under the APA's ''abuse of discretion'' standard. See *Weyerhaeuser* 139 S. Ct. at 371. The Policy would again guide the Service to consider relevant information provided by commenters without creating presumptions in tension with the statute's requirement that we designate critical habitat. Therefore, in applying the Policy (if this proposed rule were finalized), we would continue to consider information submitted by proponents of exclusions, as we did before the Final Rule was promulgated.

We now find that the significant constraints that the Final Rule places on the Secretary's discretion undermine our role in undertaking an impartial evaluation of the relevant data, including information that proponents of exclusions provide, and hinders our ability to designate critical habitat based on the scientific data available as required by the statute and to provide for conservation of species.

Federal Lands

The Policy states we would generally not exclude Federal lands from a designation of critical habitat because of the unique obligations of Federal land managers under the Act to conserve listed species and their habitats. The Final Rule states that the standards for evaluating Federal and non-Federal lands are the same and provided that our consideration of nonbiological impacts to permittees, lessees, or others with a permit, lease, or contract would be the same regardless of land ownership. It also states that the Secretary will assign weights to nonbiological impacts consistent with information provided by permittees, lessees, or contractor applicants for permits, leases, or contracts on Federal lands.

Some commenters in the rulemaking process for the Final Rule asserted that the change in policy with respect to considering exclusion of Federal lands was arbitrary and capricious because we did not adequately explain the basis for the change or elaborate on any changed circumstances. The reasoning that the preamble described for making this change in the Final Rule was that we did not wish to foreclose the potential to exclude areas under Federal ownership in cases where the benefits of exclusion outweigh the benefits of inclusion. We find that the reasoning that the preamble describes for this change was incomplete because it overlooked some key context underscoring the benefits of focusing critical habitat designations on Federal lands.

First, Congress declared its policy that ''all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.'' (U.S.C 1531(c)(1)).

Second, all Federal agencies have responsibilities under section 7 of the Act to carry out programs for the conservation of listed species and to ensure their actions are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. Federal agencies should use their authorities to further the purposes of the Act, and Federal lands are often important to the recovery of listed species. To the extent possible, we intend to focus designation of critical habitat on Federal lands in an effort to avoid the real or perceived regulatory burdens on non-Federal lands.

Finally, while the Final Rule acknowledges a change in the consideration of Federal lands from the Policy, it fails to recognize that the Policy does not prohibit exclusions of Federal lands, nor does it prohibit consideration of information provided by permittees, lessees, or contractors on Federal lands when the Secretary assigns weights to impacts under section 4(b)(2) of the Act. Thus, if this proposed rule were finalized, consistent with the Policy, the Secretary would retain their discretion to exclude Federal lands when the factual circumstances merit it. We find that the approach in the Policy better equips the Service with the flexibility necessary to account for the wide variability of circumstances in which the Secretary makes exclusion decisions—variability in the needs of the species, in the geography and quality of critical habitat areas, and of land ownership arrangements. For example, while the transactional costs of consultation with Federal agencies tend to be a relatively minor cost in most situations, and while activities on Federal lands automatically have a Federal nexus (which usually would require consultation and thus increase the potential for conservation benefits if those lands are designated), we have found that in some instances the benefits of exclusion nevertheless outweigh the benefits of designating those areas. In those situations when the benefits of excluding Federal lands outweigh the benefits of designating them as critical habitat, the Policy provides sufficient discretion for the Secretary to exclude Federal lands. Therefore, we find that it is unwise to constrain the Secretary's discretion in the regulations. Further, resuming the implementation of the Policy would realign our implementation of section 4(b)(2) of the Act with that of NMFS.

''*Shall Exclude*''

The Final Rule states that the Secretary ''shall'' exclude an area where the benefits of exclusion outweigh those of inclusion, so long as the exclusion will not result in the extinction of the species concerned. Using the phrase ''shall exclude'' requires exclusion of the area when a balancing analysis finds the benefits of exclusion outweighs those of inclusion. Although, as we stated in the preamble to the Final Rule, adding this requirement to the regulations was an exercise of the Secretary's discretion, we now find that exercising the Secretary's discretion in this way interferes with the statute's conservation goals by making a binding rule that ties the hands of current and future Secretaries in a particular way in all situations, regardless of the case-specific facts or the conservation outcomes. We recognize this change may result in a decrease in the exclusion proponent's sense of predictability in the ultimate outcome of an exclusion analysis. However, we find that advancing the conservation goals of the statute and providing a rational basis for our decision are more important than providing increased predictability, and the statute's conservation goals will be better achieved if we rescind the Final Rule and resume the implementation of the provisions of the Policy, under which the Secretary would retain discretion not to exclude an area when the benefits of exclusion outweigh those of inclusion. Although the Policy does not require exclusion when the benefits of exclusion outweigh the benefits of inclusion, it states that we would generally exclude an area in those circumstances. One difference is that the Policy acknowledges that we cannot anticipate all possible fact patterns; thus, it preserves the Secretary's discretion on exclusions regardless of the outcome of the balancing. Regardless of implementation of the Final Rule, or the Policy, when the Secretary undertakes an exclusion analysis, *Weyerhaeuser* requires us to be transparent and provide a rational basis to support the decision. Therefore, our explanation will make the basis of our decision clear to proponents of an exclusion and to the general public. We find that the ''shall exclude'' language in the Final Rule is an unnecessarily broad constraint on the Secretary's discretion. Moreover, in light of the numerous possible fact patterns regarding the relationship between critical habitat and conservation of a particular species, we find that preserving the Secretary's discretion regarding whether or not to exclude areas when the benefits of exclusion outweigh the benefits of inclusion is most consistent with the Supreme Court's characterization of the Act as representing ''a policy [of] 'institutionalized caution.' '' *Tenn. Valley Auth.* v. *Hill,* 437 U.S. 153, 194 (1978).

Other Regulatory Provisions of the Final Regulations

The Final Rule contains other provisions identifying factors for the Secretary to consider when conducting exclusion analyses that involve particular categories of impacts. For example, 50 CFR 17.90(a) includes non-exhaustive lists of the types of impacts that the terms ''economic impacts'' and ''other relevant impacts'' may include. Because these lists are examples of possible factors to be considered, and are neither mandatory nor exhaustive, with or without the Final Rule the Secretary can consider whatever factors on or off of those lists that they determine appropriate given the specific facts of a designation and its impacts. As a result, removing them, if this proposed rule is made final, will not affect the Service's implementation. Similarly, 50 CFR 17.90(d) identifies factors for the Secretary to consider in evaluating impacts related to economics, national and homeland security, and conservation plans that are or are not permitted under section 10 of the Act. These factors are mostly the same as the factors identified in the Policy. Therefore, we find that it is unnecessary to include these provisions in the regulations and that, if the Final Rule is rescinded, resuming the

implementation of the Policy would not alter our implementation of section 4(b)(2) of the Act with respect to these factors.

The one change in the Final Rule as compared to the Policy is the fourth factor for evaluating non-permitted plans and partnerships. The fourth factor in the Policy is whether compliance with the National Environmental Policy Act (NEPA) (codified at 42 U.S.C. 4321 *et seq.*) is required, but the Final Rule adds language to make clear that we may consider plans that have had reviews similar to NEPA review even if the reviews were not technically completed under NEPA. However, that language was unnecessary because the Policy specifies that the factors it identifies for evaluating nonpermitted plans are not exclusive. As a result, even without that added language under the fourth factor in the Final Rule, we may consider plans that have had reviews similar to NEPA review, but no NEPA reviews. In short, we find that it is unnecessary to include in the regulations the additional language regarding reviews of nonpermitted plans that are similar to NEPA reviews, and that, if the Final Rule is rescinded, resuming the implementation of the Policy would not substantially change our implementation of section 4(b)(2) of the Act with respect to evaluating nonpermitted plans.

Public Comments

We are soliciting public comment on this proposal and supporting material. All relevant information will be considered prior to making a final determination regarding the regulations for exclusions from critical habitat. You may submit your comments and materials concerning the proposed rule by one of the methods listed in **ADDRESSES**. Comments must be submitted to *https://www.regulations.gov* (Docket FWS–HQ–ES–2019–0115) before 11:59 p.m. (Eastern Time) on the date specified in **DATES**. We will not consider mailed comments that are not postmarked by the date specified in **DATES**.

We will post all comments on *https://www.regulations.gov.* This generally means that we will post any personal information you provide us. If you provide personal identifying information in your comment, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Required Determinations

Regulatory Planning and Review (E.O.s 12866 and 13563)

Executive Order 12866 (''E.O. 12866'') provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is significant.

Executive Order 13563 (''E.O. 13563'') reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. E.O. 13563 directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives and further emphasizes that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements. This proposed rule is consistent with E.O. 13563, and in particular with the requirement of retrospective analysis of existing rules designed ''to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.''

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency, or that person's designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We certify that, if adopted as proposed, this proposed rule would not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

This rulemaking proposes to rescind a rule that outlines Service procedures regarding exclusion of areas from designations of critical habitat under the Act. If finalized, the Service would resume the implementation of the 2013 Rule and the Policy jointly with NMFS.

As discussed above, resuming the implementation of the 2013 Rule and the Policy will not substantially alter our implementation of section 4(b)(2) of the Act. To the extent that the Final Rule differs from the Policy, it is limited to identifying specific factors for consideration that the Policy already authorizes the Service to consider in weighing the benefits of excluding areas against the benefits of including them, but in a more general sense. Moreover, the Service is the only entity that would be directly affected by this rule because the Service is the only entity that was implementing the final regulations under this portion of the CFR. No external entities, including any small businesses, small organizations, or small governments, will experience any economic impacts directly from this rule because the Service would continue to take into consideration the relevant impacts of designating specific areas as critical habitat and retain the ability to apply the factors identified in the Final Rule. In addition, our decisions to exclude or not exclude areas (where a specific request has been made) based on this consideration of impacts will continue to be judicially reviewable in accordance with the Supreme Court's opinion in *Weyerhaeuser.*

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) On the basis of information contained in the Regulatory Flexibility Act section above, this proposed rule would not ''significantly or uniquely'' affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that this proposed rule would not impose a cost of $100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments would not be affected because the proposed rule would not place additional requirements on any city, county, or other local municipalities.

(b) This proposed rule would not produce a Federal mandate on State,

local, or Tribal governments or the private sector of $100 million or greater in any year; that is, this proposed rule is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. This proposed rule would impose no obligations on State, local, or Tribal governments.

Takings (E.O. 12630)

In accordance with E.O. 12630, this proposed rule would not have significant takings implications. This proposed rule would not directly affect private property, nor would it cause a physical or regulatory taking. It would not result in a physical taking because it would not effectively compel a property owner to suffer a physical invasion of property. Further, the proposed rule would not result in a regulatory taking because it would not deny all economically beneficial or productive use of the land or aquatic resources and it would substantially advance a legitimate government interest (conservation and recovery of endangered species and threatened species) and would not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with E.O. 13132, we have considered whether this proposed rule would have significant federalism effects and have determined that a federalism summary impact statement is not required. This proposed rule pertains only to factors for designation of critical habitat under the Act and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform (E.O. 12988)

This proposed rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of E.O. 12988. This proposed rule would rescind a rule that was solely focused on exclusions from critical habitat under the Act.

Government-to-Government Relationship With Tribes

In accordance with E.O. 13175, ''Consultation and Coordination with Indian Tribal Governments,'' and the Department of the Interior's manual at 512 DM 2, we are considering possible effects of this proposed rule on federally recognized Indian Tribes. The Service has reached a preliminary conclusion that the changes to these implementing regulations are general in nature and do not directly affect specific species or Tribal lands. This proposed rule would rescind the December 18, 2020 Final Rule that modified certain aspects of the critical habitat designation processes that we have been implementing in accordance with previous guidance and policies. If finalized, we would resume the implementation of the 2013 Rule and the Policy jointly with NMFS. Further, the 2013 Rule and the Policy are almost identical to the treatment of Tribal lands under the Final Rule and will not have Tribal implications. These proposed regulatory revisions directly affect only the Service, and with or without these revisions the Service would be obligated to continue to designate critical habitat based on the best available data. Therefore, we conclude that these proposed regulations do not have ''tribal implications'' under section 1(a) of E.O. 13175, and therefore formal government-to-government consultation is not required by E.O. 13175 and related policies of the Department of the Interior. We will continue to collaborate with Tribes on issues related to federally listed species and their habitats and work with them as we implement the provisions of the Act. *See* Secretarial Order 3206, ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act'' (June 5, 1997).

Paperwork Reduction Act

This proposed rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (45 U.S.C. 3501 *et seq.*). We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We are analyzing this proposed regulation in accordance with the criteria of the NEPA, the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR 46.10–46.450), and the Department of the Interior Manual (516 DM 8). The effect of this proposed rulemaking would be to rescind the Service-only procedures for considering exclusion of areas from a designation of critical habitat under the Act and return to implementing the 2013 Rule and the Policy jointly with NMFS. As we discussed earlier, resuming the implementation of the Policy will not substantially alter our implementation of section 4(b)(2) of the Act, and to the extent the Final Rule differs from the Policy, it is limited to identifying specific factors for consideration that the Policy already authorizes the Service to consider in weighing the benefits of excluding areas against the benefits of including them, but in a more general sense.

As a result, we anticipate, similar to our conclusion stated in the Final Rule, that the categorical exclusion found at 43 CFR 46.210(i) likely applies to the proposed regulation changes. In 43 CFR 46.210(i), the Department of the Interior has found that the following categories of actions would not individually or cumulatively have a significant effect on the human environment and are, therefore, categorically excluded from the requirement for completion of an environmental assessment or environmental impact statement: ''Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature.'' However, as a result of public comments received, the final rule may differ from this proposed rule and our analysis under NEPA may also differ from the proposed rule. We will complete our analysis, in compliance with NEPA, before finalizing this regulation.

Energy Supply, Distribution or Use (E.O. 13211)

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. The proposed revised regulation is not expected to affect energy supplies, distribution, and use. Therefore, this action is a not a significant energy action, and no Statement of Energy Effects is required.

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you believe that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the

sections or paragraphs that you believe are unclearly written, identify any sections or sentences that you believe are too long, and identify the sections where you believe lists or tables would be useful.

Authority

We issue this proposed rule under the authority of the Endangered Species Act, as amended (16 U.S.C. 1531 *et seq.*).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

For the reasons discussed in the preamble, the U.S. Fish and Wildlife Service proposes to amend part 17 of chapter I, title 50 of the Code of Federal Regulations as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

Subpart I [Removed]

■ 2. Remove subpart I, consisting of § 17.90.

Subpart J [Redesignated as Subpart I]

■ 3. Redesignate subpart J, consisting of §§ 17.94 through 17.99, as subpart I.

Subpart K [Redesignated as Subpart J]

■ 4. Redesignate subpart K, consisting of §§ 17.100 through 17.199, as subpart J.

Shannon A. Estenoz,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2021–23011 Filed 10–26–21; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 424

[Docket No. FWS–HQ–ES–2020–0047, FF09E23000 FXES1111090FEDR 212; Docket No. 211007–0205]

RIN 1018–BE69; 0648–BJ44

Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat

AGENCY: U.S. Fish and Wildlife Service, Interior; National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (hereafter collectively referred to as the ''Services'' or ''we''), propose to rescind the final rule titled ''Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat'' that was published on December 16, 2020, and became effective on January 15, 2021. The proposed rescission, if finalized, would remove the regulatory definition of ''habitat'' established by that rule.

DATES: We will accept comments from all interested parties until November 26, 2021. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Standard Time on that date.

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

(1) *Electronically:* Go to the Federal eRulemaking Portal: *https://www.regulations.gov.* In the Search box, enter FWS–HQ–ES–2020–0047, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on ''Comment.''

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS–HQ–ES–2020–0047; U.S. Fish and Wildlife Service, MS: PRB(3W), 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. Comments and materials we receive will be available for public inspection on *https://www.regulations.gov.* (See Public Comments below for more information.)

FOR FURTHER INFORMATION CONTACT: Bridget Fahey, U.S. Fish and Wildlife Service, Division of Conservation and Classification, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703/358–2171; or Angela Somma, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301/427–8403. If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS) at 800/877–8339.

SUPPLEMENTARY INFORMATION:

Background

On December 16, 2020, we published a final rule adding a definition of the term ''habitat'' to our implementing regulations at 50 CFR 424.02 (85 FR 81411). The final rule summarized and responded to numerous public comments on our proposed rule that published on August 5, 2020 (85 FR 47333).

The definition of ''habitat'' that we adopted in that final rule is: For the purposes of designating critical habitat only, habitat is the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species.

Rationale for Rescission

On January 20, 2021, the President issued Executive Order 13990 (hereafter referred to as ''the E.O.''), which, among other things, required all agencies to review agency actions issued between January 20, 2017, and January 20, 2021. In support of the E.O., a ''Fact Sheet'' was issued that set forth a non-exhaustive list of specific agency actions that agencies are required to review to determine consistency with section 1 of the E.O. (See *www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/*). One of the agency actions included on the Fact Sheet was our December 16, 2020, final rule promulgating a regulatory definition for ''habitat'' under the Endangered Species Act of 1973, as amended (hereafter referred to as ''the Act''; 16 U.S.C. 1531 *et seq.*). We have reevaluated that final rule, and we are now proposing to rescind it. The following discussion provides our rationale for rescinding that rule.

First, upon reconsideration of the final rule's discussion of the extent to

which areas that may need some degree of restoration can be considered ''habitat'' for a species, we find that the definition and the preamble of the final rule inappropriately constrain the Services' ability to designate areas that meet the definition of ''critical habitat'' under the Act. The definition of ''habitat'' requires that the areas contain the resources and conditions necessary to support one or more life processes of a species. As stated in the preamble to the final rule, this definition of ''habitat'' excludes areas that do not currently or periodically contain the requisite resources and conditions, even if such areas could meet this requirement in the future after restoration activities or other changes occur. We have reviewed the statute's broad definition of ''conservation'' and find significant tension between that definition and that of ''habitat'' as defined in our December 16, 2020, final rule. The statute's definition of ''conservation'' expressly contemplates a wide range of tools for furthering the ultimate goal of recovering listed species. ''Conservation'' is defined as follows: To use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary; such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation (16 U.S.C. 1532(3); defining ''conserve,'' ''conserving,'' and ''conservation'').

We find that the broad definition of ''conservation,'' along with the statute's recognition of destruction or loss of habitat as a key factor in the decline of listed species (in section 4(a)(1) of the Act), indicates that areas not currently in an optimal state to support the species could nonetheless be considered ''habitat'' and ''critical habitat.'' The quality of habitat varies along a continuum, and species, and individuals within a species, often use habitats with variable quality over the course of their life histories. Some individuals of a listed species may use degraded or suboptimal areas, whereas other individuals may not. Including those areas in critical habitat designations, where appropriate, may be essential for the conservation of some species and is consistent with the Services' practice prior to the final rule becoming effective in January 2021. To hold otherwise would lead to the illogical result that the more a species' habitat has been degraded, the less ability there is to attempt to recover the species. While we acknowledged in the final rule that we have the ability to revise critical habitat after resources and conditions within a specific area change (*e.g.,* the area is restored or naturally improves), Congress required the Services to identify unoccupied areas that are ''essential for the conservation'' of the species when designating critical habitat. Identifying and protecting those areas when we determine they are essential, rather than delaying until an arbitrary point in time when conditions that are not required under the Act's definition are realized, better fulfills the conservation purposes of the Act and ensures that important areas of habitat are protected in section 7 consultations from destruction or adverse modification. Moreover, designating as critical habitat areas of habitat that are unoccupied but essential for the conservation of the species may guide future habitat-restoration efforts and make them more efficient and effective. Therefore, we find that some of the language included in the preamble to the final rule reflects an unnecessarily limiting interpretation of the Act that effectively hinders its stated purpose, and that the better reading of the Act is that an area should not be precluded from qualifying as habitat because some management or restoration is necessary for it to provide for a species' recovery.

In addition, our attempt to codify a single, one-size-fits-all definition of ''habitat'' under the Act that would cover a wide array of species' habitat requirements and also satisfy the underlying need that the definition be broad enough to include areas that could meet the Act's definition of unoccupied critical habitat resulted in the use of overly vague terminology in the definition. The resulting definition was one that neither stemmed from the scientific literature nor had a clear relationship with the statutory definition of ''critical habitat.'' We had reviewed and considered definitions from the ecological literature (*e.g.,* Odum 1971, Kearney 2006) and found there is inconsistent use of the term ''habitat'' (*e.g.,* Hall *et al.* 1987). We also received many suggestions for definitions of habitat from public comments on the proposed rule. Some were ecological-based definitions; others were revisions of our definition in the proposed rule; and others introduced concepts that were either in tension with the ecological principles or the definition of ''critical habitat'' in the Act. We rejected the available ecological definitions for use as our regulatory definition because we determined they were either too broad or too narrow to guide designation of areas that could qualify under the statute as unoccupied critical habitat. In addition, because the scientific literature evolves over time, and there is currently some ambiguity in the use of the term ''habitat'' (cf. Bamford and Calver 2014), codifying a single definition in regulation could constrain the Services' ability to incorporate the best available ecological science in the future.

The Act clearly indicates critical habitat should be determined on the best available science and provides a definition for the term ''critical habitat.'' Upon reconsideration, the separate regulatory definition of ''habitat'' could conflict with this mandate by shaping or limiting how the Services can consider what areas meet the definition of ''critical habitat.'' Rather, we find relying on the best available scientific data as specified in the Act, including species-specific ecological information, is the best way to determine whether areas constitute habitat and meet the definition of critical habitat for a species. We had also deliberately avoided using terminology from the statutory definition of ''critical habitat'' because we wanted to make clear that ''habitat'' is logically and necessarily broader than ''*critical* habitat.'' So, for example, we avoided use of the phrase ''physical or biological features.'' However, we now find that in doing so, we resorted to terminology that is unclear and has no established meaning in the statute or our prior regulations or practices (*i.e.,* the phrases ''biotic and abiotic setting'' and ''resources and conditions''). Thus, after reevaluating the 2020 rule, we now find that, despite our efforts to promulgate a definition that was both sufficiently broad and clear, the resulting definition is not only insufficiently clear, but also confusing.

Further, the definition of ''habitat'' was developed specifically for use in the context of critical habitat designations under the Act. As the Services expressed at the time we adopted the rule, the addition of this definition to the Code of Federal Regulations was not intended to create an additional step in the process of designating critical habitat for any species (85 FR 81411, December 16, 2020). Rather, the intent was that this definition would act as a regulatory standard that would be relevant in only a limited set of cases where questions arose as to whether an area was in fact ''habitat'' for a particular species. As the Services explained, for areas that are

within the occupied range of the species, a determination that those areas meet the statutory definition of ''critical habitat'' (at 16 U.S.C. 1532(5)(A)(i)) inherently validates that the area is in fact ''habitat'' (85 FR 81411, December 16, 2020) because the area must: (1) Be part of the geographical area occupied by the species; and (2) contain physical or biological features essential to the conservation of the species. Thus, as we explained in our final rule, the applicability of the definition of ''habitat'' is limited only to designations with unoccupied areas and further to a subset of those where ''genuine questions'' might exist as to whether areas are habitat for a species (85 FR 81411, December 16, 2020; p. 81414). However, we now recognize that the approach of codifying a regulatory definition of ''habitat'' with a limited application, which was not intended to be applied regularly in the course of designating critical habitat, is inherently confusing.

As noted, we intended the definition to apply only to the process of designating critical habitat under the Act and therefore included the phrase, ''For purposes of designation of critical habitat only'' in the definition. However, even with the specific limitation of the definition's applicability, we understand that there is continuing concern that a definition of ''habitat'' may appear to conflict, or create inconsistencies, with other Federal agency statutory authorities or programs that also have definitions or understandings of habitat. Having multiple definitions and interpretations of what constitutes habitat that varies based on the application is confusing.

Finally, although adoption of the regulation was in part intended to be a response to the Supreme Court's decision in *Weyerhaeuser Co.* v. *U.S.F.W.S.,* 139 S. Ct. 361, 372 (2018) (*Weyerhaeuser*), that decision did not require that the Services adopt a regulatory definition for ''habitat.'' Rather, the Court remanded the case to the lower court to consider whether the particular record supported a finding that the area disputed in the litigation was habitat for the particular species at issue (the dusky gopher frog). Similarly, we find after reconsidering the Court's decision that we can adequately address, on a case-by-case basis and on the basis of the best scientific data available, any concerns that may arise in future designations as to whether unoccupied areas are habitat for a particular species.

Having reconsidered the definition in light of E.O. 13990 and the issues discussed above, we now find that it would be more appropriate to return to implementing the statute as we had done for decades prior to January 2021, when the Services did not have a codified definition of ''habitat.'' Therefore, we propose to remove this definition from 50 CFR 424.02.

Public Comments

We are soliciting public comment on this proposal. All relevant information will be considered prior to making a final determination regarding the regulatory definition of ''habitat.'' You may submit your comments and materials concerning the proposed rule by one of the methods listed in **ADDRESSES**. Comments must be submitted to *https://www.regulations.gov* before 11:59 p.m. (Eastern Time) on the date specified in **DATES**. We will not consider mailed comments that are not postmarked by the date specified in **DATES**.

We will post all comments on *https://www.regulations.gov.* This generally means that we will post any personal information you provide us. If you provide personal identifying information in your comment, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Required Determinations

Regulatory Planning and Review (E.O.s 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, reduce uncertainty, and encourage use of the best, most innovative, and least burdensome tools for achieving regulatory ends. E.O. 13563 directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives and emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas.

We have developed this proposed rule in a manner consistent with the requirements of E.O. 13563, and in particular with the requirement of retrospective analysis of existing rules designed ''to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.''

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency, or their designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

NMFS and FWS are the only entities that are directly affected by this rule because we are the only entities that designate critical habitat under the Act. No other entities, including any small businesses, small organizations, or small governments, will experience any direct economic impacts from this rule. Therefore, we certify that, if adopted as proposed, this rule would not have a significant economic effect on a substantial number of small entities.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) On the basis of information contained in the Regulatory Flexibility Act section, this proposed rule would not ''significantly or uniquely'' affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that this rule would not impose a cost of $100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments would not be affected because the proposed rule would not place additional requirements on any city, county, or other local municipalities.

(b) This proposed rule would not produce a Federal mandate on State, local, or Tribal governments or the private sector of $100 million or greater in any year; therefore, this proposed rule is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. This proposed rule would impose no obligations on State, local, or Tribal governments.

Takings (E.O. 12630)

In accordance with E.O. 12630, this proposed rule would not have significant takings implications. This proposed rule would not directly affect private property, nor would it cause a physical or regulatory taking. It would not result in a physical taking because it would not effectively compel a property owner to suffer a physical invasion of property. Further, the proposed rule would not result in a regulatory taking, because it would not deny all economically beneficial or productive uses of the land or aquatic resources, it would substantially advance a legitimate government interest (conservation and recovery of endangered species and threatened species), and it would not present a barrier to all reasonable and expected beneficial uses of private property.

Federalism (E.O. 13132)

In accordance with E.O. 13132, we have considered whether this proposed rule would have significant federalism effects, and we have determined that a federalism summary impact statement is not required. This proposed rule pertains only to designation of critical habitat under the Act and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform (E.O. 12988)

This proposed rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of E.O. 12988. This proposed rule pertains only to designation of critical habitat under the Act.

Government-to-Government Relationship With Tribes

In accordance with E.O. 13175, ''Consultation and Coordination with Indian Tribal Governments,'' the Department of the Interior's manual at 512 DM 2, the Department of Commerce Tribal Consultation and Coordination Policy (May 21, 2013), the Department of Commerce Departmental Administrative Order (DAO) 218–8 (April 2012), and the National Oceanic and Atmospheric Administration (NOAA) Administrative Order (NAO) 218–8 (April 2012), we considered the possible effects of this proposed rule on federally recognized Indian Tribes. This proposed rule is general in nature and does not directly affect any specific Tribal lands, treaty rights, or Tribal trust resources. This regulation, if finalized, would remove the definition of ''habitat'' from 50 CFR 424.02, which only has a direct effect on the Services. With or without the regulatory definition of ''habitat,'' the Services would be obligated to continue to designate critical habitat based on the best available data and would continue to coordinate and consult as appropriate with Indian Tribes and Alaska Native corporations on critical habitat designations, per our longstanding practice. Therefore, we preliminarily conclude that this rule does not have ''tribal implications'' under section 1(a) of E.O. 13175; thus, formal government-to-government consultation is not required by E.O. 13175 and related policies of the Departments of Commerce and the Interior. We will continue to collaborate with Tribes on issues related to federally listed species and their habitats and work with the Tribes as we implement the provisions of the Act. *See* Joint Secretarial Order 3206 (''American Indian Tribal Rights, Federal Tribal Trust Responsibilities, and the Endangered Species Act'', June 5, 1997).

Paperwork Reduction Act

This proposed rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (45 U.S.C. 3501 *et seq.*). In accordance with the PRA, we may not conduct or sponsor a collection of information, and you are not required to respond to a collection of information, unless it displays a currently valid OMB control number.

National Environmental Policy Act

We are analyzing this proposed regulation in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR 46.10–46.450), the Department of the Interior Manual (516 DM 8), the NOAA Administrative Order 216–6A, and the NOAA Companion Manual (CM), ''Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities'' (effective January 13, 2017). We have made an initial determination that a detailed statement under the NEPA is not required because the proposed rule is covered by a categorical exclusion. At 43 CFR 46.210(i), the Department of the Interior has found that the following categories of actions would not individually or cumulatively have a significant effect on the human environment and are, therefore, categorically excluded from the requirement for completion of an environmental assessment or environmental impact statement: ''Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature.'' We have also determined that the proposed rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

NOAA's NEPA procedures include a similar categorical exclusion for ''preparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature'' (Categorical Exclusion G7, at CM Appendix E). This proposed rule does not involve any of the extraordinary circumstances provided in NOAA's NEPA procedures, and therefore does not require further analysis to determine whether the action may have significant effects (CM at 4.A).

As a result, we anticipate that the categorical exclusion found at 43 CFR 46.210(i) and in the NOAA CM applies to the proposed regulation rescission, and neither Service has identified any extraordinary circumstances that would preclude this categorical exclusion. We will review any comments submitted prior to completing our analysis or finalizing this action, in accordance with applicable NEPA regulations.

Energy Supply, Distribution or Use (E.O. 13211)

Executive Order 13211 requires agencies to prepare statements of energy effects when undertaking certain actions. The proposed rescission of the regulatory definition of ''habitat'' is not expected to affect energy supplies, distribution, and use. Therefore, this action is a not a significant energy action, and no statement of energy effects is required.

Clarity of the Rule

We are required by E.O.s 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you believe that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**.

Authority

We issue this proposed rule under the authority of the Endangered Species Act, as amended (16 U.S.C. 1531 *et seq*).

List of Subjects in 50 CFR Part 424

Administrative practice and procedure, Endangered and threatened species.

Shannon A. Estenoz

Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service, National Oceanic and Atmospheric Administration.

Proposed Regulation Promulgation

For the reasons set out in the preamble, we hereby propose to amend part 424, subchapter A of chapter IV, title 50 of the Code of Federal Regulations, as set forth below:

PART 424—LISTING ENDANGERED AND THREATENED SPECIES AND DESIGNATING CRITICAL HABITAT

■ 1. The authority citation for part 424 continues to read as follows:

Authority: 16 U.S.C. 1531 et seq.

§ 424.02 [Amended]

■ 2. Amend § 424.02 by removing the definition for ''Habitat''.

[FR Doc. 2021–23214 Filed 10–26–21; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

[Docket No. 211020–0213; RTID 0648–XP016]

Pacific Island Pelagic Fisheries; 2022 U.S. Territorial Longline Bigeye Tuna Catch Limits

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

ACTION: Proposed specifications; request for comments.

SUMMARY: NMFS proposes a 2022 limit of 2,000 metric tons (t) of longline-caught bigeye tuna for each U.S. Pacific territory (American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands (CNMI), collectively ''the territories''). NMFS would allow each territory to allocate up to 1,500 t to U.S. longline fishing vessels through specified fishing agreements that meet established criteria. However, the overall allocation limit among all territories may not exceed 3,000 t. As an accountability measure, NMFS would monitor, attribute, and restrict (if necessary) catches of longline-caught bigeye tuna, including catches made under a specified fishing agreement. The proposed catch limits and accountability measures would support the long-term sustainability of fishery resources of the U.S. Pacific Islands.

DATES: NMFS must receive comments by November 12, 2021.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2021–0076, by either of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter NOAA–NMFS–2021–0076 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Send written comments to Michael D. Tosatto, Regional Administrator, NMFS Pacific Islands Region (PIR), 1845 Wasp Blvd., Bldg. 176, Honolulu, HI 96818.

Instructions: Comments 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 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).

Pursuant to the National Environmental Policy Act, the Western Pacific Fishery Management Council (Council) and NMFS prepared a 2019 environmental assessment (EA), a 2020 supplemental environmental assessment (SEA), a 2020 supplemental information report (SIR), and a 2021 SIR that support this proposed action. The EA, SEA, and SIRs are available at *www.regulations.gov,* or from the Council, 1164 Bishop St., Suite 1400, Honolulu, HI 96813, tel 808–522–8220, fax 808–522–8226, *www.wpcouncil.org.*

FOR FURTHER INFORMATION CONTACT: Lynn Rassel, NMFS PIRO Sustainable Fisheries, 808–725–5184.

SUPPLEMENTARY INFORMATION: NMFS proposes to specify a 2022 catch limit of 2,000 t of longline-caught bigeye tuna for each U.S. Pacific territory. NMFS would also authorize each U.S. Pacific territory to allocate up to 1,500 t of its 2,000 t bigeye tuna limit, not to exceed a 3,000 t total annual allocation limit among all the territories, to U.S. longline fishing vessels that are permitted to fish under the Fishery Ecosystem Plan for Pelagic Fisheries of the Western Pacific (FEP). Those vessels must be identified in a specified fishing agreement with the applicable territory. The Council recommended these specifications.

The proposed catch limits and accountability measures are identical to those that NMFS has specified for U.S. Pacific territories in each year since 2014. The proposed individual territorial allocation limit of 1,500 t is identical to what NMFS specified for 2020 and 2021. The overall allocation limit among all of the territories may not exceed 3,000 t for the year, which is consistent with previous years. NMFS has determined that the existing EA and SEA adequately address the potential impacts on the human environment by the proposed action, and that no additional analyses are required.

NMFS will monitor catches of longline-caught bigeye tuna by the longline fisheries of each U.S Pacific territory, including catches made by U.S. longline vessels operating under specified fishing agreements. The criteria that a specified fishing agreement must meet, and the process for attributing longline-caught bigeye tuna, will follow the procedures in 50 CFR 665.819. When NMFS projects that a territorial catch or allocation limit will be reached, NMFS would, as an accountability measure, prohibit the catch and retention of longline-caught bigeye tuna by vessels in the applicable territory (if the territorial catch limit is projected to be reached), and/or vessels in a specified fishing agreement (if the allocation limit is projected to be reached).

NMFS will consider public comments on the proposed action and will

announce the final specifications in the **Federal Register**. NMFS also invites public comments that address the impact of this proposed action on cultural fishing in American Samoa.

NMFS must receive any comments on this proposed action by the date provided in the **DATES** heading. NMFS may not consider any comments not postmarked or otherwise transmitted by that date. Regardless of the final specifications, all other existing management measures will continue to apply in the longline fishery.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the NMFS Assistant Administrator has determined that this proposed specification is consistent with the FEP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

Certification of Finding of No Significant Impact on Substantial Number of Small Entities

The Chief Counsel for Regulation for the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that these proposed specifications, if adopted, would not have a significant economic impact on a substantial number of small entities.

The proposed action would specify a 2022 limit of 2,000 t of longline-caught bigeye tuna for each U.S. Pacific territory (American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands (CNMI)). NMFS would also allow each territory to allocate up to 1,500 t of its 2,000 t limit, not to exceed an overall allocation limit of 3,000 t, to U.S. longline fishing vessels in a specified fishing agreement that meets established criteria set forth in 50 CFR 665.819. As an accountability measure, NMFS would monitor, attribute, and restrict (if necessary) catches of longline-caught bigeye tuna by vessels in the applicable U.S. territory (if the territorial catch limit is projected to be reached), or by vessels operating under the applicable specified fishing agreement (if the allocation limit is projected to be reached). Payments under the specified fishing agreements support fisheries development in the U.S. Pacific territories and the long-term sustainability of fishery resources of the U.S. Pacific Islands.

This proposed action would apply directly to longline vessels that hold Federal permits under the FEP, specifically Hawaii, American Samoa, and Western Pacific General permits. In 2020, of the 164 allowable Hawaii permits, 147 were assigned to vessels active in the fishery; 24 of those were dual-permitted with both Hawaii and American Samoa permits. Forty-seven (47) had American Samoa longline permits, with 11 active in the fishery and landing catch in American Samoa. There are no active vessels with Western Pacific General permits.

Based on dealer data collected by the State of Hawaii and the Pacific Fisheries Information Network, Hawaii longline vessels landed approximately 12,655 t of pelagic fish valued at $72.8 million in 2020. With 147 vessels making either a deep- or shallow-set trip in 2020, the ex-vessel value of pelagic fish caught by Hawaii-based longline fisheries averaged almost $495,238 per vessel. In 2020, American Samoa-based longline vessels landed approximately 852 t of pelagic fish valued at $2.1 million; albacore made up the largest proportion of pelagic longline commercial landings. With 11 active longline vessels in 2020, the ex-vessel value of pelagic fish caught by the American Samoa fishery averaged almost $190,909 per vessel. In 2020, these fisheries experienced declines in prices, landings, revenue and other fishery performance measures due to the effects of travel restrictions and reduced tourism on market demand for locally caught seafood. Hawaii longline fishery revenue in 2020 was 30.4 percent lower than the average annual revenue over the previous 5 year (2015–2019) time period, while landings and prices declined by 21.9 percent and 11.5 percent compared to the average annual landings and prices over the previous 5 years. As travel and other restrictions have eased, market demand has started to resume for locally caught seafood, market prices, and fishing effort. In American Samoa, the longline fishery revenues and landings in 2020 declined 60 percent compared to the previous 5 year period.

NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $11 million for all its affiliated operations worldwide. Based on available information, NMFS has determined that all vessels permitted federally under the Pelagic FEP are small entities, *i.e.,* they are engaged in the business of fish harvesting (NAICS 114111), are independently owned or operated, are not dominant in their field of operation, and have annual gross receipts not in excess of $11 million. Even though this proposed action would apply to a substantial number of vessels, the implementation of this action would not result in significant adverse economic impact to individual vessels. The proposed action would potentially benefit the Hawaii longline fishermen by allowing them to fish under specified fishing agreements with a territory, which could extend fishing effort for bigeye tuna in the western Pacific and provide more bigeye tuna for markets in Hawaii and elsewhere.

In accordance with Federal regulations at 50 CFR part 300, subpart O, vessels that possess both an American Samoa and Hawaii longline permit are not subject to the U.S bigeye tuna limit. Therefore, these vessels may retain bigeye tuna and land fish in Hawaii after the date NMFS projects the fishery would reach that limit. Further, catches of bigeye tuna made by such vessels are attributed to American Samoa, provided the fish was not caught in the U.S. Exclusive Economic Zone around Hawaii.

The 2022 U.S. bigeye tuna catch limit in the western and central Pacific Ocean (WCPO) is 3,554 t, the same as 2021. In 2021, NMFS received separate specified fishing agreements between the CNMI and the Hawaii Longline Association (HLA) and between American Samoa and HLA, each of which included a specification of 1,500 t of bigeye tuna. NMFS began allocating catches to the CNMI on August 30, 2021, prior to the U.S. fishery reaching the WCPO bigeye tuna catch limit. Based on logbooks submitted by longline vessels, the CNMI allocation would likely be reached sometime in December of 2021, at which time NMFS would begin allocating catches to American Samoa. These combined measures, including the remaining available U.S limit and specified fishing agreements, should enable the U.S. fishery to fish through the end of 2021.

In 2022, as with prior years, under this proposed action Hawaii longline vessels could enter into one or more fishing agreements with participating territories. This would enhance the ability of these vessels to extend fishing effort in the western and central Pacific Ocean after reaching the 2022 U.S. limit and provide more bigeye tuna for markets in Hawaii. Providing opportunity to land bigeye tuna in Hawaii in the last quarter of the year when market demand is generally high

will result in positive economic benefits for fishery participants and net benefits to the nation. Allowing participating territories to enter into specified fishing agreements under this action is consistent with Western and Central Pacific Fishery Commission (WCPFC) conservation and management objectives for bigeye tuna in CMM 2018–01, and benefits the territories by providing funds for territorial fisheries development projects. Establishing a 2,000 t longline limit for bigeye tuna, where territories are not subject to WCPFC longline limits, is not expected to adversely affect vessels based in the territories.

Historical catches of bigeye tuna by the American Samoa longline fleet have been less than 2,000 t, including the catch by vessels based in American Samoa, catch by dual permitted vessels that land their catch in Hawaii, and catch attributed to American Samoa from U.S. vessels under specified fishing agreements. Longline fishing has not occurred since 2011 in Guam or the CNMI.

Under the proposed action, longline fisheries managed under the FEP are not expected to expand substantially nor change the manner in which they are currently conducted (*i.e.,* area fished, number of vessels and trips, number and depth of hooks, or deployment techniques) due to existing operational constraints in the fleet, the limited entry permit programs, and protected species mitigation requirements. The proposed action does not duplicate, overlap, or conflict with other Federal rules and is not expected to have significant impact on small organizations or government jurisdictions. Furthermore, there would be little, if any, disproportionate adverse economic impacts from the proposed action based on gear type or relative vessel size. The proposed action also will not place a substantial number of small entities, or any segment of small entities, at a significant competitive disadvantage to large entities.

For the reasons above, NMFS does not expect the proposed action to have a significant economic impact on a substantial number of small entities. As such, an initial regulatory flexibility analysis is not required and none has been prepared.

This action is exempt from review under Executive Order 12866.

This proposed rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

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

Dated: October 21, 2021.

Samuel D. Rauch, III,

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

[FR Doc. 2021–23356 Filed 10–26–21; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 86, No. 205

Wednesday, October 27, 2021

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Solicitation of Nominations for Membership on the Equity Commission Advisory Committee and Equity Commission Subcommittee on Agriculture Extension of Application Period

AGENCY: United States Department of Agriculture (USDA).

ACTION: Notice extending the nomination application period for the USDA Equity Commission and its Subcommittee on Agriculture.

SUMMARY: On September 27, 2021, the United State Department of Agriculture published in the **Federal Register** a notice of intent to establish and solicit nominations for membership on the USDA Equity Commission and its Subcommittee on Agriculture. The nomination application period for this notice has been extended in order to provide additional opportunities for interested persons to submit their nomination application. The nomination application period for individuals who wish to serve and/or submit nominations to recommend potential candidates for the Equity Commission and/or Subcommittee on Agriculture has been extended until November 20, 2021. A complete application consists of the three documents listed in the initial notice: (1) Brief summary of qualifications for the position (*e.g.,* a letter of interest that explains how the candidate's experience would contribute to the Commission), (2) résumé, and (3) background disclosure form (Form AD–755).

DATES: The application for membership on the Equity Commission and its Sub-Committee for Agriculture published on September 27, 2021, (86 FR 53265), has been extended from October 27, 2021 to November 30, 2021.

ADDRESSES: Individuals who are interested in being considered for the USDA Equity Commission and/or Subcommittee on Agriculture may submit a nomination application using the criteria identified in the solicitation notice.[1] Applications or nominations should be sent via email to *equitycommission@usda.gov.* Alternately, applications can be sent by mail to the Dr. Dewayne L. Goldmon, USDA Senior Advisor for Racial Equity, Office of the Secretary, Department of Agriculture, 1400 Independence Avenue SW, Room 6006–S, Washington, DC 20250. Submit applications via one method only, either via email or mail, not both. A Federal Official of USDA will acknowledge receipt of nominations.

FOR FURTHER INFORMATION CONTACT: *Equitycommission@usda.gov* or Dewayne L. Goldmon, Ph.D.; telephone: (202) 997–2100; email: *dewayne.goldmon@usda.gov.*

SUPPLEMENTARY INFORMATION: The USDA Equity Commission and its Subcommittee on Agriculture was established on October 14, 2021 by the Secretary of Agriculture in accordance with section 1006(a)(3) of the American Rescue Plan Act of 2021 (thereafter, the ARP Act) and the Federal Advisory Committee Act (FACA). The ARP Act directs the Secretary of the United States Department of Agriculture to create an Equity Commission to advise the Agency in ''address[ing] historical discrimination and disparities in the agriculture sector,'' which includes ''fund[ing] one or more equity commissions to address racial equity issues within USDA and its programs.'' Public Law 117–2.

On September 27, 2021 at 86 FR 53265, USDA published in the **Federal Register** a notice of intent to establish the Equity Commission and solicit nominations for memberships to the Equity Commission and its subcommittee. This notice stated the application period would close on Wednesday, October 27, 2021. At this time, the nomination application period for this notice has been extended in order to provide additional opportunities for interested persons to submit an application. The nomination application period for individuals who wish to serve or submit nominations for potential candidates for the Equity Commission and its subcommittee has been extended until November 30, 2021. Accordingly, applications now received after Wednesday, October 27, 2021 to November 30, 2021 will also be considered.

Dated: October 22, 2021.

Cikena Reid,

Committee Management Officer, USDA.

[FR Doc. 2021–23425 Filed 10–26–21; 8:45 am]

BILLING CODE 3410–01–P

[1] Footnotes

1. See, 86 FR 53265 (September 27, 2021).

[FR Doc. 2021–20840 Filed 9–24–21; 8:45 a.m.]

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2021–0034]

Notice of Availability of a Pest Risk Analysis for the Importation of Fresh Turmeric (Curcuma longa) Rhizome From Samoa Into the United States (Including Territories)

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of availability.

SUMMARY: We are advising the public that we have prepared a pest risk analysis that evaluates the risks associated with importation of fresh turmeric (*Curcuma longa*) rhizome from Samoa into the United States (including territories). Based on the analysis, we have determined that the application of one or more designated phytosanitary measures will be sufficient to mitigate the risks of introducing or disseminating plant pests or noxious weeds via the importation of turmeric (*Curcuma longa*) rhizome from Samoa. We are making the pest risk analysis available to the public for review and comment.

DATES: We will consider all comments that we receive on or before December 27, 2021.

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

- *Federal eRulemaking Portal:* Go to *www.regulations.gov.* Enter APHIS–2021–0034 in the Search field. Select the Documents tab, then select the Comment button in the list of documents.
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2021–0034, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *www.regulations.gov* or in our reading room, which is located in Room 1620 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: Mr. Marc Phillips, Senior Regulatory Policy Specialist, PPQ, APHIS, 4700 River Road, Unit 133, Riverdale, MD 20737–1231; (301) 851–2114; *Marc.Phillips@usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

Under the regulations in ''Subpart L—Fruits and Vegetables'' (7 CFR 319.56–1 through 319.56–12, referred to below as the regulations), the Animal and Plant Health Inspection Service (APHIS) prohibits or restricts the importation of fruits and vegetables into the United States from certain parts of the world to prevent plant pests from being introduced into or disseminated within the United States.

Section 319.56–4 contains a performance-based process for approving the importation of fruits and vegetables that, based on the findings of a pest risk analysis, can be safely imported subject to one or more of the five designated phytosanitary measures listed in paragraph (b) of that section.

APHIS received a request from the national plant protection organization (NPPO) of Samoa to allow the importation of fresh turmeric (*Curcuma longa*) rhizome into the United States (including territories). As part of our evaluation of Samoa's request, we have prepared a pest risk assessment (PRA) to identify the pests of quarantine significance that could follow the pathway of the importation of fresh turmeric (*Curcuma longa*) rhizome into the United States (including territories) from Samoa. Based on the PRA, a risk management document (RMD) was prepared to identify phytosanitary measures that could be applied to the fresh turmeric (*Curcuma longa*) rhizome to mitigate the pest risk.

Therefore, in accordance with § 319.56–4(c), we are announcing the availability of our PRA and RMD for public review and comment. Those documents, as well as a description of the economic considerations associated with the importation of fresh turmeric (*Curcuma longa*) rhizome from Samoa, may be viewed on the *Regulations.gov* website or in our reading room (see **ADDRESSES** above for a link to *Regulations.gov* and information on the location and hours of the reading room). You may request paper copies of the PRA and RMD by calling or writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. Please refer to the subject of the analysis you wish to review when requesting copies.

After reviewing any comments we receive, we will announce our decision regarding the import status of fresh turmeric (*Curcuma longa*) rhizome from Samoa in a subsequent notice. If the overall conclusions of our analysis and the Administrator's determination of risk remain unchanged following our consideration of the comments, then we will authorize the importation of fresh turmeric (*Curcuma longa*) rhizome from Samoa into the United States (including territories) subject to the requirements specified in the RMD.

Authority: 7 U.S.C. 1633, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 21st day of October 2021.

Mark Davidson,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2021–23358 Filed 10–26–21; 8:45 am]

BILLING CODE 3410–34–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meetings of the Virginia Advisory Committee

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Virginia Advisory Committee (Committee) will hold a meeting via web-conference on Tuesday, December 14, 2021 at 2:00 p.m. Eastern Time. The purpose of the meeting is to review and discuss testimony received regarding civil rights and police accountability in the state.

DATES: The meeting will be held on: Tuesday, December 14, 2021, at 2:00 p.m. Eastern Time.

Online Registration: https://bit.ly/3lllxUK.

Join by Phone: 800–360–9505 USA Toll Free; Access code: 2761 701 1327.

FOR FURTHER INFORMATION CONTACT: Melissa Wojnaroski, DFO, at *mwojnaroski@usccr.gov* or (202) 618–4158.

SUPPLEMENTARY INFORMATION: Members of the public may listen to this discussion through the above call in number. An open comment period will be provided to allow members of the public to make a statement as time allows. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Individual who is deaf, deafblind and hard of hearing may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Melissa Wojnaroski at *mwojnaroski@usccr.gov.*

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Virginia Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Unit at the above email or street address.

Agenda

I. Welcome & Roll Call
II. SAC Discussion: Civil Rights and Police Accountability in Virginia
III. Public Comments
IV. Adjournment

Dated: October 21, 2021.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2021–23360 Filed 10–26–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–159–2021]

Foreign-Trade Zone 18—San Jose, California; Application for Expansion of Subzone 18F; Lam Research Corporation, Livermore, California

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by

the City of San Jose, grantee of FTZ 18, requesting expanded subzone status for a facility of Lam Research Corporation, located in Livermore, California. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the FTZ Board (15 CFR part 400). It was formally docketed on October 21, 2021.

Subzone 18F—Site 5 is currently located at 7364 Marathon Drive (4.4 acres) and at 7150 Patterson Pass Road, Unit G, (2.9 acres) in Livermore and the site expires on December 31, 2021. (A minor boundary modification was approved on March 26, 2020, to remove Site 5 from the subzone after a period of time.) The applicant is now requesting authority to re-designate a portion of Site 5 that would consist of 4.4 acres located at 7364 Marathon Drive in Livermore. The expanded subzone would be subject to the existing activation limit of FTZ 18.

In accordance with the FTZ Board's regulations, Qahira El-Amin of the FTZ Staff is designated examiner to review the application and make recommendations to the Executive Secretary.

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary and sent to: *ftz@trade.gov.* The closing period for their receipt is December 6, 2021. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to December 21, 2021.

A copy of the application will be available for public inspection in the ''Online FTZ Information Section'' section of the FTZ Board's website, which is accessible via *www.trade.gov/ftz.* Additional information regarding Subzone 18F is available via the FTZ Board's website.

For further information, contact Qahira El-Amin at *Qahira.El-Amin@trade.gov.*

Dated: October 21, 2021.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2021–23374 Filed 10–26–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–971]

Multilayered Wood Flooring From the People's Republic of China: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2018

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) continues to determine that Riverside Plywood Corporation (Riverside) and its cross-owned affiliates Baroque Timber Industries (Baroque Timber) and Suzhou Times Flooring Co., Ltd., and Jiangsu Senmao Bamboo and Wood Industry Co., Ltd. (Jiangsu Senmao), producers and/or exporters of multilayered wood flooring (wood flooring) from the People's Republic of China (China), received countervailable subsidies during the period of review (POR) January 1, 2018, through December 31, 2018.

DATES: Applicable October 27, 2021.

FOR FURTHER INFORMATION CONTACT: Dennis McClure, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5973.

SUPPLEMENTARY INFORMATION:

Background

Commerce published the *Preliminary Results* of this administrative review in the **Federal Register** on April 23, 2021,[1] and invited interested parties to comment.

On June 1, 2021, we received case briefs from the following interested parties: Riverside, Jiangsu Senmao, Fine Furniture (Shanghai) Limited and Double F Limited (collectively, Fine Furniture), Lumber Liquidators Services, LLC (including various Chinese exporters and producers), the Government of the People's Republic of China (GOC), and the American Manufacturers of Multilayered Wood Flooring. On June 15, 2021, we received rebuttal briefs from Riverside, Jiangsu Senmao, and the American Manufacturers of Multilayered Wood Flooring. For a complete description of the events that occurred since the *Preliminary Results, see* the Issues and Decision Memorandum.[2]

On July 29, 2021, we extended the deadline for these final results to October 20, 2021.[3]

Scope of the Order

The product covered by the *Order*[4] is multilayered wood flooring from China. For a complete description of the scope of the *Order, see* the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised in the parties' briefs are addressed in the Issues and Decision Memorandum. A list of the issues addressed is attached to this notice at Appendix I. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Changes Since the Preliminary Results

Based on our analysis of the case and rebuttal briefs and the evidence on the record, we made certain changes from the *Preliminary Results.* These changes are explained in the Issues and Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found countervailable, we find that there is a subsidy, *i.e.,* a government-provided financial contribution that gives rise to a benefit

[1] *See Multilayered Wood Flooring from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review, and Intent to Rescind Review, in Part; 2018,* 86 FR 21693 (April 23, 2021) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the 2018 Countervailing Duty Administrative Review of Multilayered Wood Flooring from the People's Republic of China,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See* Memorandum, ''Administrative Review of the Countervailing Duty Order on Multilayered Wood Flooring from the People's Republic of China: Extension of Deadline for Final Results,'' dated July 29, 2021.

[4] *See Multilayered Wood Flooring from the People's Republic of China: Countervailing Duty Order,* 76 FR 76693 (December 8, 2011) (*Order*); *see also Multilayered Wood Flooring from the People's Republic of China: Amended Antidumping and Countervailing Duty Orders,* 77 FR 5484 (February 3, 2012) (*Amended Order*); and *Multilayered Wood Flooring from the People's Republic of China: Final Clarification of the Scope of the Antidumping and Countervailing Duty Orders,* 82 FR 27799 (June 19, 2017).

to the recipient, and that the subsidy is specific.[5] The Issues and Decision Memorandum contains a full description of the methodology underlying Commerce's conclusions, including any determination that relied upon the use of adverse facts available pursuant to sections 776(a) and (b) of the Act.

Partial Rescission of Administrative Review

As noted in the *Preliminary Results,* Commerce timely received no-shipment certifications from Innomaster Home (Zhongshan) Co., Ltd.; Jiangsu Yuhui International Trade Co., Ltd.; Jiashan On-Line Lumber Co., Ltd.; and Shandong Longteng Wood Co., Ltd. We inquired with U.S. Customs and Border Protection (CBP) whether these companies had shipped merchandise to the United States during the POR, and CBP provided no evidence to contradict the claims of no shipments made by these companies. Accordingly, in the *Preliminary Results,* Commerce stated its intention to rescind the review with respect to these companies in the final results. As the facts in this regard are unchanged since the *Preliminary Results,* we are rescinding the administrative review of these companies, pursuant to 19 CFR 351.213(d)(3).

Final Results of Administrative Review

In accordance with 19 CFR 351.221(b)(5), we calculated a final countervailable subsidy rate for each of the mandatory respondents, Riverside and Jiangsu Senmao. For the companies subject to this review that were not selected for individual examination, we followed Commerce practice, which is to base the subsidy rates on an average of the subsidy rates calculated for those companies selected for individual examination, excluding *de minimis* rates or rates based entirely on adverse facts available. In this case, for the non-selected companies, we calculated a rate by weight-averaging the calculated subsidy rates of Riverside and Jiangsu Senmao using their publicly-ranged sales data for exports of subject merchandise to the United States during the POR. We find the countervailable subsidy rates for the producers/exporters under review to be as follows:

Producer/exporter	Subsidy rate (percent)
Riverside Plywood Corporation and its Cross-Owned Affiliates[6]	9.18
Jiangsu Senmao Bamboo and Wood Industry Co., Ltd	5.81
Non-Selected Companies Under Review[7]	8.17

Assessment Rates

Pursuant to 19 CFR 351.212(b)(2), Commerce will determine, and CBP shall assess, countervailing duties on all appropriate entries of subject merchandise in accordance with the final results of this review, for the above-listed companies at the applicable *ad valorem* assessment rates listed. We intend to issue assessment instructions to CBP 35 days after the date of publication of these final results of review. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

For the companies for which this review is rescinded, Commerce will instruct CBP to assess countervailing duties on all appropriate entries at a rate equal to the cash deposit of estimated countervailing duties required at the time of entry, or withdrawal from warehouse, for consumption, during the POR in accordance with 19 CFR 351.212(c)(l)(i).

Cash Deposit Instructions

In accordance with section 751(a)(2)(C) of the Act, Commerce also intends to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts shown for each of the respective companies listed above on shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review. For all non-reviewed firms subject to the *Order,* we will instruct CBP to continue to collect cash deposits of estimated countervailing duties at the most recent company-specific or all-others rate applicable to the company, as appropriate. These cash deposit requirements, effective upon publication of these final results, shall remain in effect until further notice.

Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

We are issuing and publishing these final results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: October 20, 2021.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Final Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Rescission of the Review, In Part
V. Period of Review
VI. Subsidies Valuation Information
VII. Changes Since the Preliminary Results
VIII. Use of Facts Otherwise Available
IX. Analysis of Programs
X. Discussion of Comments
- Comment 1: Whether To Apply Adverse Facts Available to the Export Buyer's Credit Program
- Comment 2: Whether There Is a Basis to Apply Adverse Facts Available Regarding the Countervailability of the Provision of Electricity for Less Than Adequate Remuneration
- Comment 3: Whether the Electricity Rate Benchmark Selected for Adverse Facts Available Is Flawed
- Comment 4: Whether There Is a Basis to Apply Adverse Facts Available to Specificity Regarding the Countervailability of the Provision of Inputs for Less Than Adequate Remuneration
- Comment 5: Whether Individually-Owned Suppliers Are Government Authorities
- Comment 6: Whether Commerce Should Include International Tropical Timber Organization Data in the Plywood Benchmark Price for the Provision of Plywood for Less Than Adequate Remuneration
- Comment 7: Whether Commerce Should Revise its Benchmark Prices to Properly Value Multiple Sources of Data
- Comment 8: Whether Commerce Should Apply Partial Adverse Facts Available to Riverside and Baroque Timber for Failing to Fully Report Purchases of Backboard Veneers
- Comment 9: Whether Backboards Are Properly Defined as Veneers

[5] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

[6] Cross-owned affiliates are Baroque Timber Industries and Suzhou Times Flooring Co., Ltd.

[7] *See* Appendix II.

Comment 10: Whether to Use Riverside's and Baroque Timber's Density Estimates Based on Actual Purchases or Density Figures from the 2017 Administrative Review in the Provision of Fiberboard and Veneers for Less Than Adequate Remuneration Calculations
Comment 11: Whether Commerce Incorrectly Calculated Baroque Timber's Unit Price for Fiberboard and Veneers
Comment 12: Whether to Include a Specific Harmonized Tariff Schedule Subheading in the Veneer Benchmark Calculation
Comment 13: Whether Commerce Should Adjust the Value-Added Tax Used to Calculate Benchmark Prices for the Provision of Inputs for Less Than Adequate Remuneration Calculations
Comment 14: Whether Commerce Should Revise Inland Freight Costs Used To Calculate Benchmark Prices for the Provision of Inputs for Less Than Adequate Remuneration Calculations
A. Domestic Transportation and Border Fees
B. Jiangsu Senmao's Inland Freight Distance
C. Jiangsu Senmao's Domestic Transportation Rate
Comment 15: Whether Commerce Should Include Negative Less Than Adequate Remuneration Calculations in Benefits
Comment 16: Whether Commerce's Decision to Countervail ''Other Subsidies'' Is Contrary to Law
Comment 17: Whether Commerce Should Assign Kember Flooring a Countervailable Duty Subsidy Rate
Comment 18: Whether Commerce Should Revise the U.S. Customs and Border Protection Instructions
XI. Recommendation

Appendix II

Non-Selected Companies Under Review

1. Anhui Boya Bamboo & Wood Products Co., Ltd.
2. Anhui Longhua Bamboo Product Co., Ltd.
3. Anhui Yaolong Bamboo & Wood Products Co., Ltd.
4. Armstrong Wood Products (Kunshan) Co., Ltd.
5. Benxi Flooring Factory (General Partnership)
6. Benxi Wood Company
7. Changzhou Hawd Flooring Co., Ltd.
8. Dalian Huilong Wooden Products Co., Ltd.
9. Dalian Jaenmaken Wood Industry Co., Ltd.
10. Dalian Jiahong Wood Industry Co., Ltd.
11. Dalian Kemian Wood Industry Co., Ltd.
12. Dalian Penghong Floor Products Co., Ltd.
13. Dalian Qianqiu Wooden Product Co., Ltd.
14. Dalian Shengyu Science and Technology Development Co.
15. Dalian Shumaike Floor Manufacturing Co., Ltd.
16. Dalian T-Boom Wood Products Co., Ltd.
17. Dongtai Fuan Universal Dynamics, LLC
18. Dun Hua Sen Tai Wood Co., Ltd.
19. Dunhua City Dexin Wood Industry Co., Ltd.
20. Dunhua City Hongyuan Wood Industry Co., Ltd.
21. Dunhua City Jisen Wood Industry Co., Ltd.
22. Dunhua Shengda Wood Industry Co., Ltd.
23. Fine Furniture (Shanghai) Limited
24. Fusong Jinlong Wooden Group Co., Ltd.
25. Fusong Jinqiu Wooden Product Co., Ltd.
26. Fusong Qianqiu Wooden Product Co., Ltd.
27. Guangzhou Homebon Timber Manufacturing Co., Ltd.
28. HaiLin LinJing Wooden Products Co., Ltd.
29. Hangzhou Hanje Tec Company Limited
30. Hangzhou Zhengtian Industrial Co., Ltd.
31. Hunchun Forest Wolf Wooden Industry Co., Ltd.
32. Hunchun Xingjia Wooden Flooring Inc.
33. Huzhou Chenghang Wood Co., Ltd.
34. Huzhou Fulinmen Imp. & Exp. Co., Ltd.
35. Huzhou Jesonwood Co., Ltd.
36. Huzhou Sunergy World Trade Co., Ltd.
37. Jiangsu Guyu International Trading Co., Ltd.
38. Jiangsu Keri Wood Co., Ltd.
39. Jiangsu Mingle Flooring Co., Ltd.
40. Jiangsu Simba Flooring Co., Ltd.
41. Jiashan HuiJiaLe Decoration Material Co., Ltd.
42. Jiaxing Hengtong Wood Co., Ltd.
43. Jilin Xinyuan Wooden Industry Co., Ltd.
44. Karly Wood Product Limited
45. Kember Flooring, Inc. (aka Kember Hardwood Flooring, Inc.)
46. Kemian Wood Industry (Kunshan) Co., Ltd.
47. Kingman Floors Co., Ltd.
48. Linyi Anying Wood Co., Ltd.
49. Linyi Youyou Wood Co., Ltd. (successor-in-interest to Shanghai Lizhong Wood Products Co., Ltd.) (aka, The Lizhong Wood Industry Limited Company of Shanghai)
50. Pinge Timber Manufacturing (Zhejiang) Co., Ltd.
51. Power Dekor Group Co. Ltd.
52. Scholar Home (Shanghai) New Material Co. Ltd.
53. Shanghaifloor Timber (Shanghai) Co., Ltd.
54. Sino-Maple (Jiangsu) Co., Ltd.
55. Suzhou Dongda Wood Co., Ltd.
56. Tongxiang Jisheng Import and Export Co., Ltd.
57. Xiamen Yung De Ornament Co., Ltd.
58. Xuzhou Shenghe Wood Co., Ltd.
59. Yekalon Industry, Inc.
60. Yihua Lifestyle Technology Co., Ltd.
61. Yingyi-Nature (Kunshan) Wood Industry Co., Ltd.
62. Zhejiang Dadongwu Greenhome Wood Co., Ltd.
63. Zhejiang Fuerjia Wooden Co., Ltd.
64. Zhejiang Jiechen Wood Industry Co., Ltd.
65. Zhejiang Longsen Lumbering Co., Ltd.
66. Zhejiang Shiyou Timber Co., Ltd.
67. Zhejiang Shuimojiangnan New Material Technology Co., Ltd.
68. Zhejiang Simite Wooden Co., Ltd.

[FR Doc. 2021–23373 Filed 10–26–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–520–807]

Circular Welded Carbon-Quality Steel Pipe From the United Arab Emirates: Final Results of Antidumping Duty Administrative Review; 2018–2019

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that producers and/or exporters subject to this administrative review made sales of subject merchandise at less than fair value (LTFV) during the period of review (POR), December 1, 2018, through November 30, 2019.

DATES: Applicable October 27, 2021.

FOR FURTHER INFORMATION CONTACT: Benjamin A. Luberda or Steven Seifert, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2185 or (202) 482–3350, respectively.

SUPPLEMENTARY INFORMATION:

Background

This review covers three producers/exporters of the subject merchandise. Commerce selected two mandatory respondents for individual examination: Ajmal Steel Tubes & Pipes Ind. L.L.C./Noble Steel Industries L.L.C. (collectively, Ajmal) [1] and Universal Tube and Plastic Industries, Ltd./THL Tube and Pipe Industries LLC/KHK Scaffolding and Formwork LLC (collectively, Universal).[2] The producer/

[1] We collapsed Ajmal Steel Tubes & Pipes Ind. L.L.C. and Noble Steel Industries L.L.C. together in the final results of the 2016–2017 administrative review. *See Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates: Final Results of Antidumping Duty Administrative Review; 2016–2017,* 84 FR 44845 (August 27, 2019) (*CWP from the UAE 2016–2017 Final Results*). Because there is no information on the record of this administrative review that would lead us to revisit this determination, we are continuing to treat these companies as part of a single entity for the purposes of this administrative review.

[2] Commerce previously determined that Universal is a single entity consisting of the following three producers/exporters of subject merchandise: Universal Tube and Plastic Industries, Ltd.; KHK Scaffolding and Framework LLC; and Universal Tube and Pipe Industries LLC (UTP). *See Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 81 FR 36882 (June 8, 2016), and accompanying Preliminary Decision Memorandum, unchanged in *Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates: Final Determination of Sales at Less*

exporter not selected for individual examination is Conares Metal Supply Limited (Conares).

On April 23, 2021, Commerce published the *Preliminary Results.*[3] On August 13, 2021, we postponed the final results until October 20, 2021.[4] A summary of the events that occurred since Commerce published the *Preliminary Results,* as well as a full discussion of the issues raised by interested parties for these final results, may be found in the Issues and Decision Memorandum, which is hereby adopted by this notice.[5] The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Commerce conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Order

The merchandise subject to the order is welded carbon-quality steel pipes and tube, of circular cross-section, with an outside diameter not more than nominal 16 inches (406.4 mm), regardless of wall thickness, surface finish, end finish, or industry specification, and generally known as standard pipe, fence pipe and tube, sprinkler pipe, or structural pipe (although subject product may also be referred to as mechanical tubing). The products subject to this order are currently classifiable in Harmonized Tariff Schedule of the United States (HTSUS) statistical reporting numbers 7306.19.1010, 7306.19.1050, 7306.19.5110, 7306.19.5150, 7306.30.1000, 7306.30.5015, 7306.30.5020, 7306.30.5025, 7306.30.5032, 7306.30.5040, 7306.30.5055, 7306.30.5085, 7306.30.5090, 7306.50.1000, 7306.50.5030, 7306.50.5050, and 7306.50.5070. Although the HTSUS numbers are provided for convenience and for customs purposes, the written product description remains dispositive.[6]

Analysis of Comments Received

All issues raised in case and rebuttal briefs by interested parties to this administrative review are addressed in the Issues and Decision Memorandum. For a list of issues raised by parties, *see* appendix to this notice.

Changes Since the Preliminary Results

Based on a review of the record and comments received from interested parties regarding the *Preliminary Results,* we made certain changes to the preliminary weighted-average margin calculations for Universal and for those companies not selected for individual review.[7]

Final Results of the Review

We are assigning the following weighted-average dumping margins to the firms listed below for the period December 1, 2018, through November 30, 201:

Exporter/producer	Weighted-average dumping margin (percent)
Ajmal Steel Tubes & Pipes Ind. L.L.C./Noble Steel Industries L.L.C	54.27
Universal Tube and Plastic Industries, Ltd./THL Tube and Pipe Industries LLC/KHK Scaffolding and Formwork LLC	1.62
Conares Metal Supply Limited	1.62

We intend to disclose the calculations performed within five days of the date of publication of this notice to parties in this proceeding, in accordance with 19 CFR 351.224(b).

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act, and 19 CFR 351.212(b)(1), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review.

Pursuant to 19 CFR 351.212(b)(1), where Universal reported the entered value of their U.S. sales, we calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for the examined sales to the total entered value of the sales for which entered value was reported. Where either the respondent's weighted-average dumping margin is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), or an importer-specific rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

The assessment rate for antidumping duties for the company not selected for individual examination (*i.e.,* Conares) and for Ajmal, which has been assigned a rate based entirely on total adverse facts available, will be equal to the respective weighted-average dumping margin identified above in the Final Results of the Review. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.[8]

Commerce's ''automatic assessment'' will apply to entries of subject merchandise during the POR produced by companies included in these final results of review for which the reviewed

Than Fair Value, 81 FR 75030 (October 28, 2016), and accompanying Issues and Decision Memorandum. Because there is no information on the record of this administrative review that would lead us to revisit this determination, we are continuing to treat these companies as part of a single entity for the purposes of this administrative review. Additionally, we previously determined that THL Tube and Pipe Industries LLC is the successor-in-interest to UTP. *See CWP from the UAE 2016–2017 Final Results.*

[3] *See Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review; 2018–2019,* 86 FR 21688 (April 23, 2021) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[4] *See* Memorandum, ''Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates: Extension of Deadline for Final Results of 2018–2019 Administrative Review,'' dated August 13, 2021.

[5] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the 2018–2019 Administrative Review of the Antidumping Duty Order on Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[6] For a complete description of the scope of the order, *see* the Issues and Decision Memorandum.

[7] *See* accompanying Issues and Decision Memorandum.

[8] *See* section 751(a)(2)(C) of the Act.

companies did not know that the merchandise they sold to the intermediary (*e.g.,* a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[9]

We intend to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for each specific company listed above will be that established in the final results of this review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for previously investigated companies not subject to this review, the cash deposit will continue to be the company-specific rate published for the most recently completed segment of this proceeding; (3) if the exporter is not a firm covered in this review, or a previous segment, but the manufacturer is, then the cash deposit rate will be the rate established for the most recent segment for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 5.95 percent, the all-others rate established in the LTFV investigation.[10] These deposit requirements, when imposed, shall remain in effect until further notice.

[9] For a full discussion of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[10] *See Circular Welded Carbon-Quality Steel Pipe from the Sultanate of Oman, Pakistan, and the United Arab Emirates: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Orders,* 81 FR 91906, 91908 (December 19, 2016).

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Order

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: October 20, 2021.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations performing the non-exclusive functions and duties of theAssistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Use of Adverse Facts Available
V. Margin Calculations
VI. Discussion of Issues
Ajmal-Specific Issue
Comment 1: Application of Adverse Facts Available (AFA) Based on Failure to Cooperate
Universal-Specific Issues
Comment 2: Whether To Cap Universal's Cutting Revenue
Comment 3: Whether To Revise Universal's Reported Theoretical Weight
Comment 4: Whether To Use Universal's Most Recently Submitted Data Sets
Other Issue
Comment 5: Rate for the Non-Selected Company
VII. Recommendation

[FR Doc. 2021–23372 Filed 10–26–21; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–560–822, A–557–813, A–570–886, A–583–843, A–549–821, A–552–806, C–552–805]

Polyethylene Retail Carrier Bags From Indonesia, Malaysia, the People's Republic of China, Taiwan, Thailand, and the Socialist Republic of Vietnam: Continuation of the Antidumping Duty Orders and Countervailing Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of the determinations by the Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC) that revocation of the antidumping duty (AD) orders on polyethylene retail carrier bags (PRCBs) from Indonesia, Malaysia, the People's Republic of China (China), Taiwan, Thailand, and the Socialist Republic of Vietnam (Vietnam) and the countervailing duty (CVD) order on PRCBs from Vietnam would likely lead to a continuation or recurrence of dumping, countervailable subsidies, and material injury to an industry in the United States, Commerce is publishing a notice of continuation of these AD and CVD orders.

DATES: Applicable October 27, 2021.

FOR FURTHER INFORMATION CONTACT: Claudia Cott or Minoo Hatten, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4270 or (202) 482–1690, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 9, 2004, Commerce published in the **Federal Register** the AD orders on PRCBs from Malaysia, China, and Thailand, and on May 4, 2010, the AD orders on PRCBs from Indonesia, Taiwan, and Vietnam and the CVD order on PRCBs from Vietnam.[1] On

[1] See *Antidumping Duty Order: Polyethylene Retail Carrier Bags from Malaysia*, 69 FR 48203 (August 9, 2004); *Antidumping Duty Order: Polyethylene Retail Carrier Bags from the People's Republic of China*, 69 FR 48201 (August 9, 2004); *Antidumping Duty Order: Polyethylene Retail Carrier Bags from Thailand*, 69 FR 48204 (August 9, 2004); *Antidumping Duty Orders: Polyethylene*

March 31, 2021, Commerce initiated,[2] and on April 1, 2021, the ITC instituted,[3] sunset reviews of the *Orders,* pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).

As a result of its reviews, Commerce determined, pursuant to sections 751(c)(1) and 752(c) of the Act, that revocation of the *Orders* would likely lead to continuation or recurrence of dumping and countervailable subsidies. Commerce, therefore, notified the ITC of the magnitude of the margins of dumping and net subsidies rates likely to prevail should these *Orders* be revoked.[4]

On October 21, 2021, the ITC published its determination that revocation of the *Orders* would likely lead to a continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time, pursuant to sections 751(c) and 752(a) of the Act.[5]

Scope of the Orders

The merchandise covered by the *Orders* is PRCBs, which may be referred to as t-shirt sacks, merchandise bags, grocery bags, or checkout bags. The subject merchandise is defined as non-sealable sacks and bags with handles (including drawstrings), without zippers or integral extruded closures, with or without gussets, with or without printing, of polyethylene film having a thickness no greater than 0.035 inch (0.889 mm) and no less than 0.00035 inch (0.00889 mm), and with no length or width shorter than 6 inches (15.24 cm) or longer than 40 inches (101.6 cm). The depth of the bag may be shorter than 6 inches but not longer than 40 inches (101.6 cm).

PRCBs are typically provided without any consumer packaging and free of charge by retail establishments, *e.g.,* grocery, drug, convenience, department, specialty retail, discount stores, and restaurants, to their customers to package and carry their purchased products. The scope of the orders excludes (1) polyethylene bags that are not printed with logos or store names and that are closeable with drawstrings made of polyethylene film and (2) polyethylene bags that are packed in consumer packaging with printing that refers to specific end-uses other than packaging and carrying merchandise from retail establishments, *e.g.,* garbage bags, lawn bags, trash-can liners.

As a result of changes to the Harmonized Tariff Schedule of the United States (HTSUS), imports of the subject merchandise are currently classifiable under statistical category 3923.21.0085 of the HTSUS. Furthermore, although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of the *Orders* is dispositive.[6]

Continuation of the Orders

As a result of the determinations by Commerce and the ITC that revocation of the *Orders* would likely lead to a continuation or recurrence of dumping, countervailable subsidies, and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act and 19 CFR 351.218(a), Commerce hereby orders the continuation of the *Orders.* U.S. Customs and Border Protection will continue to collect AD and CVD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of the continuation of these *Orders* will be the date of publication in the **Federal Register** of this notice of continuation. Pursuant to section 751(c)(2) of the Act and 19 CFR 351.218(c)(2), Commerce intends to initiate the next five-year (sunset) reviews of these *Orders* not later than 30 days prior to the fifth anniversary of the effective date of continuation.

Administrative Protective Order (APO)

This notice also serves as the only reminder to parties subject to APO of their responsibility concerning the return, destruction, or conversion to judicial protective order of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Failure to comply is a violation of the APO which may be subject to sanctions.

Notification to Interested Parties

These five-year sunset reviews and this notice are in accordance with section 751(c) of the Act and published pursuant to section 777(i)(1) of the Act and 19 CFR 351.218(f)(4).

Dated: October 21, 2021.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2021–23375 Filed 10–26–21; 8:45 am]

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Retail Carrier Bags from Indonesia, Taiwan, and the Socialist Republic of Vietnam, 75 FR 23667 (May 4, 2010); and *Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Countervailing Duty Order,* 75 FR 23670 (May 4, 2010) (collectively, *Orders*).

[2] *See Initiation of Five-Year (Sunset) Reviews,* 86 FR 16701 (March 31, 2021).

[3] *See Polyethylene Retail Carrier Bags from China, Indonesia, Malaysia, Taiwan, Thailand, and Vietnam; Institution of Five-Year Reviews,* 86 FR 17200 (April 1, 2021).

[4] *See Polyethylene Retail Carrier Bags from Indonesia, Malaysia, the People's Republic of China, Taiwan, Thailand, and the Socialist Republic of Vietnam: Final Results of the Expedited Sunset Reviews of the Antidumping Duty Orders,* 86 FR 35478 (July 6, 2021), and accompanying Issues and Decision Memorandum (IDM); *see also Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Final Results of the Expedited Second Five-Year Sunset Review of the Countervailing Duty Order,* 86 FR 43626 (August 10, 2021), and accompanying IDM.

[5] *See Polyethylene Retail Carrier Bags from China, Indonesia, Malaysia, Taiwan, Thailand, and Vietnam; (Inv. Nos. 701–TA–462 and 731–TA–1156–1158 (Second Review) and 731–TA–1043–1045 (Third Review)),* 86 FR 58301 (October 21, 2021), *see also Polyethylene Retail Carrier Bags from China, Indonesia, Malaysia, Taiwan, Thailand, and Vietnam (Inv. Nos. 701–TA–462 and 731–TA–1156–1158 (Second Review) and 731–TA1043–1045 (Third Review),* USITC Pub. 5233 (October 2021).

[6] *See Orders.*

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–016]

Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China: Notice of Remand Proceeding and Reopening of 2017–2018 Antidumping Duty Administrative Review Record

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) is conducting a remand of the 2017–2018 administrative review of the antidumping duty (AD) order on certain passenger vehicle and light truck tires from the People's Republic of China (China), which includes a limited reopening of the record. Commerce received a notification from U.S. Customs and Border Protection (CBP) that it found discrepancies and inaccuracies between the sales information certain parties reported during the 2017–2018 administrative review and that reported to CBP at the time of entry. Accordingly, Commerce intends to reopen the record of the 2017–2018 AD administrative review and reconsider the final results of the 2017–2018 review. Commerce is providing notice of the remand and the reopening of the record, and further, inviting participation from interested parties.

DATES: Applicable October 27, 2021.

FOR FURTHER INFORMATION CONTACT: Charles DeFilippo, AD/CVD Operations, Office VII, Enforcement & Compliance, International Trade Administration, U.S. Department of Commerce, 1401

Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3979.

SUPPLEMENTARY INFORMATION:

Background

On April 22, 2020, Commerce published in the **Federal Register** the final results of the administrative review of the AD order on passenger tires from China covering the period August 1, 2017, through July 31, 2018.[1]

Pirelli Tyre Co., Ltd., Pirelli Tyre S.p.A, and Pirelli Tire LLC (collectively, Pirelli) challenged the *2017–2018 Final Results* and sought review by the U.S. Court of International Trade (CIT). Pirelli moved for the proceedings to be stayed until a final decision was rendered in the appeal of *China Manufacturers Alliance, LLC* v. *United States.*[2] The CIT granted the motion and stayed the proceedings.

On May 20, 2021, CBP notified Commerce that it had identified inaccuracies in the sales prices on imports of passenger tires from China reported to Commerce during the 2017–2018 administrative review.[3] Specifically, CBP compared the questionnaire responses submitted by mandatory respondent Shandong New Continent (SNC) to Commerce with CBP importation records and found significant undervaluation.[4] According to the CBP referral memorandum, the values submitted to CBP were approximately $2.6 million lower than the values submitted to Commerce.[5] The CBP referral memorandum raises serious concerns and questions regarding the U.S. sales information reported by SNC during the 2017–2018 administrative review. Commerce used SNC's U.S. sales information to calculate its company specific weighted-average dumping margin, and SNC's margin served as the basis for the rate assigned to the non-individually examined respondents eligible for a separate rate.[6]

As a result, the United States requested that the CIT remand the administrative review for Commerce to evaluate the information provided by CBP and further examine the issue. On September 20, 2021, the CIT lifted the stay on the action and granted the United States' motion for remand.[7]

Notification to Interested Parties

Commerce is hereby notifying interested parties of the remand of the 2017–2018 administrative review and the reopening of the record. We intend to place CBP's referral letter and accompanying information on the record of this remand proceeding in Enforcement and Compliance's Antidumping Duty and Countervailing Duty Centralized Electronic Service System (ACCESS) within five days of publication of this notice. We will address the discrepancies and inaccuracies of SNC's sales information in the remand proceeding concerning this administrative review.

Commerce intends to provide interested parties with the opportunity to participate in this remand proceeding, including through the submission of comments, and, if appropriate, new factual information and verification. Specifically, Commerce will notify parties on the segment-specific service list for this remand segment of a schedule for comments. In addition, Commerce may request factual information from any person to assist in making its determination and may verify submissions of factual information, if Commerce determines that such verification is appropriate. Based on our analysis on remand we may revise the *2017–2018 Final Results,* including by adjusting SNC's dumping margin as appropriate.

Parties are also hereby notified that this is the only notice that Commerce intends to publish in the **Federal Register** concerning this remand proceeding and reopening of the record. Interested parties that wish to participate in the remand proceeding, and receive notice of the final redetermination, must submit their letters of appearance as discussed below. Further, any party desiring access to business proprietary information in these proceedings must file an application for access to business proprietary information under administrative protective order (APO), as discussed below.

Scope of the Order

The scope of this order is passenger vehicle and light truck tires. Passenger vehicle and light truck tires are new pneumatic tires, of rubber, with a passenger vehicle or light truck size designation. Tires covered by this order may be tube-type, tubeless, radial, or non-radial, and they may be intended for sale to original equipment manufacturers or the replacement market.

Subject tires have, at the time of importation, the symbol ''DOT'' on the sidewall, certifying that the tire conforms to applicable motor vehicle safety standards. Subject tires may also have the following prefixes or suffix in their tire size designation, which also appears on the sidewall of the tire:

Prefix designations:

P—Identifies a tire intended primarily for service on passenger cars

LT—Identifies a tire intended primarily for service on light trucks

Suffix letter designations:

LT—Identifies light truck tires for service on trucks, buses, trailers, and multipurpose passenger vehicles used in nominal highway service. All tires with a ''P'' or ''LT'' prefix, and all tires with an ''LT'' suffix in their sidewall markings are covered by this investigation regardless of their intended use.

In addition, all tires that lack a ''P'' or ''LT'' prefix or suffix in their sidewall markings, as well as all tires that include any other prefix or suffix in their sidewall markings, are included in the scope, regardless of their intended use, as long as the tire is of a size that is among the numerical size designations listed in the passenger car section or light truck section of the Tire and Rim Association Year Book, as updated annually, unless the tire falls within one of the specific exclusions set out below.

Passenger vehicle and light truck tires, whether or not attached to wheels or rims, are included in the scope. However, if a subject tire is imported attached to a wheel or rim, only the tire is covered by the scope.

Specifically excluded from the scope are the following types of tires:

(1) Racing car tires; such tires do not bear the symbol ''DOT'' on the sidewall and may be marked with ''ZR'' in size designation;

(2) new pneumatic tires, of rubber, of a size that is not listed in the passenger car section or light truck section of the Tire and Rim Association Year Book;

(3) pneumatic tires, of rubber, that are not new, including recycled and retreaded tires;

(4) non-pneumatic tires, such as solid rubber tires;

(5) tires designed and marketed exclusively as temporary use spare tires for passenger vehicles which, in addition, exhibit each of the following physical characteristics:

[1] *See Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2017–2018,* 85 FR 22396 (April 22, 2020) (*2017–2018 Final Results*), and accompanying Issues and Decision Memorandum.

[2] *See* 357 F. Supp. 3d 1364 (2019).

[3] *See* Memorandum, ''Referral Memorandum from U.S. Customs and Border Protection on the Misreporting of Sales Information for Entries Covered in the 2017–2018 Antidumping Duty Administrative Review,'' dated concurrently with this notice (CBP Referral Memorandum).

[4] *Id.* at 1.

[5] *Id.*

[6] *See 2017–2018 Final Results.*

[7] *See Pirelli Tyre Co., Ltd., et al.* v. *United States,* CIT Ct. No. 20–00115, Slip Op 21–122 (September 20, 2021); *see also China Manufacturers Alliance, LLC* v. *United States,* 1 F. 4th 1028 (Fed. Cir. 2021).

(a) The size designation and load index combination molded on the tire's sidewall are listed in Table PCT–1B (''T'' Type Spare Tires for Temporary Use on Passenger Vehicles) of the Tire and Rim Association Year Book,

(b) the designation ''T'' is molded into the tire's sidewall as part of the size designation, and,

(c) the tire's speed rating is molded on the sidewall, indicating the rated speed in MPH or a letter rating as listed by Tire and Rim Association Year Book, and the rated speed is 81 MPH or a ''M'' rating;

(6) tires designed and marketed exclusively for specialty tire (ST) use which, in addition, exhibit each of the following conditions:

(a) The size designation molded on the tire's sidewall is listed in the ST sections of the Tire and Rim Association Year Book,

(b) the designation ''ST'' is molded into the tire's sidewall as part of the size designation,

(c) the tire incorporates a warning, prominently molded on the sidewall, that the tire is ''For Trailer Service Only'' or ''For Trailer Use Only'',

(d) the load index molded on the tire's sidewall meets or exceeds those load indexes listed in the Tire and Rim Association Year Book for the relevant ST tire size, and

(e) either

(i) the tire's speed rating is molded on the sidewall, indicating the rated speed in MPH or a letter rating as listed by Tire and Rim Association Year Book, and the rated speed does not exceed 81 MPH or an ''M'' rating; or

(ii) the tire's speed rating molded on the sidewall is 87 MPH or an ''N'' rating, and in either case the tire's maximum pressure and maximum load limit are molded on the sidewall and either

(1) both exceed the maximum pressure and maximum load limit for any tire of the same size designation in either the passenger car or light truck section of the Tire and Rim Association Year Book; or

(2) if the maximum cold inflation pressure molded on the tire is less than any cold inflation pressure listed for that size designation in either the passenger car or light truck section of the Tire and Rim Association Year Book, the maximum load limit molded on the tire is higher than the maximum load limit listed at that cold inflation pressure for that size designation in either the passenger car or light truck section of the Tire and Rim Association Year Book;

(7) tires designed and marketed exclusively for off-road use and which, in addition, exhibit each of the following physical characteristics:

(a) The size designation and load index combination molded on the tire's sidewall are listed in the off-the-road, agricultural, industrial or ATV section of the Tire and Rim Association Year Book,

(b) in addition to any size designation markings, the tire incorporates a warning, prominently molded on the sidewall, that the tire is ''Not For Highway Service'' or ''Not for Highway Use'',

(c) the tire's speed rating is molded on the sidewall, indicating the rated speed in MPH or a letter rating as listed by the Tire and Rim Association Year Book, and the rated speed does not exceed 55 MPH or a ''G'' rating, and

(d) the tire features a recognizable off-road tread design.

The products covered by the order are currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 4011.10.10.10, 4011.10.10.20, 4011.10.10.30, 4011.10.10.40, 4011.10.10.50, 4011.10.10.60, 4011.10.10.70, 4011.10.50.00, 4011.20.10.05, and 4011.20.50.10. Tires meeting the scope description may also enter under the following HTSUS subheadings: 4011.90.2050, 4011.99.45.10, 4011.99.45.50, 4011.99.85.10, 4011.99.85.50, 8708.70.45.30, 8708.70.45.45, 8708.70.45.46, 8708.70.45.48, 8708.70.45.60, 8708.70.60.30, 8708.70.60.45, and 8708.70.60.60. While HTSUS subheadings are provided for convenience and for customs purposes, the written description of the subject merchandise is dispositive.

Filing Requirements

All submissions to Commerce must be filed electronically using ACCESS.[8] An electronically filed document must be received successfully in its entirety by the time and date it is due. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information.[9]

Letters of Appearance and Administrative Protective Order

Interested parties that wish to participate in this remand proceeding and be added to the public service list must file a letter of appearance in accordance with 19 CFR 351.103(d)(1).

Interested parties must submit applications for disclosure under the APO in accordance with the procedures outlined in Commerce's regulations at 19 CFR 351.305. Those procedures apply to this remand proceeding.

Dated: October 22, 2021.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2021–23429 Filed 10–26–21; 8:45 am]

BILLING CODE 3510–DS–P

[8] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011), as amended in *Enforcement and Compliance; Change of Electronic Filing System Name,* 79 FR 69046 (November 20, 2014) for details of Commerce's electronic filing requirements, effective August 5, 2011. Information on help using ACCESS can be found at *https://access.trade.gov/help.aspx* and a handbook can be found at *https://access.trade.gov/help/Handbook%20on%20Electronic%20Filing%20Procedures.pdf.*

[9] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006 (March 26, 2020); *see also Temporary Rule Modifying AD/CVD Service Requirements Due to COVID19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Notice of Deadline Extension for the NOAA Brennan Matching Fund Opportunity for Ocean and Coastal Mapping

AGENCY: Office of Coast Survey (OCS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Announcement to extend the deadline for the Brennan Matching Fund program opportunity, request for proposals, and request for interest to November 12, 2021; notice of availability of a mapping data acquisition cost estimation sheet.

SUMMARY: This notice extends the proposal submission deadline for the NOAA Rear Admiral Richard T. Brennan Ocean Mapping Matching Fund program by two weeks to November 12, 2021. Notice of the Brennan Matching Fund opportunity originally appeared in the **Federal Register** on July 27, 2021 (86 FR 40197, pages 40197–40200, 2021–15970, or at: *https://www.federalregister.gov/documents/2021/07/27/2021-15970/notice-of-matching-fund-opportunity-for-ocean-and-coastal-mapping-and-request-for-partnership).*

DATES: Proposals must be received via email by 5 p.m. ET on November 12, 2021, including any accompanying GIS files. If an entity is unable to apply for this particular opportunity but has an interest in participating in similar, future opportunities, NOAA requests a

one-page statement of interest, instead of a proposal, also by November 12, 2021, to help gauge whether to offer the Brennan Matching Fund program in future years. All other dates in the original FRN remain unchanged at this time.

ADDRESSES: Proposals must be submitted in PDF format via email to *iwgocm.staff@noaa.gov* by the November 12, 2021, deadline. NOAA strongly encourages interested entities to submit their proposals in advance of the deadline. Interested applicants may also contact NOAA via email, *iwgocm.staff@noaa.gov,* for a rough order of magnitude cost estimation sheet to use in estimating acquisition costs for the matching program.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Ashley Chappell, NOAA Integrated Ocean and Coastal Mapping Coordinator, 240–429–0293, or at *iwgocm.staff@noaa.gov.*

SUPPLEMENTARY INFORMATION: The goal of the Brennan Matching Fund is to acquire more ocean and coastal mapping data for mutual benefit, including for safe navigation, integrated ocean and coastal mapping, coastal zone management, coastal and ocean science, climate preparedness, infrastructure investments, and other activities. The program relies on NOAA's mapping, charting, and geodesy expertise, appropriated funds, and its authority to receive and expend matching funds contributed by partners to conduct surveying and mapping activities. This program is subject to funding availability.

Authority: The Coast and Geodetic Survey Act of 1947, 33 U.S.C. 883e.

Kathryn Ries,

Performing the Duties of Director, Office of Coast Survey, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2021–23426 Filed 10–26–21; 8:45 am]

BILLING CODE 3510–JE–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB524]

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will hold a one-day meeting of its Outreach & Education Technical Committee.

DATES: The meeting will convene on Monday, November 15, 2021, 9 a.m.–5 p.m., EST. For agenda details, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES:

Meeting address: The meeting will be held via webinar. Please visit the Gulf Council website *www.gulfcouncil.org* for meeting materials and webinar registration information.

Council address: Gulf of Mexico Fishery Management Council, 4107 W Spruce Street, Suite 200, Tampa, FL 33607; telephone: (813) 348–1630.

FOR FURTHER INFORMATION CONTACT: Emily Muehlstein, Public Information Officer, Gulf of Mexico Fishery Management Council; *emily.muehlstein@gulfcouncil.org,* telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION: The following items are on the agenda, though agenda items may be addressed out of order (changes will be noted on the Council's website when possible).

Monday, November 15, 2021; 9 a.m.–5 p.m.

Introductions of members and staff, adoption of agenda, and approval of minutes from the October 15, 2020 meeting summary. Staff will give a presentation on the 2021 Communications Improvement Plan. Staff will give a presentation on the 2021 Communications analytics. The Committee will review Draft Social Media, Public Comment, and Press Release Guidelines/Standard Operating Policy and Procedures. The Committee will discuss re-naming the Council's Something's Fishy Tool. The Committee will hear an update on the Return 'Em Right project and make recommendations on the future of Fishing for Our Future. The Committee will also discuss future communication topics and discuss the 2022 Council Communications Plan. The committee will discuss any Other Business items and take Public Comment before the meeting adjourns.

—Meeting Adjourns

The meeting will be broadcast via webinar only. You may register for the webinar by visiting *www.gulfcouncil.org* and clicking on the Council meeting on the calendar.

The Agenda is subject to change, and the latest version along with other meeting materials will be posted on *www.gulfcouncil.org* as they become available.

Although other non-emergency issues not on the agenda may come before the group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during this meeting. Actions will be restricted to those issues specifically identified 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 action to address the emergency.

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

Dated: October 22, 2021.

Tracey L. Thompson,

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

[FR Doc. 2021–23399 Filed 10–26–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2021–SCC–0149]

Agency Information Collection Activities; Comment Request; School Pulse Panel Data Collection

AGENCY: Institute of Educational Science (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is requesting the Office of Management and Budget (OMB) to conduct an emergency review of a new information collection.

DATES: Approval by OMB has been requested by October 22, 2021. The Department has waived the comment period for this notice.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2021–SCC–0149.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Carrie Clarady, 202–245–6347.

SUPPLEMENTARY INFORMATION: This information collection request contains (1) *Title of Collection:* School Pulse Panel Data Collection; (2) *OMB Control Number:* 1850–0963; (3) *Type of Review:* A revision of a currently approved collection; (4) *Respondents/Affected Public:* State, Local, and Tribal Governments; (5) *Total Estimated Number of Annual Responses:* 17,280; (6) *Total Estimated Number of Annual Burden Hours:* 4,752.

Abstract: The School Pulse Panel is a new study conducted by the National Center for Education Statistics (NCES), part of the Institute of Education Sciences (IES), within the United States Department of Education, to collect extensive data on issues concerning the impact of the COVID–19 pandemic on students and staff in U.S. public primary, middle, high, and combined-grade schools. The survey will ask school district staff and sampled school principals about topics such as instructional mode offered; enrollment counts of subgroups of students using various instructional modes; learning loss mitigation strategies; safe and healthy school mitigation strategies; special education services; use of technology; use of federal relief funds; and information on staffing. Because this data collection is extremely high priority and time sensitive, it will undergo Emergency Clearance. The administration of the School Pulse Panel study is in direct response to President Biden's Executive Order 14000: Supporting the Reopening and Continuing Operation of Schools and Early Childhood Education Providers. It will be one of the nation's few sources of reliable data on a wealth of information focused on school reopening efforts, virus spread mitigation strategies, services offered for students and staff, and technology use, as reported by school district staff and principals in U.S. public schools. About 1,200 public elementary, middle, high, and combined-grade schools will be selected to participate in a panel where school and district staff will be asked to provide requested data monthly during the 2021–22 school years. This approach provides the ability to collect detailed information on various topics while also assessing changes in reopening efforts over time. Given the high demand for data collection during this time, the content of the survey may change on a quarterly basis.

Emergency Justification: In September 2021, NCES made the decision to suspend data collection for the months of October, November, and December 2021, as the response rate for the first month of the collection was under 10 percent and not expected to provide sufficient data for accurate and unbiased estimates to be produced. The reason for the delay was to provide the Institute of Education Sciences sufficient time to redesign the study to improve response rates. A primary strategy is to reduce burden in each month's collection and to rotate content to address data needs of the agencies across months. The January SPP collection will be based on updated materials cleared through OMB in previous submissions for the study. The SPP study itself is extremely important particularly now that COVID–19 has not waned, and the pulse model is one that the agency will need after the pandemic subsides for other quick-turnaround data needs.

Dated: October 22, 2021.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2021–23424 Filed 10–26–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2021–SCC–0103]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Education Stabilization Fund—Emergency Assistance for Non-Public Schools (EANS) Program Recipient Annual Reporting Data Collection Form

AGENCY: Office of Elementary of Secondary Education (OESE), 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 November 26, 2021.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this information collection request by selecting ''Department of Education'' under ''Currently Under Review,'' then check ''Only Show ICR for Public Comment'' checkbox. Comments may also be sent to *ICDocketmgr@ed.gov.*

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Gloria Tanner, 202–453–5596.

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: Education Stabilization Fund—Emergency Assistance for Non-Public Schools (EANS) Program Recipient Annual Reporting Data Collection Form.

OMB Control Number: 1810–NEW.

Type of Review: A new information collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 52.

Total Estimated Number of Annual Burden Hours: 208.

Abstract: Under the Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (CRRSA Act), Public Law 116–260 (December 27, 2020), Congress first authorized the Emergency Assistance to Non-Public Schools (EANS) program to provide emergency services or assistance to non-public schools in the wake of the Coronavirus Disease 2019 (COVID–19). The American Rescue Plan Act of 2021 (ARP Act), Public Law 117–2 (March 11, 2021), authorized a second round of funding (ARP EANS) to provide services or assistance to non-public schools.

This information collection requests approval for a new collection that includes annual reporting requirements that align with the requirements of the EANS program and obtain information on how the funds were used. In accordance with the Recipient's Funding Certification and Agreements executed by EANS grantees, the Secretary may specify additional forms of reporting.

Dated: October 21, 2021.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2021–23321 Filed 10–26–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 9074–053]

Warrensburg Hydropower Limited Partnership; Notice of Intent To File License Application, Filing of Pre-Application Document, and Approving Use of the Traditional Licensing Process

a. *Type of Application:* Notice of Intent to File License Application and Request to Use the Traditional Licensing Process.

b. *Project No.:* 9074–053.

c. *Date Filed:* September 3, 2021.

d. *Submitted by:* Warrensburg Hydropower Limited Partnership (Warrensburg Hydro).

e. *Name of Project:* Warrensburg Hydroelectric Project.

f. *Location:* Located on the Schroon River in the town of Warrensburg, Warren County, New York. The project does not occupy any federal land.

g. *Filed Pursuant to:* 18 CFR 5.3 of the Commission's regulations.

h. *Potential Applicant Contact:* Mr. Erik Bergman, Manager, Warrensburg Hydropower Limited Partnership, 33 Hudson Falls Road, South Glens, NY 12803, Phone: (518) 480–3962, Email: *erik.bergman@boralex.com*.

i. *FERC Contact:* John Stokely, Phone: (202) 502–8534, Email: *john.stokely@ferc.gov*.

j. Warrensburg Hydro filed its request to use the Traditional Licensing Process on September 3, 2021. Warrensburg Hydro provided public notice of its request on September 15, 2021. In a letter dated October 21, 2021, the Director of the Division of Hydropower Licensing approved Warrensburg Hydro's request to use the Traditional Licensing Process.

k. With this notice, we are initiating informal consultation with the U.S. Fish and Wildlife Service and/or NOAA Fisheries under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR, Part 402; and NOAA Fisheries under section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act and implementing regulations at 50 CFR 600.920. We are also initiating consultation with the New York State Historic Preservation Officer, as required by section 106, National Historic Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. With this notice, we are designating Warrensburg Hydro as the Commission's non-federal representative for carrying out informal consultation pursuant to section 7 of the Endangered Species Act and section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act; and consultation pursuant to section 106 of the National Historic Preservation Act.

m. Warrensburg Hydro filed a Pre-Application Document (PAD; including a proposed process plan and schedule) with the Commission, pursuant to 18 CFR 5.6 of the Commission's regulations.

n. A copy of the PAD may be viewed on the Commission's website (*http://www.ferc.gov*), using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field, to access the document. For assistance, contact FERC Online Support at *FERCOnline Support@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY).

o. The applicant states its unequivocal intent to submit an application for a new license for Project No. 9074. Pursuant to 18 CFR 16.8, 16.9, and 16.10 each application for a new license and any competing license applications must be filed with the Commission at least 24 months prior to the expiration of the existing license. All applications for license for this project must be filed by December 31, 2024.

p. Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Dated: October 21, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–23417 Filed 10–26–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP22–6–000]

WBI Energy Transmission, Inc.; Notice of Request Under Blanket Authorization and Establishing Intervention and Protest Deadline

Take notice that on October 12, 2021, WBI Energy Transmission, Inc. (WBI Energy), 1250 West Century Avenue, Bismarck, North Dakota 58503, filed in the above referenced docket a prior notice pursuant to sections 157.205, 157.208, and 157.211 of the Federal Energy Regulatory Commission's regulations under the Natural Gas Act and WBI Energy's blanket certificate issued in Docket Nos. CP28–487–000, et al., seeking authorization for its Line Section 7 Expansion Project in McLean and Morton Counties, North Dakota. WBI Energy is proposing to construct approximately 9.6 miles of 8-inch-diameter natural gas lateral pipeline, associated receipt and delivery point facilities, and three farm taps. The estimated cost for the project is approximately $10.4 million, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions concerning this application should be directed to Lori Myerchin, Director, Regulatory Affairs and Transportation Services, WBI Energy Transmission, Inc., 1250 West Century Avenue, Bismarck, North Dakota 58503, phone: 701–530–1563, email: *lori.myerchin@wbienergy.com*.

Public Participation

There are three ways to become involved in the Commission's review of this project: You can file a protest to the project, you can file a motion to intervene in the proceeding, and you can file comments on the project. There is no fee or cost for filing protests, motions to intervene, or comments. The deadline for filing protests, motions to intervene, and comments is 5:00 p.m. Eastern Time on December 20, 2021. How to file protests, motions to intervene, and comments is explained below.

Protests

Pursuant to section 157.205 of the Commission's regulations under the NGA,[1] any person [2] or the Commission's staff may file a protest to the request. If no protest is filed within the time allowed or if a protest is filed and then withdrawn within 30 days after the allowed time for filing a protest, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request for authorization will be considered by the Commission.

Protests must comply with the requirements specified in section 157.205(e) of the Commission's regulations,[3] and must be submitted by the protest deadline, which is December 20, 2021. A protest may also serve as a motion to intervene so long as the protestor states it also seeks to be an intervenor.

Interventions

Any person has the option to file a motion to intervene in this proceeding. Only intervenors have the right to request rehearing of Commission orders issued in this proceeding and to subsequently challenge the Commission's orders in the U.S. Circuit Courts of Appeal.

To intervene, you must submit a motion to intervene to the Commission in accordance with Rule 214 of the Commission's Rules of Practice and Procedure [4] and the regulations under the NGA [5] by the intervention deadline for the project, which is December 20, 2021. As described further in Rule 214, your motion to intervene must state, to the extent known, your position regarding the proceeding, as well as your interest in the proceeding. For an individual, this could include your status as a landowner, ratepayer, resident of an impacted community, or recreationist. You do not need to have property directly impacted by the project in order to intervene. For more information about motions to intervene, refer to the FERC website at *https://www.ferc.gov/resources/guides/how-to/intervene.asp.*

All timely, unopposed motions to intervene are automatically granted by operation of Rule 214(c)(1). Motions to intervene that are filed after the intervention deadline are untimely and may be denied. Any late-filed motion to intervene must show good cause for being late and must explain why the time limitation should be waived and provide justification by reference to factors set forth in Rule 214(d) of the Commission's Rules and Regulations. A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies (paper or electronic) of all documents filed by the applicant and by all other parties.

Comments

Any person wishing to comment on the project may do so. The Commission considers all comments received about the project in determining the appropriate action to be taken. To ensure that your comments are timely and properly recorded, please submit your comments on or before December 20, 2021. The filing of a comment alone will not serve to make the filer a party to the proceeding. To become a party, you must intervene in the proceeding.

How To File Protests, Interventions, and Comments

There are two ways to submit protests, motions to intervene, and comments. In both instances, please reference the Project docket number CP22–6–000 in your submission.

(1) You may file your protest, motion to intervene, and comments by using the Commission's eFiling feature, which is located on the Commission's website (*www.ferc.gov*) under the link to Documents and Filings. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making; first select ''General'' and then select ''Protest'', ''Intervention'', or ''Comment on a Filing''; or [6]

(2) You can file a paper copy of your submission by mailing it to the address below.[7] Your submission must reference the Project docket number CP22–6–000.

Kimberly D. Bose, Secretary, federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

The Commission encourages electronic filing of submissions (option 1 above) and has eFiling staff available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov.*

Protests and motions to intervene must be served on the applicant either by mail or email (with a link to the document) at: Lori Myerchin, Director, Regulatory Affairs and Transportation Services, 1250 West Century Avenue, Bismarck, North Dakota 58503 or *lori.myerchin@wbienergy.com.* Any subsequent submissions by an intervenor must be served on the applicant and all other parties to the proceeding. Contact information for parties can be downloaded from the service list at the eService link on FERC Online.

Tracking The Proceeding

Throughout the proceeding, additional information about the project will be available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at *www.ferc.gov* using the ''eLibrary'' link as described above. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. For more information and to register, go to *www.ferc.gov/docs-filing/esubscription.asp.*

Dated: October 21, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–23418 Filed 10–26–21; 8:45 am]

BILLING CODE 6717–01–P

[1] 18 CFR 157.205.

[2] Persons include individuals, organizations, businesses, municipalities, and other entities. 18 CFR 385.102(d).

[3] 18 CFR 157.205(e).

[4] 18 CFR 385.214.

[5] 18 CFR 157.10.

[6] Additionally, you may file your comments electronically by using the eComment feature, which is located on the Commission's website at *www.ferc.gov* under the link to Documents and Filings. Using eComment is an easy method for interested persons to submit brief, text-only comments on a project.

[7] Hand-delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

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: ER10–1817–024.
Applicants: Southwestern Public Service Company.
Description: Supplement to June 30, 2021 Triennial Market Power Analysis for Southwest Power Pool, Inc. Region of Southwestern Public Service Company.
Filed Date: 10/20/21.
Accession Number: 20211020–5176.
Comment Date: 5 p.m. ET 11/10/21.

Docket Numbers: ER20–681–004.
Applicants: Tri-State Generation and Transmission Association, Inc.
Description: Compliance filing: Compliance Filing to be effective 4/1/2021.
Filed Date: 10/21/21.
Accession Number: 20211021–5041.
Comment Date: 5 p.m. ET 11/12/21.

Docket Numbers: ER21–2497–001.
Applicants: El Paso Electric Company.
Description: Tariff Amendment: Service Agreement No. 360, LGIA with Solar PV Development NM 29 II to be effective 9/22/2021.
Filed Date: 10/20/21.
Accession Number: 20211020–5150.
Comment Date: 5 p.m. ET 11/10/21.

Docket Numbers: ER21–2513–002.
Applicants: Golden Spread Electric Cooperative, Inc.
Description: Compliance filing: 2nd Amendment to Order No. 676–I Compliance and Waiver to be effective 12/31/9998.
Filed Date: 10/21/21.
Accession Number: 20211021–5022.
Comment Date: 5 p.m. ET 11/12/21.

Docket Numbers: ER21–2591–001.
Applicants: Arizona Public Service Company.
Description: Compliance filing: OATT Modifications—Pursuant to Order 676–I to be effective 12/31/9998.
Filed Date: 10/21/21.
Accession Number: 20211021–5099.
Comment Date: 5 p.m. ET 11/12/21.

Docket Numbers: ER22–158–000.
Applicants: Florida Power & Light Company.
Description: § 205(d) Rate Filing: FPL's Request for Effective Date Change to eTariff ID 341 to be effective 1/1/2020.
Filed Date: 10/20/21.
Accession Number: 20211020–5140.
Comment Date: 5 p.m. ET 11/10/21.

Docket Numbers: ER22–159–000.
Applicants: RE Gaskell West LLC.
Description: Tariff Amendment: Notice of Cancellation of Market-Based Rate Tariff to be effective 10/21/2021.
Filed Date: 10/20/21.
Accession Number: 20211020–5151.
Comment Date: 5 p.m. ET 11/10/21.

Docket Numbers: ER22–160–000.
Applicants: Macho Springs Solar, LLC.
Description: § 205(d) Rate Filing: Macho Springs MBR Tariff Amendment Filing to be effective 12/19/2021.
Filed Date: 10/20/21.
Accession Number: 20211020–5152.
Comment Date: 5 p.m. ET 11/10/21.

Docket Numbers: ER22–161–000.
Applicants: Kay Wind, LLC.
Description: § 205(d) Rate Filing: Kay Wind MBR Tariff Amendment Filing to be effective 12/19/2021.
Filed Date: 10/20/21.
Accession Number: 20211020–5153.
Comment Date: 5 p.m. ET 11/10/21.

Docket Numbers: ER22–162–000.
Applicants: Grant Wind, LLC.
Description: § 205(d) Rate Filing: Grant Wind MBR Tariff Amendment Filing to be effective 12/19/2021.
Filed Date: 10/20/21.
Accession Number: 20211020–5156.
Comment Date: 5 p.m. ET 11/10/21.

Docket Numbers: ER22–163–000.
Applicants: SG2 Imperial Valley LLC.
Description: § 205(d) Rate Filing: SG2 MBR Tariff Amendment Filing to be effective 12/19/2021.
Filed Date: 10/20/21.
Accession Number: 20211020–5158.
Comment Date: 5 p.m. ET 11/10/21.

Docket Numbers: ER22–164–000.
Applicants: Spectrum Nevada Solar, LLC.
Description: § 205(d) Rate Filing: Spectrum Nevada MBR Tariff Amendment Filing to be effective 12/19/2021.
Filed Date: 10/20/21.
Accession Number: 20211020–5162.
Comment Date: 5 p.m. ET 11/10/21.

Docket Numbers: ER22–165–000.
Applicants: Parrey, LLC.
Description: § 205(d) Rate Filing: Parrey MBR Tariff Amendment Filing to be effective 12/19/2021.
Filed Date: 10/20/21.
Accession Number: 20211020–5163.
Comment Date: 5 p.m. ET 11/10/21.

Docket Numbers: ER22–166–000.
Applicants: Southern California Edison Company.
Description: § 205(d) Rate Filing: Transmission Formula Rate Revisions to be effective 1/1/2022.
Filed Date: 10/21/21.
Accession Number: 20211021–5042.
Comment Date: 5 p.m. ET 11/12/21.

Docket Numbers: ER22–167–000.
Applicants: Ontario Power Generation Energy Trading, Inc.
Description: § 205(d) Rate Filing: Market Based Rate Tariff Revision to be effective 10/22/2021.
Filed Date: 10/21/21.
Accession Number: 20211021–5048.
Comment Date: 5 p.m. ET 11/12/21.

Docket Numbers: ER22–168–000.
Applicants: Cayuga Operating Company LLC.
Description: Tariff Amendment: Notice of Cancellation to be effective 10/22/2021.
Filed Date: 10/21/21.
Accession Number: 20211021–5058.
Comment Date: 5 p.m. ET 11/12/21.

Docket Numbers: ER22–169–000.
Applicants: Somerset Operating Company, LLC.
Description: Tariff Amendment: Notice of Cancellation to be effective 10/22/2021.
Filed Date: 10/21/21.
Accession Number: 20211021–5060.
Comment Date: 5 p.m. ET 11/12/21.

Docket Numbers: ER22–170–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2021–10–21_SA 3194 Wolf Run Solar-Ameren Illinois 1st Rev GIA (J641) to be effective 10/6/2021.
Filed Date: 10/21/21.
Accession Number: 20211021–5067.
Comment Date: 5 p.m. ET 11/12/21.

Docket Numbers: ER22–171–000.
Applicants: NaturEner Montana Wind Energy, LLC.
Description: Tariff Amendment: Cancellation tariff id to be effective 10/22/2021.
Filed Date: 10/21/21.
Accession Number: 20211021–5075.
Comment Date: 5 p.m. ET 11/12/21.

Docket Numbers: ER22–172–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Revisions to OATT, section 7.3 re: Uniform Cure Code to be effective 12/21/2021.
Filed Date: 10/21/21.
Accession Number: 20211021–5077.
Comment Date: 5 p.m. ET 11/12/21.

Docket Numbers: ER22–173–000.
Applicants: Puget Sound Energy, Inc.
Description: § 205(d) Rate Filing: Interconnection and Facilities Agreement by and between PSE and the Navy to be effective 12/21/2021.
Filed Date: 10/21/21.
Accession Number: 20211021–5080.
Comment Date: 5 p.m. ET 11/12/21.

Docket Numbers: ER22–175–000.

Applicants: Fairbanks Solar Energy Center LLC.

Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff Filing to be effective 12/21/2021.

Filed Date: 10/21/21.

Accession Number: 20211021–5115.

Comment Date: 5 p.m. ET 11/12/21.

Docket Numbers: ER22–176–000.

Applicants: Fairbanks Solar Holdings LLC.

Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff Filing to be effective 12/21/2021.

Filed Date: 10/21/21.

Accession Number: 20211021–5116.

Comment Date: 5 p.m. ET 11/12/21.

Docket Numbers: ER22–177–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Interim ISA, Service Agreement No. 6211; Queue No. AE1–155 to be effective 9/29/2021.

Filed Date: 10/21/21.

Accession Number: 20211021–5127.

Comment Date: 5 p.m. ET 11/12/21.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by 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: October 21, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–23420 Filed 10–26–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 15240–000]

PacifiCorp; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On October 13, 2021, PacifiCorp filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Dry Canyon Pumped Storage Project (Dry Canyon Project or project) to be located on Mud Lake, near Saint Charles, Bear Lake County, Idaho. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following: (1) A roller-compacted concrete dam with a height of 530 feet and a crest length of 2,900 feet; (2) a rock-armored earthen levee with an average height of 22 feet above the bottom of the Mud Lake and a length of 24,242 feet with two inlet/outlet structures; (3) an upper reservoir with a surface area of 182 acres and a storage volume of approximately 26,880 acre-feet; (4) three 22-foot-diameter, 6,650-foot-long concrete and steel penstocks; (5) a 660-foot-long and 110-foot-wide underground generating/pumping station chamber with six 300-megawatt generating/pumping units; (6) three 22-foot-diameter, 2,200-foot-long concrete-lined tailrace tunnels; (7) a lower reservoir with a surface area of 1,390 acres and a storage volume of 30,680 acre-feet; (8) a 500 kilovolt transmission line from the powerhouse to a new substation that would interconnect to PacifiCorp's existing or planned transmission lines; and, (9) appurtenant facilities. The estimated annual generation of the Dry Canyon Project would be 5.4 terawatt-hours.

Applicant Contact: Mark Stenberg, License Program Manager, PacifiCorp, 822 Grace Power Plant Rd., Grace, ID 83241; email: *mark.stenberg@pacificorp.com;* phone: (208) 339–9552.

FERC Contact: Ryan Hansen; email: *ryan.hansen@ferc.gov;* phone: (202) 502–8074.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, notices of intent, and competing applications 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. In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P–15240–000.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's website at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–15420) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: October 21, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–23419 Filed 10–26–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14861–002]

FFP Project 101, LLC; Notice of Meeting

a. *Project Name and Number:* Goldendale Energy Storage Project No. 14861–002.

b. *Applicant:* FFP Project 101, LLC.

c. *Date and Time of Meeting:* November 10, 2021 at 12:00 p.m. EST.

d. *FERC Contact:* Michael Tust, (202) 502–6522, *michael.tust@ferc.gov.*

e. *Purpose of Meeting:* Commission staff will hold a virtual meeting with staff from the Confederated Tribes and Bands of the Yakama Nation (Yakama Tribe) to discuss the Commission's role

and obligations regarding consultation pursuant to section 106 of the National Historic Preservation Act for the proposed Goldendale Energy Storage Project.

f. All local, state, and federal agencies, Indian tribes, and other interested parties are invited to attend the virtual meeting; however, participation will be limited to representation of the Yakama Tribe and the Commission's representatives. Please call or email Michael Tust at (202) 502–6522 or *michael.tust@ferc.gov* by November 5, 2021 at 4:30 p.m. EST, to RSVP and to receive specific instructions on how to participate.

Dated: October 21, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–23416 Filed 10–26–21; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2006–0947; FRL–9198–01–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; NO_X SIP Call (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), NO_X SIP Call (EPA ICR Number 1857.12, OMB Control Number 2060–0445) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through December 31, 2021. Public comments were previously requested via the **Federal Register** on April, 6, 2021 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. 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.

DATES: Additional comments may be submitted on or before November 26, 2021.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OAR–2006–0947, online using *www.regulations.gov* (our preferred method) or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Karen VanSickle, Clean Air Markets Division, Office of Atmospheric Programs (6204J), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 343–9220; fax number: (202) 343–2361; email address: *Vansickle.karen@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Abstract: The NO_X SIP Call was created to reduce emissions of nitrogen oxides (NO_X) from power plants and other large combustion sources. NO_X is a prime ingredient in the formation of ground-level ozone (smog), a pervasive air pollution problem in many areas of the eastern United States. The NO_X SIP Call requires affected states to include certain provisions in their state implementation plans (SIPs) addressing emissions of NO_X that adversely affect air quality in other states. Although most large combustion sources affected under the NO_X SIP Call are also subject to monitoring requirements under the Acid Rain Program or the Cross-State Air Pollution Rule, this information collection is being renewed because some industrial sources in certain states are still required to monitor and report emissions data to EPA under these rules, so we will account for their burden. All data received by EPA will be treated as public information. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

Form Numbers: None.

Respondents/affected entities: Entities which participate in the NO_X SIP Call.

Respondent's obligation to respond: mandatory (Sections 110(a) and 301(a) of the Clean Air Act).

Estimated number of respondents: EPA estimates that there are 356 units that will continue to conduct monitoring solely under the NO_X SIP Call.

Frequency of response: yearly, quarterly, occasionally.

Total estimated burden: 140,226 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $20,622,606 (per year), includes $9,194,261 annualized capital or operation & maintenance costs.

Changes in the estimates: There is increase of 8,281 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This increase is due to assumptions made in the previous ICR regarding the number of respondents. In the previous ICR, EPA estimated fewer sources would continue to follow the Part 75 monitoring requirements due to amendments to the NO_X SIP Call. This ICR is based on updated information regarding the actual numbers of sources.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2021–23369 Filed 10–26–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9151–01–OLEM]

Fortieth Update of the Federal Agency Hazardous Waste Compliance Docket

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Since 1988, the Environmental Protection Agency (EPA) has maintained a Federal Agency Hazardous Waste Compliance Docket (''Docket'') under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). CERCLA requires EPA to establish a Docket that contains certain information reported to EPA by Federal facilities that manage hazardous waste

or from which a reportable quantity of hazardous substances has been released. This notice identifies the Federal facilities not previously listed on the Docket and identifies Federal facilities reported to EPA since the last update on April 29, 2021. In addition to the list of additions to the Docket, this notice includes a section with revisions of the previous Docket list and a section of Federal facilities that are to be deleted from the Docket. Thus, the revisions in this update include one addition, three deletions, and two corrections to the Docket since the previous update.

DATES: This list is current as of October 8, 2021.

FOR FURTHER INFORMATION CONTACT: Electronic versions of the Docket and more information on its implementation can be obtained at *http://www.epa.gov/fedfac/federal-agency-hazardous-waste-compliance-docket* by clicking on the link for *Cleanups at Federal Facilities* or by contacting Benjamin Simes (*Simes.Benjamin@epa.gov*), Federal Agency Hazardous Waste Compliance Docket Coordinator, Federal Facilities Restoration and Reuse Office. Additional information on the Docket and a complete list of Docket sites can be obtained at: *https://www.epa.gov/fedfac/federal-agency-hazardous-waste-compliance-docket-1.*

SUPPLEMENTARY INFORMATION:

Table of Contents

1.0 Introduction
2.0 Regional Docket Coordinators
3.0 Revisions of the Previous Docket
4.0 Process for Compiling the Updated Docket
5.0 Facilities Not Included
6.0 Facility NPL Status Reporting, Including NFRAP Status
7.0 Information Contained on Docket Listing

1.0 Introduction

Section 120(c) of CERCLA, 42 U.S.C. 9620(c), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), requires EPA to establish the Federal Agency Hazardous Waste Compliance Docket. The Docket contains information on Federal facilities that manage hazardous waste and such information is submitted by Federal agencies to EPA under sections 3005, 3010, and 3016 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6925, 6930, and 6937. Additionally, the Docket contains information on Federal facilities with a reportable quantity of hazardous substances that has been released and such information is submitted by Federal agencies to EPA under section 103 of CERCLA, 42 U.S.C. 9603. Specifically, RCRA section 3005 establishes a permitting system for certain hazardous waste treatment, storage, and disposal (TSD) facilities; RCRA section 3010 requires waste generators, transporters and TSD facilities to notify EPA of their hazardous waste activities; and RCRA section 3016 requires Federal agencies to submit biennially to EPA an inventory of their Federal hazardous waste facilities. CERCLA section 103(a) requires the owner or operator of a vessel or onshore or offshore facility to notify the National Response Center (NRC) of any spill or other release of a hazardous substance that equals or exceeds a reportable quantity (RQ), as defined by CERCLA section 101. Additionally, CERCLA section 103(c) requires facilities that have ''stored, treated, or disposed of'' hazardous wastes and where there is ''known, suspected, or likely releases'' of hazardous substances to report their activities to EPA.

CERCLA section 120(d) requires EPA to take steps to assure that a Preliminary Assessment (PA) be completed for those sites identified in the Docket and that the evaluation and listing of sites with a PA be completed within a reasonable time frame. The PA is designed to provide information for EPA to consider when evaluating the site for potential response action or inclusion on the National Priorities List (NPL).

The Docket serves three major purposes: (1) To identify all Federal facilities that must be evaluated to determine whether they pose a threat to human health and the environment sufficient to warrant inclusion on the National Priorities List (NPL); (2) to compile and maintain the information submitted to EPA on such facilities under the provisions listed in section 120(c) of CERCLA; and (3) to provide a mechanism to make the information available to the public. Previous Docket updates are available at *https://www.epa.gov/fedfac/previous-federal-agency-hazardous-waste-compliance-docket-updates.*

This notice provides some background information on the Docket. Additional information on the Docket requirements and implementation are found in the Docket Reference Manual, Federal Agency Hazardous Waste Compliance Docket found at *http://www.epa.gov/fedfac/docket-reference-manual-federal-agency-hazardous-waste-compliance-docket-interim-final* or obtained by calling the Regional Docket Coordinators listed below. This notice also provides changes to the list of sites included on the Docket in three areas: (1) Additions, (2) Deletions, and (3) Corrections. Specifically, additions are newly identified Federal facilities that have been reported to EPA since the last update and now are included on the Docket; the deletions section lists Federal facilities that EPA is deleting from the Docket.[1] The information submitted to EPA on each Federal facility is maintained in the Docket repository located in the EPA Regional office of the Region in which the Federal facility is located; for a description of the information required under those provisions, *see* 53 FR 4280 (February 12, 1988). Each repository contains the documents submitted to EPA under the reporting provisions and correspondence relevant to the reporting provisions for each Federal facility.

In prior updates, information was also provided regarding No Further Remedial Action Planned (NFRAP) status changes. However, information on NFRAP and NPL status is no longer being provided separately in the Docket update as it is now available at: *http://www.epa.gov/fedfacts/federal-facility-cleanup-sites-searchable-list* or by contacting the EPA HQ Docket Coordinator at the address provided in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

2.0 Regional Docket Coordinators

Contact the following Docket Coordinators for information on Regional Docket repositories:

- *U.S. EPA Region 1.* Ross Gilleland (HBS), 5 Post Office Square, Suite 100, Mail Code: 01–5, Boston MA 02109–3912, (617) 918–1188.
- *U.S. EPA Region 2.* Cathy Moyik (ERRD), 290 Broadway, New York, NY 10007–1866, (212) 637–4339.
- *U.S. EPA Region 3.* Joseph Vitello (3HS12), 1650 Arch Street, Philadelphia, PA 19107, (215) 814–3354.
- *U.S. EPA Region 3.* Dawn Fulsher (3HS12), 1650 Arch Street, Philadelphia, PA 19107, (215) 814–3270.
- *U.S. EPA Region 4.* Alayna Famble (9T25), 61 Forsyth St. SW, Atlanta, GA 30303, (404) 564–8444.
- *U.S. EPA Region 5.* David Brauner (SR–6J), 77 W Jackson Blvd., Chicago, IL 60604, (312) 886–1526.
- *U.S. EPA Region 6.* Philip Ofosu (6SF–RA), 1445 Ross Avenue, Dallas, TX 75202–2733, (214) 665–3178.
- *U.S. EPA Region 7.* Todd H Davis (SUPRERSP), 11201 Renner Blvd., Lenexa, KS 66219, (913) 551–7749.
- *U.S. EPA Region 8.* Ryan Dunham (EPR–F), 1595 Wynkoop Street, Denver, CO 80202, (303) 312–6627.

[1] See Section 3.2 for the criteria for being deleted from the Docket.

• *U.S. EPA Region 9.* Leslie Ramirez (SFD–6–1), 75 Hawthorne Street, San Francisco, CA 94105, (415) 972–3978.

• *U.S. EPA Region 10.* Ken Marcy, Oregon Operations Office, 805 SW Broadway, Suite 500, Portland, OR 97205, (503) 326–3269.

3.0 Revisions of the Previous Docket

This section includes a discussion of the additions, deletions and corrections to the list of Docket facilities since the previous Docket update.

3.1 Additions

These Federal facilities are being added primarily because of new information obtained by EPA (for example, recent reporting of a facility pursuant to RCRA sections 3005, 3010, or 3016 or CERCLA section 103). CERCLA section 120, as amended by the Defense Authorization Act of 1997, specifies that EPA take steps to assure that a Preliminary Assessment (PA) be completed within a reasonable time frame for those Federal facilities that are included on the Docket. Among other things, the PA is designed to provide information for EPA to consider when evaluating the site for potential response action or listing on the NPL. This notice includes one addition.

3.2 Deletions

There are no statutory or regulatory provisions that address deletion of a facility from the Docket. However, if a facility is incorrectly included on the Docket, it may be deleted from the Docket. The criteria EPA uses in deleting sites from the Docket include: A facility for which there was an incorrect report submitted for hazardous waste activity under RCRA (*e.g.,* 40 CFR 262.44); a facility that was not Federally-owned or operated at the time of the listing; a facility included more than once (*i.e.,* redundant listings); or when multiple facilities are combined under one listing. (*See* Docket Codes (*Reasons for Deletion of Facilities*) for a more refined list of the criteria EPA uses for deleting sites from the Docket.) Facilities being deleted no longer will be subject to the requirements of CERCLA section 120(d). This notice includes three deletions.

3.3 Corrections

Changes necessary to correct the previous Docket are identified by both EPA and Federal agencies. The corrections section may include changes in addresses or spelling, and corrections of the recorded name and ownership of a Federal facility. In addition, changes in the names of Federal facilities may be made to establish consistency in the Docket or between the Superfund Enterprise Management System (SEMS) and the Docket. For the Federal facility for which a correction is entered, the original entry is as it appeared in previous Docket updates. The corrected update is shown directly below, for easy comparison. This notice includes two corrections.

4.0 Process for Compiling the Updated Docket

In compiling the newly reported Federal facilities for the update being published in this notice, EPA extracted the names, addresses, and identification numbers of facilities from four EPA databases—the WebEOC, the Biennial Inventory of Federal Agency Hazardous Waste Activities, the Resource Conservation and Recovery Act Information System (RCRAInfo), and SEMS—that contain information about Federal facilities submitted under the four provisions listed in CERCLA section 120(c).

EPA assures the quality of the information on the Docket by conducting extensive evaluation of the current Docket list and contacts the other Federal Agency (OFA) with the information obtained from the databases identified above to determine which Federal facilities were, in fact, newly reported and qualified for inclusion on the update. EPA is also striving to correct errors for Federal facilities that were previously reported. For example, state-owned or privately-owned facilities that are not operated by the Federal government may have been included. Such problems are sometimes caused by procedures historically used to report and track Federal facilities data. Representatives of Federal agencies are asked to contact the EPA HQ Docket Coordinator at the address provided in the **FOR FURTHER INFORMATION CONTACT** section of this notice if revisions of this update information are necessary.

5.0 Facilities Not Included

Certain categories of facilities may not be included on the Docket, such as: (1) Federal facilities formerly owned by a Federal agency that at the time of consideration was not Federally-owned or operated; (2) Federal facilities that are small quantity generators (SQGs) that have not, more than once per calendar year, generated more than 1,000 kg of hazardous waste in any single month; (3) Federal facilities that are very small quantity generators (VSQGs) that have never generated more than 100 kg of hazardous waste in any month; (4) Federal facilities that are solely hazardous waste transportation facilities, as reported under RCRA section 3010; and (5) Federal facilities that have mixed mine or mill site ownership.

An EPA policy issued in June 2003 provided guidance for a site-by-site evaluation as to whether ''mixed ownership'' mine or mill sites, typically created as a result of activities conducted pursuant to the General Mining Law of 1872 and never reported under section 103(a) of CERCLA, should be included on the Docket. For purposes of that policy, mixed ownership mine or mill sites are those located partially on private land and partially on public land. This policy is found at *http://www.epa.gov/fedfac/policy-listing-mixed-ownership-mine-or-mill-sites-created-result-general-mining-law-1872.* The policy of not including these facilities may change; facilities now omitted may be added at some point if EPA determines that they should be included.

6.0 Facility NPL Status Reporting, Including NFRAP Status

EPA tracks the NPL status of Federal facilities listed on the Docket. An updated list of the NPL status of all Docket facilities, as well as their NFRAP status, is available at *http://www.epa.gov/fedfac/fedfacts* or by contacting the EPA HQ Docket Coordinator at the address provided in the **FOR FURTHER INFORMATION CONTACT** section of this notice. In prior updates, information regarding NFRAP status changes was provided separately.

7.0 Information Contained on Docket Listing

The information is provided in three tables. The first table is a list of additional Federal facilities that are being added to the Docket. The second table is a list of Federal facilities that are being deleted from the Docket. The third table is for corrections.

The Federal facilities listed in each table are organized by the date reported. Under each heading is listed the name and address of the facility, the Federal agency responsible for the facility, the statutory provision(s) under which the facility was reported to EPA, and a code.[2]

The statutory provisions under which a Federal facility is reported are listed in a column titled ''Reporting Mechanism.'' Applicable mechanisms are listed for each Federal facility: For example, Sections 3005, 3010, 3016, 103(c), or Other. ''Other'' has been

[2] Each Federal facility listed in the update has been assigned a code that indicates a specific reason for the addition or deletion. The code precedes this list.

added as a reporting mechanism to indicate those Federal facilities that otherwise have been identified to have releases or threat of releases of hazardous substances. The National Contingency Plan at 40 CFR 300.405 addresses discovery or notification, outlines what constitutes discovery of a hazardous substance release, and states that a release may be discovered in several ways, including: (1) A report submitted in accordance with section 103(a) of CERCLA, *i.e.,* reportable quantities codified at 40 CFR 302; (2) a report submitted to EPA in accordance with section 103(c) of CERCLA; (3) investigation by government authorities conducted in accordance with section 104(e) of CERCLA or other statutory authority; (4) notification of a release by a Federal or state permit holder when required by its permit; (5) inventory or survey efforts or random or incidental observation reported by government agencies or the public; (6) submission of a citizen petition to EPA or the appropriate Federal facility requesting a preliminary assessment, in accordance with section 105(d) of CERCLA; (7) a report submitted in accordance with section 311(b)(5) of the Clean Water Act; and (8) other sources. As a policy matter, EPA generally believes it is appropriate for Federal facilities identified through the CERCLA discovery and notification process to be included on the Docket.

The complete list of Federal facilities that now make up the Docket and the NPL and NFRAP status are available to interested parties and can be obtained at *http://www.epa.gov/fedfac/fedfacts* or by contacting the EPA HQ Docket Coordinator at the address provided in the **FOR FURTHER INFORMATION CONTACT** section of this notice. As of the date of this notice, the total number of Federal facilities that appear on the Docket is 2,380.

7.1 Docket Codes/Reasons for Deletion of Facilities

- *Code 1.* Small-Quantity Generator and Very Small Quantity Generator. Show citation box.
- *Code 2.* Never Federally Owned and/or Operated.
- *Code 3.* Formerly Federally Owned and/or Operated but not at time of listing.
- *Code 4.* No Hazardous Waste Generated.
- *Code 5.* (This code is no longer used.)
- *Code 6.* Redundant Listing/Site on Facility.
- *Code 7.* Combining Sites Into One Facility/Entries Combined.
- *Code 8.* Does Not Fit Facility Definition.

7.2 Docket Codes/Reasons for Addition of Facilities

- *Code 15.* Small-Quantity Generator with either a RCRA 3016 or CERCLA 103 Reporting Mechanism.
- *Code 16.* One Entry Being Split Into Two (or more)/Federal Agency Responsibility Being Split.
- *Code 16A.* NPL site that is part of a Facility already listed on the Docket.
- *Code 17.* New Information Obtained Showing That Facility Should Be Included.
- *Code 18.* Facility Was a Site on a Facility That Was Disbanded; Now a Separate Facility.
- *Code 19.* Sites Were Combined Into One Facility.
- *Code 19A.* New Currently Federally Owned and/or Operated Facility Site.

7.3 Docket Codes/Types of Corrections of Information About Facilities

- *Code 20.* Reporting Provisions Change.
- *Code 20A.* Typo Correction/Name Change/Address Change.
- *Code 21.* Changing Responsible Federal Agency. (If applicable, new responsible Federal agency submits proof of previously performed PA, which is subject to approval by EPA.)
- *Code 22.* Changing Responsible Federal Agency and Facility Name. (If applicable, new responsible Federal Agency submits proof of previously performed PA, which is subject to approval by EPA.)
- *Code 24.* Reporting Mechanism Determined To Be Not Applicable After Review of Regional Files.

FEDERAL AGENCY HAZARDOUS WASTE COMPLIANCE DOCKET UPDATE #40—ADDITIONS

Facility name	Address	City	State	Zip code	Agency	Reporting mechanism	Code	Date
Central Arkansas Veterans Healthcare System.	4300 West 7th Street	Little Rock	AR	72205	VA	RCRA 3010	17	Update #40.

FEDERAL AGENCY HAZARDOUS WASTE COMPLIANCE DOCKET UPDATE #40—DELETIONS

Facility name	Address	City	State	Zip code	Agency	Reporting mechanism	Code	Date
BWXT Conversion Services, LLC.	Hobbs Road	Kevil	KY	42053	Energy	RCRA 3010	6	9/1/2016
USDOI BLM Red Elephant Mill Site.	Croy Road, 7 MI SW of Hailey T2N R17E SEC 28 SE1/4 SE1/4, Boise Meridian.	Hailey	ID	83333	Interior	Other	2	10/13/2010
NPS–Wrangell St. Elias NP&P: Nabesna Mine.	7N R13E S21	Glennallen	AK	99588	Interior	CERCLA 103	8	

FEDERAL AGENCY HAZARDOUS WASTE COMPLIANCE DOCKET UPDATE #40—CORRECTIONS

Facility name	Address	City	State	Zip code	Agency	Reporting mechanism	Code	Date
Water & Power Resources	Denver Federal Center, Bldg. 56.	Denver	State	Zip code	Interior	CERCLA 103	22	6/11/1995
Denver Federal Center 56	Denver Federal Center, Bldg. 56.	Lakewood	CO	80215	General Services Administration.	CERCLA 103		6/11/1995
Library of Congress Packard Campus Audio Visual Conversion Center.	Mount Pony Road	Culpeper	VA	22701	Architect of the Capitol.	RCRA 3010	21	10/29/2020

FEDERAL AGENCY HAZARDOUS WASTE COMPLIANCE DOCKET UPDATE #40—CORRECTIONS—Continued

Facility name	Address	City	State	Zip code	Agency	Reporting mechanism	Code	Date
Library of Congress Packard Campus Audio Visual Conversion Center.	Mount Pony Road	Culpeper	VA	22701	Library of Congress	RCRA 3010		10/29/2020

Gregory Gervais,

Director, Federal Facilities Restoration and Reuse Office, Office of Land and Emergency Management.

[FR Doc. 2021–23357 Filed 10–26–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OARM–2018–0028; FRL–9195–01–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Contractor Conflicts of Interest (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), Contractor Conflicts of Interest (EPA ICR Number 1550.12, OMB Control Number 2030–0023) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through December 31, 2021. Public comments were previously requested via the **Federal Register** on April 9, 2021 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. 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.

DATES: Additional comments may be submitted on or before November 26, 2021.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OARM–2018–0028, online using *www.regulations.gov* (our preferred method) or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Pamela Leftrict, Policy Training and Oversight Division, Office of Acquisition Solutions (3802R), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564–9463; email address: *leftrict.pamela@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Abstract: The collection of this information is required to ensure that the Agency can effectively identify, evaluate, and take appropriate action concerning contractor conflicts of interest (COI). Environmental Protection Agency (EPA) contractors are required to disclose any actual or potential COI with regard to their employees, corporate affiliations, and business relationships. Contractors will be required to maintain a database of business relationships and report information to EPA on either an annual basis or when work is ordered under an Agency contract. Additionally, under some contracts, the contractor must request written approval from the contracting officer to enter a proposed contract subject to the restrictions of EPA's Limitation of Future Contracting Clause that can found at CFR 48 1552.209–74.

Form Numbers: None.

Respondents/affected entities: All contractors seeking contract award that are identified with the potential conflict of interest upon contract award.

Respondent's obligation to respond: Mandatory in accordance with Federal Acquisition Regulation (FAR) subpart 9.5.

Estimated number of respondents: 56.

Frequency of response: Varies.

Total estimated burden: 69,757.52 hours annually. Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $5,029,174 (per year), includes $0 annualized capital or operation & maintenance costs.

Changes in Estimates: There is an increase of 13,703 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This increase is due to an increase in the number of Conflicts of Interest Plans required by the upsurge in acquisitions during the past three years. In the previous filing, there were 45 required COI plans, but in the current filing there are 56 required COI plans.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2021–23366 Filed 10–26–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2021–0080; FRL–8795–03–OCSPP]

Pesticide Product Registration; Receipt of Applications for New Uses

October 2021.

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received applications to register new uses for pesticide products containing currently registered active ingredients. Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is hereby

providing notice of receipt and opportunity to comment on these applications.

DATES: Comments must be received on or before November 26, 2021.

ADDRESSES: Submit your comments, identified by docket identification (ID) number and the File Symbol of interest as shown in the body of this document, online at *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. Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets/about-epa-dockets.*

Due to the public health concerns related to COVID–19, the EPA/DC and Reading Room is closed to visitors with limited exceptions. The staff continues to provide remote customer service via email, phone, and webform. For the latest status information on the EPA/DC and docket access, visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Charles Smith, Biopesticides and Pollution Prevention Division (7511P), main telephone number: (703) 305–7090, email address: *BPPDFRNotices@epa.gov;* or Marietta Echeverria, Registration Division (RD) (7505P), main telephone number: (703) 305–7090, email address: *RDFRNotices@epa.gov.* The mailing address for each contact person is: Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001. As part of the mailing address, include the contact person's name, division, and mail code. The division to contact is listed at the end of each application summary.

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).

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 *https://www.epa.gov/dockets/commenting-epa-dockets.*

II. Registration Applications

EPA has received applications to register new uses for pesticide products containing currently registered active ingredients. Pursuant to the provisions of FIFRA section 3(c)(4) (7 U.S.C. 136a(c)(4)), EPA is hereby providing notice of receipt and opportunity to comment on these applications. Notice of receipt of these applications does not imply a decision by the Agency on these applications.

Notice of Receipt—New Uses

1. *EPA Registration Number:* 100–1001; 100–1070. *Docket ID number:* EPA–HQ–OPP–2021–0310. *Applicant:* Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419. *Active ingredient:* Fluazifop-P-butyl. *Product type:* Herbicide Manufacturing Use Product; Herbicide End Use Product. *Proposed use:* Berry, low growing, subgroup 13–07G; brassica, leafy greens, subgroup 4–16B; chive, dried leave; fruit, citrus, group 10–10; fruit, stone, group 12–12; leaf petiole vegetable subgroup 22B; onion, green, subgroup 3–07B; papaya; and vegetable, brassica, head and stem, group 5–16. *Contact:* RD.

2. *EPA Registration Numbers:* 264–1194 & 264–1192. *Docket ID number:* EPA–HQ–OPP–2021–0624. *Applicant:* Bayer CropScience LP, 800 N Lindbergh Blvd., St. Louis, MO 63167. *Active ingredient:* Tetraniliprole [1-(3-chloro-2-pyridinyl)-N-[4-cyano-2-methyl-6-[(methylamino)carbonyl]phenyl]-3-[[5-(trifluoromethyl)-2H-tetrazol-2-yl]methyl]-1H-pyrazole-5-carboxamide]. *Product type:* Insecticide. *Proposed Use:* New food use in or on soybean seed. *Contact:* RD.

3. *EPA Registration Numbers:* 264–1194 & 264–RERO. *Docket ID number:* EPA–HQ–OPP–2021–0624. *Applicant:* Bayer CropScience LP, 800 N Lindbergh Blvd., St. Louis, MO 63167. *Active ingredient:* Tetraniliprole [1-(3-chloro-2-pyridinyl)-N-[4-cyano-2-methyl-6-[(methylamino)carbonyl]phenyl]-3-[[5-(trifluoromethyl)-2H-tetrazol-2-yl]methyl]-1H-pyrazole-5-carboxamide]. *Product type:* Insecticide. *Proposed Use:* New food use in or on cereal grain seed (Crop Group 15; Cereal Grains, Except Rice and Crop Group 16; Forage, Fodder, and Straw of Cereal Grains Group, except Field Corn, Popcorn, and Sweet Corn). *Contact:* RD.

4. *File Symbol:* 45728–GL and 45728–GU. *Docket ID number:* EPA–HQ–OPP–2021–0290. *Applicant:* Taminco US LLC, a subsidiary of Eastman Chemical Company, 200 S Wilcox Drive Kingsport, TN 37660–5147. *Active ingredient:* Chlormequat chloride. *Product type:* Fungicide. *Proposed use:* Establish domestic tolerances in or on, barley, oat, triticale, and wheat grains. They are also establishing secondary residues in eggs, meat, milk, and poultry. *Contact:* RD.

5. *File Symbol:* 54555–2. *Docket ID number:* EPA–HQ–OPP–2021–0300. *Applicant:* Alzchem Trostberg GmbH c/o Biologic Regulatory Consulting, Inc., 10529 Heritage Bay Blvd., Naples, FL 32120. *Active ingredient:* Hydrogen Cyanamide. *Product type:* Fungicide. *Proposed Use:* Walnut. *Contact:* RD.

6. *EPA Registration Number:* 91197–3. *Docket ID number:* EPA–HQ–OPP–2021–0627. *Applicant:* AFS009 Plant Protection, Inc., 104 T.W. Alexander Dr., Research Triangle Park, NC 27709. *Active ingredient: Pseudomonas chlororaphis* strain AFS009. *Product type:* Bactericide and fungicide. *Proposed use:* Aerial application to numerous crops (*e.g.,* legume vegetables, pome fruit, stone fruit, and ornamentals) in agricultural settings. *Contact:* BPPD.

Authority: 7 U.S.C. 136 *et seq.*

Dated: October 21, 2021.

Delores Barber,

Director, Information Technology and Resources Management Division, Office of Program Support.

[FR Doc. 2021–23390 Filed 10–26–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2021–0414 and EPA–HQ–OPPT–2021–0415; FRL–9146–01–OCSPP]

Science Advisory Committee on Chemicals (SACC); Request For Nominations of Ad Hoc Expert Reviewers To Consider for Participation in Two Early 2022 Reviews

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) requests public nominations of scientific experts to consider for service as *ad hoc* reviewers assisting the SACC with two peer review topics anticipated for early 2022: The draft EPA TSCA Systematic Review Protocol; and the draft EPA TSCA Screening Level Approach for Assessing Ambient Air and Water Exposures to Fenceline Communities. Any interested person or organization may nominate qualified individuals to be considered prospective candidates for these reviews by following the instructions provided in this document. Individuals may also self-nominate.

DATES: Nominations should be provided on or before November 17, 2021. For additional instructions, see Unit I.B. of the **SUPPLEMENTARY INFORMATION**.

ADDRESSES: Nominations. Submit your nominations to the Designated Federal Officials (DFOs) listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Contact the listed Designated Federal Official (DFO) for the topic of interest or call our main office at (202) 564–8450:

Systematic Review: Dr. Todd Peterson, DFO, email address: *peterson.todd@epa.gov.*

Exposures to Fenceline Communities: Dr. Alaa Kamel, DFO, email address: *kamel.alaa@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. This action may, however, be of interest to those involved in the manufacture, processing, distribution, and disposal of chemical substances and mixtures, and/or those interested in the assessment of risks involving chemical substances and mixtures. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. What should I consider as I prepare my nominations for EPA?

1. *Submitting CBI.* Do not submit CBI information to EPA through regulations.gov or email. If your nomination contains any information that you consider to be CBI or otherwise protected, please contact the DFO listed under **FOR FURTHER INFORMATION CONTACT** to obtain special instructions before submitting your nomination.

2. *Request for nominations to serve as ad hoc expert reviewers to assist the SACC.* As part of a broader process for developing a pool of candidates for SACC peer reviews, EPA solicits the public and stakeholder communities for nominations of prospective candidates for service as *ad hoc* reviewers. Any interested person or organization may nominate qualified individuals to be considered as prospective candidates. Individuals also may self-nominate.

1. Peer Review Topics Anticipated for Early 2022

Individuals nominated for the two SACC reviews anticipated for early 2022 should have expertise in one or more of the following areas:

- *Systematic review:* Individuals nominated for peer review of the draft systematic review protocol should have expertise in one or more of the following areas: Systematic review approaches of human health and ecological hazard, exposure topics and fate. All experts, including those representing other fields of interest, who have experience with engineering, machine learning, artificial intelligence techniques and natural language processing approaches as applied to systematic review are also needed. Understanding of the TSCA risk evaluation process is highly desirable for the context of this peer review. Familiarity with systematic review tools like DistillerSR (Systematic Review Software), SWIFT (Sciome Workbench for Interactive computer-Facilitated Text-mining; SWIFT-Active Screener and SWIFT-Review), Health and Environmental Research Online (HERO) database and the Health Assessment Workspace Collaborative (HAWC) is highly desirable.
- *Exposures to fenceline communities:* Individuals nominated for peer review of the draft EPA TSCA Screening Level Approach for Assessing Ambient Air and Water Exposures to Fenceline Communities should have expertise in one or more of the following areas: Chemical fate and transport via ambient air and water pathways; atmospheric modeling of fate, transport, and human exposures; human health, exposure and risk assessment for airborne and/or waterborne chemicals; expertise estimating environmental air releases of chemicals from a variety of sources and databases such as Chemical Data Reporting; experience developing air dispersion methodologies and/or models to estimate ambient air concentrations and impacts to human populations; expertise estimating environmental water releases of chemicals from a variety of sources and databases such as Chemical Data Reporting, Toxics Release Inventory, Discharge Monitoring Report; experience developing methodologies and/or models to estimate chemical concentrations in ambient/source/drinking water and impacts to human populations; and public health protection for at-risk communities.

2. Nominations

Nominees should be scientists who have sufficient professional qualifications, including training and experience, to be capable of providing expert comments on the scientific issues for these reviews. The following information should be included for nominations: Contact information for the person making the nomination; name, affiliation, and contact information for the nominee; and the disciplinary and specific areas of expertise of the nominee. Nominations should be provided to the DFOs listed under **FOR FURTHER INFORMATION CONTACT** on or before the date listed in the **DATES** section of this notice.

SACC members and *ad hoc* reviewers are subject to the provisions of the Standards of Ethical Conduct for Employees of the Executive Branch at 5 CFR part 2635, conflict of interest statutes in Title 18 of the United States Code and related regulations. In anticipation of this requirement, prospective candidates for service on the SACC will be asked to submit confidential financial information which shall fully disclose, among other financial interests, the candidate's employment, stocks and bonds, and where applicable, sources of research support. EPA will evaluate the candidates' financial disclosure forms to assess whether there are financial conflicts of interest, appearance of a loss of impartiality, or any prior involvement with the development of the documents under consideration (including previous scientific peer review) before the candidate is considered further for service on the SACC. Those who are selected from the pool of prospective candidates will be asked to attend the public meetings and to participate in the discussion of key issues and

assumptions at these meetings. In addition, they will be asked to review and to help finalize the meeting minutes.

3. Selection of Ad Hoc Reviewers

The selection of scientists to serve as *ad hoc* reviewers for the SACC is based on the function of the Committee and the expertise needed to address the Agency's charge to the Committee. No interested scientists shall be ineligible to serve by reason of their membership on any other advisory committee to a Federal department or agency or their employment by a Federal department or agency, except EPA. Other factors considered during the selection process include availability of the prospective candidate to fully participate in the Committee's reviews, absence of any conflicts of interest or appearance of loss of impartiality, independence with respect to the matters under review, and lack of bias. Although financial conflicts of interest, the appearance of loss of impartiality, lack of independence, and bias may result in non-selection, the absence of such concerns does not assure that a candidate will be selected to serve on the SACC. Numerous qualified candidates are identified for each review. Therefore, selection decisions involve carefully weighing a number of factors including the candidates' areas of expertise and professional qualifications and achieving an overall balance of different scientific perspectives across reviewers.

At this time, EPA is seeking nominations to create a pool of *ad hoc* experts who can be available to the SACC to assist in reviews conducted by the Committee. EPA anticipates selecting experts from this pool, as needed, to assist the SACC in their review of both designated topics. The Agency will consider all nominations of prospective candidates for service as *ad hoc* reviewers for the SACC that are received on or before that date. However, final selection of *ad hoc* reviewers is a discretionary function of the Agency.

EPA plans to make a list of candidates under consideration as prospective *ad hoc* reviewers for these reviews available for public comment. The lists will be posted on the SACC website at *http://www.epa.gov/tsca-peer-review* or may be obtained from the OPPT Dockets at *http://www.regulations.gov.*

II. Background

A. Purpose of the SACC

The SACC was established by EPA in 2016 under the authority of the Frank R. Lautenberg Chemical Safety for the 21st Century Act, Public Law 114–182, 140 Stat. 448 (2016), and operates in accordance with the Federal Advisory Committee Act (FACA) of 1972. The SACC supports activities under the Toxic Substances Control Act (TSCA), 15 U.S.C. 2601 *et seq.,* the Pollution Prevention Act (PPA), 42 U.S.C. 13101 *et seq.,* and other applicable statutes. The SACC provides independent scientific advice and recommendations to the EPA on the scientific and technical aspects of risk assessments, methodologies, and pollution prevention measures and approaches for chemicals regulated under TSCA.

The SACC is comprised of experts in toxicology; environmental risk assessment; exposure assessment; and related sciences (*e.g.,* synthetic biology, pharmacology, biotechnology, nanotechnology, biochemistry, biostatistics, physiologically based pharmacokinetic modelling (PBPK), computational toxicology, epidemiology, environmental fate, and environmental engineering and sustainability). The SACC currently consists of 17 members. When needed, the committee will be assisted by *ad hoc* reviewers with specific expertise in the topics under consideration.

B. Background for Each Area of Review

1. Systematic Review

The draft TSCA Systematic Review Protocol includes a revised generic approach for TSCA-related approaches taking into account previous peer review comments from SACC reviews of risk evaluations on the first 10 chemical assessments and more recent recommendations from the National Academies of Sciences, Engineering, and Medicine (NASEM) review of the Application of Systematic Review in TSCA Risk Evaluations. In addition to the revised generic approach, this peer review package will include appendices containing chemical specific information that is relevant for searching, screening, data evaluation and evidence integration for the next chemical risk evaluations being conducted by OPPT.

2. Exposure to Fenceline Communities

The draft EPA TSCA Screening Level Approach for Assessing Ambient Air and Water Exposures to Fenceline Communities will be developed as a path forward decision to address potential air and water exposures to fenceline communities which may be excluded from other Agency statutes. EPA will use this screening level approach to reassess seven of the first ten TSCA chemical risk evaluations for the air pathway and five of the first ten TSCA chemical risk evaluations for the water pathway to determine if there is a potential for unreasonable risk to these communities. The methodology will be assessed for air exposure on the following chemicals: 1-bromopropane, methylene chloride, N-methylpyrrolidone, carbon tetrachloride, trichloroethylene, perchloroethylene, and 1, 4-dioxane and water exposure for the following chemicals: Methylene chloride, N-methylpyrrolidone, carbon tetrachloride, trichloroethylene, and perchloroethylene. If the agency finds unreasonable risk that cannot be addressed through current risk management approaches, the agency will conduct additional comprehensive exposure assessments and supplement the risk evaluation for that chemical with the updated information.

Authority: 15 U.S.C. 2625 *et seq.*; 5 U.S.C. appendix 2 *et seq.*

Dated: October 20, 2021.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2021–23362 Filed 10–26–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OGC–2021–0753; FRL–9178–01–OGC]

Proposed Consent Decree, Safe Drinking Water Act Claims

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed consent decree; request for public comment.

SUMMARY: In accordance with the Environmental Protection Agency (EPA) Administrator's October 16, 2017, Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements, EPA is giving notice of a proposed consent decree to address a complaint filed by the Natural Resources Defense Council in the United States District Court for the Southern District of New York alleging that EPA failed to perform a mandatory duty under the Safe Drinking Water Act (SDWA). On January 19, 2021, the Plaintiffs filed a complaint pursuant to the SDWA alleging failure of the Administrator to issue revisions to EPA's consumer confidence report regulations by October 23, 2020. Under the proposed Consent Decree, the EPA would agree to a deadline for issuing the revisions.

DATES: Written comments on the proposed consent decree must be received by November 26, 2021.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OGC–2021–0753, online at *https://www.regulations.gov* (EPA's preferred method). Follow the online instructions for submitting comments.

Instructions: All submissions received must include the Docket ID number for this action. Comments received may be posted without change to *https://www.regulations.gov,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''Additional Information about Commenting on the Proposed Consent Decree'' heading under the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov,* as there may be a delay in processing mail and faxes. Hand-deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

EPA continues to carefully and continuously monitor information from the CDC, local area health departments, and our federal partners so that we can respond rapidly as conditions change regarding COVID–19.

FOR FURTHER INFORMATION CONTACT: Leslie Darman, Water Law Office, Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone: (202) 564–5452; email address: *Darman.Leslie@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining a Copy of the Proposed Consent Decree

The official public docket for this action (identified by Docket ID No. EPA–HQ–OGC–2021–0753) contains a copy of the proposed consent decree.

The electronic version of the public docket for this action contains a copy of the proposed consent decree and is available through *https://www.regulations.gov.* You may use *https://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select ''search.''

II. Additional Information About the Proposed Consent Decree

On January 19, 2021, the Natural Resources Defense Council filed a complaint pursuant to SDWA alleging failure of the Administrator to issue revisions to the consumer confidence report regulations by October 23, 2020. (*Natural Resources Defense Council* v. *Michael Regan, Administrator of the United States Environmental Protection Agency, et al.,* No. 21–cv–461 (S.D.N.Y.)) Pursuant to Section 1414(c)(4) of the Safe Drinking Water Act (SDWA), EPA promulgated consumer confidence report regulations in 1998 to require ''each community water system to mail to each customer of the system at least once annually a report on the level of contaminants in the drinking water purveyed by that system (referred to in this paragraph as a ''consumer confidence report'').'' 42 U.S.C. 300g–3(c)(4)(A). In 2018, the America's Water Infrastructure Act (''the Act'') amended Section 1414(c)(4) to require EPA to issue revisions to its consumer confidence report regulations ''[n]ot later than 24 months after October 23, 2018,'' or October 23, 2020, 42 U.S.C. 300g–3(c)(4)(F)(i), to increase ''the readability, clarity, and understandability of the information presented in consumer confidence reports'' and to increase ''the accuracy of information presented, and risk communication, in consumer confidence reports.'' 42 U.S.C. 300g–3(c)(4)(F)(i)(I)(aa)–(bb). The Act also provides that the CCR regulations (1) require community water systems serving more than 10,000 persons to provide a consumer confidence report to each customer ''at least biannually'' and (2) allow electronic delivery of the consumer confidence reports. 42 U.S.C. 300g–3(c)(4)(F)(i)(II) and 300g–3(c)(4)(F)(ii). The Act requires EPA to issue the revisions to the CCR regulations ''in consultation with'' ''public water systems, environmental groups, public interest groups, risk communication experts, and the States, and other interested parties,'' 42 U.S.C. 300g–3(c)(4)(F) and 300g–3(c)(4)(A). EPA has not issued revisions to the consumer confidence report regulations as described in 42 U.S.C. 300g–3(c)(4)(F), 42 U.S.C. 300g–3(c)(4)(F)(i). Under the proposed Consent Decree, the EPA would agree to a deadline for issuing the revisions.

For a period of thirty (30) days following the date of publication of this document, the Agency will accept written comments relating to the proposed consent decree. EPA or the Department of Justice may withdraw or withhold consent to the proposed consent decree if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act.

III. Additional Information About Commenting on the Proposed Consent Decree

Submit your comments, identified by Docket ID No. EPA–HQ–OGC–2021–0753, via *https://www.regulations.gov.* Once submitted, comments cannot be edited or removed from this docket. EPA may publish any comment received to its public docket. Do not submit to EPA's docket at *https://www.regulations.gov* any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. 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 additional information about submitting information identified as CBI, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this document. Note that written comments containing CBI and submitted by mail may be delayed and deliveries or couriers will be received by scheduled appointment only.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information

provided in the body of a comment will be included as part of the comment that is placed in the official public docket and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the *https://www.regulations.gov* website to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an ''anonymous access'' system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment.

Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

Steven M. Neugeboren,

Associate General Counsel.

[FR Doc. 2021–23427 Filed 10–26–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OARM–2018–0124; FRL–9197–01–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Contractor Cumulative Claim and Reconciliation (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit an information collection request (ICR), Contractor Cumulative Claim and Reconciliation (EPA ICR Number 0246.14, OMB Control Number 2030–0016) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (PRA). Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through December 30, 2021. Public comments were previously requested via the **Federal Register** on April 12, 2021 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. 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.

DATES: Additional comments may be submitted on or before November 26, 2021.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OARM–2018–0124, online using *www.regulations.gov* (our preferred method) or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Thomas Valentino, Policy Training and Oversight Division, Office of Acquisition Solutions (3802R), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564–4522; email address: *valentino.thomas@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Abstract: All contractors who have completed an EPA cost-reimbursement type contract will be required to submit EPA Form 1900–10. EPA Form 1900–10 summarizes all costs incurred in performance of the contract and sets forth the final indirect rates. This form is reviewed by the contracting officer to determine the final costs reimbursable to the contractor. The Federal Acquisition Regulation (FAR) 52.216–7 states that the Government will pay only the costs determined to be allowable by the contracting officer in accordance with FAR Subpart 31.2. Furthermore, FAR 52.216–7 states that indirect cost rates shall be established for each fiscal year at the close of a contractor's fiscal year. EPA Form 1900–10 summarizes this information for the entire contract period and provides a basis for cost review by contracting, finance, and audit personnel. In addition, FAR 4.804–5 mandates that the office administering the contract shall ensure that the costs and indirect cost rates are settled.

Form Numbers: EPA Form 1900–10.

Respondents/affected entities: All contractors who have completed an EPA cost-reimbursement type contract.

Respondent's obligation to respond: Mandatory (FAR 52.216–7).

Estimated number of respondents: 5 (total).

Frequency of response: Once, at the end of the contract.

Total estimated burden: 31.5 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $4,730.40 (per year), includes $0 annualized capital or operation & maintenance costs.

Changes in Estimates: There is no change in the hours in the total estimated respondent burden compared with the ICR currently approved by OMB. The previous ICR included annual costs of $60 for postage and envelopes, which is now done electronically. Therefore, there are now no operating and maintenance costs.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2021–23367 Filed 10–26–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[CERCLA 01–2021–0082; FRL–9159–01–R1]

Proposed CERCLA Cost Recovery and Work Administrative Settlement: Wampus Milford Associates Site, Milford, Connecticut

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed settlement; request for public comments.

SUMMARY: Notice is hereby given of a proposed cost recovery and work administrative settlement concerning

the Wampus Milford Associates Site (Site), located in Milford, New Haven County, Connecticut, with the Settling Party, FCI USA LLC. The proposed settlement requires the Settling Party to conduct a removal action estimated to cost approximately $1.2 million at the Wood Block Area of the Site and pay all of EPA's future response costs in overseeing the removal work. The parameters of the removal action include, but are not limited to, excavation and disposal of soil/woodblock debris contaminated by polycyclic aromatic hydrocarbons. In exchange, EPA will provide the Settling Party with a covenant not to sue for the work, future response costs related to the work, and EPA's past response costs, which are approximately $105,800. For 30 days following the date of publication of this notice, the Agency will receive written comments relating to the settlement for cost recovery and response work.

DATES: Comments must be submitted by November 26, 2021.

ADDRESSES: Comments should be addressed to RuthAnn Sherman, Senior Enforcement Counsel, Office of Regional Counsel, U.S. Environmental Protection Agency, 5 Post Office Square, Suite 100 (04–2), Boston, MA 02109–3912, (617) 918–1886, *sherman.ruthann@epa.gov,* and should reference the Wampus Milford Associates Site, U.S. EPA Docket No: CERCLA 01–2021–0082.

FOR FURTHER INFORMATION CONTACT: A copy of the proposed settlement may be obtained from Stacy Greendlinger, Superfund and Emergency Management Division, U.S. Environmental Protection Agency, Region I, 5 Post Office Square, Suite 100 (02–2), Boston, MA 02109–3912, telephone number: (617) 918–1403, email address: *greendlinger.stacy@epa.gov.* Direct technical questions to Stacy Greendlinger and legal questions to RuthAnn Sherman, Office of Regional Counsel, U.S. Environmental Protection Agency, Region I, 5 Post Office Square, Suite 100 (04–2), Boston, MA 02109–3912, telephone number: (617) 918–1886, email address: *sherman.ruthann@epa.gov.*

SUPPLEMENTARY INFORMATION: This proposed cost recovery and work administrative settlement concerning the Wampus Milford Associates Site, located in Milford, New Haven County, Connecticut, is made in accordance with Section 122(h)(l) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). EPA covenants not to sue or take administrative action against the FCI USA LLC, pursuant to Section 107(a) of CERCLA, 42 U.S.C. 9607(a), for the Work, Future Response Costs, and Past Response Costs, as defined in the settlement agreement. In exchange, the Settling Party agrees to conduct a removal action estimated to cost approximately $1.2 million, and pay all of EPA's future response costs related to overseeing the work. The Agency will consider all comments received and may modify or withdraw its consent to this cost recovery settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate. The Agency's response to any comments received will be available for public inspection at the Environmental Protection Agency—Region I, 5 Post Office Square, Suite 100, Boston, MA 02109–3912. The Effective Date of the Agreement is the date upon which EPA notifies FCI USA LLC that the public comment period has closed and that such comments, if any, do not require that EPA modify or withdraw from the Agreement. The proposed settlement has been approved by the Environmental and Natural Resources Division of the United States Department of Justice, subject to any comments received and EPA's response thereto.

Bryan Olson,

Director, Superfund and Emergency Management Division.

[FR Doc. 2021–23394 Filed 10–26–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2021–0040; FRL–9196–01–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Servicing of Motor Vehicle Air Conditioners (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), Servicing of Motor Vehicle Air Conditioners (EPA ICR Number 1617.10, OMB Control Number 2060–0247) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through December 31, 2021. Public comments were previously requested via the **Federal Register** on April 16, 2021, during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. 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.

DATES: Comments must be submitted on or before November 26, 2021.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2021–0040, online using *www.regulations.gov* (our preferred method) or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Chenise Farquharson, Stratospheric Protection Division, Office of Atmospheric Programs (Mail Code 6205T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564–7768; email address: *farquharson.chenise@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR.

Abstract: Section 609 of the Clean Air Act Amendments of 1990 (Act) provides general guidelines for the servicing of motor vehicle air conditioners (MVACs). It states that ''no person repairing or servicing motor vehicles for consideration may perform any service on a motor vehicle air conditioner involving the refrigerant for such air conditioner without properly using approved refrigerant recycling equipment and no such person may

perform such service unless such person has been properly trained and certified.'' In 1992, EPA developed regulations under section 609 that were published in 57 FR 31240 and codified at 40 CFR subpart B (Section 82.30 *et seq.*). The information required to be collected under the section 609 regulations is: Approved refrigerant handling equipment; approved independent standards testing organizations; technician training and certification; and certification, reporting and recordkeeping.

Form Numbers: None.

Respondents/affected entities: The following is a list of NAICS codes for organizations potentially affected by the information requirements covered under this ICR. It is meant to include any establishment that may service or maintain motor vehicle air conditioners.

4411 Automobile Dealers

4413 Automotive Parts, Accessories, and Tire Stores

44711 Gasoline Stations with Convenience Stores

8111 Automotive Repair and Maintenance

811198 All Other Automotive Repair and Maintenance

Other affected groups include independent standards testing organizations and organizations with technician certification programs.

Respondent's obligation to respond: Mandatory (40 CFR 82.36, 82.38, 82.40, 82.42).

Estimated number of respondents: 46,033 (per year).

Frequency of response: On occasion, biennially, only once.

Total estimated burden: 4,165 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $213,153 (per year), includes $0 annualized capital or operation & maintenance costs.

Changes in Estimates: There is an increase of 35 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This increase is due in part to an increase in the number of motor vehicle establishments in the United States. This correlates with an increase in the number of establishments that send refrigerants off-site for recycling or reclamation.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2021–23368 Filed 10–26–21; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION

Notice of Agreement Filed

The Commission hereby gives notice of the filing of the following agreement under the Shipping Act of 1984. Interested parties may submit comments, relevant information, or documents regarding the agreement to the Secretary by email at *Secretary@fmc.gov,* or by mail, Federal Maritime Commission, Washington, DC 20573. Comments will be most helpful to the Commission if received within 12 days of the date this notice appears in the **Federal Register**. Copies of agreement 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.: 008005–015.

Title: New York Terminal Conference Agreement.

Parties: APM Terminals Elizabeth, LLC; Port Newark Container Terminal; GCT Bayonne LP; Red Hook Container Terminal, LLC; and GCT New York LP.

Filing Party: Gerald A. Morrissey III; Holland & Knight.

Synopsis: The amendment adds Gerald A. Morrissey III as an authorized agent for the Agreement.

Proposed Effective Date: 10/19/2021.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/14242.

Dated: October 22, 2021.

Rachel E. Dickon,

Secretary.

[FR Doc. 2021–23385 Filed 10–26–21; 8:45 am]

BILLING CODE 6730–02–P

FEDERAL MEDIATION AND CONCILIATION SERVICE

Privacy Act of 1974; System of Records

AGENCY: Federal Mediation and Conciliation Service.

ACTION: Notice of a new system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the Federal Mediation and Conciliation Service (FMCS) proposes to create a system of records notice, titled FMCS–0006. The system will cover the Executive Branch Confidential Financial Disclosure Reports, and agency ethics guidance to employees.

DATES: This notice will be effective without further notice on November 26, 2021 unless otherwise revised pursuant to comments received. New routine uses will be effective on November 26, 2021. Comments must be received on or before November 26, 2021.

ADDRESSES: You may send comments, identified by FMCS–0006 by any of the following methods:

- *Mail:* Office of General Counsel, 250 E Street SW, Washington, DC 20427.
- *Email: ogc@fmcs.gov.* Include FMCS–0006 on the subject line of the message.
- *Fax:* (202) 606–5444.

FOR FURTHER INFORMATION CONTACT: Sarah Cudahy, Designated Agency Ethics Official and Deputy General Counsel, at *scudahy@fmcs.gov* or 202–606–8090.

SUPPLEMENTARY INFORMATION: In accordance with the Privacy Act of 1974, 5 U.S.C. 552(a), this document provides public notice that FMCS is creating a new system of records.

SYSTEM NAME AND NUMBER:

FMCS–0006 Ethics Records.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Federal Mediation and Conciliation Service, Office of General Counsel (OGC), 250 E Street SW, Washington, DC 20427.

SYSTEM MANAGER(S):

Sarah Cudahy, Designated Agency Ethics Official and Deputy General Counsel, email *scudahy@fmcs.gov*, or send mail to Federal Mediation and Conciliation Service, Office of General Counsel (OGC), 250 E Street Southwest, Washington, DC 20427, Attn: Sarah Cudahy.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. app. (Ethics in Government Act of 1978); E.O. 12674 (as modified by E.O. 12731); 5 CFR part 2634.

PURPOSE(S) OF THE SYSTEM:

These records are collected and maintained to meet the requirements of Executive Order 12674, as modified, 5 CFR part 2634, and subsequent agency regulations, as well as section 107 of the Ethics in Government Act of 1978, as amended, concerning the filing of confidential financial disclosure reports. Confidential financial disclosure reports are required to assure compliance with ethics laws and regulations, and to determine if an actual or apparent conflict of interest or impartiality issue exists between the employment of individuals by the Federal Government and their outside employment financial interests.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Officers and employees in the executive branch whose positions have been designated as confidential financial disclosure filing positions or alternative financial disclosure filers in accordance with 5 CFR 2634.904 and 5 U.S.C. app. 107. In addition, all executive branch special Government Employees (SGE) as defined in 18 U.S.C. 202(a) and 5 CFR 2634.105(s) are required to file unless they are required to file public financial disclosure reports, or their positions have been excluded from filing. The system of records includes both current and former Federal employees in these categories.

CATEGORIES OF RECORDS IN THE SYSTEM:

These records contain statements and amended statements of personal and family holdings and other interests in property, income, gifts, reimbursements, liabilities, agreements, arrangements, outside positions, retirement products, pensions, and other information related to conflict-of-interest determinations. These statements include completed copies of the Office of General Ethics (OGE) Form 450 and alternate 450 forms and supplemental agency ethics documents.

RECORD SOURCE CATEGORIES:

Information in this system of records is provided by:

1. The Federal employee or a designated person such as a trustee, accountant, banker or relative.
2. Federal officials who review the statements to make conflict-of-interest determinations.
3. Persons alleging conflicts of interest or other violations of ethics laws and persons contacted during any investigation of the allegations.
4. FMCS clients who complete notice documents in the waiver process.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

These confidential records and information contained therein may be used:

(a) To disclose pertinent information to the appropriate Federal, State, or local agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule regulation or order where the disclosing agency becomes aware of an indication of a violation or potential violation of civil or criminal laws or regulations.

(b) To disclose information to any source when necessary to obtain information relevant to a conflict-of-interest investigation or determination.

(c) To disclose information to the National Archives and Records Administration (NARA) or the General Services Administration in records management inspections conducted under authority of 44 U.S.C. 2904 and 2906.

(d) To disclose information to the Office of Management and Budget at any stage in the legislative coordination and clearance process in connection with private relief legislation as set forth in OMB Circular No. A–19.

(e) To disclose information when the disclosing agency determines that the records are relevant to a proceeding before a court, grand jury, or administrative or adjudicative body when the adjudicator determines the records to be relevant to the proceeding.

(f) To disclose the confidential financial disclosure report or certificate of no new interest and any accompanying documents to reviewing officials in a new office, department or agency when an employee transfers or is detailed from a covered position in one office, department or agency to a covered position in another office, department, or agency.

(g) To disclose information to a Member of Congress or a congressional office in response to an inquiry made on behalf of, and at the request of, an individual who is the subject of the record.

(h) To disclose information to contractors, grantees, experts, consultants, detailees, and other non-Government employees performing or working on a contract, service, or other assignment for the Federal Government when necessary to accompany an agency function related to this system of records.

(i) To disclose the existence of a potential or actual impartiality concern to an Agency party or client to resolve a concern under 5 CFR 2635.502.

(j) To disclose information to appropriate agencies, entities, and persons when: (1) The agency maintaining the records suspects or has confirmed that there has been a breach of the system of records; (2) the agency maintaining the records has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the agency (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government or national security, resulting from a suspected or confirmed breach.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

These records are maintained in paper and electronic form in locations only accessible to authorized personnel.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

These records are retrieved by the name or other programmatic identifier assigned to an individual.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

In accordance with the NARA's General Records Schedule (GRS) 2.8 Employee Ethics Records, these records are retained for six years after filing, except when filed by or with respect to a nominee and the nominee ceases to be under consideration for the position. If any records are needed in an ongoing investigation, they will be retained for the duration of the investigation. Records are destroyed by shredding or deleting.

ADMINSTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Records are located in a locked file storage area or stored electronically in locations requiring agency network access via username and password. FMCS buildings are guarded and monitored by security personnel, cameras, ID checks, and other physical security measures.

RECORD ACCESS PROCEDURES:

Individuals wishing to request access to their records should contact the Office of General Counsel (OGC). Individuals must provide the following information for their records to be located and identified: (1) Full name, (2) Dates of employment, and (3) A specific description of the record content requested. Individuals requesting access to records maintained at the Office of Government Ethics (OGE) must also follow OGE's Privacy Act regulations regarding verification of identity and access to records (5 CFR part 2606).

CONTESTING RECORDS PROCEDURES:

Records are updated on a periodic basis; most record corrections can be handled through established administrative procedures. Contact the Office of General Counsel (OGC) for contesting records under the provisions of the Privacy Act.

NOTIFICATION PROCEDURES:

See 29 CFR 1410.3(a), Individual access requests.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

None.

Dated: October 22, 2021.

Sarah Cudahy,

General Counsel.

[FR Doc. 2021–23409 Filed 10–26–21; 8:45 am]

BILLING CODE 6732–01–P

FEDERAL MEDIATION AND CONCILIATION SERVICE

Privacy Act of 1974; System of Records

AGENCY: Federal Mediation and Conciliation Service.

ACTION: Notice of a new system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the Federal Mediation and Conciliation Service (FMCS) proposes to create a system of records notice, titled FMCS–0005, the Religious Accommodation System. The system will include the Religious Accommodation Form that can be completed by any employee.

DATES: This notice will be effective without further notice on November 26, 2021 unless otherwise revised pursuant to comments received. New routine uses will be effective on November 26, 2021. Comments must be received on or before November 26, 2021.

ADDRESSES: You may send comments, identified by FMCS–0005 by any of the following methods:

- *Mail:* Office of General Counsel, 250 E Street SW, Washington, DC 20427.
- *Email: ogc@fmcs.gov.* Include FMCS–0005 on the subject line of the message.
- *Fax:* (202) 606–5444.

FOR FURTHER INFORMATION CONTACT: Doug Jones, Director of Information Technology, at *djones@fmcs.gov* or 202–606–5483.

SUPPLEMENTARY INFORMATION: In accordance with the Privacy Act of 1974, 5 U.S.C. 552(a), this system is needed for collecting and storing FMCS employee religious exemption information.

SYSTEM NAME AND NUMBER:

FMCS–0005 Religious Accommodation System.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Federal Mediation and Conciliation Service, Office of General Counsel (OGC), 250 E Street SW, Washington, DC 20427.

SYSTEM MANAGER(S):

Angie Titcombe, Director of Human Resources, and Natalie Samuels, Benefits and Retirement Specialist. Doug Jones, Director of Information Technology, will not access content in the internal folder, will only troubleshoot any technical issues regarding electronic files. Send mail to Federal Mediation and Conciliation Service, 250 E Street Southwest, Washington, DC 20427.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

29 U.S.C. 172, *et seq.;* Title VII of the Civil Rights Act of 1964.

PURPOSE(S) OF THE SYSTEM:

The purpose of this system is to provide a system for collecting, processing, and maintaining religious accommodation requests. Information stored and maintained in this system pertains to exemptions based upon a religious accommodation.

The system will collect information submitted by employees, detailing the requested accommodations and any supporting documentation. This also includes information pertaining to the final determination of the accommodation.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The categories of individuals covered in the system of records includes both current and former Federal employees who have requested religious accommodations.

CATEGORIES OF RECORDS IN THE SYSTEM:

These records contain first and last name, position held, the date of the request, description of religious belief and how it will impact the ability to comply with agency requirements and perform official duties.

RECORD SOURCE CATEGORIES:

Information in this system of records is provided by:

1. The Federal employee submitting an accommodation form.

2. FMCS Human Resources officials who provide confirmation approval or denial of requests.

Additional record source categories could include documents pertaining to the employee's religion and religious practices.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed to authorized entities, as is determined to be relevant and necessary, outside the FMCS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

(a) To disclose pertinent information to the appropriate Federal, State, or local agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule regulation or order where FMCS becomes aware of an indication of a violation or potential violation of civil or criminal laws or regulations.

(b) To disclose information to the National Archives and Records Administration (NARA) for use in its records management inspections; to the Government Accountability Office (GAO) for oversight purposes; to the Department of Justice (DOJ) to obtain that department's advice regarding disclosure obligations under the Freedom of Information Act (FOIA); or to the Office of Management and Budget (OMB) to obtain that office's advice regarding obligations under the Privacy Act.

(c) To officials of labor organizations recognized under 5 U.S.C. chapter 71 upon receipt of a formal request and in accordance with the conditions of 5 U.S.C. 7114 when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting working conditions.

(d) To disclose information to a Member of Congress or a congressional office in response to an inquiry made on behalf of, and at the request of, an individual who is the subject of the record.

(e) To respond to subpoenas in any litigation or other proceeding.

(f) To appropriate agencies, entities, and persons when (1) FMCS suspects or has confirmed that there has been a breach of the system of records, (2) FMCS has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, FMCS (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with FMCS's efforts to respond to the suspected or confirmed

breach or to prevent, minimize, or remedy such harm.

(g) To another Federal agency or Federal entity, when FMCS determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

These records are maintained in hard copy and electronic form in locations only accessible to authorized personnel. Electronic records are stored on the agency's internal servers with restricted access. Hard copy records are stored in a locked cabinet accessible to authorized Human Resources staff and designated deciding officials.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

These records are retrieved by the name or other programmatic identifier assigned to an individual in the electronic database and paper filing system.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All records are retained and disposed of in accordance with General Records Schedule 2.3, issued by the National Archives and Records Administration. Records are updated as needed, retained for three years after separation and/or for the entirety of the employee's active employment, and destroyed by shredding or deleting.

ADMINSTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Records are located in a locked file storage area or stored electronically in locations only accessible to authorized personnel. Access is restricted, and accessible to limited Human Resources officials, and/or individuals in a need-to-know capacity. FMCS buildings are guarded and monitored by security personnel, cameras, ID checks, and other physical security measures.

RECORD ACCESS PROCEDURES:

If an employee would like access to their Religious Accommodation Form, please send a request with the specific information needed to the resource mailbox at *FMCSMedicalInfo@fmcs.gov.* A copy of the requested information will be provided via email in an encrypted file.

CONTESTING RECORDS PROCEDURES:

See 29 CFR 1410.6, Requests for correction or amendment of records, on how to contest the content of any records. Privacy Act requests to amend or correct records may be submitted to the Chief Privacy Officer at *privacy@fmcs.gov* or Chief Privacy Officer, FMCS, 250 E Street SW, Washington, DC 20427. Also, see *https://www.fmcs.gov/privacy-policy/.*

NOTIFICATION PROCEDURES:

See 29 CFR 1410.3(a), Individual access requests.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

None.

Dated: October 22, 2021.

Sarah Cudahy,

General Counsel.

[FR Doc. 2021–23408 Filed 10–26–21; 8:45 am]

BILLING CODE 6732–01–P

FEDERAL RESERVE SYSTEM

[Docket No. OP–1755]

Notice of Review and Request for Comment

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice of review and request for comment.

SUMMARY: The Federal Reserve is conducting a review under the Primary Dealers Act of 1988 of the treatment of U.S. firms operating in the Spanish government debt market. As part of that review, the Board requests public comment on the treatment of U.S. firms in the Spanish government debt market, and specifically on whether Spain grants to U.S. companies the same competitive opportunities to underwrite and distribute Spanish government debt instruments that Spain accords to Spanish companies.

DATES: Comments must be received by November 26, 2021.

ADDRESSES: You may submit comments, identified by Docket No. OP–1755, by any of the following methods:

- *Agency website: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Email: regs.comments@federalreserve.gov.* Include docket 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 *www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons or to remove personally identifiable information at the commenter's request. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room 146, 1709 New York Avenue NW, Washington, DC 20006, between 9:00 a.m. and 5:00 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Sophia H. Allison, Senior Special Counsel (202–452–3565 or *sophia.h.allison@frb.gov*), Legal Division, or Brett Berger, Senior Adviser (202–452–6427 or *brett.d.berger@frb.gov*), Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551.

SUPPLEMENTARY INFORMATION: Under the Primary Dealers Act of 1988, 22 U.S.C. 5341–5342 (Act), the Federal Reserve may not designate a person of a foreign country as a primary dealer, or allow a person of a foreign country to retain designation as a primary dealer, if that person's country does not grant to U.S. companies the same competitive opportunities to underwrite and distribute that country's government debt instruments as that country accords to its domestic companies. A ''person of a foreign country'' includes any foreign individual or company that directly or indirectly controls a primary dealer. The Board has made determinations under the Act with respect to six foreign countries: Japan (1989), the United Kingdom (1989), Switzerland (1989) Germany (1990), France (1992), and the Netherlands (1998).

A U.S. bank holding company owned by a Spanish firm intends to acquire a U.S. broker-dealer that is currently designated as a primary dealer. Under the Act, the broker-dealer would not be permitted to retain its designation as a primary dealer following its acquisition by the Spanish firm without a determination under the Act that Spain affords the same competitive opportunities to U.S. firms to underwrite and distribute Spanish government debt instruments as Spain accords to Spanish firms.

In order to make this determination, the Federal Reserve is conducting a review of the market in Spanish

government debt instruments. The Board requests comment on all aspects of the review. The Board specifically requests comment on the respects in which U.S. companies are accorded, or are not accorded, the same competitive opportunities in the underwriting and distribution of Spanish government debt instruments as Spain accords to Spanish companies. All comments received will be considered in the context of the review of this market.

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

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2021–23428 Filed 10–26–21; 8:45 am]

BILLING CODE P

GENERAL SERVICES ADMINISTRATION

[Notice-MA–2021–05; Docket No. 2021–0002; Sequence No. 27]

Federal Travel Regulation (FTR); Applicability of the Federal Travel Regulation Part 301–13 to Employees Who Are Nursing

AGENCY: Office of Government-wide Policy (OGP), General Services Administration (GSA).

ACTION: Notice of GSA Bulletin FTR 22–03, Applicability of the Federal Travel Regulation Part 301–13 to Employees who are Nursing.

SUMMARY: GSA Bulletin FTR 22–03 provides guidance to agencies subject to the Federal Travel Regulation (FTR) to clarify that ''special needs'' travel may include reasonable accommodations for employees who breastfeed.

DATES: *Applicability Date:* This notice is effective upon date of publication.

FOR FURTHER INFORMATION CONTACT: Ms. Jill Denning, Office of Government-wide Policy, Office of Asset and Transportation Management, at *travelpolicy@gsa.gov.* Please cite Notice of GSA Bulletin FTR 22–03.

SUPPLEMENTARY INFORMATION:

Background

Federal agencies can accommodate an employee's special needs while on temporary duty travel pursuant to the FTR, Part 301–13. Per § 301–13.2, an agency can pay for additional travel expenses to accommodate a special physical need which is either: (a) Clearly visible and discernible; or (b) substantiated in writing by a competent medical authority.

In recent years, agencies and employees have asked whether employees who breastfeed have a special need that agencies may accommodate while the employee is on temporary duty travel (TDY).

Employees who breastfeed and go on official travel orders face a physical challenge that other employees who are not breastfeeding do not. Travel away from home usually requires the employee to be away from the child. While milk can be expressed beforehand and left for a caregiver, sometimes there is not enough to last the duration of the trip and milk must be safely stored and shipped back home.

In order to not force employees to make a choice between nursing or fulfilling work duties, Federal agencies may recognize that a nursing employee on official travel has a special need, as verified per regulatory requirements. Agencies may determine that the special need means that a spouse, nanny, or other attendant can accompany the employee on the trip at Government expense in order to watch the child in between the employee's reasonable break periods to breastfeed while working at the temporary duty station. If no attendant is necessary, an employee on official travel may still need to use services for storage and shipment of breast milk to the child.

GSA Bulletin FTR 22–03 can be viewed in its entirety at *https://www.gsa.gov/ftrbulletins.*

Krystal J. Brumfield,

Associate Administrator, Office of Government-wide Policy.

[FR Doc. 2021–23397 Filed 10–26–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket No. CDC–2018–0057]

Record of Decision; Acquisition of Site for Development of a Replacement Underground Safety Research Program Facility for the Centers for Disease Control and Prevention/National Institute for Occupational Safety and Health (CDC/NIOSH) in Mace, West Virginia

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of availability.

SUMMARY: The Centers for Disease Control and Prevention (CDC) within the Department of Health and Human Services (HHS), in cooperation with the General Services Administration (GSA), announces the availability of the Record of Decision (ROD) for the acquisition of a Site in Mace, West Virginia, and the development of this Site into a replacement for the National Institute for Occupational Safety and Health (NIOSH) Underground Safety Research Program facility (Proposed Action). The acquisition and development will replace the former Lake Lynn Experimental Mine in Fayette County, Pennsylvania, and will support research programs focused on miner health and safety issues. The site to be acquired and developed includes 461.35 acres located off U.S. Route 219 in Randolph and Pocahontas Counties near Mace, West Virginia (Site).

ADDRESSES: The ROD is available for viewing on the Federal eRulemaking Portal: *http://www.regulations.gov* (reference Docket No. CDC–2018–0057).

FOR FURTHER INFORMATION CONTACT: Sam Tarr, Office of Safety, Security, and Asset Management (OSSAM), Centers for Disease Control and Prevention, 1600 Clifton Road NE, H20–4, Atlanta, Georgia 30329–4027, phone: (770) 488–8170, or email: *cdc-macewv-eis@cdc.gov.*

SUPPLEMENTARY INFORMATION:

Background: CDC is dedicated to protecting health and promoting quality of life through the prevention and control of disease, injury, and disability. NIOSH was established by the Occupational Safety and Health Act of 1970. NIOSH plans, directs, and coordinates a national program to develop and establish recommended occupational safety and health standards, conduct research and training, provide technical assistance, and perform related activities to ensure safe and healthful working conditions for every working person in the United States.

In 1997, when the mine safety and health function was transferred from the Bureau of Mines (BOM) to NIOSH, NIOSH took over the lease for a facility referred to as the Lake Lynn Experimental Mine (LLEM). The BOM had leased the LLEM facility since 1982. The LLEM is located 60 miles south of Pittsburgh, Pennsylvania. The LLEM and its aboveground fire testing facility were primarily used for studies and research on mine explosions, mine seals, mine rescue, ventilation, diesel exhaust, new health and safety technologies, ground control, and fire suppression. After December 2012, the property was no longer available for long-term leasing. CDC attempted to purchase the underlying property on which LLEM is located, but NIOSH vacated the LLEM after market-based

purchase offers were rejected by the property owners.

In 2013, CDC completed a Project Development Study to outline a design solution to replace the LLEM. The study presented the facility and site requirements and design concepts for the replacement facilities. In 2016, to identify potentially available locations that could accommodate the space requirements defined in the 2013 study, GSA issued (on behalf of CDC) two separate Requests for Expressions of Interest (REOI) for a site, developed or undeveloped, that could be used for the new underground safety research facility. The first REOI, advertised in June 2016, contained a limited delineated area within a 200-mile radius of the LLEM. The REOI set forth criteria that would be used to evaluate the suitability of the submitted sites. One expression of interest that had the potential to meet the minimum criteria was received. After further evaluation, however, the site was found to be non-viable.

The second REOI was issued in October 2016 and expanded the delineated area to the entire contiguous United States. Three expressions of interest were received for sites in Kentucky, Missouri, and West Virginia. The Kentucky site did not meet the minimum criteria, and the Missouri site expression of interest did not contain all necessary information to evaluate. The offeror of the Missouri site did not respond to subsequent GSA inquiries.

The potential Site in West Virginia met the minimum criteria and was determined to be a viable site. The Site is located near Mace, West Virginia, and straddles the Randolph and Pocahontas County lines.

Under the National Environmental Policy Act (NEPA), as implemented by the Council on Environmental Quality (CEQ) Regulations (40 CFR parts 1500–1508), Federal agencies are required to evaluate the environmental effects of their proposed actions and a range of reasonable alternatives to the proposed action before making a decision. In compliance with NEPA, CDC published a Draft Environmental Impact Statement (EIS) for the acquisition of the Site and construction of a new underground safety research facility on February 14, 2019 and a Final EIS on July 16, 2021. The Draft EIS was available for public review and comment for 51 days. All comments received were considered when preparing the Final EIS. The Draft and Final EIS analyzed two alternatives: The Proposed Action Alternative (acquisition of the Site and construction of a new underground safety research facility) and the No Action Alternative. The Final EIS identified the Proposed Action Alternative as CDC's Preferred Alternative.

After carefully considering the Final EIS and all comments received, CDC has made the decision to implement the Proposed Action Alternative. CDC's rationale for this decision is detailed in the ROD. The ROD incorporates all the mitigation and minimization measures described in the Final EIS.

Dated: October 21, 2021.

Angela K. Oliver,

Executive Secretary, Centers for Disease Control and Prevention.

[FR Doc. 2021–23341 Filed 10–26–21; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2020–E–1843; FDA–2020–E–1840; and FDA–2020–E–1839]

Determination of Regulatory Review Period for Purposes of Patent Extension; XENLETA Tablets New Drug Application 211672

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for XENLETA tablets and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human drug product.

DATES: Anyone with knowledge that any of the dates as published (see the **SUPPLEMENTARY INFORMATION**) are incorrect may submit either electronic or written comments and ask for a redetermination by December 27, 2021. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by April 25, 2022. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: 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 December 27, 2021. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of December 27, 2021. 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 Nos. FDA–2020–E–1839, FDA–2020–E–1840, and FDA–2020–E–1843 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; XENLETA TABLETS NDA 211672.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at

https://www.regulations.gov or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT:

Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug or biologic product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved new drug application (NDA) 211672 for marketing the human drug product, XENLETA tablets (lefamulin) indicated for the treatment of adults with community-acquired bacterial pneumonia caused by susceptible microorganisms. Subsequent to this approval, the USPTO received patent term restoration applications for XENLETA tablets (U.S. Patent Nos. 8,071,643; 8,153,689; and 9,120,727) from Nabriva Therapeutics GMBH and the USPTO requested FDA's assistance in determining the patents' eligibility for patent term restoration. In a letter dated October 13, 2020, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of XENLETA tablets and XENLETA injection represent the first permitted commercial marketing or use of the products. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for XENLETA tablets is 3,595 days. Of this time, 3,351 days occurred during the testing phase of the regulatory review period, while 244 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(i)) became effective:* October 17, 2009. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on October 17, 2009.

2. *The date the new drug application (NDA 211672) was initially submitted with respect to the human drug product under section 505 of the FD&C Act:* December 19, 2018. FDA has verified the applicant's claim that the new drug application (NDA) for XENLETA tablets (NDA 211672) was initially submitted on December 19, 2018.

3. *The date the application was approved:* August 19, 2019. FDA has verified the applicant's claim that NDA 211672 was approved on August 19, 2019.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 819 days, 1,465 days, or 1,528 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: Must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: October 19, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–23387 Filed 10–26–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2020–E–1843 and FDA–2020–E–1842]

Determination of Regulatory Review Period for Purposes of Patent Extension; XENLETA Injection New Drug Application 211673

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for XENLETA injection new drug application (NDA) 211673 and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human drug product.

DATES: Anyone with knowledge that any of the dates as published (see **SUPPLEMENTARY INFORMATION**) are incorrect may submit either electronic or written comments and ask for a redetermination by December 27, 2021. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by April 25, 2022. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: 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 December 27, 2021. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of December 27, 2021. 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

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- *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 Nos. FDA–2020–E–1842 and FDA–2020–E–1843 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; XENLETA Injection NDA 211673.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug or biologic product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved NDA 211673 for marketing the human drug product, XENLETA injection (lefamulin), which is indicated for the treatment of adults with community-acquired bacterial pneumonia caused by susceptible microorganisms. Subsequent to this approval, the USPTO received patent term restoration applications for XENLETA injection (U.S. Patent Nos. 8,071,643 and 8,153,689) from Nabriva Therapeutics GMBH, and the USPTO requested FDA's assistance in determining the patents' eligibility for patent term restoration. In a letter dated October 13, 2020, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approvals of XENLETA injection and XENLETA tablets represent the first permitted commercial marketing or use of the products. Thereafter, the USPTO requested that FDA determine the products' regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for XENLETA injection is 3,595 days. Of this time, 3,351 days occurred during the testing phase of the regulatory review period, while 244 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(i)) became effective:* October 17, 2009. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on October 17, 2009.

2. *The date the new drug application (NDA 211673) was initially submitted with respect to the human drug product under section 505 of the FD&C Act:* December 19, 2018. FDA has verified the applicant's claims that the new drug application (NDA) for XENLETA injection (NDA 211673) was initially submitted on December 19, 2018.

3. *The date the application was approved:* August 19, 2019. FDA has verified the applicant's claims that NDA 211673 was approved on August 19, 2019.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 1,465 days or 1,528 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: Must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: October 15, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–23386 Filed 10–26–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2021–N–1043]

Exemption of Certain Categories of Biological Products From Certain Reporting Requirements Under the Federal Food, Drug, and Cosmetic Act

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed order.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is proposing to exempt certain categories of biological products from certain reporting requirements under the Federal Food, Drug, and Cosmetic Act (FD&C Act) as amended by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). Specifically, each person who registers with FDA with regard to a drug is required to report annually to FDA on the amount of each listed drug that was manufactured, prepared, propagated, compounded, or processed by such person for commercial distribution; however, certain biological products or categories of biological products may be exempted by order from these reporting requirements if FDA determines that applying such reporting requirements is not necessary to protect the public health. FDA is proposing to exempt the two categories of biological products from these reporting requirements because the Agency has determined that applying such requirements is not necessary to protect the public health.

DATES: Submit either electronic or written comments on the proposed order by December 27, 2021. Please see section IV of this document for the proposed effective date when the exemptions apply and for the proposed effective date of a final order based on this proposed order.

ADDRESSES: 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 December 27, 2021. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of December 27, 2021. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2021–N–1043 for ''Exemption of Certain Categories of Biological Products from Certain Reporting Requirements Under the Federal Food, Drug, and Cosmetic Act.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT:

Sana F. Hussain, 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—Reporting Requirements Under Section 510(j)(3) of the FD&C Act

On March 27, 2020, the CARES Act (Pub. L. 116–136) was enacted to aid response efforts and ease the economic impact of the Coronavirus Disease 2019. In addition, the CARES Act included authorities to enhance FDA's ability to identify, prevent, and mitigate possible drug shortages by, among other things, enhancing FDA's visibility into drug supply chains.

Section 3112(e) of the CARES Act added new paragraph (j)(3) to section 510 of the FD&C Act (21 U.S.C. 360(j)(3)), which requires that each person who registers with FDA under section 510 of the FD&C Act with regard to a drug must report annually to FDA on the amount of each listed drug that was manufactured, prepared, propagated, compounded, or processed by such person for commercial distribution. FDA anticipates that these reporting requirements in section 510(j)(3)(A) of the FD&C Act will enhance FDA's ability to anticipate and react expeditiously to drug shortages by enabling the Agency to quickly identify all manufacturing sites impacted, analyze potential bottlenecks, and develop options to remediate shortage risks to the product supply chain.

Under section 510(j)(3)(B) of the FD&C Act, FDA may exempt certain biological products or categories of biological products regulated under section 351 of the Public Health Service Act (42 U.S.C. 262) from some or all of the reporting requirements under section 510(j)(3)(A) of the FD&C Act, if FDA determines that applying such reporting requirements is not necessary to protect the public health.

II. Categories of Biological Products Proposed for Exemption

FDA is proposing to exempt the following two categories of biological products from all of the reporting requirements under section 510(j)(3)(A) of the FD&C Act pursuant to section 510(j)(3)(B) of the FD&C Act because FDA has determined that applying such reporting requirements is not necessary to protect the public health:

• Blood and blood components for transfusion; and

• Cell and gene therapy products, where one lot treats a single patient.

1. Blood and Blood Components for Transfusion

In accordance with section 510(j)(3)(B) of the FD&C Act, FDA is proposing to exempt blood and blood components for transfusion from the reporting requirements under section 510(j)(3)(A) of the FD&C Act. In light of FDA's existing visibility into the supply chain for this category of products, requiring registrants to report annually under section 510(j)(3)(A) of the FD&C Act on the amount of such products manufactured, prepared, propagated, compounded, or processed for commercial distribution is not needed to enhance the Agency's ability to identify, prevent, and mitigate possible shortages. As such, FDA has determined that applying the reporting requirements under section 510(j)(3)(A) of the FD&C Act to this category of biological products is not necessary to protect the public health.

Generally, registered blood establishments are inspected on a biennial basis by the Agency. There are approximately 1,900 registered blood establishments that manufacture blood and blood components for transfusion, all located in the United States, except a small number of United States military blood establishments that are located internationally in order to provide blood and blood components to United States military personnel onsite when needed. The supply chains for blood and blood components for transfusion are well-established and well-understood based on the nature of the products; namely, blood is collected from human donors via venipuncture, separated into components (if applicable), and stored at specified temperatures and under the complete control of each blood establishment. Additionally, supply chains for blood and blood components for transfusion are controlled and secure from initial donation to final product delivery to the transfusion site and, generally, do not involve wholesale distributors, brokers, or other intermediaries. Further, many registered blood establishments voluntarily submit the amount of blood and blood components for transfusion manufactured as part of the Health and Human Services National Blood Collection and Utilization Survey (NBCUS), which, historically, has a high response rate.[1]

2. Cell and Gene Therapy Products, Where One Lot Treats a Single Patient

In accordance with section 510(j)(3)(B) of the FD&C Act, FDA is proposing to exempt cell and gene therapy products, where one lot treats a single patient, from the reporting requirements under section 510(j)(3)(A) of the FD&C Act. In light of FDA's existing visibility into the supply chain for this category of products, requiring registrants to report annually under section 510(j)(3)(A) of the FD&C Act on the amount of such products manufactured, prepared, propagated, compounded, or processed for commercial distribution, is not needed to enhance the Agency's ability to identify, prevent, and mitigate possible shortages. As such, FDA has determined that applying the reporting requirements under section 510(j)(3)(A) of the FD&C Act to this category of biological products is not necessary to protect the public health.

Manufacturers of cell and gene therapy products, where one lot treats a single patient, maintain a highly controlled and secure supply chain from initial request for treatment of a patient to final product delivery to the site where the treatment occurs. This is because, due to the nature of these products, manufacturers implement strict chain of identity procedures to track products through the manufacturing process, to make sure the correct product gets to the correct patient. Additionally, the supply chains for these products are well-established and well-understood from information described in the biologics license application (BLA), and generally do not involve wholesale distributors, brokers, or other intermediaries.

Additionally, pursuant to § 600.81 (21 CFR 600.81), the Agency generally receives lot distribution reports every 6 months from BLA holders. Specifically, reports submitted to the Agency under § 600.81 include, among other information, the fill lot numbers for the total number of dosage units of each strength or potency distributed, the label lot number (if different from fill lot number), the number of doses in fill lot/label lot, and the date of release of fill lot/label lot for distribution. For this category of biological products, since one lot treats a single patient, the lot distribution reports submitted to the Agency under § 600.81 represent the amount of product manufactured for commercial distribution, and additional reporting of such information under section 510(j)(3)(A) of the FD&C Act would be redundant.

III. Paperwork Reduction Act of 1995

This proposed order contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). Information collection associated with section 510(j)(3) of the FD&C Act, requiring each person who registers with FDA with regard to a drug to report annually to FDA on the amount of each listed drug that was manufactured, prepared, propagated, compounded, or processed by such person for commercial distribution, is approved under OMB control number 0910–0045. If finalized, we believe the order will reduce burden associated with the approved information collection by exempting these biological product categories from such reporting requirements. We invite comment on our assumptions.

IV. Proposed Effective Date

FDA proposes that any final order based on this proposed order become effective 30 days after its date of publication in the **Federal Register**.

Dated: October 21, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–23396 Filed 10–26–21; 8:45 am]

BILLING CODE 4164–01–P

[1] See *https://doi.org/10.1111/trf.16449.* The response rate for the 2019 NBCUS was 94 percent for community-based blood collection facilities and 84 percent for hospital-based blood collection facilities.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2020–E–1902; FDA–2020–E–1903; and FDA–2020–E–1904]

Determination of Regulatory Review Period for Purposes of Patent Extension; INREBIC

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for INREBIC and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human drug product.

DATES: Anyone with knowledge that any of the dates as published (see the **SUPPLEMENTARY INFORMATION**) are incorrect may submit either electronic or written comments and ask for a redetermination by December 27, 2021. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by April 25, 2022. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: 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 December 27, 2021. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of December 27, 2021. 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 Nos. FDA–2020–E–1902, FDA–2020–E–1903, and FDA–2020–E–1904 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; INREBIC.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug or biologic product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human drug product, INREBIC (fedratinib), indicated for the treatment of adult patients with intermediate-2 or high-risk primary or secondary (post-polycythemia vera or post-essential thrombocythemia) myelofibrosis. Subsequent to this approval, the USPTO received patent term restoration applications for INREBIC (U.S. Patent Nos. 7,528,143; 7,825,246; and 8,138,199) from Impact Biomedicines, Inc., and the USPTO requested FDA's assistance in determining the patents' eligibility for patent term restoration. In a letter dated January 4, 2021, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of INREBIC represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for INREBIC is 4,285 days. Of this time, 4,059 days occurred during the testing phase of the regulatory review period, while 226 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(i)) became effective:* November 24, 2007. FDA has verified the applicant's claims that the date the investigational new drug application became effective was on November 24, 2007.

2. *The date the application was initially submitted with respect to the human drug product under section 505 of the FD&C Act:* January 3, 2019. FDA has verified the applicant's claims that the new drug application (NDA) for INREBIC (NDA 212327) was initially submitted on January 3, 2019.

3. *The date the application was approved:* August 16, 2019. FDA has verified the applicant's claims that NDA 212327 was approved on August 16, 2019.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 1,271 days, 1,523 days or 1,796 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: Must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket Nos. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: October 19, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–23388 Filed 10–26–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–1021]

Notice to Public of Website Location of Center for Devices and Radiological Health Fiscal Year 2022 Proposed Guidance Development

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is announcing the website location where the Agency will post two lists of guidance documents that the Center for Devices and Radiological Health (CDRH or the Center) intends to publish in fiscal year (FY) 2022. In addition, FDA has established a docket where interested persons may comment on the priority of topics for guidance, provide comments and/or propose draft language for those topics, suggest topics for new or different guidance documents, comment on the applicability of guidance documents that have issued previously, and provide any other comments that could benefit the CDRH guidance program and its engagement with stakeholders. This feedback is critical to the CDRH guidance program to ensure that we meet stakeholders' needs.

DATES: Submit either electronic or written comments by November 26, 2021.

ADDRESSES: 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 December 27, 2021. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of December 27, 2021. 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–2012–N–1021 for ''Notice to Public of website Location of CDRH Fiscal Year 2021 Proposed Guidance Development.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit

both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT:

Erica Takai, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5456, Silver Spring, MD 20993–0002, 301–796–6353.

SUPPLEMENTARY INFORMATION:

I. Background

During negotiations on the Medical Device User Fee Amendments of 2012, Title II, Food and Drug Administration Safety and Innovation Act (Pub. L. 112–144), FDA agreed to meet a variety of quantitative and qualitative goals intended to help get safe and effective medical devices to market more quickly. Among these commitments included:

- Annually posting a list of priority medical device guidance documents that the Agency intends to publish within 12 months of the date this list is published each fiscal year (the ''A-list''), and
- Annually posting a list of device guidance documents that the Agency intends to publish, as the Agency's guidance-development resources permit each fiscal year (the ''B-list'').

The Medical Device User Fee Amendments of 2017 (MDUFA IV), FDA Reauthorization Act of 2017 (Pub. L. 115–52), maintained these commitments.

In addition, to ensure that final guidance documents continue to provide stakeholders with the Agency's current thinking, CDRH annually conducts a staged review of previously issued final guidances in collaboration with stakeholders. CDRH intends to annually provide lists of previously issued final guidances that are subject to review through FY 2025 so that by 2025, FDA and stakeholders will have assessed the applicability of all guidances older than 10 years. For instance, in the annual notice for FY 2023, CDRH expects to provide a list of the final guidance documents that issued in 2013, 2003, 1993, and 1983; the annual notice for FY 2024 is expected to provide a list of the final guidance documents that issued in 2014, 2004, 1994, and 1984, and so on.

FDA welcomes comments on any or all of the guidance documents on the lists as explained in 21 CFR 10.115(f)(5). FDA has established Docket No. FDA–2012–N–1021 where comments on the FY 2022 lists, draft language for guidance documents on those topics, suggestions for new or different guidances, and relative priority of guidance documents may be submitted and shared with the public (see **ADDRESSES**). FDA believes this docket is a valuable tool for receiving information from interested persons. FDA anticipates that feedback from interested persons will allow CDRH to better prioritize and more efficiently draft guidances to meet the needs of the Agency and our stakeholders.

In addition to posting the lists of prioritized device guidance documents, CDRH has identified as a priority, and has devoted resources to, finalization of draft guidance documents. To assure the timely completion or reissuance of draft guidances, in FY 2015 CDRH committed to performance goals for current and future draft guidance documents. For draft guidance documents issued after October 1, 2014, CDRH committed to finalize, withdraw, reopen the comment period, or issue new draft guidance on the topic for 80 percent of the documents within 3 years of the close of the comment period and for the remaining 20 percent, within 5 years. As part of MDUFA IV commitments, FDA reaffirmed this commitment, as resources permit.

Fulfillment of these commitments will be reflected through the issuance of updated guidance on existing topics, withdrawal of guidances that no longer reflect FDA's current thinking on a particular topic, and annual updates to the A-list and B-list announced in this notice.

II. CDRH Guidance Development Initiatives

A. Metrics for FY 2021 A-List and B-List Publication

Stakeholder feedback on guidance priorities is important to ensure that the CDRH guidance program meets the needs of stakeholders. The feedback received on the FY 2021 list was mostly in agreement, and CDRH continued to work toward issuing the guidances on this list. In FY 2021, CDRH published 11 of 27 guidances on the FY 2021 list (8 from the A-list, 3 from the B-list). In addition, FDA is committed to providing timely guidance to support response efforts to the Coronavirus Disease 2019 (COVID–19) pandemic. As such, FDA has shifted resources to issue 5 guidances and 8 guidance revisions in FY 2021, as well as to support other activities to address the pandemic.

B. Finalization of Draft Guidance Documents

Of the 29 draft guidances issued FY 2016 onward, CDRH finalized 79 percent within 3 years of the comment period close and 86 percent within 5 years. In addition, in FY 2021, 5 draft guidances issued prior to October 1, 2015, remain for which no action has been taken yet, and CDRH has been continuing to work towards taking an action on these remaining draft guidances.

Looking forward, in FY 2022, CDRH will strive to finalize, withdraw, or reopen the comment period for 50 percent of existing draft guidances issued prior to October 1, 2016.

C. Applicability of Previously Issued Final Guidance

At the website where CDRH has posted the ''A-list'' and ''B-list'' for FY 2021, CDRH has also posted a list of final guidance documents that issued in 2012, 2002, 1992, and 1982 for our annual review of previously issued final guidances. CDRH is interested in external feedback on whether any of these final guidances should be revised or withdrawn. In addition, for guidances that are recommended for revision, information explaining the need for revision, such as the impact and risk to public health associated with not revising the guidance, would also be helpful as the Center considers potential action with respect to these guidances. CDRH will consider the comments received from this retrospective review when determining priorities for updating guidance documents and will revise these as resources permit.

Consistent with the Good Guidance Practices regulation at 21 CFR

10.115(f)(4), CDRH would appreciate suggestions that CDRH revise or withdraw an already existing guidance document. We request that the suggestion clearly explain why the guidance document should be revised or withdrawn and, if applicable, how it should be revised. While we are requesting feedback on the list of previously issued final guidances located in the annual agenda website, feedback on any guidance is appreciated and will be considered.

In FY 2021, CDRH received comments regarding guidances issued in 2011, 2001, 1991, and 1981 and has withdrawn 1 guidance document because the guidance document was determined to no longer represent the Agency's current thinking. The revision of several guidance documents is also being considered as resources permit.

III. Website Location of Guidance Lists

This notice announces the website location of the document that provides the A- and B- lists of guidance documents, which CDRH is intending to publish during FY 2022. To access these two lists, visit FDA's website at *https://www.fda.gov/medical-devices/guidance-documents-medical-devices-and-radiation-emitting-products/cdrh-proposed-guidance-development.* We note that the topics on this and past guidance priority lists may be removed or modified based on current priorities, as well as comments received regarding these lists. Furthermore, FDA and CDRH priorities are subject to change at any time (*e.g.,* newly identified safety issues). The Agency is not required to publish every guidance on either list if the resources needed would be to the detriment of meeting quantitative review timelines and statutory obligations. In addition, the Agency is not precluded from issuing guidance documents that are not on either list.

Dated: October 22, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–23392 Filed 10–26–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2021–N–0758]

Antimicrobial Drugs Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; establishment of a public docket; request for comments.

SUMMARY: The Food and Drug Administration (FDA) announces a forthcoming public advisory committee meeting of the Antimicrobial Drugs Advisory Committee. The general function of the committee is to provide advice and recommendations to FDA on regulatory issues. The meeting will be open to the public. FDA is establishing a docket for public comment on this document.

DATES: The meeting will be held on November 30, 2021, from 9 a.m. to 5 p.m. Eastern Time.

ADDRESSES: Please note that due to the impact of this COVID–19 pandemic, all meeting participants will be joining this advisory committee meeting via an online teleconferencing platform. Answers to commonly asked questions about FDA advisory committee meetings may be accessed at: *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm.*

FDA is establishing a docket for public comment on this meeting. The docket number is FDA–2021–N–0758. The docket will close on November 29, 2021. Submit either electronic or written comments on this public meeting by November 29, 2021. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before November 29, 2021. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of November 29, 2021. 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.

Comments received on or before November 15, 2021, will be provided to the committee. Comments received after that date will be taken into consideration by FDA. In the event that the meeting is cancelled, FDA will continue to evaluate any relevant applications or information, and consider any comments submitted to the docket, as appropriate.

You may submit comments 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–2021–N–0758 for ''Antimicrobial Drugs Advisory Committee; Notice of Meeting; Establishment of a Public Docket; 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, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' FDA 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 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 the information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Joyce Yu, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993–0002, 301–796–2894, Fax: 301–847–8533, email: *AMDAC@fda.hhs.gov,* or 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 FDA'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: The meeting presentations will be heard, viewed, captioned, and recorded through an online teleconferencing platform. The committee will discuss Emergency Use Authorization (EUA) 000108, submitted by Merck & Co. Inc., for emergency use of molnupiravir oral capsules for treatment of mild to moderate COVID–19 in adults who are at risk for progressing to severe COVID–19 and/or hospitalization.

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 on FDA's website at the time of the advisory committee meeting. Background material and the link to the online teleconference meeting room will be available at *https://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link. The meeting will include slide presentations with audio components to allow the presentation of materials in a manner that most closely resembles an in-person advisory committee meeting.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. All electronic and written submissions submitted to the Docket (see **ADDRESSES**) on or before November 15, 2021, will be provided to the committee. Oral presentations from the public will be scheduled between approximately 1:30 p.m. and 2:30 p.m. Eastern Time. 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 November 4, 2021. 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 November 5, 2021.

For press inquiries, please contact the Office of Media Affairs at *fdaoma@fda.hhs.gov* or 301–796–4540.

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 Joyce Yu (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: October 21, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–23384 Filed 10–26–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0742]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Registration of Producers of Drugs and Listing of Drugs in Commercial Distribution

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments (including recommendations) on the collection of information by November 26, 2021.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. The OMB control number for this information collection is 0910–0045. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Registration of Producers of Drugs and Listing of Drugs in Commercial Distribution—21 CFR Part 207

OMB Control Number 0910–0045—Revision

This information collection supports implementation of drug establishment registration and listing requirements governed by FDA. These requirements are set forth in section 510 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360) and section 351 of the Public Health Service (PHS) Act (42 U.S.C. 262) and provide for electronic submission of information. Agency regulations implementing these provisions are found in part 207 (21 CFR part 207) and set forth the scope, applicability, and content of information to be included in submissions. Except as provided in § 207.65 (21 CFR 207.65), all information submitted under part 207 must be transmitted to FDA in an electronic format by using our electronic drug registration and listing system, in a form that we can process, review, and archive. For more information pertaining to drug establishment registration and listing, we invite you to visit our website at: *https://www.fda.gov/drugs/drug-approvals-and-databases/drug-establishments-current-registration-site.*

We have revised the information collection to include the collection of certain information required by the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. 116–136). Section 3112(e) of the CARES Act amended section 510(j) of the FD&C Act to require that registrants under section 510 of the FD&C Act must annually report the amount of each drug listed that was manufactured, prepared, propagated, compounded, or processed by such person for commercial distribution. Section 510(j) of the FD&C Act, as amended by section 3112(e) of the CARES Act, also authorizes FDA to require that registrants report this information electronically and to require that registrants report this information at the time a public health emergency is declared.

To assist respondents to the information collection with the current electronic reporting requirements, we issued the guidance document entitled ''Providing Regulatory Submissions in Electronic Format—Drug Establishment Registration and Drug Listing'' (June 2009), available from our website at: *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/providing-regulatory-submissions-electronic-format-drug-establishment-registration-and-drug-listing.* Guidance on the submission of the reporting required under section 510(j) of the FD&C Act, as amended by section 3112(e) of the CARES Act, is included on CDER's 2021 guidance agenda available from our website at: *https://www.fda.gov/media/134778/download.* Agency guidance documents are issued consistent with our good guidance practice regulations in 21 CFR 10.115, which provide for public comment at any time.

Registration under part 207: Unless otherwise exempt under section 510(g) of the FD&C Act or 21 CFR 207.13, all manufacturers, repackers, relabelers, and salvagers must register each domestic establishment that manufactures, repacks, relabels, or salvages a drug, or an animal feed bearing or containing a new animal drug, and each foreign establishment that manufactures, repacks, relabels, or salvages a drug, or an animal feed bearing or containing a new animal drug that is imported or offered for import into the United States. When operations are conducted at more than one establishment and common ownership and control among all the establishments exists, the parent, subsidiary, or affiliate company may submit registration information for all establishments. Private label distributors who do not also manufacture, repack, relabel, or salvage drugs are not required to register under part 207. We will accept registration or listing information submitted by a private label distributor only if the distributor is acting as an authorized agent for and submitting information that pertains to an establishment that manufactures, repacks, relabels, or salvages drugs.

Listing requirements under part 207: Under § 207.41 (21 CFR 207.41), registrants must list each drug that it manufactures, repacks, relabels, or salvages for commercial distribution. Each domestic registrant must list each such drug regardless of whether the drug enters interstate commerce. When operations are conducted at more than one establishment, and common ownership and control exists among all the establishments, the parent, subsidiary, or affiliate company may submit listing information for any drug manufactured, repacked, relabeled, or salvaged at any such establishment. A drug manufactured, repacked, or relabeled for private label distribution must be listed in accordance with the requirements in § 207.41(c).

In the **Federal Register** of May 10, 2021 (86 FR 24871), we published a 60-day notice requesting public comment on the proposed collection of information. FDA received one comment about reporting provisions newly established by section 3112(e) of the CARES Act. Specifically, the comment questioned the utility of information submitted by respondents who have limited knowledge of the marketing of products and also recommended that FDA limit reporting by certain respondents to final retail packages intended to be marketed. We appreciate this comment and note that we will consider the utility of this information as we continue to implement the information collection. No comments were received requesting that FDA revise its estimate of burden associated with the information collection.

On our own initiative, we have downwardly revised the burden estimate found in our 60-day notice regarding reporting elements associated with reporting requirements under section 510(j) of the FD&C Act. Section 510(j) provides for certain exemptions from these reporting requirements. Specifically, section 510(j)(3)(B) of the FD&C Act authorizes the Secretary of Health and Human Services, by order, to exempt from some or all of these reporting requirements certain biological products or categories of biological products regulated under section 351 of the PHS Act if the Secretary determines that such reporting is not necessary to protect the public health. Elsewhere in this issue of the **Federal Register**, FDA is issuing a proposed order that, if finalized, would exempt the following two categories of biological products from such reporting requirements: (1) Blood and blood components for transfusion, and (2) cell and gene therapy products, where one lot treats a single patient.

We estimate the burden of the information collection as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity; 21 CFR section/statutory citation	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Initial establishment registration; §§ 207.17, 207.21, and 207.25.	1,480	2	2,960	1	2,960
Annual review and update of registration information (including expedited updates); § 207.29.	10,000	1	10,000	0.5 (30 minutes)	5,000
Initial listing (including National Drug Code); §§ 207.33, 207.41, 207.45, 207.49, 207.53, 207.54, and 207.55.	1,713	7.28	12,470	1.5	18,705
June and December review and update (or certification) of listing; §§ 207.35 and 207.57.	5,300	20	106,000	0.75 (45 minutes)	79,500
Waiver requests; § 207.65	1	1	1	0.5 (30 minutes)	1
Public disclosure exemption request; § 207.81(c)	100	1	100	1	100
Manufacturing amount information; CARES Act section 3112.	11,020	22.5	247,950	0.25 (15 minutes)	61,988
Total			379,481		168,254

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

Guidance recommendation	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
Preparing Standard Operating Procedures for Creating and Uploading the Structured Product Labeling File	1,000	1	1,000	40	40,000

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

According to internal data, we estimate 1,480 respondents will submit 2,960 new establishment registrations annually. We estimate that 10,000 registrants will provide 10,000 annual reviews and updates of registration information (including expedited updates) or reviews and certifications that no changes have occurred. The estimates include the registration of establishments for both domestic and foreign manufacturers, repackers, relabelers, and drug product salvagers, and registration information submitted by anyone acting as an authorized agent for an establishment that manufactures, repacks, relabels, or salvages drugs. The estimates include an additional 80 positron emission tomography drug producers who are not exempt from registration and approximately 30 manufacturers of plasma derivatives.

We assume 1 hour is necessary for registrants to submit initial registration information electronically for each new establishment. We assume 30 minutes is necessary for each annual review and update of registration information (including any expedited updates) or each review and certification that no changes have occurred. Our estimate reflects the average amount of time and effort necessary to register a domestic or foreign establishment, and the average amount of time and effort necessary to review and update registration information, or review registration information and certify no changes have occurred.

Based on the number of drugs listed annually since June 2009, we estimate 1,713 registrants will report approximately 12,469 new listings annually (including the information submitted to obtain a labeler code and to reserve a National Drug Code (NDC) for future use). Based on the number of drugs in our listing database and the current number of changes to listing information submitted, we estimate 5,300 registrants will each report 20 reviews and updates (including the information submitted to revise an NDC) for a total of 106,000 annually. The estimates for the number of drug listings include both domestic and foreign listings, listings submitted by registrants for products sold under their own names as well as products intended for private label distribution, and information submitted related to an NDC and to obtain a labeler code. The estimate for the number of drugs subject to the listing requirements includes positron emission tomography drugs and approximately 30 plasma derivatives. The estimates for the number of June and December reviews and updates of listing information include the number of changes to drug characteristics pertaining to the drug product code to obtain a new NDC and the reports of the withdrawal of an approved drug from sale under § 314.81(b)(3)(iii) (21 CFR 314.81(b)(3)(iii)).

Based on our experience with electronically listing submissions since June 2009, we assume it takes 1 hour and 30 minutes to submit information electronically for each drug listed for the first time (for both foreign and domestic registrant listings). These estimates are an average of the time it will take manufacturers, repackers, relabelers, and drug product salvagers, with drug product salvagers taking considerably less time than manufacturers. The estimates include the time for submitting the content of labeling and other labeling in an electronic format (for drugs subject to an approved marketing application, the electronic submission of the content of labeling under 21 CFR 314.50(*l*)(1)(i) is approved under OMB control number 0910–0001). We assume it takes 45 minutes for each June and December review and update. These estimates represent the average amount of time to review and update listing information or to review and certify that no changes have occurred. The estimates include the time for submitting any labeling for each drug, changes to the drug's characteristics submitted for a new NDC, and reports of the withdrawal of

an approved drug from sale under § 314.81(b)(3)(iii).

We estimate 1,000 firms will expend 40 hours to prepare, review, and approve a standard operating procedure (SOP), for a total of 40,000 hours annually. Although we expect most respondents will have already prepared and implemented an SOP for the electronic submission of drug establishment registration and drug listing information, we retain an estimate for new firms that will do so, as recommended in the guidance.

Finally, we estimate 12,800 respondents are now subject to the reporting provisions introduced by the CARES Act under section 3112(e), and assume it will take 15 minutes to prepare and submit the requisite information, as shown in our 60-day notice. However, we have reduced this figure by 1,780 to 11,020 to reflect proposed reporting exemptions pertaining to: (1) Blood and blood components for transfusion and (2) cell and gene therapy products, where one lot treats a single patient. Consistent with section 510(j)(3)(B) of the FD&C Act, we have proposed to exempt these biological product categories from the reporting requirements in section 510(j)(3)(A) of the FD&C Act. If our proposed order is not finalized, we will adjust our estimate accordingly upon reevaluation of the information collection.

Overall, the information collection reflects an increase which we attribute to the new reporting required by section 510(j) of the FD&C Act, as amended by the CARES Act. We have otherwise retained the currently approved burden estimates for the provisions in part 207.

Dated: October 21, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–23395 Filed 10–26–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–0026]

Issuance of Priority Review Voucher; Rare Pediatric Disease Product

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the issuance of a priority review voucher to the sponsor of a rare pediatric disease product application. The Federal Food, Drug, and Cosmetic Act (FD&C Act) authorizes FDA to award priority review vouchers to sponsors of approved rare pediatric disease product applications that meet certain criteria. FDA is required to publish notice of the award of the priority review voucher. FDA has determined that RETHYMIC (allogeneic processed thymus tissue-agdc), manufactured by Enzyvant Therapeutics, GmbH, meets the criteria for a priority review voucher.

FOR FURTHER INFORMATION CONTACT: Myrna Hanna, 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: FDA is announcing the issuance of a priority review voucher to the sponsor of an approved rare pediatric disease product application. Under section 529 of the FD&C Act (21 U.S.C. 360ff), FDA will award priority review vouchers to sponsors of approved rare pediatric disease product applications that meet certain criteria. FDA has determined that RETHYMIC (allogeneic processed thymus tissue-agdc), manufactured by Enzyvant Therapeutics, GmbH, meets the criteria for a priority review voucher. RETHYMIC (allogeneic processed thymus tissue-agdc) is indicated for immune reconstitution in pediatric patients with congenital athymia. RETHYMIC (allogeneic processed thymus tissue-agdc) is not indicated for the treatment of patients with severe combined immunodeficiency (SCID).

For further information about the Rare Pediatric Disease Priority Review Voucher Program and for a link to the full text of section 529 of the FD&C Act, go to *https://www.fda.gov/industry/developing-products-rare-diseases-conditions/rare-pediatric-disease-rpd-designation-and-voucher-programs.* For further information about RETHYMIC (allogeneic processed thymus tissue-agdc), go to the Center for Biologics Evaluation and Research Cellular and Gene Therapy Products website at *https://www.fda.gov/vaccines-blood-biologics/cellular-gene-therapy-products/approved-cellular-and-gene-therapy-products.*

Dated: October 19, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–23336 Filed 10–26–21; 8:45 am]

BILLING CODE 4164–01–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 Conflict: In Toxicology, Pharmacology and Hepatology.

Date: December 2, 2021.

Time: 9:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Santanu Banerjee, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2106, Bethesda, MD 20892, (301) 435–5947, *banerjees5@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Special Topics in Nephrology and Urology.

Date: December 2, 2021.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Stacey Nicole Williams, Ph.D., Scientific Review Officer, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, 301–867–5309, *stacey.williams@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Cancer Genomics.

Date: December 2, 2021.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jian Cao, M.D., Scientific Review Officer, Center for Scientific Review, 6701 Rockledge Drive, Room 4196, MSC 7844, Bethesda, MD 20892, (301) 827–5902, *caojn@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Pain Management and Substance Use Disorder Research.

Date: December 2, 2021.

Time: 2:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Abu Saleh Mohammad Abdullah, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1003–L, Bethesda, MD 20892, (301) 827–4043, *abuabdullah.abdullah@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: October 22, 2021.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–23382 Filed 10–26–21; 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; PAR Panel: Workforce Diversity in Basic Cancer Research.

Date: November 30, 2021.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Rolf Jakobi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6187, MSC 7806, Bethesda, MD 20892, 301–495–1718, *jakobir@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Infectious Diseases and Immunology Panel C.

Date: December 1–2, 2021.

Time: 10:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Kumud Singh, Ph.D., Scientific Review Officer, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, 301–761–7830, *kumud.singh@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Sleep, Circadian Rhythms, Glucose Regulation, and Cognition.

Date: December 1, 2021.

Time: 1:00 p.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Janita N. Turchi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 402–4005, *turchij@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Cancer Prevention and Immunotherapy.

Date: December 1, 2021.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Laura Asnaghi, Ph.D., Scientific Review Officer, National Institutes of Health, Center for Scientific Review, 6701 Rockledge Drive, Room 6200, MSC 7804, Bethesda, MD 20892, (301) 443–1196, *laura.asnaghi@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: October 22, 2021.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–23383 Filed 10–26–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; 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 National Advisory Environmental Health Sciences Council.

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.

Name of Committee: Special Open Session of the National Advisory Environmental Health Sciences Council.

Date: November 29, 2021.

Time: 3:30 p.m. to 5:00 p.m.

Agenda: Concept: Climate Change and Health Initiative.

Place: National Institute of Environmental Health Science, Research Triangle Park, NC, *https://www.niehs.nih.gov/news/webcasts/* (Virtual Meeting).

Contact Person: J. Patrick Mastin, Ph.D., Deputy Division Director, Division of Extramural Research and Training, National Institute of Environmental Health Science, Research Triangle Park, NC 27709, (984) 287–3285, *mastin@niehs.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.niehs.nih.gov/about/boards/naehsc/index.cfm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: October 21, 2021.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–23371 Filed 10–26–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[1651–0127]

Guarantee of Payment

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 30-Day notice and request for comments; extension of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting 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 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than November 26, 2021) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov.* Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/.*

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (86 FR 35817) on July 7, 2021, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions 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, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Guarantee of Payment.

OMB Number: 1651–0127.

Form Number: CBP Form I–510.

Current Actions: Extension without change.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: Section 253 of the Immigration and Nationality Act (INA), 8 U.S.C. 1283, requires that a nonimmigrant crewman found to be or suspected of having any of the diseases named in section 255 of the INA must be hospitalized or otherwise treated, with the associated expenses paid by the carrier. The owner, agent, consignee, commanding officer, or master of the vessel or aircraft must complete CBP Form I–510, *Guarantee of Payment,* that certifies the guarantee of payment for medical and other related expenses required by section 253 of the INA. No vessel or aircraft can be granted clearance until such expenses are paid or the payment is appropriately guaranteed.

CBP Form I–510 collects information such as the name of the owner, agent, commander officer or master of the vessel or aircraft; the name of the crewmember; the port of arrival; and signature of the guarantor. This form is provided for by 8 CFR 253.1(a) and is accessible at: *https://www.cbp.gov/newsroom/publications/forms?title=I-510.*

Type of Information Collection: CBP Form I–510.

Estimated Number of Respondents: 100.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 100.

Estimated Time per Response: 0.083 hours.

Estimated Total Annual Burden Hours: 8.

Dated: October 22, 2021.

Seth D. Renkema,

Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2021–23402 Filed 10–26–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[1651–0011]

Declaration of Free Entry for Returned American Products (CBP Form 3311)

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 30-Day notice and request for comments; extension of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting 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 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted no later than November 26, 2021 to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov.* Please note that the contact information provided here is solely for questions regarding this notice. Individuals

seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/.*

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (86 FR 41985) on August 4, 2021, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions 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, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Declaration of Free Entry for Returned American Products (CBP Form 3311).

OMB Number: 1651–0011.

Form Number: CBP Form 3311.

Current Actions: Extension without change.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: CBP Form 3311, *Declaration for Free Entry of Returned American Products,* which is authorized by, among others, 19 CFR 10.1, 10.66, 10.67, 12.41, 123.4, and 143.23, is used to collect information from the importer or authorized agent in order to claim duty-free treatment for articles entered under certain provisions of Subchapter I of Chapter 98 of the Harmonized Tariff Schedule of the United States (HTSUS, *https://hts.usitc.gov/current*). The form serves as a declaration that the articles are: (1) The growth, production, and manufacture of the United States; (2) are returned to the United States without having been advanced in value or improved in condition while abroad; (3) the goods were not previously entered under a temporary importation under bond provision; and (4) drawback was never claimed and/or paid.

This collection of information applies to members of the importing public and trade community who seek to claim duty-free treatment based on compliance with the aforementioned requirements. These members of the public and trade community are familiar with import procedures and with CBP regulations. Obligation to respond to this information collection is required to obtain benefits.

Type of Information Collection: CBP Form 3311, Declaration for Free Entry of Returned American Products.

Estimated Number of Respondents: 12,000.

Estimated Number of Annual Responses per Respondent: 35.

Estimated Number of Total Annual Responses: 420,000.

Estimated Time per Response: 0.10 hours.

Estimated Total Annual Burden Hours: 42,000.

Dated: October 12, 2021.

Seth D. Renkema,

Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2021–23400 Filed 10–26–21; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. USCIS–2021–0019]

Privacy Act of 1974 System of Records

AGENCY: Office of the Citizenship and Immigration Services Ombudsman, Department of Homeland Security.

ACTION: Notice of a modified system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the U.S. Department of Homeland Security (DHS) proposes to modify and reissue the current DHS system of records notice titled, ''DHS/Office of the Citizenship and Immigration Services Ombudsman (CISOMB)–001 Virtual Ombudsman System'' and rename it as, ''DHS/CISOMB–001 Case Assistance Analytics and Data Integration (CAADI) System.'' This system of records enables the DHS Office of the Citizenship and Immigration Services Ombudsman (CIS Ombudsman) to perform its statutory mission, which is to: (1) Assist individuals and employers who are experiencing difficulty resolving immigration benefit-related matters with U.S. Citizenship and Immigration Services (USCIS); (2) identify systemic problems and challenges with the delivery of immigration benefits; and (3) propose changes in the administrative practices of USCIS to mitigate those problems and challenges. This updated system will be included in the DHS inventory of records systems.

DATES: Submit comments on or before November 26, 2021. This modified system will be effective upon publication. New or modified routine uses will be effective November 26, 2021.

ADDRESSES: You may submit comments, identified by docket number DHS–2021–0019 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–343–4010.
- *Mail:* Lynn Parker Dupree, Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528–0655.

Instructions: All submissions received must include the agency name and docket number DHS–2021–0019. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions, please contact: Zoubair Moutaoukil (202) 357–8100, Privacy Point of Contact, Office of the Citizenship and Immigration Services Ombudsman, Washington, DC 20528. For privacy questions, please contact: Lynn Parker Dupree, (202) 343–1717, Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528–0655.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to the Privacy Act of 1974, 5 U.S.C. 552a, the CIS Ombudsman is giving notice that it proposes to update, rename, and reissue the current system of records titled, ''DHS/CISOMB–001 Virtual Ombudsman System'' as the ''DHS/CISOMB–001 Case Assistance

Analytic Data Integration (CAADI) System of Records.'' This system of records will ensure the efficient and secure processing of information to aid the CIS Ombudsman in providing assistance to individuals and employers and their representatives in resolving problems with USCIS; identifying areas in which individuals, employers, and their representatives have problems in dealing with USCIS; and to the extent possible, proposing administrative changes to mitigate those problems.

This SORN is being updated to: (1) Provide notice that applicants are allowed to submit the DHS Case Assistance Form 7001 online via the website, *https://www.dhs.gov/topic/cis-ombudsman/forms/7001;* (2) provide more specificity on the Categories of Records collected; (3) clarify the record source categories, to include information received from other agencies during processing; (4) modify Routine Use ''E'' and add Routine Use ''F'' to conform to OMB Memorandum M–17–12; and (5) update the retention schedule.

CAADI is used to efficiently manage the workflow of the submitted requests for case assistance. Individuals/employers (or their legal/accredited representatives) seeking case assistance from the CIS Ombudsman submit their request using the Form DHS–7001, *Case Assistance Form,* which can be completed and submitted electronically on the CIS Ombudsman website. Individuals/employers are also able to attach and submit supporting documentation related to their request, such as paperwork previously submitted to USCIS. Cases within CAADI have a corresponding field for each section of Form DHS–7001, so that each piece of information entered by the individual/employer appears in the CAADI record.

CAADI assists the CIS Ombudsman in accomplishing its statutory mandate in a more efficient and effective manner and reduces the amount of time dedicated to data entry and collection by affording an individual or employer with the option to submit their information electronically. CIS Ombudsman also uses the data from this system of records to generate reports and statistics to assist with identifying systemic challenges and trends, as well as proposing changes to mitigate those issues.

CIS Ombudsman personnel, when appropriate, may send inquiries to USCIS and other DHS Components, as well as the U.S. Departments of State, Labor, and Justice, to resolve case issues or to obtain case status. The CIS Ombudsman may provide those departments with information such as receipt numbers and beneficiary or petitioners' names to obtain status updates in order to assist individuals and employers. This type of information is generally stored in those agencies' files, records, and databases.

II. Privacy Act

The Privacy Act embeds Fair Information Practice Principles in a statutory framework governing the means by which Federal Government agencies collect, maintain, use, secure, and disseminate individuals' records. The Privacy Act applies to information that is maintained in a ''system of records,'' a group of any records under the control of an agency from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifier assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. Additionally, and similarly, the Judicial Redress Act (JRA) provides covered persons with a statutory right to make requests for access and amendment to covered records, as defined by the JRA, along with judicial review for denials of such requests. In addition, the JRA prohibits disclosures of covered records, except as otherwise permitted by the Privacy Act.

The description of the DHS/CISOMB–001 Case Assistance Analytic Data Integration (CAADI) System of Records is provided below.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the Office of Management and Budget and to Congress.

System of Records:

SYSTEM NAME AND NUMBER:

U.S. Department of Homeland Security (DHS)/Office of Citizenship and Immigration Services Ombudsman-001 Case Assistant Analytic Data Integration System (CAADI) System of Records.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records are maintained at the Office of Citizenship and Immigration Services Ombudsman in Washington, DC.

SYSTEM MANAGER(S):

Kelly Kingsley, Management and Program Analyst, (202) 357–8485, Office of Citizenship and Immigration Services Ombudsman, 375 E St. SW, Washington, DC 20024.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Section 452 of the Homeland Security Act of 2002; 6 U.S.C. 272.

PURPOSE(S) OF THE SYSTEM:

The purpose of this system of records is to provide efficient and secure case management and processing of information related to individuals and employers experiencing problems with USCIS.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Any individuals or persons, including their employers or representatives, who are seeking assistance from the CIS Ombudsman in resolving general problems with USCIS.

CATEGORIES OF RECORDS IN THE SYSTEM:

The CIS Ombudsman collects the following information via Form DHS–7001 from individuals who seek assistance in resolving problems with USCIS:

- Full legal name, including any aliases;
- Date and country of birth;
- Country of citizenship;
- A-Number;
- Contact information, including mailing address, email address, phone number, and fax number;
- Full legal name of person preparing the form if other than the individual named in the application or petition;
- Applications and/or petitions filed;
- Receipt number received from USCIS in response to application/petition filed;
- Immigration status or interim benefit applied or petitioned for;
- Type of case problem;
- Source of case problem;
- Description of case problem;
- Prior actions taken to remedy the problem;
- Designated attorney/representative name, address, phone number, email address, and fax number;
- Supporting documentation attached to submissions, such as evidence submitted to USCIS, documents received from USCIS, or other information the individual feels is relevant or important;
- Consent of the petitioner for USCIS to disclose information in the file to the designated representative, if applicable;
- Verification statement signed and dated by the subject of the request or the authorized representative; and
- Declaration by the attorney or accredited representative submitting the case problem.

RECORD SOURCE CATEGORIES:

Records are obtained from individuals or persons seeking assistance, including

their employers or representatives, and USCIS, or other agencies such as the U.S. Departments of State, Labor, and Justice.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3), as follows:

A. To the Department of Justice (DOJ), including the U.S. Attorney's Offices, or any other federal agencies conducting litigation or proceedings before any court, adjudicative, or administrative body, when it is relevant or necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any Component thereof;
2. Any employee or former employee of DHS in his/her official capacity;
3. Any employee or former employee of DHS in his/her individual capacity, only when DOJ or DHS has agreed to represent the employee; or
4. The United States or any agency thereof.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration (NARA) or General Services Administration (GSA) pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency or organization for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when (1) DHS suspects or has confirmed that there has been a breach of the system of records; (2) DHS has determined that, as a result of the suspected or confirmed breach, there is a risk of harm to individuals, DHS (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed breach, or to prevent, minimize, or remedy such harm.

F. To another federal agency or entity, when DHS determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

G. To an appropriate federal, state, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

I. To an attorney or representative who is acting on behalf of an individual covered by this system of records to obtain the individual's information submitted to the CAADI System.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

The CIS Ombudsman stores records in this system electronically or on paper in secure facilities in a locked drawer behind a locked door.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

The CIS Ombudsman's retrieves records by Case Number, A-Number, or the individual's name.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

In accordance with NARA's approved retention and disposal schedule DAA–0563–2019–0004–0001, the processed case files are resolved at the final disposition of the case and are deleted or destroyed three years after resolution. Incomplete case files are the record copy of cases where additional information is requested, but not received. The CIS Ombudsman's procedure is to close such cases seven days after the request for additional information, if such information is not received. These records are also deleted or destroyed three years after resolution.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

The CIS Ombudsman safeguards records in this system according to applicable rules and policies, including all applicable DHS automated systems security and access policies. The CIS Ombudsman has imposed strict controls to minimize the risk of compromising the information that is stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties, and who have appropriate clearances or permissions.

RECORD ACCESS PROCEDURES:

Individuals seeking access to and notification of any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the DHS Chief Privacy Officer and Chief Freedom of Information Act Officer, whose contact information can be found on page two of this document. If an individual believes more than one DHS Component maintains Privacy Act records concerning him or her, the individual may submit the request to the DHS Chief Privacy Officer and Chief Freedom of Information Act Officer. Even if neither the Privacy Act nor the JRA provide a right of access, certain records about you may be available under the Freedom of Information Act (FOIA).

When an individual is seeking records about himself or herself from this system of records or any other Departmental system of records, the individual's request must conform with the Privacy Act regulations set forth in 6 CFR part 5. The individual must first verify his/her identity, meaning that the individual must provide his/her full name, current address, and date and place of birth. The individual must sign the request, and the individual's signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. In addition, the individual should:

- Explain why he or she believes the Department would have the information being requested;
- Identify which DHS Component may have the information;
- Specify when the individual believes the records would have been created; and

• Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records.

If the request is seeking records pertaining to another living individual, the request must include an authorization from the individual whose record is being requested, authorizing the release to the requester.

Without the information above, the DHS Component(s) may not be able to conduct an effective search, and the individual's request may be denied due to lack of specificity or lack of compliance with applicable regulations.

CONTESTING RECORD PROCEDURES:

For records covered by the Privacy Act or covered JRA records, individuals may make a request for amendment or correction of a record of the Department about the individual by writing directly to the DHS Component that maintains the record, unless the record is not subject to amendment or correction. The request should identify each particular record in question, state the amendment or correction desired, and state why the individual believes that the record is not accurate, relevant, timely, or complete. The individual may submit any documentation that would be helpful. If the individual believes that the same record is in more than one system of records, the request should state that and be addressed to each component that maintains a system of records containing the record. The CIS Ombudsman may amend requestor-specific information upon notification from that individual. Additionally, the CIS Ombudsman may verify information submitted by the requestor against other agency databases; amendments may also be made as a result. Amendments may be made in case notes or by overwriting inaccurate information. Requestors are notified of material changes.

NOTIFICATION PROCEDURES:

See ''Record Access Procedures'' above.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

When this system receives a record from another system exempted in that source system under 5 U.S.C. 552a(j)(2), DHS will claim the same exemptions for those records that are claimed for the original primary systems of records from which they originated.

HISTORY:

DHS/CISOMB–001, 75 FR 18857 (April 13, 2010).

* * * * *

Lynn Parker Dupree,

Chief Privacy Officer, U.S. Department of Homeland Security.

[FR Doc. 2021–23342 Filed 10–26–21; 8:45 am]

BILLING CODE 9112–FJ–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7034–N–63]

30-Day Notice of Proposed Information Collection: Community Development Block Grant Entitlement Program; OMB Control No: 2506–0077

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 30 days of public comment.

DATES: *Comments Due Date:* November 26, 2021.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_submission@omb.eop.gov* or *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Anna P. Guido, Reports Management Officer, QMAC, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email her at *Anna.P.Guido@hud.gov* or telephone 202–402–5535. This is not a toll-free number. Person with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. Copies of available documents submitted to OMB may be obtained from Ms. Guido.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on August 18, 2021 at 86 FR 46265.

A. Overview of Information Collection

Title of Information Collection: Community Development Block Grant Entitlement Program.

OMB Approval Number: 2506–0077.

Type of Request: reinstatement with change of a previously approved collection.

Form Number: N/A.

Description of the need for the information and proposed use: This request identifies the estimated reporting burden associated with information that CDBG entitlement grantees will report in IDIS for CDBG-assisted activities, recordkeeping requirements, and reporting requirements. Grantees are encouraged to update their accomplishments in IDIS on a quarterly basis. In addition, grantees are required to retain records necessary to document compliance with statutory and regulatory requirements, Executive Orders, 2 CFR part 200 requirements, and determinations required to be made by grantees as a determination of eligibility. Grantees are required to prepare and submit their Consolidated Annual Performance and Evaluation Reports, which demonstrate the progress grantees make in carrying out CDBG-assisted activities listed in their consolidated plans. This report is due to HUD 90 days after the end of the grantee's program year. The information required for any particular activity is generally based on the eligibility of the activity and which of the three national objectives (benefit low- and moderate-income persons; eliminate/prevent slums or blight; or meet an urgent need) the grantee has determined that the activity will address.

Task	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
Current Inventory: Recordkeeping pursuant to 24 CFR 570.506	1,227.00	1.00	1,227.00	129.00	158,283.00	35.16	$5,565,230.28

Task	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
Reporting pursuant to 24 CFR 570.507, 24 CFR 570.200 (e) and 570.506(c)	1,227.00	4	4,908.00	78.50	385,278.00	35.16	13,546,374.48
Entitlement communities maintain required documentation	1,227.00	1.00	1,227.00	25.00	30,675.00	35.16	1,078,533.00
Total	1,227.00				574,236.00		20,190,137.76

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) If the information will be processed and used in a timely manner;

(3) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(4) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(5) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Anna P. Guido,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2021–23411 Filed 10–26–21; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7041–N–05]

60-Day Notice of Proposed Information Collection: Eviction Protection Grant Program

AGENCY: Office of the Assistant Secretary for Policy Development and Research, HUD.

ACTION: Notice.

SUMMARY: The U.S. Department of Housing and Urban Development (HUD) is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* December 27, 2021.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Anna P. Guido, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Room 4176, Washington, DC 20410–5000; telephone 202–402–5534 (this is not a toll-free number) or email at *Anna.P.Guido@hud.gov* for a copy of the proposed forms or other available information. 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 FURTHER INFORMATION CONTACT: Anna P. Guido, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Anna P. Guido at *Anna.P.Guido@hud.gov* or telephone 202–402–5535. 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.

Copies of available documents submitted to OMB may be obtained from Ms. Guido.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Eviction Protection Grant Program.

OMB Approval Number: 2528–0331.

Type of Request: Revision of a currently approved collection.

Form Number: Application for Federal Assistance, Standard Form-424; Disclosure of Lobbying Activities, Standard Form-LLL; HUD Detailed Budget Worksheet, 424 CBW; HUD Applicant/Recipient Disclosure/Update Report, 2880; NOFO narrative; HUD Client Services and Outcomes Report, 52698; and grant activity report.

Description of the need for the information and proposed use: This information is collected in connection with HUD's Eviction Protection Grant Program and will be used by HUD to determine that the grant applicant meets the requirements of the Notice of Funding Opportunity (NOFO). Information collected is also used to assign points for awarding grant funds on a competitive and equitable basis. The information is collected via a narrative and the budget form. Information collected from grantees post-award will be used by HUD to meet its statutory program monitoring and demonstration obligations.

HUD is required to develop a competitive grant program to fund nonprofit or governmental entities to provide legal assistance (including assistance related to pretrial activities, trial activities, post-trial activities and alternative dispute resolution) at no cost to eligible low-income tenants at risk of or subject to eviction. In connection with the COVID–19 emergency, the CARES Act was enacted on March 28, 2020. It placed a moratorium on eviction in all federally-assisted housing and federally-backed mortgages through July 24, 2020. The expiration of that moratorium was followed by an Order from the Centers of Disease Control and Prevention (CDC) temporarily halting evictions for nonpayment of rent on September 4, 2020, which was subsequently extended until July 31,

2021, nationally and until October 3, 2021, in areas with substantial or high levels of community transmission of COVID–19.

As households continue to struggle with income loss and accumulating back rent, the threat of evictions has grown considerably. The Household Pulse Survey Phase 3.1 found that the week of June 23, 2021, over 7.4 million renters were behind on their rent payments and another 4.9 million were not confident they would be able to make next month's payment. With the expiration of the CDC's national moratorium looming, 3.6 million renters reported eviction was likely or somewhat likely in the next two months. Housing instability caused by formal and informal evictions has significant economic, physical, and mental consequences. Research has found eviction protection services, including services such as legal representation, court navigators, education and outreach, and assistance completing the legal forms to respond to an eviction notice, reduce evictions and increase housing stability for low-income renters. The Eviction Protection Grant Program will provide $20 million to support eviction protection services in areas with high rates of eviction or probable eviction to low-income tenants at risk of or subject to eviction. The Eviction Protection Grant Program NOFO, FR–6500–N–79, OMB Approval Number 2528–0331, was published on July 20, 2021.

This notice updates HUD's previously approved emergency review request to include HUD's proposed form for collecting information about client services and outcomes. Grantees will be expected to submit this information to HUD with its post-award quarterly reports. This review is needed to fulfill Congress' intent for the Eviction Protection grant program to expeditiously provide funds to meet the need for which Congress appropriated them and reduce the harm these tenants will face without access to eviction protection services. It is also needed to enable HUD to meet its statutory program monitoring and demonstration obligations for this new program and fulfill its statutory, Executive Order, and regulatory obligations to ensure the equitable disbursement of critical eviction protection services.

Respondents: Office of Policy Development and Research Grantee Recipients for the Eviction Protection Grant Program.

Total Burden Estimate: The table below reflects our estimate of the burden on the grantee recipients.

Respondent's Obligation: Voluntary.

Legal Authority: The data collection is conducted under Title 12, United States Code, Section. 1701z and Section 3507 of the Paperwork Reduction Act of 1995, 44, U.S.C., 35, as amended.

Information collection	Number of respondents	Frequency of response	Responses per year	Average burden hours per response	Annual burden hours	Hourly cost per response (hourly wage rate)	Total annual respondent cost
Pre award							
NOFO application narrative	100	1	100	40	4,000	$52.36	$209,440
Application for Federal Assistance, Standard Form-424	0	0	0	0	0	0.00	0.00
Disclosure of Lobbying Activities, Standard Form-LLL	0	0	0	0	0	0.00	0.00
Detailed Budget Worksheet, 424 CBW	100	1	100	3.12	312	52.36	16,336.32
Disclosure/Update Report (Form HUD–2880)	100	1	100	2	200	52.36	10,472
Total Pre award	100	1	100	45.12	4,512	52.36	236,248.32
Post award							
Grant work plan	20	1	20	2	40	52.36	2,094.40
Detailed Budget Worksheet, 424 CBW	20	1	20	3.12	62.4	52.36	3,267.26
Client Services and Outcomes Report, 52698	20	*1,000	20,000	0.25	5,000	52.36	261,800.00
Grant activity reporting	20	4	80	2	160	52.36	8,377.60
Total Post award	20	5	120	7.37	5,262.4	52.36	275,539.26
Totals	120	6	220	52.49	9,774.40	52.36	511,787.58

*Anticipated average number of annual responses per respondent (grantee), to be reported to HUD quarterly with grant activity report.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(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 collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Todd M. Richardson,

General Deputy Assistant Secretary for Policy Development and Research.

[FR Doc. 2021–23401 Filed 10–26–21; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–MB–2021–N193; FF09M20200 FGMB123109CITY0 (212); OMB Control Number 1018–NEW]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Urban Bird Treaty Program Requirements

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the U.S. Fish and Wildlife Service (Service), are proposing an existing collection in use without an Office of Management and Budget control number.

DATES: Interested persons are invited to submit comments on or before November 26, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS: PRB (JAO/3W), 5275 Leesburg Pike, Falls Church, VA 22041–3803 (mail); or by email to *Info_Coll@fws.gov.* Please reference ''1018–UBT'' in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: Madonna L. Baucum, Service Information Collection Clearance Officer, by email at *Info_Coll@fws.gov,* or by telephone at (703) 358–2503. Individuals who are hearing or speech impaired may call the Federal Relay Service at 1–800–877–8339 for TTY assistance. You may also view the information collection request (ICR) at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995 (PRA, 44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

On June 11, 2021, we published in the **Federal Register** (86 FR 31336) a notice of our intent to request that the Office of Management and Budget (OMB) approve this information collection. In that notice, we solicited comments for 60 days, ending on August 10, 2021. The Service shared the notice with current and prospective UBT program partners to encourage participation in the public commenting process. We did not receive any comments in response to that notice.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The Urban Bird Treaty Program (UBT Program) is administered through the Service's Migratory Bird Program, under the authority of the Fish and Wildlife Coordination Act (16 U.S.C. 661–667e). The UBT Program aims to support partnerships of public and private organizations and individuals working to conserve migratory birds and their habitats in urban areas for the benefit of these species and the people that live in urban areas. The UBT partners' habitat conservation activities help to ensure that more natural areas, including forests, grasslands, wetlands, and meadows, are available in urban areas, so that historically excluded and underserved communities can have improved access to green space and opportunities to engage in habitat restoration and community science as well as bird-related recreation and educational programs. These habitat restoration activities, especially urban forest conservation, also contribute to climate resiliency by reducing the amount of carbon dioxide in the atmosphere. Lights-out programs in UBT cities help reduce energy costs and greenhouse gas emissions by reducing the use of electricity when people and businesses turn off their lights between dusk and dawn during the fall and spring periods of bird migration in order to reduce bird collisions with building glass.

The Service designates Urban Bird Treaty cities or municipalities through a process in which applicants submit a nomination package, including a letter of intention and an implementation plan, for approval by the Service's Migratory Bird Program. Within 3 months, the Service reviews the package, makes any necessary recommendations for changes, and then decides to either approve or reject the package. If rejected, the city can reapply the following year. In most cases, when the Service designates a new city partner, the Service and the new city partner hold a signing ceremony, during which a representative from both the Service and the city sign a nonbinding document that states the importance of conserving birds and their habitats to the health and well-being of people that live in and visit the city. To maintain this city partner designation, the city must submit information on the activities it has carried out to meet the goals of the UBT program, including those related to bird habitat conservation, bird hazard reduction, and bird-related community education and engagement. By helping make cities healthier places for birds and people,

the UBT Program contributes to the Administration's priorities of justice and racial equity, climate resiliency, and the President's Executive Order 14008 to protect 30 percent of the Nation's land and 30 percent of its ocean areas by 2030.

The UBT program benefits city partners in many ways, including:

• Helps city partners achieve their goals for making cities healthier places for birds and people.

• Provides opportunities to share and learn from other city partners' tools, tactics, successes, and challenges, to advance city partners' urban bird conservation efforts.

• Strengthens the cohesion and effectiveness of the partnerships by coming together and working under the banner of the UBT program.

• Gives city partners improved access to funding through the National Fish and Wildlife Foundation's Five Star and Urban Waters Restoration grant program, as UBT cities receive priority in this program.

• Helps partners garner additional funds through other urban conservation grant programs that have shared goals and objectives.

• Achieve green building credits, reduced energy costs, green space requirements, environmental equity, and other sustainability goals.

• Promotes the livability and sustainability of partner cities by spreading the word about the city's UBT Federal designation and all the benefits of a green and bird-friendly city.

We collect the following information from prospective and successful applicants in conjunction with the UBT Program:

• Nomination Letter—Prospective applicants must submit a letter of intention from the city's partnership that details its commitment to urban bird conservation and community engagement in bird-related education, recreation, conservation, science, and monitoring. Support and involvement by the city government is required.

• Implementation Plan—The required implementation plan should contain the following (see the UBT Program Guidebook—*https://www.fws.gov/migratorybirds/pdf/grants/UrbanBirdTreatyV3.pdf*—for full descriptions of requirements):

—Detailed description of the importance of the city to migrating, nesting, and overwintering birds; bird habitats; human population size of the city; and socioeconomic profile of the human communities present and those targeted for education and engagement programs.

—Map of the geographic area that is being nominated for designation.

—List of individuals and organizations, and their contact information, that are active in the partnership.

—The mission, goals, and objectives of the partnership applying for designation, organized by the three UBT goal categories.

—Description of accomplishments (*e.g.,* activities, products, outcomes) that have been completed over the last 2–3 years, the audiences and communities reached/engaged through those activities, and the partner organizations that have achieved them, organized by UBT goal categories.

—Description of strategies, actions, tools/products that are being planned for the next 3–5 years under the UBT designation, the objectives to be accomplished, the audiences and communities targeted for engagement, and the partners who will complete the work, organized by UBT goal categories.

• Ad Hoc Reports—The Service will also request information updates on UBT city points of contact, activities and events, and other information on an ongoing basis for urban bird conservation in the city, as needed by the Service for storytelling, promotion, and internal programmatic communications, education, and outreach.

• Biennial Reporting—The Service requires city partners to provide biennial metrics as well as written and photographic descriptions of activities for each goal category. City partners are required to submit this information to maintain their city's designation by ensuring that they are actively working to achieve the goals of the UBT Program.

We will use the information collected for storytelling purposes to promote the urban bird conservation work of city partners, and to enable the Migratory Bird Program to develop UBT Program accomplishment reports and other communications tools to share with the public and the conservation community at large. The reporting requirement ensures that the UBT city designation is meaningful and that city partners are accountable for the efforts that they agreed to undertake to earn their designation. Additionally, we will use the information to promote the UBT program to other interested city partners and the benefits of urban bird conservation generally. For more information, please see the UBT Program Guidebook at the following link: *https://www.fws.gov/migratorybirds/pdf/grants/UrbanBirdTreatyV3.pdf.*

Title of Collection: Urban Bird Treaty Designation, Updates, and Reporting Requirements.

OMB Control Number: 1018–NEW.

Form Number: None.

Type of Review: Existing collection in use without an OMB control number.

Respondents/Affected Public: Nonprofits; colleges, universities, and schools; museums, zoos, and aquaria; local community groups; private businesses; and municipal, State, and Tribal governments involved in urban bird conservation in UBT cities.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: One-time submission of nomination letter; one-time submission of implementation plan; on occasion for information updates; and biennial reporting.

Requirement	Average number of annual respondents	Average number of responses each	Average number of annual responses	Average completion time per response hours)	Estimated annual burden hours
Nomination Letter					
Private Sector	2	1	2	4	8
Government	1	1	1	4	4
Implementation Plan (Initial Submission)					
Private Sector	2	1	2	40	80
Government	1	1	1	20	20

Requirement	Average number of annual respondents	Average number of responses each	Average number of annual responses	Average completion time per response hours)	Estimated annual burden hours
Ad Hoc Reports					
Private Sector	19	4	76	3	228
Government	3	4	12	3	36
Biennial Reporting					
Private Sector	9	1	9	80	720
Government	2	1	2	80	160
Totals:	*39*		*105*		*1,256*

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Madonna Baucum,

Information Collection Clearance Officer, U.S. Fish and Wildlife Service.

[FR Doc. 2021–23413 Filed 10–26–21; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–NCTC–2021–N197; FXGO16610900600 (212) FF09X35000; OMB Control Number 1018–0176]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Native Youth Community Adaptation and Leadership Congress

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the U.S. Fish and Wildlife Service (Service), are proposing to revise a currently approved information collection.

DATES: Interested persons are invited to submit comments on or before November 26, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS: PRB (JAO/3W), 5275 Leesburg Pike, Falls Church, VA 22041–3803 (mail); or by email to *Info_Coll@fws.gov.* Please reference ''1018–0176'' in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: Madonna L. Baucum, Service Information Collection Clearance Officer, by email at *Info_Coll@fws.gov,* or by telephone at (703) 358–2503. Individuals who are hearing or speech impaired may call the Federal Relay Service at 1–800–877–8339 for TTY assistance. You may also view the information collection request (ICR) at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995 (PRA, 44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

On July 19, 2021, we published in the **Federal Register** (86 FR 38111) a notice of our intent to request that OMB approve a revision to this information collection. In that notice, we solicited comments for 60 days, ending on September 17, 2021. No comments were received in response to that notice.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The Service offers eligible Native American, Alaskan Native, and Pacific Islander high school students the opportunity to apply for the Native Youth Community Adaptation and Leadership Congress (Congress). The mission of the Congress is to develop future conservation leaders with the skills, knowledge, and tools to address environmental change and conservation challenges to better serve their schools and home communities. The Congress

supports and operates under the following authorities:

• Executive Order (E.O.) 13175, ''Consultation and Coordination With Indian Tribal Governments'' (November 6, 2000);

• E.O. 13515, ''Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs'' (October 14, 2009);

• E.O. 13592, ''Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities'' (December 2, 2011);

• Public Law 116–9, Section 9003, ''John D. Dingell, Jr. Conservation, Management, and Recreation Act'' (March 12, 2019);

• 16 U.S.C. 1727b, Indian Youth Service Corps;

• White House Memorandum on Government-to-Government Relationships with Tribal Governments (September 23, 2004);

• Secretarial Order (S.O.) 3206, ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act,'' issued jointly by the Department of the Interior and the Department of Commerce (June 5, 1997);

• S.O. 3317, ''DOI Policy: Department of the Interior Policy on Consultation with Indian Tribes'' (December 1, 2011);

• S.O. 3335, ''Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries'' (August 20, 2014); and

• The Service's Native American Policy (510 FW 1), published January 20, 2016.

The following Federal partners assist and support the Service's administration of the Congress:

• The U.S. Department of the Interior—

—Bureau of Indian Affairs;
—Bureau of Land Management;
—National Park Service; and
—United States Geological Survey;

• The U.S. Department of Agriculture—U.S. Forest Service;

• The U.S. Department of Commerce—National Oceanic and Atmospheric Administration;

• The Federal Emergency Management Agency; and

• The National Aeronautics and Space Administration.

The weeklong environmental conference fosters an inclusive, meaningful, and educational opportunity for aspiring Native youth leaders interested in addressing environmental issues facing Native American, Alaskan Native, and Pacific Islander communities. Eligible students—representing a diverse mix of Native communities from various geographic locations, both urban and rural—compete for the opportunity to represent their Native communities from across the country. The students learn about environmental change and conservation while strengthening their leadership skills for addressing conservation issues within their own Native communities.

Through a cooperative agreement with the New Mexico Wildlife Federation (NMWF), the Service solicits and evaluates applications from eligible students interested in applying for the program. The NMWF notifies successful applicants and arranges all travel for them. Information collected from each applicant via an online application administered by the NMWF includes:

• Applicant's full name, contact information, date of birth, and Tribal/community affiliation;

• Emergency contact information for applicant;

• Name and contact information of applicant's mentor;

• Applicant's school name and address;

• Applicant's current grade in school;

• Applicant's participation in extracurricular activities, school clubs, or community organizations;

• Applicant's volunteer experience; and

• Applicant's accomplishments or awards received.

Successful applicants also complete Form 3–2525, ''Native Youth Community Adaptation and Leadership Congress Student Medical Information,'' which collects the following information:

• Student's full name and preferred name;

• Date of birth;

• Age;

• Health insurance policy information;

• Medication information, to include dose and frequency;

• Drug and/or food sensitivities/allergies;

• Medications and immunizations; and

• Pre-existing condition(s).

Each applicant also provides essay responses to questions concerning topics such as environmental issues affecting their home/Tribal community, how or whether the environmental issues are addressed, and/or how, as a Native youth leader, they can lead the community in adapting to a changing environment. Successful applicants must also provide basic medical information to assure their health and safety while on site at the National Conservation Training Center. The on-site nurse keeps this information strictly confidential, for use only in an emergency.

Proposed Revisions Requiring OMB Approval

The following forms used with the Congress require OMB approval:

• Form 3–2546, ''Enrollment Form,'' which collects the following information:

—Applicant's full name, address, and contact information;
—Parent/guardian name and contact information;
—Student's age, date of birth, and gender;
—Student's high school year;
—Student's high school name, address, and contact information; and
—Chaperone name.

• Form 3–2547, ''Parental Consent Form,'' which collects the following information:

—Name of student and date of birth;
—Student address, school, grade, and contact information; and
—Student's physician name, address, and contact information.

• Form 3–2548, ''Student Conduct Agreement,'' which collects the following information:

—Student's full name and preferred name;
—Student signature and signature date; and
—Parent/guardian name, signature, and signature date.

• Form 3–2549, ''Mentor Waiver,'' which collects the following information:

—Mentor name;
—Mentor signature and signature date;
—Emergency contact name and contact number.

Title of Collection: Native Youth Community Adaptation and Leadership Congress.

OMB Control Number: 1018–0176.

Form Numbers: Forms 3–2525, 3–2546, 3–2547, 3–2548, and 3–2549.

Type of Review: Revision of a currently approved information collection.

Respondents/Affected Public: Eligible high school or college students interested in applying for the program.

Respondent's Obligation: Voluntary.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: None.

Activity	Total annual responses	Completion time per response	Total annual burden hours
Application (Online)	105	4 Hours	420
Form 3–2525, Student Medical Information	100	30 Mins	50
Form 3–2546, Enrollment Form	100	18 mins	30
Form 3–2547, Parental Consent Form	100	12 Mins	20
Form 3–2548, Student Conduct Agreement	100	12 Mins	20
Form 3–2549, Mentor Waiver	30	12 Mins	6
Totals	535		546

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Madonna Baucum,

Information Collection Clearance Officer, U.S. Fish and Wildlife Service.

[FR Doc. 2021–23415 Filed 10–26–21; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX22GC009PLFM00; OMB Control Number 1028–0088]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; National Cooperative Geologic Mapping Program (EDMAP and STATEMAP)

AGENCY: Geological Survey, Department of the Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, we, the U.S. Geological Survey (USGS) are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before November 26, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by \]=[search function. You may also submit comments by mail at U.S. Geological Survey, Information Collections Officer, 12201 Sunrise Valley Drive MS 159, Reston, VA 20192; or by email to *gs-info_collections@usgs.gov.* Please reference OMB Control Number 1028–0088 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this information collection request (ICR), contact Michael Marketti by email at *mmarketti@usgs.gov,* or by telephone at 703–648–6976. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.* Individuals who are hearing or speech impaired may call the Federal Relay Service at 1–800–877–8339 for TTY assistance.

SUPPLEMENTARY INFORMATION: In accordance with the PRA and 5 CFR 1320.8(d)(1), we, the USGS, provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on August 11, 2021, FR 86, 44036. No comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How the USGS might 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.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personally identifiable information (PII) in your comment, you should be aware that your entire comment—including your PII—may be made publicly available at any time. While you can ask us in your comment to withhold your PII from public review, we cannot guarantee that we will be able to do so.

Abstract: EDMAP is the educational component of the National Cooperative Geologic Mapping Program (NCGMP) that is intended to train the next generation of geologic mappers. The primary objective of the STATEMAP component of the NCGMP is to establish the geologic framework of areas that are vital to the welfare of individual States.

The NCGMP EDMAP program allocates funds to colleges and universities in the United States and Puerto Rico through an annual competitive cooperative agreement process. Every Federal dollar awarded is matched with university funds. Geology professors, who are skilled in geologic mapping, request EDMAP funding to support undergraduate and graduate students at their college or university in a one-year mentored geologic mapping project that focuses on a specific geographic area.

Only State Geological Surveys are eligible to apply to the STATEMAP component of the NCGMP pursuant to the National Geologic Mapping Act (Pub. L. 106–148). Since many State Geological Surveys are organized under a state university system, such universities may submit a proposal on behalf of the State Geological Survey.

Each fall, the program announcements are posted to the *Grants.gov* website and respondents are required to submit applications (comprising Standard Form

424, 424A, 424B, Proposal Summary Sheet, the Proposal, and Budget Sheets. Additionally, EDMAP proposals must include a Negotiated Rate Agreement and a support letter from a State Geologist or USGS Project Chief).

Since 1996, more than $10 million from the NCGMP has supported geologic mapping efforts of more than 1,335 students at 171 universities in 44 states, the District of Columbia, and Puerto Rico. Funds for graduate projects are limited to $25,000 and undergraduate project funds limited to $15,000. These funds are used to cover field expenses and student salaries, but not faculty salaries or tuition. The authority for both programs is listed in the National Geologic Mapping Act (Pub. L. 106–148).

Title of Collection: National Cooperative Geologic Mapping Program (NCGMP–EDMAP and STATEMAP).

OMB Control Number: 1028–0088.

Form Number: None.

Type of Review: Extension without change of a currently approved collection.

Respondents/Affected Public: University or college faculty and State Geological Surveys.

Total Estimated Number of Annual Respondents: Total number of responses is 95. Approximately 50 university or college faculty and 45 State Geological Survey respondents.

Total Estimated Number of Annual Responses: Total number of responses is 185. Approximately 95 university or college faculty and 90 State Geological Survey responses.

Estimated Completion Time per Response: 20 to 36 hours.

Total Estimated Number of Annual Burden Hours: 5,220 hours total.

Respondent's Obligation None. Participation is voluntary, though necessary to receive funding.

Frequency of Collection: Annually.

Total Estimated Annual Non-hour Burden Cost: There are no ''non-hour cost'' burdens associated with this IC.

An agency may not conduct, or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*).

Michael Marketti,

Acting Associate Program Coordinator, National Cooperative Geologic Mapping Program.

[FR Doc. 2021–23361 Filed 10–26–21; 8:45 am]

BILLING CODE 4338–11–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[222A2100DD/AAKC001030/ A0A501010.999900253G]

Living Languages Grant Program (LLGP); Solicitation of Proposals

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: The Office of Indian Economic Development (OIED), through its Living Languages Grant Program (LLGP), is soliciting proposals from federally recognized Tribes for grants to fund Native language instruction and immersion programs for Native students not enrolled at Bureau of Indian Education (BIE) schools, including those Tribes in States without BIE-funded schools.

DATES: Applications will be accepted until 11:59 p.m. ET on January 25, 2022.

FOR FURTHER INFORMATION CONTACT: Mr. James R. West, Program Analyst, Office of Indian Economic Development, Room 6049–B, 12220 Sunrise Valley Drive, Reston, Virginia 20191; telephone: (202) 595–4766; email: *jamesr.west@bia.gov.* Additional Program information can be found at *https://www.bia.gov/service/grants/llgp.*

SUPPLEMENTARY INFORMATION:

I. General Information
II. Number of Projects Funded
III. Background
IV. Eligibility for Funding
V. Applicant Procurement Procedures
VI. Limitations
VII. Language Instructor Credentials
VIII. LLGP Application Guidance
IX. Review and Selection Process
X. Evaluation Criteria
XI. Transfer of Funds
XII. Reporting Requirements for Award Recipients
XIII. Conflicts of Interest
XIV. Questions and Requests for OIED Assistance
XV. Separate Document(s)
XVI. Paperwork Reduction Act
XVII. Authority

I. General Information

Award Ceiling: 200,000
Award Floor: 25,000
CFDA Number: 15.151
Cost Sharing or Matching Requirement: No
Number of Awards: 15–60
Category: Education Program Enhancements

II. Number of Projects Funded

OIED anticipates award of approximately fifteen (15) to sixty (60) grants under this announcement ranging in value from approximately $25,000 to $200,000. The program can fund projects only one year at a time. OIED will use a competitive evaluation process based on criteria described in the Evaluation Criteria section (section X of this notice).

III. Background

The Office of the Assistant Secretary—Indian Affairs, through OIED, is soliciting proposals from Indian Tribes as listed in 85 FR 5462 for grant funding to support Tribal programs to document Native languages or build Tribal capacity to create or expand language preservation programs. The LLGP will exclude as grantees BIE schools and BIE-funded schools or programs targeting students enrolled in those schools.

The funding will focus on small or start-up programs whose objective is to document or build the capacity to preserve Native languages that are losing users, but which still have active users at the grandparent generation. The LLGP seeks to document, preserve, and revitalize languages that are used for face-to-face communication; languages that can be used by a child-bearing generation, but are not being transmitted to children; languages whose only active users are members of the grandparent generation or older; languages whose only active users are members of the grandparent generation or older but who have little opportunity to use them; and languages that serve as a reminder of heritage identity for an ethnic community, but which lack proficient speakers.

These grants will be funded under a non-recurring appropriation of the BIA budget. Congress appropriates funds on a year-to-year basis. Thus, while some LLGP projects may extend over several years, funding for successive years depends on each fiscal year's appropriations.

OIED administers this program through its Division of Economic Development (DED).

The funding periods and amounts referenced in this solicitation are subject to the availability of funds at the time of award, as well as the Department of the Interior (DOI) and Indian Affairs priorities at the time of the award. Neither DOI nor Indian Affairs will be held responsible for proposal or application preparation costs. Publication of this solicitation does not obligate DOI or Indian Affairs to award any specific grant or to obligate all or any part of available funds. Future funding is subject to the availability of appropriations and cannot be guaranteed. DOI or Indian Affairs may cancel or withdraw this solicitation at any time.

IV. Eligibility for Funding

The Secretary of the Interior (Secretary), through the OIED Division of Economic Development (DED), solicits proposals from federally recognized Indian Tribes to receive grants LLGP grants.

Excluded as grantees are BIE-operated schools and BIE-funded schools or programs targeting students enrolled in those schools.

V. Applicant Procurement Procedures

The applicant is subject to the procurement standards in 2 CFR 200.318 through 200.326. In accordance with 2 CFR 200.318, an applicant must use its own documented procurement procedures which reflect Tribal laws and regulations, provided that the procurements conform to applicable Federal law and standards identified in 25 CFR part 2.

VI. Limitations

The LLGP grant funding must be expended in accordance with applicable statutory and regulatory requirements, including 2 CFR part 200.

Applicants that are currently under BIA sanction Level 2 or higher resulting from non-compliance with the Single Audit Act are ineligible for an LLGP award. Applicants at Sanction Level 1 will be considered for funding.

No more than one proposal will be accepted by a federally recognized Tribe. Applications should address only one project. Any submissions that contain multiple project proposals will not be considered. OIED will apply the same objective ranking criteria to each proposal.

The purpose of LLGP grants is to fund Native language instruction and immersion programs only. LLGP awards *may not* be used for:

- Indirect costs or administrative costs as defined by the Federal Acquisition Regulation (FAR);
- Legal fees;
- Contract negotiation fees; and
- Any other activities not authorized by the grant award letter.

VII. Language Instructor Credentials

Instructors identified in LLGP proposals for funding need only be approved by the Tribal applicant and need not be credentialed or certified by a State, educational institution, or other external entity.

VIII. LLGP Application Guidance

All applications must be submitted in digital form to *grants.gov.* For instructions, see *https://www.grants.gov/help/html/help/Applicants/HowToApplyForGrants.htm.*

All LLGP applicants must submit the standard forms ''package'' as outlined in section IX of this announcement. These forms can be found under the ''package'' tab on the LLGP2021 grant listing at *www.grants.gov.* In very limited circumstances, OIED may accept a non-digital application. Please contact OIED at least a week prior to the submission deadline for approval.

There are seven mandatory components (forms) that must be included in each proposal package. Links to the mandatory forms can be found under the ''package'' tab on the LLGP2021 grant opportunity page at *www.grants.gov.* The following are the names of the required forms:

- Application for Federal Assistance (SF–424) [V3.0]
- Budget Information for Non-Construction Programs (SF–424A) [V1.0]
- Budget Narrative Attachment Form [V1.2]
- Project Abstract Summary [V2.0]
- Project Narrative Attachment Form [V1.2]
- Attachments [V1.2]
- Key Contacts [V2.0]

Application for Federal Assistance SF–424

It is required that the applicant complete the Application for Federal Assistance SF–424. Please use a descriptive file name that includes Tribal name and project description. For example: LLGPSF424.Tribalname.Project.

Project Abstract Summary and Project Narrative Attachment

The first paragraph of the project narrative must include the title and basic description of the proposed Living Languages project. The Project Narrative must not exceed 15 pages. At a minimum, it should include:

- A technical description of the project and, if applicable, an explanation of how the project would benefit the applicant and does not duplicate previous work.
- A description of the project objectives and goals.
- Deliverable products that the project will generate, including interim deliverables (such as status reports and technical data to be obtained) and final deliverables.
- Resumes of key consultants and/or personnel to be retained, if available, and the names of subcontractors, if applicable. This information may be included as an attachment to the application and will not be counted towards the 15-page limitation.
- Please use a descriptive file name that includes Tribal name and project description. *For example:* LLGPNarrative.Tribalname.Project.

Project Narratives are not judged based on their length. Please do not submit any unnecessary attachments or documents beyond what is listed above, *e.g.,* Tribal history, unrelated photos, and maps.

Budget Information for Non-Construction Programs (SF–424A) [V1.0] and Budget Narrative Attachment Form [V1.2]

It is required that the budget be submitted using the SF–424A form. Please use a descriptive file name that includes Tribal name and project description. For example: LLGPBudget.Tribalname.Project.

The budget must identify the amount of grant funding requested and a comprehensive breakdown of all projected and anticipated expenditures, including contracted personnel fees, consulting fees (hourly or fixed), travel costs, data collection and analysis costs, computer rentals, report generation, drafting, advertising costs for a proposed project and other relevant project expenses, and their subcomponents.

- Travel costs should be itemized by airfare, vehicle rental, lodging, and per diem, based on the current Federal government per diem schedule.
- Data collection and analysis costs should be itemized in sufficient detail for the OIED review committee to evaluate the charges.
- Other expenses may include computer rental, report generation, drafting, and advertising costs for a proposed project.

Key Contacts [V2.0]

Applicants must include the Key Contacts information page that includes:

- Project Manager's contact information including address, email, desk, and cell phone number.
- If there is more than one contact, please provide an additional key contact's form.
- Please use a descriptive file name that includes Tribal name and identifies that it is the critical information page (CIP). For example: LLGPCIP.Tribalname.Project.

Attachments [V1.2]

Utilize the *attachments form* to include the Tribal resolution issued in the fiscal year of the grant application, authorizing the submission of a LLGP 2021 grant application. It must be signed by authorized Tribal representative(s). The Tribal resolution

must also include a description of the Living Language project that will be delivered. The attachments form can also be used to include any other attachments related to the proposal.

Required Grantee Travel and Attendance at an Language Preservation Annual Grantee Meeting

Grantees will be required to have two individuals who work directly on the project attend an in-person annual DOI/OIED-sponsored grantee 3-day meeting in Washington, DC, during the year of the grant award. Applicants must include costs in the budget to cover this requirement. Travel costs must not exceed $6,000 per person. Applicants should follow their own travel policies to budget for this 3-day meeting.

Special Notes

Please make sure that the System for Award Management (SAM) number used to apply is active, not expired.

Please make sure an *active* Automated Standard Application for Payment (ASAP) number is provided. Applicants *must* have an ASAP number to be eligible.

It is helpful to list counties where the project is located and congressional district number where the project is located.

Incomplete Applications. Incomplete applications will not be accepted. Please ensure that all of the forms listed in the announcement are completed and submitted in *grants.gov.*

IX. Review and Selection Process

Upon receiving an LLGP application, OIED will determine whether the application is complete. Any proposal that is received after the date and time in the **DATES** section of this notice will not be reviewed.

The Committee, comprised of OIED staff, Federal partners, and subject matter experts, will evaluate the proposals against the ranking criteria. Proposals will be evaluated using the three ranking criteria listed below, with a maximum achievable total of 100 points.

Final award selections will be approved by the Assistant Secretary—Indian Affairs and the Associate Deputy Secretary, U.S. Department of the Interior. Applicants not selected for award will be notified in writing.

X. Evaluation Criteria

Clarity and Reasonableness: 20 points. The Committee will review LLGP grant proposals for completeness, organization, and the reasonableness of identified costs, all in the context of achieving a project's stated goals and objectives. The Committee will examine whether the budget submitted is detailed enough to explain how and when funds are to be spent and whether line-item budget numbers are appropriate and reasonable to complete the proposed tasks.

Qualitative Impact: 40 points. The proposal should clearly state how the project would document, preserve, or revitalize a Native language whose status is described at Section III of this notice. The Committee will evaluate the extent to which the Native language addressed by the proposal is jeopardized or nearing extinction and the degree to which the proposal could enliven the language by arresting or minimizing intergenerational disruption.

Quantitative Impact: 40 points. The proposal should estimate the number of students or percentage of Tribal members who will be directly and indirectly benefitted by the proposal. This criterion is not intended to favor proposals submitted by Tribes with larger populations or disadvantage those submitted by Tribes with smaller ones. Because LLGP funds are limited, however, the Committee must conduct a cost-benefit analysis of each proposal. On this basis, the Committee will prefer applicants that are currently receiving little or no Federal funding for language preservation activities.

LLGP applications will be ranked using only these criteria (as described above):

- *Clarity and Reasonableness:* 20.
- *Qualitative Impact:* 40.
- *Quantitative Impact:* 40.
- *Total:* 100.

XI. Transfer of Funds

OIED's obligation under this solicitation is contingent on receipt of congressionally appropriated funds. No liability on the part of the U.S. Government for any payment may arise until funds are made available to the awarding officer for this grant and until the recipient receives notice of such availability, to be confirmed in writing by the grant officer.

All payments under this agreement will be made by electronic funds transfer through the ASAP. All award recipients are required to have a current and accurate DUNS number to receive funds. All payments will be deposited to the banking information designated by the applicant in the SAM.

XII. Reporting Requirements for Award Recipients

The applicant must deliver all products and data required by the signed Grant Agreement for the proposed LLGP activities to OIED within 30 days of the end of each reporting period and 90 days after completion of the project. The reporting periods will be established in the terms and conditions of the final award.

OIED requires that deliverable products be provided in both digital format and printed hard copies. Reports can be provided in either Microsoft Word or Adobe Acrobat PDF format. Spreadsheet data can be provided in Microsoft Excel, Microsoft Access, or Adobe PDF formats. All vector figures should be converted to PDF format. Raster images can be provided in PDF, JPEG, TIFF, or any of the Windows's metafile formats. The contract between the grantee and the consultant conducting the LLGP funded project must include deliverable products and require that the products be prepared in the format described above.

The contract should include budget amounts for all printed and digital copies to be delivered in accordance with the grant agreement. In addition, the contract must specify that all products generated for the project belong to the grantee and cannot be released to the public without the grantee's written approval. Products include, but are not limited to, all reports and technical data obtained, status reports, and the final report.

In addition, this funding opportunity and financial assistance award must adhere to the following provisions:

XIII. Conflicts of Interest

Applicability

- This section intends to ensure that non-Federal entities and their employees take appropriate steps to avoid conflicts of interest in their responsibilities under or with respect to Federal financial assistance agreements.
- In the procurement of supplies, equipment, construction, and services by recipients and by sub-recipients, the conflict-of-interest provisions in 2 CFR 200.318 apply.

Requirements

- Non-Federal entities must avoid prohibited conflicts of interest, including any significant financial interests that could cause a reasonable person to question the recipient's ability to provide impartial, technically sound, and objective performance under or with respect to a Federal financial assistance agreement.
- In addition to any other prohibitions that may apply with respect to conflicts of interest, no key official of an actual or proposed recipient or sub-recipient, who is

substantially involved in the proposal or project, may have been a former Federal employee who, within the last one (1) year, participated personally and substantially in the evaluation, award, or administration of an award with respect to that recipient or sub-recipient or in development of the requirement leading to the funding announcement.

• No actual or prospective recipient or sub-recipient may solicit, obtain, or use non-public information regarding the evaluation, award, administration of an award to that recipient or sub-recipient or the development of a Federal financial assistance opportunity that may be of competitive interest to that recipient or sub-recipient.

Notification

• Non-Federal entities, including applicants for financial assistance awards, must disclose in writing any conflict of interest to the DOI awarding agency or pass-through entity in accordance with 2 CFR 200.112, Conflicts of Interest.

• Recipients must establish internal controls that include, at a minimum, procedures to identify, disclose, and mitigate or eliminate identified conflicts of interest. The recipient is responsible for notifying the Financial Assistance Officer in writing of any conflicts of interest that may arise during the life of the award, including those that have been reported by sub-recipients.

• Restrictions on Lobbying. Non-Federal entities are strictly prohibited from using funds under this grant or cooperative agreement for lobbying activities and must provide the required certifications and disclosures pursuant to 43 CFR part 18 and 31 U.S.C. 1352.

• Review Procedures. The Financial Assistance Officer will examine each conflict-of-interest disclosure on the basis of its particular facts and the nature of the proposed grant or cooperative agreement and will determine whether a significant potential conflict exists and, if it does, develop an appropriate means for resolving it.

• Enforcement. Failure to resolve conflicts of interest in a manner that satisfies the Government may be cause for termination of the award. Failure to make the required disclosures may result in any of the remedies described in 2 CFR 200.338, Remedies for Noncompliance, including suspension or debarment (see also 2 CFR part 180).

Data Availability

• Applicability. The Department of the Interior is committed to basing its decisions on the best available science and providing the American people with enough information to thoughtfully and substantively evaluate the data, methodology, and analysis used by the Department to inform its decisions.

• Use of Data. The regulations at 2 CFR 200.315 apply to data produced under a Federal award, including the provision that the Federal Government has the right to obtain, reproduce, publish, or otherwise use the data produced under a Federal award as well as authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

• Availability of Data. The recipient shall make the data produced under this award and any subaward(s) available to the Government for public release, consistent with applicable law, to allow meaningful third-party evaluation and reproduction of the following:

○ The scientific data relied upon;

○ The analysis relied upon; and

○ The methodology, including models, used to gather and analyze data.

XIV. Questions and Requests for OIED Assistance

OIED staff may provide technical assistance, upon written request by an applicant. The request must clearly identify the type of assistance sought. Technical assistance does not include funding to prepare a grant proposal, grant writing assistance, or pre-determinations as to the likelihood that a proposal will be awarded. The applicant is solely responsible for preparing its grant proposal. Technical assistance may include clarifying application requirements, and registration information for SAM or ASAP.

XV. Separate Document(s)

• Application for Federal Assistance SF–424 Form.

• Project Narrative Attachment Form (This form includes the Project Narrative, Budget, Tribal Resolution, and Critical Information page).

XVI. Paperwork Reduction Act

The information collection requirements contained in SF–424, Application for Federal Assistance have been reviewed and approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3504(h). The OMB control number is 4040–0004. The authorization expires on December 31, 2022. An agency may not conduct or sponsor, and you are not required to respond to, any information collection that does not display a currently valid OMB Control Number.

XVII. Authority

This is a discretionary grant program authorized under the Snyder Act (25 U.S.C. 13) and the Further Consolidated Appropriations Act, 2020 (Pub. L. 116–94). The Snyder Act authorizes the BIA to expend such moneys as Congress may appropriate for the benefit, care, and assistance of Indians for the purposes listed in the Act. LLGP grants facilitate one of the purposes listed in the Snyder Act: ''General support and civilization, including education.'' The Further Consolidated Appropriations Act, 2020, authorizes the BIA to ''carry out the operation of Indian programs by direct expenditure, contracts, cooperative agreements, compacts, and grants, either directly or in cooperation with States and other organizations.'' Further, the Conference Report specifies $3,000,000 for grants to federally recognized Indian Tribes to provide Native language instruction and immersion programs to Native students not enrolled in BIE schools, including those Tribes and organizations in States without Bureau-funded schools.

Bryan Newland,

Assistant Secretary—Indian Affairs.

[FR Doc. 2021–23406 Filed 10–26–21; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLOR936000.14400000.ET0000, 212 WAOR–55695]

Notice of Application for Withdrawal Extension and Opportunity for Public Meeting for the Holden Mine Reclamation Project, Washington

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of application.

SUMMARY: The Bureau of Land Management (BLM) is providing notice of an application from the United States Forest Service (USFS) requesting that Public Land Order (PLO) No. 7533 be extended for an additional 20 years.

DATES: Comments and requests for a public meeting must be received by January 25, 2022.

ADDRESSES: All comments and meeting requests should be sent to the BLM Oregon/Washington State Director, P.O. Box 2965, Portland, Oregon 97208. The application and the case file are available for public examination by interested persons by appointment at the BLM Public Room, 1220 SW 3rd Ave., 11th Floor, Portland, OR 97208 during regular business hours 8:00 a.m.

to 4:30 p.m., Monday through Friday except holidays. Please call 503–808–6001 to make an appointment.

FOR FURTHER INFORMATION CONTACT: Dustin Wharton, Section Chief of Lands and Realty, BLM Oregon/Washington State Office, at 503–808–6001, by email at *dwharton@blm.gov,* or at the address noted above. The USFS can be reached at the Okanogan-Wenatchee National Forest Supervisor's Office, 215 Melody Lane, Wenatchee, WA 98801, 509–664–9204.

Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact either Dustin Wharton or the USFS during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: PLO No. 7533 withdrew 1,265 acres of National Forest System lands in the Okanogan-Wenatchee National Forest from location and entry under the United States mining laws for a period of 20 years to protect the Holden Mine Reclamation Site, where the USFS has remediated for release of hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act, including undertaking infrastructure improvements and capital investments in Chelan County, Washington. This notice advises the public of an opportunity to comment on the USFS application for the extension of the existing withdrawal for an additional 20 years and to request a public meeting. This notice also corrects the legal land description and acreage figure (from 1,265 acres to 1,285 acres) stated in PLO No. 7533. Unless extended, the withdrawal established by PLO 7553 will expire on August 5, 2022.

The legal land description and acreage figure written in PLO No. 7533 is revised to reflect the BLM Cadastral Survey's Specification for Descriptions of Land. The revised land description does not change the footprint of the lands withdrawn which is as follows:

Willamette Meridian

T. 31 N., R. 16 E.,
Protraction Block 37.

T. 31 N., R 17 E.,
Sec. 8, S½NE¼, S½NW¼, and S½;
Protraction Block 37.

The area described contains 1,285 acres, according to the official protraction diagrams of said land on file with the BLM.

The use of a right-of-way, interagency agreement, or cooperative agreement would not constrain nondiscretionary uses or protect the capital investments made. There are no suitable alternative sites since the lands described in PLO No. 7533 identify the area as an ongoing reclamation project tied to the location of former mining activities.

No water rights will be needed to fulfill the purpose of this requested withdrawal extension.

Mining would be inconsistent with protecting the remediation work.

Comments, including name and street address of respondents, will be available for public review by appointment at the BLM, 1220 SW 3rd Ave., Portland, OR 97208 during regular business hours 8:00 a.m. to 4:30 p.m., Monday through Friday except holidays. Call 503–808–6001 to make an appointment.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personally identifying information—may be made publicly available at any time. While you may ask the BLM in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Notice is hereby given that an opportunity for a public meeting may be afforded in connection with the proposed withdrawal extension. All interested persons who desire a public meeting for the purpose of being heard on the application for this withdrawal extension must submit a written request to the State Director, BLM Oregon/Washington State Office at the address in the **ADDRESSES** section, within 90 days from the date of publication of this notice. If the authorized officer determines that a public meeting will be held, a notice of the date, time, and place will be published in the **Federal Register** and local newspapers and posted on the BLM website at: *www.blm.gov* at least 30 days before the scheduled date of the meeting. This withdrawal extension proposal will be processed in accordance with the regulations set forth in 43 CFR 2310.4.

(Authority: 43 CFR 2310.3–1)

Barry R. Bushue,

Oregon/Washington State Director.

[FR Doc. 2021–23422 Filed 10–26–21; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–PWRO–TUSK–32685; PPPWTUSK00, PPMPSPD1Z.YM0000]

Tule Springs Fossil Beds National Monument Advisory Council Notice of Public Meeting

AGENCY: National Park Service, Interior.

ACTION: Meeting notice.

SUMMARY: In accordance with the Federal Advisory Committee Act of 1972, the National Park Service is hereby giving notice that the Tule Springs Fossil Beds National Monument Advisory Council (Council) will meet as indicated below.

DATES: A teleconference will be held on Wednesday, November 10, 2021, at 5:00 p.m. until 7:00 p.m. (PACIFIC).

ADDRESSES: Information on how to access the meeting will be posted by November 5, 2021, to the Committee's website at *https://www.nps.gov/tusk/index.htm.*

FOR FURTHER INFORMATION CONTACT: Further information concerning the meeting may be obtained from Christie Vanover, Public Affairs Officer, Lake Mead National Recreation Area, 601 Nevada Way, Boulder City, Nevada 89005, via telephone at (702) 293–8691, or email at *christie_vanover@nps.gov.*

SUPPLEMENTARY INFORMATION: The Council was established pursuant to section 3092(a)(6) of Public Law 113–291 and in accordance with the provisions of the Federal Advisory Committee Act (5 U.S.C. appendix 1–16). The purpose of the Council is to advise the Secretary of the Interior with respect to the preparation and implementation of the management plan.

Purpose of the Meeting: The Council agenda will include:

1. Superintendent Update:
- Update on General Management Plan
- Update on Green Link West Project
2. TUSK Resource Updates
3. Subcommittee Reports
4. Old Business
5. New Business
6. Public Comments

The meeting is open to the public. Interested persons may make oral or written presentations to the Council during the business meeting or file written statements. Requests to address the Council should be made to the Superintendent prior to the meeting. Members of the public may submit written comments by mailing them to Derek Carter, Superintendent, Tule Springs Fossil Beds National

Monument, 601 Nevada Way, Boulder City, NV 89005, or by email *derek_carter@nps.gov.* All written comments will be provided to members of the Council. Due to time constraints during the meeting, the Council is not able to read written public comments submitted into the record. Depending on the number of people who wish to speak and the time available, the time for individual comments may be limited.

Public Disclosure of Comments: Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 5 U.S.C. appendix 2.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2021–23412 Filed 10–26–21; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1216]

Certain Vacuum Insulated Flasks and Components Thereof; Commission Decision To Review in Part an Initial Determination Granting in Part Complainants' Motion for Summary Determination of a Violation of Section 337; Request for Submissions

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part an initial determination (''ID'') (Order No. 24) of the presiding Chief Administrative Law Judge (''CALJ'') granting-in-part complainants' motion for summary determination of a violation of section 337. The Commission also requests written submissions from the parties, interested government agencies, and other interested persons regarding remedy, bonding, and the public interest, under the schedule set forth below.

FOR FURTHER INFORMATION CONTACT: Michael Liberman, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2392. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.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: On September 3, 2020, the Commission instituted this investigation under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (''section 337''), based on a complaint filed by Steel Technology LLC d/b/a Hydro Flask and Helen of Troy Limited (collectively, ''Complainants,'' or ''Hydro Flask''). 85 FR 55030–31 (Sept. 3, 2020). The complaint alleges a violation of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain vacuum insulated flasks and components thereof by reason of infringement of: (1) The sole claims of U.S. Design Patent Nos. D806,468 (''the D'468 patent''); D786,012 (''the D'012 patent'') and D799,320 (''the D'320 patent''), respectively; and (2) U.S. Trademark Registration Nos. 4,055,784 (''the '784 trademark''); 5,295,365 (''the '365 trademark''); 5,176,888 (''the '888 trademark''); and 4,806,282 (''the '282 trademark''). The complaint also alleges the existence of a domestic industry. The notice of investigation names numerous respondents: Cangnan Kaiyisi E-Commerce Technology Co., Ltd.; Shenzhen Huichengyuan Technology Co., Ltd.; Sinbada Impex Co., Ltd.; Yongkang Huiyun Commodity Co., Ltd.; Wuyi Loncin Bottle Co., Ltd.; Zhejiang Yuchuan Industry & Trade Co., Ltd.; Zhejiang Yongkang Unique Industry & Trade Co., Ltd.; Suzhou Prime Gifts Co., Ltd.; Hangzhou Yuehua Technology Co., Ltd.; Guangzhou Yawen Technology Co., Ltd.; Jinhua City Ruizhi E-Commerce Co., Ltd.; Wo Ma Te (Tianjin) International Trade Co., Ltd.; and Shenzhen City Yaxin General Machinery Co., Ltd. (collectively, the ''Defaulting Respondents''); Eddie Bauer, LLC; PSEB Holdings, LLC; Dunhuang Group a.k.a. DHgate; Everich and Tomic Houseware Co., Ltd.; HydroFlaskPup; Yiwu Honglu Daily Necessities Co., Ltd.; and Yiwu Houju E-commerce Firm. The Commission's Office of Unfair Import Investigations (''OUII'') is also named as a party in this investigation. *Id.*

Subsequently, the Commission permitted Hydro Flask to amend the complaint and notice of investigation to: (1) Assert the '012 patent against additional infringing products; (2) incorporate into the complaint the information and additional paragraphs included in Complainants' Supplemental Letter to the Commission of August 18, 2020; and (3) correct the corporate names of four non-appearing respondents—Yiwu Houju E-Commerce Firm; Jinhua City Ruizhi E-Commerce Co., Ltd.; Wo Ma Te (Tianjin) International Trade Co., Ltd.; and Shenzhen City Yaxin General Machinery Co., Ltd. Mot. at 1. Order No. 12 (Nov. 6, 2020), *unreviewed by* Notice (Nov. 24, 2020); *see* 85 FR 77239–40 (Dec. 1, 2020). The Commission also terminated the investigation as to certain other respondents based on a consent order and settlement agreement, or a settlement agreement, or a consent order stipulation and consent order: Eddie Bauer LLC and PSEB Holdings, LLC; DHgate; Everich and Tomic Houseware Co., Ltd. Order No. 13 (Nov. 30, 2020), *unreviewed by* Notice (Dec. 21, 2020); Order No. 17 (Jan. 27, 2021), *unreviewed by* Notice (Feb. 16, 2021); Order No. 19 (Feb. 19, 2021), *unreviewed by* Notice (Mar. 12, 2021). The Commission likewise terminated the investigation with respect to the '282 trademark. Order No. 16 (Jan. 11, 2021), *unreviewed by* Notice (Feb. 8, 2021).

On April 14, 2021, the Commission further found the Defaulting Respondents in default Order No. 21 (Mar. 22, 2021), *unreviewed* by Notice (Apr. 14, 2021). The Commission also permitted Hydro Flask to withdraw the amended complaint as to HydroFlaskPup, Yiwu Honglu Daily Necessities Co., Ltd., and Yiwu Houju E-commerce Firm. Order No. 22 (Apr. 7, 2021), *unreviewed by* Notice (Apr. 22, 2021).

On April 8, 2021, Hydro Flask filed a motion for summary determination of a violation of section 337 pursuant to Commission Rule 210.16(c)(2) (19 CFR 210.16(c)(2)) to support its request for entry of a GEO with respect to all asserted patents and trademarks. OUII filed a response in support of the motion on August 9, 2021.

On September 3, 2021, the CALJ issued the subject ID granting in part Hydro Flask's motion for summary determination. The ID finds that Hydro Flask has shown by reliable, probative, and substantial evidence that a violation of section 337 has occurred with respect to the '784, '365, and '888 trademarks,

and the D'468, D'012, and D'320 patents, and that the domestic industry requirement is satisfied for the Asserted Trademarks and Patents. The ID finds that a violation has been established with respect to ten out of thirteen defaulting respondents: Cangnan Kaiyisi E-Commerce Technology Co., Ltd.; Yongkang Huiyun Commodity Co., Ltd.; Wuyi Loncin Bottle Co., Ltd.; Zhejiang Yongkang Unique Industry & Trade Co., Ltd.; Suzhou Prime Gifts Co., Ltd.; Hangzhou Yuehua Technology Co., Ltd.; Guangzhou Yawen Technology Co., Ltd.; Jinhua City Ruizhi E-Commerce Co., Ltd.; Wo Ma Te (Tianjin) International Trade Co., Ltd.; and Shenzhen City Yaxin General Machinery Co., Ltd.

The ID also finds that no violation has been established as to respondents Shenzhen Huichengyuan Technology Co., Ltd.; Sinbada Impex Co., Ltd.; and Zhejiang Yuchuan Industry & Trade Co., Ltd.

The ID contains the CALJ's recommended determination on remedy and bonding (''RD''). The RD recommends issuance of a general exclusion order (''GEO'') with respect to the asserted patents and trademarks. The RD does not recommend issuance of any cease and desist orders (''CDOs''). No petitions for review were filed.

Having examined the record of this investigation, the Commission has determined to review in part the subject ID. Specifically, the Commission has determined to review the ID's finding that Hydro Flask has satisfied the economic prong of the domestic industry requirement under Section 337(a)(3)(A). *See* ID at 89–92. On review, the Commission affirms the ID's findings that Hydro Flask has established a domestic industry under Section 337(a)(3)(A). Given the nature and extent of Hydro Flask's investments in plant and equipment as a whole, Hydro Flask is not a mere importer. As the ID correctly found, Hydro Flask conducts engineering, product development and design, quality assurance, customer support, research and development, product assembly and customization, and distribution in the United States and Hydro Flask's plant and equipment investments in these activities directed to the DI products are quantitatively and qualitatively significant. *See* ID at 89–92. The Commission notes that the nature and extent of Hydro Flask's investments distinguish this case from those in which complainants sought to establish a domestic industry almost entirely based on investments in sales, marketing, and/or distribution. As the Commission has previously stated, '' '[w]hile marketing and sales activity, alone, may not be sufficient to meet the domestic industry test, those activities may be considered as part of the overall evaluation of whether or not a Complainant meets the economic prong.' '' *Certain Solid State Storage Drives, Stacked Electronics Components, and Products Containing the Same,* Inv. No. 337–TA–1097, Commission Op. at 22 (June 29, 2018) (quoting *Certain Printing and Imaging Devices and Components Thereof,* Inv. No. 337–TA–690, Order No. 24 at 34 (Apr. 21, 2010) (denying summary determination on the economic prong of the domestic industry requirement). Chair Kearns notes that some of the claimed investments in plant and equipment appear to be for activities that would be carried out by a mere importer, such as distribution and customer support, and that the record does not allow a breakout of investments for such activities. In affirming the ALJ's grant of summary determination here, he finds that given the apparent amount of domestic investments for activities such as engineering, product development, research and development, and manufacturing, and the qualitative importance of these activities to this industry, it is unlikely that discounting the investments that are those of a mere importer would cause him to question the existence of a domestic industry.

In connection with the final disposition of this investigation, the Commission may issue an order that could result in the exclusion of the subject articles from entry into the United States. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, *see Certain Devices for Connecting Computers via Telephone Lines,* Inv. No. 337–TA–360, USITC Pub. No. 2843, Comm'n Op. at 7–10 (December 1994).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers/The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve, disapprove, or take no action on the Commission's action. See Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

Written Submissions: Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the ALJ on remedy and bonding.

In their initial submissions, Complainants are requested to identify the remedy sought and Complainants Hydro Flask and OUII are requested to submit proposed remedial orders for the Commission's consideration. Hydro Flask is also requested to state the dates on which the asserted patents expire, to provide the HTSUS subheadings under which the accused products are imported, and to supply the names of all known importers of the products at issue in this investigation. The initial written submissions and proposed remedial orders must be filed no later than close of business on November 4, 2021. Reply submissions must be filed no later than the close of business on November 11, 2021. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. The Commission's paper filing requirements in 19 CFR 210.4(f) are currently waived. 85 FR 15798 (March 19, 2020). Submissions should refer to the investigation number (''Inv. No. 337–TA–1216'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, *https://www.usitc.gov/secretary/documents/handbookonfilingprocedures.pdf*).

Persons with questions regarding filing should contact the Secretary at (202) 205–2000.

Any person desiring to submit a document to the Commission in confidence must request confidential treatment by marking each document with a header indicating that the document contains confidential information. This marking will be deemed to satisfy the request procedure set forth in Rules 201.6(b) and 210.5(e)(2) (19 CFR 201.6(b) & 210.5(e)(2)). Documents for which confidential treatment by the Commission is sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing. 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 personnel1, solely for cybersecurity purposes. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in part 210 of the Commission's Rules of Practice and Procedure, 19 CFR part 210.

By order of the Commission.

Issued: October 21, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–23359 Filed 10–26–21; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0062]

Agency Information Collection Activities; Proposed eCollection of eComments Requested; Extension Without Change of a Currently Approved Collection; Identification of Imported Explosives Materials

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Department of Justice (DOJ) 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.

DATES: Comments are encouraged and will be accepted for an additional 30 days until November 26, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

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:* Extension without change of a currently approved collection.

(2) *The Title of the Form/Collection:* Identification of Imported Explosives Materials.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number: 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-profit.

Other: None.

Abstract: This information collection ensures that explosive materials can be effectively traced by requiring all licensed importers to identify by marking all explosive materials they import for sale or distribution.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 17 respondents will take approximately one hour to respond three times per year to this collection.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 51 hours, which is equal to 17 (total respondents) * 3 (total # of responses annually) * 1 hour (total time to prepare each response).

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, Mail Stop 3E.405A, Washington, DC 20530.

Dated: October 21, 2021.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2021–23354 Filed 10–26–21; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

[OMB Number 1123–0010]

Agency Information Collection Activities: Proposed Collection; Comments Requested; Request for Registration Under the Gambling Devices Act of 1962

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Criminal Division, will be submitting 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.

DATES: The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for 30 until November 26, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

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 agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *Title of the Form/Collection:* Request for Registration Under the Gambling Devices Act of 1962.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: DOJ\CRM\OEO\GDR–1. Sponsoring component: Criminal Division, 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-profit. Other: Not-for-profit institutions, individuals or households, and State, Local or Tribal Government. The form can be used by any entity required to register under the Gambling Devices Act of 1962 (15 U.S.C. 1171–1178).

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 7,800 respondents will complete each form within approximately 5 minutes.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 650 total annual burden hours associated with this collection.

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: October 21, 2021.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2021–23355 Filed 10–26–21; 8:45 am]

BILLING CODE 4410–14–P

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Information Collection Activities, Comment Request

AGENCY: Bureau of Labor Statistics, Department of Labor.

ACTION: Notice of information collection; request for comment.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Bureau of Labor Statistics (BLS) is soliciting comments concerning the proposed extension of the ''Consumer Price Index Housing Survey.'' A copy of the proposed information collection request (ICR) can be obtained by contacting the individual listed below in the Addresses section of this notice.

DATES: Written comments must be submitted to the office listed in the Addresses section of this notice on or before December 27, 2021.

ADDRESSES: Send comments to Nora Kincaid, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room 4080, 2 Massachusetts Avenue NE, Washington, DC 20212. Written comments also may be transmitted by email to *BLS_PRA_Public@bls.gov.*

FOR FURTHER INFORMATION CONTACT: Nora Kincaid, BLS Clearance Officer, telephone 202–691–7628 (this is not a toll free number). (See **ADDRESSES** Section.)

SUPPLEMENTARY INFORMATION:

I. Background

The Consumer Price Index (CPI) is the timeliest instrument compiled by the U.S. Government that is designed to measure changes in the purchasing power of the urban consumer's dollar. The CPI is used most widely as a measure of inflation, and is used in the formulation of economic policy. It also is used as a deflator of other economic series, that is, to adjust other series for price changes and to translate these series into inflation-free dollars.

II. Current Action

Office of Management and Budget clearance is being sought for the CPI Housing Survey. The continuation of the collection of housing rents for the CPI is essential since the CPI is the nation's chief source of information on retail price changes. If the information on rents were not collected, Federal fiscal and monetary policies would be hampered due to the lack of information on price changes in a major sector of the U.S. economy, and estimates of the real value of the Gross Domestic Product

could not be made. The consequences to both the Federal and private sectors would be far reaching and would have serious repercussions on Federal government policy and institutions.

III. Desired Focus of Comments

The Bureau of Labor Statistics is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

Title of Collection: CPI Housing Survey.

OMB Number: 1220–0163.

Type of Review: Extension.

Affected Public: Individuals or households; business or other for-profit.

Total Respondents: 76,157.

Frequency: Semi-annually.

Total Responses: 120,694.

Average Time per Response: 5.88596 minutes.

Estimated Total Burden Hours: 11,840 hours.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they also will become a matter of public record.

Signed at Washington, DC, this 21st day of October 2021.

Eric Molina,

Acting Chief, Division of Management Systems.

[FR Doc. 2021–23363 Filed 10–26–21; 8:45 am]

BILLING CODE 4510–24–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petition for Modification of Application of an Existing Mandatory Safety Standard

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: This notice includes the summary of a petition for modification submitted to the Mine Safety and Health Administration (MSHA) by the party listed below.

DATES: All comments on the petition must be received by MSHA's Office of Standards, Regulations, and Variances on or before November 26, 2021.

ADDRESSES: You may submit your comments including the docket number of the petition by any of the following methods:

1. *Email: zzMSHA-comments@dol.gov.* Include the docket number of the petition in the subject line of the message.

2. *Facsimile:* 202–693–9441.

3. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452, *Attention:* Jessica D. Senk, Director, Office of Standards, Regulations, and Variances. Persons delivering documents are required to check in at the receptionist's desk in Suite 4E401. Individuals may inspect copies of the petition and comments during normal business hours at the address listed above. Before visiting MSHA in person, call 202–693–9455 to make an appointment, in keeping with the Department of Labor's COVID–19 policy. Special health precautions may be required.

MSHA will consider only comments postmarked by the U.S. Postal Service or proof of delivery from another delivery service such as UPS or Federal Express on or before the deadline for comments.

FOR FURTHER INFORMATION CONTACT: Jessica D. Senk, Office of Standards, Regulations, and Variances at 202–693–9440 (voice), *Senk.Jessica@dol.gov* (email), or 202–693–9441 (facsimile). [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and Title 30 of the Code of Federal Regulations (CFR) part 44 govern the application, processing, and disposition of petitions for modification.

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor (Secretary) determines that:

1. An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or

2. The application of such standard to such mine will result in a diminution of safety to the miners in such mine.

3. In addition, sections 44.10 and 44.11 of 30 CFR establish the requirements for filing petitions for modification.

II. Petition for Modification

Docket Number: M–2021–033–C.

Petitioner: Consol Pennsylvania Coal Company LLC, 685 Patterson Creek Road, Sycamore, PA 15364.

Mine: Harvey Mine, MSHA ID No. 36–10045, located in Greene County, Pennsylvania.

Regulation Affected: 30 CFR 75.312(c) and (d) (Main mine fan examinations and records).

Modification Request: The petitioner requests modification of the existing standard 30 CFR 75.312(c) and (d) to permit an alternative method of compliance as it pertains to a mine fan shutdown to test the automatic fan stoppage signal device and to determine that air flow reversal prevention doors will automatically close when the fan shuts down. The petitioner proposes an alternate method of performing the main fan tests without shutting down the fan(s) and without removing the miners from the mine.

The petitioner states that:

1. Harvey Mine is a large mine with a complex ventilation system consisting of both intake and exhaust shafts. The exhaust shafts have main mine fans connected to them. Each fan is equipped with a pressure recording device and an automatic signal system designed to give an alarm should the fan slow or stop. All exhaust fans are equipped with automatic closing doors to prevent the reversal of air into the mine upon a shutdown of the fan.

2. Because of the complexity of the ventilation system, shutting down any fans creates the potential for effects on the system which may require evaluation and delay. Use of the methods described below will minimize the hazards associated with stopping the fans in a complex ventilation system.

3. The mine liberates significant amounts of methane in a 24-hour period. Disruption of the ventilation system by stopping and starting the fans can cause damage underground and/or to ventilation fans. This damage can result in methane accumulations underground. Stopping and starting the fans has the potential to damage the electrical and mechanical systems of the fans.

4. If a fan does not restart within 15 minutes of shutdown, a lengthy restart of the mine operating system is required. This includes a 3- to 4-hour examination, reset of underground mine power, and return of the workers (who must exit the mine when testing begins) to their assigned work areas.

5. A mine with multiple ventilation fans must equip air flow reversal prevention doors on those fans where air reversal is possible. These doors close in the event of a fan stoppage to prevent the air flow in the mine from reversing direction.

Petitioner proposes the following alternative method:

The petitioner's alternative test method consists of manually moving the test frame assembly toward the horizontal position (operation position) of the door while the fan is in operation. Since the test frame and air flow reversal prevention door both use the same horizontal bearing support shaft for bearing attachment, the test will verify that the solid air flow reversal prevention door will close in the event of a fan stoppage. If the test frame will move to the door and form a tight fit, then the door will close against the fan housing during an actual fan stoppage and form a tight fit when the air flow that keeps the door open stops.

a. The modification will apply to exhausting main mine fans only. Mine fans subject to this modification shall be equipped with a special fan door assembly consisting of an open test frame and a solid air flow reversal prevention door. The test frame shall be attached to a rotatable shaft and latched to the fan housing during normal operation. The air flow reversal prevention door shall be attached by bearing sets to the shaft supporting the test frame and shall be rotatable around the shaft. The air flow reversal prevention door shall be kept open during normal fan operation only by air flowing from the fan. It shall fit tightly against the fan housing when the fan stops closing the door. The test frame shall be latched against the fan housing when not being used for testing.

b. The air flow reversal prevention door(s) shall be tested at least every 31 days by rotating the test frame outward from its latched position until it contacts the air flow reversal prevention door. Rotation of the test frame shall also rotate the shaft and bearings hinging the air flow reversal prevention door.

c. After the initial test, the door and frame test system will be evaluated by MSHA and upon MSHA approval, testing shall occur at least every 31 days. The person(s) conducting the test must be able to visually observe the movement of the test frame and to visually observe the rotation of the attached shaft. The person(s) conducting the testing shall observe the contact between the test frame and the air flow reversal prevention door to determine that a proper fit exists. Also, the person(s) shall observe the general maintenance of the metal door and test frame for good repair.

d. The method of using fans with multiple louvered air flow reversal prevention doors is as follows:

i. When fans are equipped with multiple louvered air flow reversal prevention door assemblies, each of these doors shall be mounted to a rotatable shaft with a modified end.

ii. Fans with multiple louvered air flow reversal prevention doors will be tested at least every 31 days by using a torque wrench or lever. Each individual door will be rotated to a closed position, using the special wrench, or lever on the end of the shaft, to insure that they are functioning correctly. A record of the torque reading shall be maintained. If any torque reading increases by 15 percent or more, the cause shall be investigated and corrective actions taken. A record of the investigation and any corrective action taken shall be made and the results made available for inspection by MSHA and the miners' representative.

e. Each air flow reversal prevention door shall be tested at least every 7 months by stopping the fan to ensure the door automatically closes when the fan shuts down.

f. Each fan subject to this petition shall be provided with a fan alarm signal system consisting of:

i. A motor run fail safe relay energized through a contact provided on the main starter vacuum contactor;

ii. An automatic fan signal device is provided by a fail-safe relay energized by the chart recorder (water gauge) with the trip ranges set to alarm when 25 percent of normal operating water gauge pressure is lost;

iii. A dial out computer that monitors power to the fan signal. When this control power is lost, the computer will call preprogramed telephone numbers and notify the responsible person of the power loss; and

iv. A mine monitoring system that monitors each fan signal. If the monitoring system loses a signal or has a communication loss, or if any of the previously mentioned alarms are triggered, the monitoring system will sound a visible and audible alarm. The visible and audible alarm will be provided at a location where a responsible person is always on duty and has two-way communications with working sections and where people are normally scheduled to work.

g. The automatic fan signal device will be tested at least every 31 days by manually operating a valve near the fan pressure recording chart reducing the pressure on the water gauge to activate the fan signal. The actuation of the fan alarm will be verified by a responsible person at the location where the responsible person is always on duty when anyone is underground.

h. Each automatic fan signal device and signal alarm shall be tested at least every 7 months by stopping the fan to ensure that the automatic signal device causes the alarm to activate when the fan shuts down.

i. The petitioner shall notify the MSHA District Manager when each fan is equipped with the test frame, air flow reversal prevention door, and fan alarm signal system, so that MSHA may conduct an inspection prior to testing the door and alarm in accordance with the terms and conditions of this petition. If required by the District Manager, the test procedure shall be demonstrated and the fan shall be shut down during this MSHA inspection to verify that the air flow reversal prevention door closes and the automatic fan signal activates an alarm at the location of the responsible person.

j. Until all mine fans are equipped in compliance with this petition, the miners must be removed from the mine for the testing of any fan not equipped as required by the terms and conditions of this petition.

k. Person(s) performing the fan signal device or air flow reversal prevention door test(s) shall record the result of the test(s) in a secure book prior to the end of the shift when testing takes place. The record book shall be retained at a surface location at the mine for at least 1 year and shall be made available for inspection by an authorized representative of the Secretary and the representative of miners. Such records shall also indicate the general repair of the system.

l. Within 60 days of the petition being granted, the petitioner shall submit proposed revisions for its approved 30

CFR part 48 training plan to MSHA's District Manager. These proposed revisions shall include initial and refresher training regarding compliance with the terms and conditions of the petition. Also, miners who are to perform tests under the petition must be specifically trained on the proper method of testing upon initial assignment to these responsibilities and at least annually thereafter.

The petitioner asserts that the alternate method proposed will at all times guarantee no less than the same measure of protection afforded the miners under the mandatory standard.

Jessica Senk,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2021–23405 Filed 10–26–21; 8:45 am]

BILLING CODE 4520–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petition for Modification of Application of an Existing Mandatory Safety Standard

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: This notice includes the summary of a petition for modification submitted to the Mine Safety and Health Administration (MSHA) by the party listed below.

DATES: All comments on the petition must be received by MSHA's Office of Standards, Regulations, and Variances on or before November 26, 2021.

ADDRESSES: You may submit your comments including the docket number of the petition by any of the following methods:

1. *Email: zzMSHA-comments@dol.gov.* Include the docket number of the petition in the subject line of the message.
2. *Facsimile:* 202–693–9441.
3. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452.

Attention: Jessica D. Senk, Director, Office of Standards, Regulations, and Variances. Persons delivering documents are required to check in at the receptionist's desk in Suite 4E401. Individuals may inspect copies of the petition and comments during normal business hours at the address listed above. Before visiting MSHA in person, call 202–693–9455 to make an appointment, in keeping with the Department of Labor's COVID–19 policy. Special health precautions may be required.

MSHA will consider only comments postmarked by the U.S. Postal Service or proof of delivery from another delivery service such as UPS or Federal Express on or before the deadline for comments.

FOR FURTHER INFORMATION CONTACT: Jessica D. Senk, Office of Standards, Regulations, and Variances at 202–693–9440 (voice), *Senk.Jessica@dol.gov* (email), or 202–693–9441 (facsimile). [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and Title 30 of the Code of Federal Regulations (CFR) part 44 govern the application, processing, and disposition of petitions for modification.

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor (Secretary) determines that:

1. An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or
2. The application of such standard to such mine will result in a diminution of safety to the miners in such mine.
3. In addition, sections 44.10 and 44.11 of 30 CFR establish the requirements for filing petitions for modification.

II. Petition for Modification

Docket Number: M–2021–032–C.

Petitioner: Consol Pennsylvania Coal Company LLC, 192 Crabapple Road, Wind Ridge, PA 15380.

Mine: Bailey Mine, MSHA ID No. 36–07230, located in Greene County, Pennsylvania.

Regulation Affected: 30 CFR 75.312 (c) and (d) (Main mine fan examinations and records).

Modification Request: The petitioner requests modification of the existing standard 30 CFR 75.312 (c) and (d) to permit an alternative method of compliance as it pertains to a mine fan shutdown to test the automatic fan stoppage signal device and to determine that air flow reversal prevention doors will automatically close when the fan shuts down. The petitioner proposes an alternate method of performing the main fan tests without shutting down the fan(s) and without removing the miners from the mine.

The petitioner states that:

1. Bailey Mine is a large mine with a complex ventilation system consisting of both intake and exhaust shafts. The exhaust shafts have main mine fans connected to them. Each fan is equipped with a pressure recording device and an automatic signal system designed to give an alarm should the fan slow or stop. All exhaust fans are equipped with automatic closing doors to prevent the reversal of air into the mine upon a shutdown of the fan.
2. Because of the complexity of the ventilation system, shutting down any fans creates the potential for effects on the system which may require evaluation and delay. Use of the methods described below will minimize the hazards associated with stopping the fans in a complex ventilation system.
3. The mine liberates significant amounts of methane in a 24-hour period. Disruption of the ventilation system by stopping and starting the fans can cause damage underground and/or to ventilation fans. This damage can result in methane accumulations underground. Stopping and starting the fans has the potential to damage the electrical and mechanical systems of the fans.
4. If a fan does not restart within 15 minutes of shutdown, a lengthy restart of the mine operating system is required. This includes a 3- to 4-hour examination, reset of underground mine power, and return of the workers (who must exit the mine when testing begins) to their assigned work areas.
5. It is essential that a mine with multiple ventilation fans be equipped with air flow reversal prevention doors where air reversal is possible. The doors close in the event of a fan stoppage to prevent the air flow in the mine from reversing direction.
6. Petitioner proposes the following alternative method: The petitioner's alternative test method consists of manually moving the test frame assembly toward the horizontal position (operation position) of the door while the fan is in operation. Since the test frame and air flow reversal prevention door both use the same horizontal bearing support shaft for bearing attachment, the test will verify that the solid air flow reversal prevention door will close in the event of a fan stoppage. If the test frame will move to the door and form a tight fit, then the door will close against the fan housing during an actual fan stoppage and form a tight fit when the air flow that keeps the door open stops.

a. The modification will apply to exhausting main mine fans only. Mine fans subject to this modification shall be equipped with a special fan door assembly consisting of an open test frame and a solid air flow reversal prevention door. The test frame shall be attached to a rotatable shaft and latched to the fan housing during normal operation. The air flow reversal prevention door shall be attached by bearing sets to the shaft supporting the test frame and shall be rotatable around the shaft. The air flow reversal prevention door shall be kept open during normal fan operation only by air flowing from the fan. It shall fit tightly against the fan housing when the fan stops, closing the door. The test frame shall be latched against the fan housing when not being used for testing.

b. The air flow reversal prevention door(s) shall be tested at least every 31 days by rotating the test frame outward from its latched position until it contacts the air flow reversal prevention door. Rotation of the test frame shall also rotate the shaft and bearings hinging the air flow reversal prevention door.

c. After the initial test, the door and frame test system will be evaluated by MSHA and upon MSHA approval, testing shall occur at least every 31 days. The person(s) conducting the test must be able to visually observe the movement of the test frame and to visually observe the rotation of the attached shaft. The person(s) conducting the testing shall observe the contact between the test frame and the air flow reversal prevention door to determine that a proper fit exists. Also, the person(s) shall observe the general maintenance of the metal door and test frame for good repair.

d. The method of using fans with multiple louvered air flow reversal prevention doors is as follows:

i. When fans are equipped with multiple louvered air flow reversal prevention door assemblies, each of these doors shall be mounted to a rotatable shaft with a modified end.

ii. Fans with multiple louvered air flow reversal prevention doors will be tested at least every 31 days by using a torque wrench or lever. Each individual door will be rotated to a closed position, using the special wrench, or lever on the end of the shaft, to insure that they are functioning correctly. A record of the torque reading shall be maintained. If any torque reading increases by 15 percent or more, the cause shall be investigated and corrective actions taken. A record of the investigation and any corrective action taken shall be made and the results made available for inspection by MSHA and the miners' representative.

e. Each air flow reversal prevention door shall be tested at least every 7 months by stopping the fan to ensure the door automatically closes when the fan shuts down.

f. Each fan subject to this petition shall be provided with a fan alarm signal system consisting of:

i. A motor run fail safe relay energized through a contact provided on the main starter vacuum contactor;

ii. An automatic fan signal device is provided by a fail-safe relay energized by the chart recorder (water gauge) with the trip ranges set to alarm when 25 percent of normal operating water gauge pressure is lost;

iii. A dial out computer that monitors power to the fan signal. When this control power is lost, the computer will call preprogramed telephone numbers and notify the responsible person of the power loss; and

iv. A mine monitoring system that monitors each fan signal. If the monitoring system loses a signal or has a communication loss, or if any of the previously mentioned alarms are triggered, the monitoring system will sound a visible and audible alarm. The visible and audible alarm will be provided at a location where a responsible person is always on duty and has two-way communications with working sections and where people are normally scheduled to work.

g. The automatic fan signal device will be tested at least every 31 days by manually operating a valve near the fan pressure recording chart reducing the pressure on the water gauge to cause activation of the fan signal. The actuation of the fan alarm will be verified by a responsible person at the location where the responsible person is always on duty when anyone is underground.

h. Each automatic fan signal device and signal alarm shall be tested at least every 7 months by stopping the fan to ensure that the automatic signal device causes the alarm to activate when the fan shuts down.

i. The petitioner shall notify the MSHA District Manager when each fan is equipped with the test frame, air flow reversal prevention door, and fan alarm signal system so that MSHA may make an inspection prior to testing the door and alarm in accordance with the terms and conditions of this petition. If required by the District Manager, the test procedure shall be demonstrated and the fan shall be shut down during this MSHA inspection to verify that the air flow reversal prevention door closes and the automatic fan signal activates an alarm at the location of the responsible person.

j. Until all mine fans are equipped in compliance with this petition, the miners must be removed from the mine for the testing of any fan not equipped as required by the terms and conditions of this petition.

k. Person(s) performing the fan signal device or air flow reversal prevention door test(s) shall record the result of the test(s) in a secure book prior to the end of the shift when testing takes place. The record book shall be retained at a surface location at the mine for at least 1 year and shall be made available for inspection by an authorized representative of the Secretary and the representative of miners. Such records shall also indicate the general repair of the system.

l. Within 60 days of the petition being granted, the petitioner shall submit proposed revisions for its approved 30 CFR part 48 training plan to MSHA's District Manager. These proposed revisions shall include initial and refresher training regarding compliance with the terms and conditions of the petition. Also, miners who are to perform tests under the petition must be specifically trained on the proper method of testing upon initial assignment to these responsibilities and at least annually thereafter.

The petitioner asserts that the alternate method proposed will at all times guarantee no less than the same measure of protection afforded the miners under the mandatory standard.

Jessica Senk,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2021–23404 Filed 10–26–21; 8:45 am]

BILLING CODE 4520–43–P

NATIONAL SCIENCE FOUNDATION

Notice of Permit Applications Received Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of permit applications received.

SUMMARY: The National Science Foundation (NSF) is required to publish a notice of permit applications received to conduct activities regulated under the Antarctic Conservation Act of 1978. NSF has published regulations under the Antarctic Conservation Act in the Code of Federal Regulations. This is the required notice of permit applications received.

DATES: Interested parties are invited to submit written data, comments, or views with respect to this permit application by November 26, 2021. This application may be inspected by interested parties at the Permit Office, address below.

ADDRESSES: Comments should be addressed to Permit Office, Office of Polar Programs, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, Virginia 22314 or *ACApermits@nsf.gov.*

FOR FURTHER INFORMATION CONTACT: Polly Penhale, ACA Permit Officer, at the above address, 703–292–8030.

SUPPLEMENTARY INFORMATION: The National Science Foundation, as directed by the Antarctic Conservation Act of 1978 (Pub. L. 95–541, 45 CFR 670), as amended by the Antarctic Science, Tourism and Conservation Act of 1996, has developed regulations for the establishment of a permit system for various activities in Antarctica and designation of certain animals and certain geographic areas as requiring special protection. The regulations establish such a permit system to designate Antarctic Specially Protected Areas.

Application Details

Permit Application: 2022–014

1. *Applicant:* Nicole Abbot, Vice-President, Wilderness Travel, 1102 Ninth St., Berkley, CA 94710

Activity for Which Permit is Requested: Waste management. The applicant seeks an Antarctic Conservation Act permit for waste management activities associated with the use of unmanned aerial systems (UASs) in Antarctica. The applicant proposes using quadcopter UAS for commercial filmmaking purposes in areas surrounding South Georgia Island and the Antarctic Peninsula. UAS are only to be flown by pilots with extensive experience in the proposed regions. The applicant includes various mitigation measures to limit potential impacts to the environment. These measures include the following: Safety measures that minimize the risk of equipment failure, using observers to maintain visual line of sight with the aircraft and to aid in possible retrieval, not flying above any concentrations of wildlife and disinfecting UAVs after flight to prevent possible contamination between operation sites. The applicant seeks a waste permit to cover any accidental release that may result from UAS use.

Location: Antarctic Peninsula Region.

Dates of Permitted Activities: November 23, 2021–December 12, 2021.

Permit Application: 2022–019

2. *Applicant:* Walter Barinaga, Crystal Destination Experiences, 1501 Biscayne Blvd. #501, Miami FL, 33132

Activity for Which Permit is Requested: Waste management. The applicant seeks an Antarctic Conservation Act permit for waste management activities associated with the use of Unmanned Aerial Systems (UAS) activities in the Antarctic. UAS will be flown by experienced, approved pilots for educational, marketing, and commercial purposes only. Flights will be conducted in fair weather conditions with wind speeds under 25 knots. UAS will not be flown over any concentrations of wildlife or Antarctic Specially Protected Areas or Historical Sites and Monuments. Observers will be present during all flights and will always maintain a visual line of sight with the aircraft. The applicant seeks a waste permit to cover any accidental release that may occur as the result of UAS activities.

Location: Antarctic Peninsula Region.

Dates of Permitted Activities: December 1, 2021–March 31, 2022.

Permit Application: 2022–020

3. *Applicant:* David Rootes, Antarctic Logistics & Expeditions, 4741 S Commerce Dr., Salt Lake City, UT 84107

Activity for Which Permit is Requested: Waste Management. Antarctic Logistics & Expeditions, LLC (ALE) seeks an Antarctic Conservation permit for waste management activities associated with logistics and tourism activities to be conducted in Antarctica. The applicant plans to operate a remote camp at Union Glacier, Antarctica, and provide logistical support services for scientific and other expeditions, film crews, and tourists. These activities include aircraft support, cache positioning, camp and field support, resupply, search and rescue, medevac, medical support, and logistic support for some National Operators. Operations will be centered around a main camp located on Union Glacier that is adjacent to a blue-ice runway. The blue-ice runway is a natural feature that requires limited amount of preparation and upkeep for aircraft use. There are standard programs offered on a regular basis including: Climbing trips to Vinson Massif, the Ellsworth Mountains, and the Transantarctic Mountains; ski trips to the Ellsworth Mountains and the Geographic South Pole; ice marathons and sky diving at Union Glacier; and flights to the Geographic South Pole and the emperor penguin colony at Gould Bay. Several aircraft will be operated by ALE throughout the Antarctic and may consist of the following: Ilyushin IL–76TD90, Boeing 767–300ER, Douglas DC3–TP67, Gulfstream G550, Dassault Falcon 7X, Dassault Falcon 900EX, and De Havilland DHC–6 Twin Otter. ALE plans to allow clients to fly Unmanned Aerial Vehicles (UAV) provided their plan meets certain requirements, including ALE's standard operating procedures, IATTO UAV policy, and civil aviation authority regulations (ICAO, FAA, CAA).

Location: Activities are centered around union glacier and in the general area surrounding the Patriot Hills and Ellsworth Mountains. Amundsen-Scott South Pole Station and Gould Bay. General routes from Hercules Cove to South Pole, Berkner Island to South Pole, and Ross Ice Shelf to South Pole.

Dates of Permitted Activities: November 30, 2021–February 2, 2026.

Erika N. Davis,

Program Specialist, Office of Polar Programs.

[FR Doc. 2021–23364 Filed 10–26–21; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. STN 50–528, STN 50–529, and 72–44; NRC–2021–0126]

In the Matter of Arizona Public Service Company; Salt River Project Agricultural Improvement and Power District; Public Service Company of New Mexico; Palo Verde Nuclear Generating Station, Units 1 and 2; and Independent Spent Fuel Storage Installation

AGENCY: Nuclear Regulatory Commission.

ACTION: Transfers of control of licenses; order.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an Order approving the application dated May 19, 2021, as supplemented by letter dated September 14, 2021, filed by Arizona Public Service Company (APS), on behalf of Salt River Project Agricultural Improvement and Power District (SRP) and Public Service Company of New Mexico (PNM). The application sought NRC consent to the partial transfers of Renewed Facility Operating License Nos. NPF–41 and NPF–51 for Palo Verde Nuclear Generating Station (Palo Verde), Units 1 and 2, respectively, and the general license for the Palo Verde Independent Spent Fuel Storage Installation (ISFSI). Specifically, it

sought NRC consent to the transfers from PNM to SRP of a 7.9333330 percent share of the undivided interests in Palo Verde, Unit 1, and of a 0.7933333 percent share of the undivided interests in Palo Verde Unit 2. No physical changes or operational changes were proposed in the application.

DATES: The Order was issued on October 21, 2021, and is effective for 1 year.

ADDRESSES: Please refer to Docket ID NRC–2021–0126 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2021–0126. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–287–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The license transfer order and the NRC staff safety evaluation supporting the order are available in ADAMS under ADAMS Package Accession No. ML21245A072.
- *Attention:* The PDR, where you may examine and order copies of public documents, is currently closed. You may submit your request to the PDR via email at *pdr.resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8:00 a.m. and 4:00 p.m. (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Siva P. Lingam, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–1564, email: *Siva.Lingam@nrc.gov.*

SUPPLEMENTARY INFORMATION: The text of the Order is attached.

Dated: October 21, 2021.

For the Nuclear Regulatory Commission.

Siva P. Lingam,

Project Manager, Plant Licensing Branch IV, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

Attachment—Order Approving Transfers of Control of Licenses

United States of America

Nuclear Regulatory Commission

In the Matter of: Arizona Public Service Company, Salt River Project Agricultural Improvement and Power District, Public Service Company of New Mexico, Palo Verde Nuclear Generating Station, Units 1 and 2, and Independent Spent Fuel Storage Installation.

Docket Nos. STN 50–528, STN 50–529, and 72–44.

License Nos. NPF–41 and NPF–51.

Order Approving Transfers of Control of Licenses

I

Arizona Public Service Company (APS) is the licensed operator and a licensed co-owner of Renewed Facility Operating License Nos. NPF–41, NPF–51, and NPF–74 for the Palo Verde Nuclear Generating Station (Palo Verde), Units 1, 2, and 3, respectively, and the general license for the Palo Verde Independent Spent Fuel Storage Installation (ISFSI). Palo Verde is located in Maricopa County, Arizona. The other licensed co-owners (tenants-in-common), Salt River Project Agricultural Improvement and Power District (SRP); Southern California Edison Company; El Paso Electric Company; Public Service Company of New Mexico (PNM); Southern California Public Power Authority; and Los Angeles Department of Water and Power, hold possession-only rights for these licenses (*i.e.,* they are not licensed to operate the facility).

II

By application dated May 19, 2021, as supplemented by letter dated September 14, 2021 (Agencywide Documents Access and Management System (ADAMS) Accession Nos. ML21139A330 and ML21257A399, respectively), APS, on behalf of SRP and PNM (together, the Applicants), requested, pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR) Sections 50.80, ''Transfer of licenses,'' and 72.50, ''Transfer of license,'' that the U.S. Nuclear Regulatory Commission (NRC, the Commission) consent to the partial license transfers from PNM to SRP of a 7.9333330 percent share of the undivided interests in Palo Verde, Unit 1, and of a 0.7933333 percent share of the undivided interests in Palo Verde, Unit 2.

According to the application, PNM currently has a 10.2 percent possession-only interest in Palo Verde, Units 1, 2, and 3. While most of this interest is directly owned by PNM, the remainder, specifically the Unit 1 interests and Unit 2 interests, is leased from financial institutions pursuant to sale-leaseback transactions PNM executed in 1985 and 1986 with investment and banking firms. As the lessee, PNM retained all the leasehold and control rights and responsibility associated therewith. The NRC consented to these sale-leaseback transactions (ADAMS Accession No. ML021680489). Under the terms of these past transactions, the Unit 1 interests and the Unit 2 interests are currently held in trust and leased to PNM pursuant to the NRC's prior orders, license amendments, and creditor regulations in accordance with 10 CFR 50.81, ''Creditor regulations.'' The sale-leaseback transactions were structured so that although the investment and banking firms own the Unit 1 interests and the Unit 2 interests, none has direct or indirect controlling interest in Palo Verde. Instead, under the leases, PNM retains leasehold and control rights and responsibility under the NRC licenses for these interests.

According to the application, PNM entered into a total of 11 sale-leaseback transactions refinancing portions of its interests in Palo Verde, Units 1 and 2. Six leases have since expired, leaving five remaining. The application concerns those remaining five leases, which are approaching their expiration dates and cannot be renewed, with four leases expiring in 2023 and one in 2024. The financial institutions have agreed to sell and transfer these interests to SRP starting from 2021 and SRP has agreed to purchase these interests, provided that SRP and PNM have secured the requisite approval from the NRC for SRP ownership of the incremental interests once the leases expire.

After the proposed partial license transfers, SRP would own a total of 25.423333 percent of the shares in Unit 1, and 18.2833333 percent of the shares in Unit 2, and PNM would own a total of 2.266667 percent of the shares in Unit 1, and 9.4066667 percent of the shares in Unit 2. APS owns a 29.1 percent tenant-in-common interest and holds both operating and possession rights in the NRC licenses. Further, APS operates, and would continue to operate, each of the Palo Verde units and the ISFSI pursuant to the operating rights granted to it under the license of each Palo Verde unit. The remaining tenant-in-common co-owners that hold

possession-only rights in the NRC licenses are: Southern California Edison Company (15.8 percent); El Paso Electric Company (15.8 percent); Southern California Public Power Authority (5.91 percent); and Los Angeles Department of Water and Power (5.7 percent). Although the ownership interests in Palo Verde would change, significant actions involving operation of the Palo Verde units require unanimity of all owners of Palo Verde. Currently, no entity owns 50 percent or more of the voting interests. The same would be true following the proposed transfers of the leased interests. Accordingly, after the effective date of the transactions, there would be no change in the control of operation of Palo Verde; APS would continue to make all technical decisions that do not require approval from all owners of Palo Verde.

No physical changes or operational changes are proposed in the application.

A notice of the application and opportunity to comment, request a hearing, and petition for leave to intervene on the application was published in the **Federal Register** (FR) on June 29, 2021 (86 FR 34282). The NRC did not receive any comments or hearing requests on the application.

Under 10 CFR 50.80 and 10 CFR 72.50, no license for a production or utilization facility or ISFSI, or any right thereunder, shall be transferred, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the Commission gives its consent in writing. Upon review of the information in the application, and other information before the Commission, the NRC staff has determined that PNM can transfer a 7.9333330 percent share of the undivided interests in Palo Verde, Unit 1, and a 0.7933333 percent share of the undivided interest in Palo Verde, Unit 2, to SRP. The proposed transferee is qualified to be the holder of the licenses and transfer of the licenses is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

The findings set forth above are supported by an NRC staff safety evaluation dated the same date as this Order, which is available at ADAMS Accession No. ML21245A064.

III

Accordingly, pursuant to Sections 161b, 161i, and 184 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2201(b), 2201(i), and 2234; and 10 CFR 50.80 and 10 CFR 72.50, *it is hereby ordered* that the application regarding the proposed partial license transfers is approved for Palo Verde Units 1 and 2 and the Palo Verde ISFSI.

It is further ordered that after receipt of all required regulatory approvals of the proposed partial license transfers, the Applicants shall inform the Director of the NRC Office of Nuclear Reactor Regulation in writing of such receipt, and of the date of the closing of the transfers, no later than 2 business days prior to the date of the closing of the transfers. Should the transfers not be completed within 1 year of the date of this Order, this Order shall become null and void, provided, however, that upon written application and for good cause shown, such date may be extended by order.

This Order is effective upon issuance.

For further details with respect to this Order, see the application dated May 19, 2021, as supplemented by letter dated September 14, 2021, and the NRC staff's safety evaluation dated the same date as this Order, which are available for public inspection electronically through ADAMS in the NRC Library at *https://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems accessing the documents located in ADAMS should contact the NRC Public Document Room reference staff by telephone at 1–800–397–4209 or 301–415–4737 or by email to *pdr.resource@nrc.gov.*

Dated: October 21, 2021.

For the Nuclear Regulatory Commission.

/RA/

Bo M. Pham,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2021–23346 Filed 10–26–21; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: Representative Payee Application/Information Necessary for a Competency Determination

AGENCY: Office of Personnel Management.

ACTION: Emergency notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction of 1995, Retirement Services, Office of Personnel Management (OPM) is requesting the Office of Management and Budget (OMB) to conduct an emergency review of an existing information collection.

DATES: Comments are encouraged and will be accepted until November 1, 2021. Approval by the Office of Management and Budget (OMB) has been requested by November 1, 2021.

ADDRESSES: You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) and title, by the following method:

—*Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

All submissions received must include the agency name and docket number or RIN for this document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: A copy of this ICR with applicable supporting documentation, may be obtained by contacting the Retirement Services Publications Team, Office of Personnel Management, 1900 E Street NW, Room 3316–L, Washington, DC 20415, Attention: Cyrus S. Benson, or may be obtained by sending an email to *Cyrus.Benson@opm.gov* or by fax to (202) 606–0910 or via telephone at (202) 606–4808.

SUPPLEMENTARY INFORMATION: As required by the Paperwork Reduction Act of 1995, Public Law 104–13, 109 Stat. 163 (44 U.S.C. 35) as amended by the Clinger-Cohen Act of 1996, Public Law 104–106, 110 Stat. 642 (40 U.S.C. 1401 *et seq.*), OPM is soliciting comments for this collection (OMB No. 3206–0034). The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of functions of the agency, including whether the information will have practical utility;
2. 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;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

OPM is publishing a final rule to create 5 CFR part 849—Representative

Payees. Payments to individuals as representative payees has long been authorized by 5 U.S.C. 8345(e) and 8466(c). The Representative Payee Fraud Prevention Act of 2019, Public Law 116–126, 134 Stat. 174 (2020) (the ''Act''), amended the statute to formally define a representative payee as ''a person (including an organization) designated . . . to receive payments on behalf of a minor or an individual mentally incompetent or under other legal disability.'' This Act also made it unlawful for representative payees to embezzle or misuse benefits and established the penalty for the misuse of payments by representative payees.

Congress ordered OPM to promulgate regulations to carry out the provisions of this Act. Promulgating these regulations requires OPM to amend both RI 20–7, Representative Payee Application, and RI 30–3, Information Necessary for a Competency Determination, so that the information required by the regulations is accurately collected. The changes in the forms reflect the regulatory requirements.

Analysis

Agency: Retirement Services, Office of Personnel Management.

Title: Representative Payee Application/Information Necessary for a Competency Determination.

OMB Number: 3206–0140.

Frequency: On occasion.

Affected Public: Individuals or Organizations.

Number of Respondents: 12,480 [RI 20–7] and 250 [RI 30–3].

Estimated Time per Respondent: 30 minutes [RI 20–7] and 1 hour [RI 30–3].

Total Burden Hours: 6,240 [RI 20–7] and 250 [RI 30–3].

Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

[FR Doc. 2021–23353 Filed 10–26–21; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

Privacy Act of 1974; System of Records

AGENCY: Office of Personnel Management.

ACTION: Notice of a new system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the Office of Personnel Management (OPM) proposes to establish a new system of records titled, ''OPM/Internal—25 Reasonable Accommodations Records.'' This system of records will include information that OPM collects and maintains on applicants for employment and employees who request and/or receive reasonable accommodations from OPM for medical or religious reasons.

DATES: Submit comments on or before November 26, 2021. This new system is effective upon publication in the **Federal Register**, except for the routine uses, which are effective December 1, 2021.

ADDRESSES: You may submit written comments through the Federal Rulemaking Portal: *http://www.regulations.gov.* All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make them available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: For general questions, please contact: Carmen Garcia, Deputy Chief Human Capital Officer, OPM Human Resources, Office of Personnel Management, at *OCHCO2@opm.gov.* For privacy questions, please contact: Kellie Cosgrove Riley, Chief Privacy Officer, Office of Personnel Management, at *privacy@opm.gov* or call 202–360–6065. Please put ''Reasonable Accommodations SORN'' in the subject line of your email.

SUPPLEMENTARY INFORMATION:

In accordance with the Privacy Act of 1974, the Office of Personnel Management (OPM) proposes to establish a new system of records titled, ''OPM/Internal—25, Reasonable Accommodations Records.'' This system of records covers OPM's collection and maintenance of records on applicants for employment, employees, and other individuals who participate in OPM programs or activities who request or receive reasonable accommodations or other appropriate modifications from OPM for medical or religious reasons.

Title V of the Rehabilitation Act of 1973, as amended, prohibits discrimination in services and employment on the basis of disability, and Title VII of the Civil Rights Act of 1974 prohibits discrimination, including on the basis of religion. These prohibitions on discrimination require Federal agencies to provide reasonable accommodations to individuals with disabilities and those with sincerely held religious beliefs unless doing so would impose an undue hardship. In some instances, individuals may request modifications to their workspace, schedule, duties, or other requirements for documented medical reasons that may not qualify as a disability but may necessitate an appropriate modification to workplace policies and practices. OPM may address those requests pursuant to the general authority of the Director contained in Title V of the United States Code.

Reasonable accommodations may include, but are not limited to: Making existing facilities readily accessible to individuals with disabilities; restructuring jobs, modifying work schedules or places of work, and providing flexible scheduling for medical appointments or religious observance; acquiring or modifying equipment or examinations or training materials; providing qualified readers and interpreters, personal assistants, service animals; granting permission to wear religious dress, hairstyles, or facial hair or to observe a religious prohibition against wearing certain garments; considering requests for medical and religious exemptions to specific workplace requirements; and making other modifications to workplace policies and practices.

OPM's Office of Human Resources and OPM's Human Resource Solutions program process requests for reasonable accommodations from employees and applicants for employment, respectively, who require an accommodation due to a medical or religious reason; OPM's Human Resources also processes requests based on documented medical reasons that may not qualify as a disability but that necessitate an appropriate modification to workplace policies and practices. Other OPM offices may also receive such requests related to programs or activities for which they are responsible. The request, documentation provided in support of the request, any evaluation conducted internally, or by a third party under contract to OPM, the decision regarding whether to grant or deny a request, and the details and conditions of the reasonable accommodation are all included in this system of records.

OPM has provided a report of this system of records to the Committee on Oversight and Government Reform of the House of Representatives, the Committee on Homeland Security and Governmental Affairs of the Senate, and the Office of Management and Budget (OMB), pursuant to 5 U.S.C. 552a(r) and OMB Circular A–108, ''Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act,'' dated December 23, 2016. This system will be included in the OPM inventory of record systems.

U.S. Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

SYSTEM NAME AND NUMBER:

Office of Personnel Management, OPM/Internal—25 Reasonable Accommodations Records

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records are maintained primarily by the Office of Personnel Management's Human Resources Office, 1900 E Street NW, Washington, DC 20415, and by the Human Resource Solutions Office, Office of Personnel Management, 4685 Log Cabin Dr., Macon, GA. Records may be located in locked cabinets and offices, on OPM's local area network, or in designated U.S. data centers for FedRAMP-authorized cloud service providers.

SYSTEM MANAGER(S):

Chief Human Capital Officer, U.S. Office of Personnel Management, 1900 E Street NW, Washington, DC 20415, *OCHCO2@opm.gov.*

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Rehabilitation Act of 1973, 29 U.S.C. 701, 791, 794; Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e; 29 CFR 1605 (Guidelines on Discrimination Because of Religion); 29 CFR 1614 (Federal Sector Equal Employment Opportunity); 29 CFR 1614 (Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act); 5 U.S.C. 302, 1103; Executive Order 13164, Requiring Federal Agencies to Establish Procedures to Facilitate the Provision of Reasonable Accommodation (July 26, 2000); and Executive Order 13548, Increasing Federal Employment of Individuals with Disabilities (July 26, 2010).

PURPOSE(S) OF THE SYSTEM:

The purpose of this system of records is to allow OPM to collect and maintain records on applicants for employment, employees, and other individuals who participate in OPM programs or activities who request or receive reasonable accommodations or other appropriate modifications from OPM for medical or religious reasons; to process, evaluate, and make decisions on individual requests; and to track and report the processing of such requests OPM-wide to comply with applicable requirements in law and policy.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Applicants for Federal employment, Federal employees, and visitors to Federal buildings who requested and/or received reasonable accommodations or other appropriate modifications from OPM for medical or religious reasons.

CATEGORIES OF RECORDS IN THE SYSTEM:

- Requester's name;
- Requester's status (applicant or current employee);
- Date of request;
- Employee's position title, grade, series, step;
- Position title, grade, series, step of the position the requester is applying for;
- Requester's contact information (addresses, phone numbers, and email addresses);
- Description of the requester's medical condition or disability and any medical documentation provided in support of the request;
- Requester's statement of a sincerely held religious belief and any additional information provided concerning that religious belief and the need for an accommodation to exercise that belief;
- Description of the accommodation being requested;
- Description of previous requests for accommodation;
- Whether the request was made orally or in writing;
- Documentation by an OPM official concerning whether the disability is obvious, and the accommodation is obvious and uncomplicated, whether medical documentation is required to evaluate the request, whether research is necessary regarding possible accommodations, and any extenuating circumstances that prevent the OPM official from meeting the relevant timeframe;
- Whether the request for reasonable accommodation was granted or denied, and if denied the reason for the denial;
- The amount of time taken to process the request;
- The sources of technical assistance consulted in trying to identify a possible reasonable accommodation;
- Any reports or evaluations prepared in determining whether to grant or deny the request; and
- Any other information collected or developed in connection with the request for a reasonable accommodation.

RECORD SOURCE CATEGORIES:

Information is obtained from the individuals who request and/or receive a reasonable accommodation or other appropriate modification from OPM, directly or indirectly from an individual's medical provider or another medical professional who evaluates the request, directly or indirectly from an individual's religious or spiritual advisors or institutions, and from management officials.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside OPM as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

a. To the Department of Justice, including Offices of the U.S. Attorneys; another Federal agency conducting litigation or in proceedings before any court, adjudicative, or administrative body; another party in litigation before a court, adjudicative, or administrative body; or to a court, adjudicative, or administrative body. Such disclosure is permitted only when it is relevant or necessary to the litigation or proceeding, and one of the following is a party to the litigation or has an interest in such litigation:

(1) OPM, or any component thereof;

(2) Any employee or former employee of OPM in his or her official capacity;

(3) Any employee or former employee of OPM in his or her capacity where the Department of Justice or OPM has agreed to represent the employee;

(4) The United States, a Federal agency, or another party in litigation before a court, adjudicative, or administrative body, upon the OPM General Counsel's approval, pursuant to 5 CFR part 295 or otherwise.

b. To the appropriate Federal, State, or local agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, when a record, either on its face or in conjunction with other information, indicates or is relevant to a violation or potential violation of civil or criminal law or regulation.

c. To a member of Congress from the record of an individual in response to an inquiry made at the request of the individual to whom the record pertains.

d. To the National Archives and Records Administration (NARA) for records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

e. To appropriate agencies, entities, and persons when (1) OPM suspects or has confirmed that there has been a breach of the system of records; (2) OPM has determined that as a result of the

suspected or confirmed breach, there is a risk of harm to individuals, OPM (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with OPM's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

f. To another Federal agency or Federal entity, when OPM determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

g. To contractors, grantees, experts, consultants, or volunteers performing or working on a contract, service, grant, cooperative agreement, or other assignment for OPM when OPM determines that it is necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to OPM employees.

h. To another federal agency or commission with responsibility for labor or employment relations or other issues, including equal employment opportunity and reasonable accommodation issues, when that agency or commission has jurisdiction over reasonable accommodation.

i. To an authorized appeal grievance examiner, formal complaints examiner, administrative judge, equal employment opportunity investigator, arbitrator, or other duly authorized official engages in investigation or settlement of a grievance, complaint, or appeal filed by an individual who requested a reasonable accommodation or other appropriate modification.

j. To another Federal agency, including but not limited to the Equal Employment Opportunity Commission and the Office of Special Counsel to obtain advice regarding statutory, regulatory, policy, and other requirements related to reasonable accommodation.

k. To a Federal agency or entity authorized to procure assistive technologies and services in response to a request for reasonable accommodation.

l. To first aid and safety personnel if the individual's medical condition requires emergency treatment.

m. To another Federal agency or oversight body charged with evaluating OPM's compliance with the laws, regulations, and policies governing reasonable accommodation requests.

n. To another Federal agency pursuant to a written agreement with OPM to provide services (such as medical evaluations), when necessary, in support of reasonable accommodation decisions.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

The records in this system of records are stored electronically on OPM's local area network or with FedRAMP-authorized cloud service providers segregated from non-government traffic and data, with access limited to a small number of personnel. In addition, paper records are stored in locked file cabinets in access-restricted offices.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by name or other unique personal identifiers.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records in this system of records are maintained in accordance with GRS 2.3 and are destroyed three years after separation from the agency or all appeals are concluded, whichever is later, but longer retention is authorized if requested for business use.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Records in the system are protected from unauthorized access and misuse through various administrative, technical, and physical security measures. OPM security measures are in compliance with the Federal Information Security Modernization Act (Pub. L. 113–283), associated Office of Management and Budget policies, and applicable standards and guidance from the National Institute of Standards and Technology. Strict controls have been imposed to minimize the risk of compromising the information that is stored. Access to the paper and electronic records in this system of records is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RECORDS ACCESS PROCEDURES:

Individuals seeking notification of and access to their records in this system of records may submit a request in writing to the U.S. Office of Personnel Management, Office of Privacy and Information Management—FOIA, 1900 E Street NW, Room: 5H35, Washington, DC 20415–7900, ATTN: OPM HR; or by emailing *foia@opm.gov.* Individuals must furnish the following information for their records to be located:

1. Full name.
2. Signature.
3. The reason why the individual believes this system contains information about him/her.
4. The address to which the information should be sent.

Individuals requesting access must also comply with OPM's Privacy Act regulations regarding verification of identity and access to records (5 CFR 297).

CONTESTING RECORD PROCEDURES:

Individuals wishing to request amendment of records about them contained in this system of records may do so by writing to the U.S. Office of Personnel Management, Office of Privacy and Information Management—FOIA, 1900 E Street NW, Room: 5H35, Washington, DC 20415–7900, ATTN: OPM HR; or by emailing *foia@opm.gov.* Requests for amendment of records should include the words ''PRIVACY ACT AMENDMENT REQUEST'' in capital letters at the top of the request letter or in the subject line of the email. Individuals must furnish the following information for their records to be located:

1. Full name.
2. Signature.
3. Precise identification of the information to be amended.

Individuals requesting amendment must also comply with OPM's Privacy Act regulations regarding verification of identity and access to records (5 CFR 297).

NOTIFICATION PROCEDURES:

See ''Record Access Procedure.''

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

None.

[FR Doc. 2021–23347 Filed 10–26–21; 8:45 am]

BILLING CODE 6325–45–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2022–13 and CP2022–14]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* October 29, 2021.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2022–13 and CP2022–14; *Filing Title:* USPS Request to Add Priority Mail Express Contract 93 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* October 21, 2021; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* October 29, 2021.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2021–23407 Filed 10–26–21; 8:45 am]

BILLING CODE 7710–FW–P

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2022–12 and CP2022–13]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* October 28, 2021.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2022–12 and CP2022–13; *Filing Title:* USPS Request to Add Priority Mail Contract 726 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing*

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

Acceptance Date: October 20, 2021; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* October 28, 2021.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2021–23340 Filed 10–26–21; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release Nos. 33–11002; 34–93402; File No. 265–32]

SEC Small Business Capital Formation Advisory Committee

AGENCY: Securities and Exchange Commission.

ACTION: Notice of meeting.

SUMMARY: The Securities and Exchange Commission Small Business Capital Formation Advisory Committee, established pursuant to Section 40 of the Securities Exchange Act of 1934 as added by the SEC Small Business Advocate Act of 2016, is providing notice that it will hold a public meeting by videoconference. The public is invited to submit written statements to the Committee.

DATES: The meeting will be held on Tuesday, November 16, 2021, from 10:00 a.m. to 2:30 p.m. (ET) and will be open to the public. Written statements should be received on or before November 16, 2021.

ADDRESSES: The meeting will be conducted by remote means (videoconference). Members of the public may attend the meeting by viewing the webcast on the Commission's website at *www.sec.gov.* Written statements may be submitted by any of the following methods:

Electronic Statements

- Use the Commission's internet submission form (*https://www.sec.gov/rules/submitcomments.htm*); or
- Send an email message to *rule-comments@sec.gov.* Please include File Number 265–32 on the subject line; or

Paper Statements

- Send paper statements to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File No. 265–32. To help us process and review your statement more efficiently, please use only one method. The Commission will post all statements on the SEC's website at *www.sec.gov.*

Statements also 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. (ET). All statements received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Julie Z. Davis, Senior Special Counsel, Office of the Advocate for Small Business Capital Formation, at (202) 551–5407, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–3628.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public. Persons needing special accommodations because of a disability should notify the contact person listed in the section above entitled **FOR FURTHER INFORMATION CONTACT**. The agenda for the meeting includes matters relating to rules and regulations affecting small and emerging companies and their investors under the federal securities laws.

Dated: October 22, 2021.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2021–23391 Filed 10–26–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93394; File No. SR–BOX–2021–24]

Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Introduce a New Data Product To Be Known as Open-Close Data Report and To Adopt Fees for Such Product

October 21, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 13, 2021, BOX Exchange LLC (''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to introduce a new data product to be known as Open-Close Data Report and to adopt fees for such product. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's internet website at *http://boxoptions.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to introduce a new data product on BOX to be known as the Open-Close Data Report, which will be available for purchase to BOX Participants and non-Participants. The Exchange also proposes to adopt fees for Open-Close Data Report. The Exchange will make the Open-Close Data Report available for purchase to Participants and non-Participants on the BOX website (*www.boxoptions.com*).[3] The Exchange notes that a substantially similar product and fees for such product currently exist at Cboe C2 Exchange, Inc. (''C2'').[4]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange notes that the date of the Fee Schedule will be revised to reflect the operative date of this filing.

[4] *See* C2 Options Fees Schedule, Livevol Fees, Open-Close Data. *See also* Securities Exchange Act Release No. 87463 (November 5, 2019), 84 FR 61129 (November 12, 2019) (Notice of Filing and Immediate Effectiveness SR–C2–2019–23). *See also* Securities Exchange Act Release No. 92173 (June 14, 2021) 86 FR 33399 (June 24, 2021) (Notice of Filing and Immediate Effectiveness SR–C2–2021–010). C2 currently offers an Intraday Subscription and Intraday Ad-hoc Request. BOX is not proposing

Continued

The Open-Close Data Report is a volume summary file for trading activity on BOX. The Exchange notes it is proprietary BOX trade data and does not include trade data from any other exchanges. It is also a historical data product and not a real time data feed. Additionally, the Open-Close Data Report will only be distributed at the end of each day. Participants wishing to purchase historical Open-Close Data Reports will be able to request monthly reports beginning in January 2018.[5] The Open-Close Data Report aggregates and buckets the volume by origin (Public Customer, Professional Customer, Broker Dealer, and Market Maker), buying/selling, and opening/closing criteria. Public Customer and Professional Customer volume is further broken down into trade size buckets (less than 100 contracts, 100–199 contracts, greater than 199 contracts).

The Exchange anticipates a wide variety of market participants will wish to purchase Open-Close Data Reports, including, but not limited to, individual customers, buy-side investors, investment banks and academic institutions. For example, the Exchange notes that academic institutions may utilize the proposed Open-Close Data Report and as a result promote research and studies of the options industry to the benefit of all market participants. The Exchange believes the proposed Open-Close Data Report may also provide helpful trading information regarding investor sentiment and may be used to create and test trading models and analytical strategies and provides comprehensive insight into trading on BOX. It is a completely voluntary product, in that the Exchange is not required by any rule or regulation to make this data available and that potential subscribers may purchase it only if they voluntarily choose to do so. As stated above, other options exchanges offer a similar data product.[6]

The Exchange proposes to provide in its Fee Schedule that Participants and non-Participants may purchase Open-Close Data Report on a subscription basis (end of day file) or by ad-hoc request for a specified month (historical file). The Exchange proposes to assess a monthly fee of $500 for subscribing to a daily update which will consist of Open/Close data covering all Exchange-listed securities. Participants and non-Participants purchasing Open/Close data on a subscription basis will receive access to a daily data file.

The Exchange also proposes to assess a fee of $400 per request per month for an ad-hoc request of historical Open/Close data covering all Exchange-listed securities. An ad-hoc request can be for any number of months beginning with January 2018.[7] The proposed subscription and ad-hoc fees will apply both to Participants and non-Participants. The Exchange notes that other exchanges provide similar data products that may be purchased on both a subscription and ad-hoc basis and are similarly priced.[8]

The Exchange also seeks to adopt a free trial period for the End-of-Day Open-Close Data Report for first time subscribers.[9] Particularly, the Exchange proposes to provide a three-month free trial of the End-of-Day Subscription of Open-Close Data Report to any Participant or non-Participant that has not previously subscribed to this offering.[10] The Exchange believes the proposed trial will serve as an incentive for new users to start subscribing to the End-of-Day Subscription for Open-Close Data Reports. More specifically, the Exchange believes it will give potential subscribers the ability to use and test the data offering before signing up for additional months of the End of Day Subscription. The Exchange also notes that other exchanges offer a free trial for first time subscribers of similar data products.[11] The proposed free trial is substantially similar to the free trial currently offered by Nasdaq ISE, which provides a 1-month free trial to both members and non-members who have not previously subscribed to the Nasdaq ISE Open/Close Trade Profile End of Day.[12] Lastly, the purchase of the Open-Close data Report is discretionary and not compulsory.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[13] in general, and Section 6(b)(5) of the Act,[14] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, and that it is not designed to permit unfair discrimination among customers, brokers, or dealers. The Exchange also believes that its proposal to adopt fees for Open-Close Data Report is consistent with Section 6(b) of the Act in general, and furthers the objectives of Section 6(b)(4) of the Act[15] in particular, in that it is an equitable allocation of dues, fees and other charges among its members and other recipients of Exchange data.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (''SROs'') and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was

to adopt these Intraday products at this time. If BOX wishes to offer this product at a later date, the Exchange will file a proposal with the Commission. C2 also offers Qualifying Academic Purchasers the End-of-Day Ad-hoc Request historical data for $500 for the first year. Each additional month purchased thereafter will be prorated based on the $500 per year rate. BOX is not proposing a Qualifying Academic Purchaser rate at this time. If BOX wishes to offer this in the future, the Exchange will file a proposal with the Commission. Lastly, during the months of June and July 2021, C2 offered a free trial for up to three historical months of Intraday Ad-hoc Request Open-Close historical data to TPHs and non-TPHs who have not previously subscribed to Intraday Open-Close Historical Data. The Exchange again notes that it is not proposing any Intraday products at this time. However, the Exchange proposes to provide a three-month free trial of the End-of-Day Subscription of the Open-Close Data Report to any Participant or non-Participant that has not previously subscribed to this offering.

[5] The historical monthly reports will contain all series in an underlying security if the security had volume on BOX during that month. The Open-Close Data Report file format specifications can be found at *www.boxoptions.com.*

[6] *See* Securities Exchange Act Release No. 55062 (January 8, 2007), 72 FR 2048 (January 17, 2007) (approving SR–CBOE–2006–88); *See also* Securities Exchange Act Release No. 56254 (August 15, 2007), 72 FR 47104 (August 22, 2007) (SR–ISE–2007–70); *See also* Securities Exchange Act Release No. 87463 (November 5, 2019), 84 FR 61129 (November 12, 2019) (SR–C2–2019–23).

[7] For example, a Participant or non-Participant that requests historical Open/Close Data for the months of October 2018 and November 2018, would be assessed a total of $800. The Exchange notes that it may make historical data prior to January 2018 available in the future and that such historical data would be available to all Participants or non-Participants.

[8] *See e.g.,* Nasdaq ISE Options 7 Pricing Schedule, Section 10.A. *See also* C2 Options Fees Schedule, Livevol Fees, Open-Close Data.

[9] The Exchange notes that the free trial is not available for End-of-Day Ad-hoc Requests (historical data). If the Exchange wishes to adopt a free month trial for this offering, it will file a proposal with the Commission.

[10] For example, if a Participant or non-Participant that has not previously subscribed to the End-of-Day Subscription, subscribes to this offering on October 22nd, then the accounting would begin on January 22nd. The accounting will be prorated based on the number of trading days in the month versus the number of trading days received. The Participant or non-Participant will be charged for the remainder of January on a prorated basis.

[11] *See* Nasdaq ISE, Options 7 Pricing Schedule, Section 10A., Nasdaq ISE Open/Close Trade Profile End of Day. *See also* Cboe Options Fees Schedule, Livevol Fees, Open-Close Data. *See also* C2 Options Fees Schedule, Livevol Fees, Open-Close Data.

[12] *See* Nasdaq ISE, Options 7 Pricing Schedule, Section 10A., Nasdaq ISE Open/Close Trade Profile End of Day.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(5).

[15] 15 U.S.C. 78f(b)(4).

believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Exchange believes that the proposed Open-Close Data Report would further broaden the availability of U.S. option market data to investors consistent with the principles of Regulation NMS. The proposal also promotes increased transparency through the dissemination of Open-Close Data. The proposed rule change would benefit investors by providing access to the Open-Close Data, which as noted above, may promote better informed trading, as well as research and studies of the options industry. Particularly, information regarding opening and closing activity across different option series may indicate investor sentiment, which can be helpful research and/or trading information. Subscribers to the data may be able to enhance their ability to analyze option trade and volume data, and create and test trading models and analytical strategies. The Exchange believes Open-Close Data Report provides a valuable tool that subscribers can use to gain comprehensive insight into the trading activity in a particular series, but also emphasizes such data is not necessary for trading. Moreover, as discussed herein, other exchanges also offer a similar data product.[16]

The Exchange notes that it operates in a highly competitive environment where there are currently 16 registered options exchanges that trade options. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Particularly, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [17] Making similar data products available to market participants fosters competition in the marketplace, and constrains the ability of exchanges to charge supracompetitive fees. In the event that a market participant views one exchange's data product as more or less attractive than the competition they can and do switch between similar products. The proposed fees are a result of the competitive environment, as the Exchange seeks to adopt fees to attract purchasers of the proposed Open-Close Data Report product.

The Exchange believes the proposed fees are reasonable as the proposed fees are both modest and similar to the fees assessed by other exchanges that provide similar data products.[18] Proposing fees that are excessively higher than established fees for similar data products would simply serve to reduce demand for the Exchange's data product, which as noted, is entirely optional. Like the Exchange's proposed Open-Close Data Report product, other exchanges offer similar data products that each provide insight into trading on those markets and may likewise aid in assessing investor sentiment. Although each of these similar open-close data products provide only proprietary trade data and not trade data from other exchanges, it's possible investors are still able to gauge overall investor sentiment across different option series based on open and closing interest on any one exchange.[19] Similarly, market participants may be able to analyze option trade and volume data, and create and test trading models and analytical strategies using only open-close data relating to trading activity on one or more of the other markets that provide similar data products. As such, if a market participant views another exchange's open-close data as more attractive than the proposed Open-Close Data Report product, then such market participant can merely choose not to purchase the Exchange's Open-Close Data Report and instead purchase another exchange's open-close data product, which offer similar data points, albeit based on that other market's trading activity.

The Exchange also believes the proposed fees are reasonable as they would support the introduction of a new market data product that is designed to aid investors by providing insight into trading on BOX. The proposed Open-Close Data Report would provide options market participants with valuable information about opening and closing transactions executed on the Exchange, similar to other historical trade data products offered by competing options exchanges. In turn, this data would assist market participants in gauging investor sentiment and trading activity, resulting in potentially better-informed trading decisions. As noted above, users may also use such data to create and test trading models and analytical strategies.

Selling historical market data, such as Open-Close Data, is also a means by which exchanges compete to attract business. To the extent that the Exchange is successful in attracting subscribers for the Open-Close Data Report, it may earn trading revenues and further enhance the value of its data products. If the market deems the proposed fees to be unfair or inequitable, firms can diminish or discontinue their use of the data and/or avail themselves of similar products offered by other exchanges.[20] The Exchange therefore believes that the proposed fees for Open-Close Data Report reflect the competitive environment and would be properly assessed on Participant or non-Participant users. The Exchange also believes the proposed fees are equitable and not unfairly discriminatory as the fees would apply equally to all users who choose to purchase such data. The Exchange's proposed fees would not differentiate between subscribers that purchase Open-Close Data Report and are set at a modest level that would allow any interested Participant or non-Participant to purchase such data based on their business needs.

As noted above, the Exchange anticipates a wide variety of market participants to purchase Open-Close Data, including but not limited to individual customers, buy-side investors, investment banks and academic institutions. The Exchange reiterates that the decision as to whether or not to purchase the Open-Close Data Report is entirely optional for all potential subscribers. Indeed, no market participant is required to purchase the Open-Close Data Report, and the Exchange is not required to make the Open-Close Data Report available to all investors. Rather, the Exchange is voluntarily making the historical Open-Close Data Report available, as requested by customers, and market participants may choose to receive (and pay for) this data based on their own business needs. Potential purchasers may request the data at any time if they

[16] *See* Securities Exchange Act Release No. 55062 (January 8, 2007), 72 FR 2048 (January 17, 2007) (approving SR–CBOE–2006–88); *See also* Securities Exchange Act Release No. 56254 (August 15, 2007), 72 FR 47104 (August 22, 2007) (SR–ISE–2007–70); *See also* Securities Exchange Act Release No. 87463 (November 5, 2019), 84 FR 61129 (November 12, 2019) (SR–C2–2019–23).

[17] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[18] *See e.g.,* Nasdaq ISE, Options 7 Pricing Schedule, Section 10A., Nasdaq ISE Open/Close Trade Profile End of Day. *See also* C2 Options Fees Schedule, Livevol Fees, Open-Close Data.

[19] The Exchange notes that its Open-Close Data Report product does not include data on any exclusive, singly-listed option series.

[20] *See* Nasdaq ISE, Options 7 Pricing Schedule, Section 10A., Nasdaq ISE Open/Close Trade Profile End of Day. *See also* Cboe Options Fees Schedule, Livevol Fees, Open-Close Data. *See also* C2 Options Fees Schedule, Livevol Fees, Open-Close Data.

believe it to be valuable or may decline to purchase such data.

The Exchange also believes that the proposed free trial for any Participant or non-Participant who has not previously purchased End-of-Day Open-Close Data Report is reasonable because such users would not be subject to fees for 3 months' worth of End-of-Day Open-Close Data. The Exchange believes the proposed free trial is also reasonable and not unfairly discriminatory as it will give potential subscribers the ability to use and test the End-of-Day Open-Close Data Report prior to purchasing additional months and will therefore encourage and promote new users to purchase the End-of-Day Open-Close Data Report. The Exchange believes it is reasonable to only offer the free trial for End-of-Day subscription requests and not ad-hoc requests because the opportunity to use and test the End-of-Day Open-Close Data Report is not necessary for ad-hoc requests. The purpose of the proposed free trial period is to allow new users to test the product and incentivize Participants and non-Participants to subscribe to additional months. However, when a Participant or non-Participant makes an ad-hoc request for End-of-Day Open-Close data, they are merely making a one-time request for a discrete period of data. The Exchange believes that the proposed discount is equitable and not unfairly discriminatory because it will apply equally to all Participants and non-Participants who have not previously purchased End-of-Day Open-Close data. Similar to the proposed change, another exchange offers a one-month free trial for their End-of-Day Open/Close Trade Profile subscription for members and non-members who have not previously subscribed to the offering, but not for the intraday product or ad-hoc requests.[21] Lastly, the purchase of this data product is discretionary and not compulsory.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In this regard and as indicated above, the Exchange notes that similar products and fees are offered at another exchange.[22] The Exchange believes that the proposal will promote competition by permitting the Exchange to introduce and sell a data product similar to those offered by other competitor options exchanges.[23] The Exchange is proposing to introduce the Open-Close Data Report in order to keep pace with changes in the industry and evolving customer needs and believes this proposed rule change would contribute to robust competition among national securities exchanges. As noted, at least three other U.S. options exchanges offer a market data product that is substantially similar to the Open-Close Data Report product discussed herein. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges.

Furthermore, the Exchange operates in a highly competitive environment, and its ability to price the proposed data product is constrained by competition among exchanges that offer similar data products to their customers. As discussed, there are currently a number of similar products available to market participants and investors. At least three other U.S. options exchanges offer a market data product that is substantially similar to the Open-Close Data Report discussed herein, which the Exchange must consider in its pricing discipline in order to compete for the market data.[24] For example, proposing fees that are excessively higher than established fees for similar data products would simply serve to reduce demand for the Exchange's data product, which as discussed, market participants are under no obligation to utilize. In this competitive environment, potential purchasers are free to choose which, if any, similar product to purchase to satisfy their need for market information. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges.

The Exchange also does not believe the proposed fees would cause any unnecessary or inappropriate burden on intermarket competition as other exchanges are free to introduce their own comparable data product and lower their prices to better compete with the Exchange's offering. The Exchange does not believe the proposed rule change would cause any unnecessary or inappropriate burden on intramarket competition. Particularly, the proposed product and fees apply uniformly to any purchaser, in that it does not differentiate between subscribers that purchase Open-Close Data. The proposed fees are set at a modest level that would allow any interested Participants or non-Participants to purchase such data based on their business needs.

The Exchange also does not believe that the proposed rule change relating to the free trial will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed rule change will apply to all Participants and non-Participants who have never made request to purchase the End-of-Day Open-Close Data Report. Moreover, purchase of Open-Close Data Report is discretionary and not compulsory.

The Exchange also 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 the proposed change applies only to the Exchange. Furthermore, other exchanges currently offer a similar free-trial period for similar data.[25]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has 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 Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act[26] and Rule 19b–4(f)(6)[27] thereunder. Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[28] and Rule 19b–4(f)(6)[29] thereunder.

[21] *See* Nasdaq ISE, Options 7 Pricing Schedule, Section 10A., Nasdaq ISE Open/Close Trade Profile End of Day.

[22] *See supra* note 3 [sic].

[23] *See supra* note 19 [sic].

[24] *See e.g.,* Cboe Options Fees Schedule, Livevol Fees, Open-Close Data. *See also* C2 Options Fees Schedule, Livevol Fees, Open-Close Data. *See also* Nasdaq ISE Options 7 Pricing Schedule, Section 10.A.

[25] *See* Nasdaq ISE, Options 7 Pricing Schedule, Section 10A., Nasdaq ISE Open/Close Trade Profile End of Day. *See also* Cboe Options Fees Schedule, Livevol Fees, Open-Close Data. *See also* C2 Options Fees Schedule, Livevol Fees, Open-Close Data.

[26] 15 U.S.C. 78(b)(3)(A).

[27] 17 CFR 240.19b–4(f)(6).

[28] 15 U.S.C. 78s(b)(3)(A).

[29] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time

A proposed rule change filed under Rule 19b–4(f)(6) [30] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[31] the Commission may designate a shorter time if such action is consistent with protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that it may become operative immediately upon filing to allow the Exchange to compete with exchanges that already have substantially similar products in place and to allow potential subscribers to use and test the data before purchasing the Open-Close Data Report. The Commission believes that, as described above, the Exchange's proposal does not raise any new or novel issues. Therefore, the Commission believes that waving the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission designates the proposed rule change to be operative upon filing.[32]

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–BOX–2021–24 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–BOX–2021–24. 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–BOX–2021–24 and should be submitted on or before November 17, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[33]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–23343 Filed 10–26–21; 8:45 am]

BILLING CODE 8011–01–P

as designated by the Commission. The Exchange has satisfied this requirement.

[30] 17 CFR 240.19b–4(f)(6).

[31] 17 CFR 240.19b–4(f)(6).

[32] For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[33] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93399; File No. SR–NYSE–2021–62]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the NYSE Proprietary Market Data Fee Schedule

October 21, 2021.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on October 14, 2021, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Proprietary Market Data Fee Schedule (''Market Data Fee Schedule'') to delete reference to the NYSE Alerts market data product and associated fees from the Market Data Fee Schedule effective immediately. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Market Data Fee Schedule to delete reference to the NYSE Alerts market data product and associated fees from the Market Data Fee Schedule effective immediately.

In 2004, pursuant to Securities and Exchange Commission approval, the Exchange adopted the NYSE Alerts market data product.[4] In 2019, the Exchange discontinued offering the NYSE Alerts market data product.[5] As a result, reference on the Market Data Fee Schedule to the NYSE Alerts market data product and fees associated with the NYSE Alerts market data product have both become obsolete. Therefore, the Exchange proposes to remove reference to NYSE Alerts and fees associated with NYSE Alerts from the Market Data Fee Schedule. The proposed rule change is intended to streamline the Market Data Fee Schedule by eliminating obsolete rule text.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[7] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would eliminate rule text that is now obsolete, thereby improving the clarity of the Exchange's rules and enabling market participants to more easily navigate the Market Data Fee Schedule. The Exchange also believes that the proposed change would protect investors and the public interest because the deletion of obsolete text would make the Market Data Fee Schedule more accessible and transparent and facilitate market participants' understanding of the fees charged for services currently offered by the Exchange. The Exchange believes the proposed rule change is reasonable because it would streamline the Market Data Fee Schedule by deleting obsolete rule text. The Exchange believes deleting obsolete rule text would promote clarity to the Fee Schedule and reduce confusion to market participants as to which fees are applicable to them.

The Exchange believes deleting obsolete rule text would also simplify the Market Data Fee Schedule. The Exchange believes that deleting obsolete rule text from the Market Data Fee Schedule is equitable and not unfairly discriminatory because the resulting streamlined Market Data Fee Schedule would continue to apply to all market participants as it does currently because the Exchange is not adopting any new fees or removing any current fees from the Market Data Fee Schedule. All market participants would continue to be subject to the same fees that currently apply to them.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[8] the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the proposal relates solely to elimination of obsolete fees and, as such, would not have any impact on intra- or inter-market competition because the proposed change is solely designed to accurately reflect the services that the Exchange currently offers, thereby adding clarity to the Market Data Fee Schedule.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[9] of the Act and subparagraph (f)(2) of Rule 19b–4[10] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[11] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2021–62 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2021–62. 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/*

[4] *See* Securities Exchange Act Release No. 50844 (Dec. 13, 2004), 69 FR 76806 (Dec. 22, 2004) (SR–NYSE–2004–53) (Order Granting Approval to Proposed Rule Change and Amendment Nos. 1 and 2 Relating to a Fee for the NYSE Alerts Datafeed); *see also* Securities Exchange Act Release No. 50639 (November 5, 2004), 69 FR 65488 (November 12, 2004) (Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 by New York Stock Exchange, Inc. Relating to a Fee for the NYSE Alerts Datafeed). In 2016, the Exchange adopted a multiple data feed fee for NYSE Alerts. *See* Securities Exchange Act Release No. 76972 (Jan. 26, 2016), 81 FR 5143 (Feb. 1, 2016) (SR–NYSE–2016–08) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Amending the Fees for NYSE Order Imbalances and NYSE Alerts).

[5] *See* Securities Exchange Act Release No. 86492 (Jul. 26, 2019), 84 FR 37702 (Aug. 1, 2019) (SR–NYSE–2019–42) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Discontinue the NYSE Alerts Market Data Product Offering).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4) and (5).

[8] 15 U.S.C. 78f(b)(8).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(2).

[11] 15 U.S.C. 78s(b)(2)(B).

rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2021–62 and should be submitted on or before November 17, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–23344 Filed 10–26–21; 8:45 am]

BILLING CODE 8011–01–P

[12] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Reporting and Recordkeeping Requirements Under OMB Review

AGENCY: Small Business Administration.

ACTION: 30-Day notice.

SUMMARY: The Small Business Administration (SBA) is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act and OMB procedures, SBA is publishing this notice to allow all interested member of the public an additional 30 days to provide comments on the proposed collection of information.

DATES: Submit comments on or before November 26, 2021.

ADDRESSES: Written comments and recommendations for this information collection request should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection request by selecting ''Small Business Administration''; ''Currently Under Review,'' then select the ''Only Show ICR for Public Comment'' checkbox. This information collection can be identified by title and/or OMB Control Number.

FOR FURTHER INFORMATION CONTACT: Curtis Rich, Agency Clearance Officer, (202) 205–7030 *curtis.rich@sba.gov.*

Copies: You may obtain a copy of the information collection and supporting documents from the Agency Clearance Officer.

SUPPLEMENTARY INFORMATION: Section 324 of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, (Economic Aid Act), Div. N, Title III of Public Law 116–260 (12/27/20), authorizes SBA to provide grants of up to $10 million dollars under the Shuttered Venue Operators Grant (SVOG) program to certain eligible persons or entities: A live venue operator or promoter, theatrical producer, or live performing arts organization operator, museum operator, motion picture theatre operator, or talent representative subject to the statutory eligibility requirements and the availability of funds. This information collection is used by SBA's Office of Disaster Assistance (ODA) to make a preliminary determination on whether an applicant meets certain threshold eligibility requirements to receive a SVOG award.

In order to expedite implementation of the SVOG program, SBA received emergency clearance of this information pursuant to the procedures in 5 CFR 1320.13. That approval, which included waiver of the 60-day and 30-day public comment notices, expires on October 31, 2021. SBA published the 60-day notice August 4, 2021, at 86 FR 42005; no comments were received by October 4, 2021, the comment end date. The public is once again invited to submit comments as instructed in the **DATES** and **ADDRESSES** sections above.

Solicitation of Public Comments

Comments may be submitted on (a) whether the collection of information is necessary for the agency to properly perform its functions; (b) whether the burden estimates are accurate; (c) whether there are ways to minimize the burden, including through the use of automated techniques or other forms of information technology; and (d) whether there are ways to enhance the quality, utility, and clarity of the information.

Title: Shuttered Venues Grant Application.

OMB Control Number: 3245–0420.

Description of Respondents: Eligible persons or entities seeking grant assistance: A live venue operator or promoter, theatrical producer, or live performing arts organization operator, museum operator, motion picture theatre operator, or talent representative.

Estimated Annual Responses: 10,000.

Estimated Annual Hour Burden: 20,000.

Curtis Rich,

Management Analyst.

[FR Doc. 2021–23313 Filed 10–26–21; 8:45 am]

BILLING CODE 8026–03–P

DEPARTMENT OF STATE

[Public Notice: 11568]

Notice of Determinations; Culturally Significant Objects Being Imported for Exhibition—Determinations: "Mixpantli: Space, Time, and the Indigenous Origins of Mexico" Exhibition

SUMMARY: Notice is hereby given of the following determinations: I hereby determine that certain objects being imported from abroad pursuant to agreements with their foreign owners or custodians for temporary display in the exhibition ''Mixpantli: Space, Time, and the Indigenous Origins of Mexico'' at the Los Angeles County Museum of Art, Los Angeles, California, and at possible additional exhibitions or venues yet to be determined, are of cultural significance, and, further, that their temporary exhibition or display within the United States as aforementioned is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Chi D. Tran, Program Administrator, 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, 2200 C Street NW (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), E.O. 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.

Matthew R. Lussenhop,

Acting Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2021–23410 Filed 10–26–21; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2021–0154]

Agency Information Collection Activities; Renewal of a Currently-Approved Information Collection Request: Annual Report of Class I and Class II For-Hire Motor Carriers

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for its review and approval and invites public comment. FMCSA requests approval to renew the previously approved ICR now titled, ''*Annual Report of Class I and Class II For-Hire Motor Carriers,*'' OMB Control No. 2126–0032. This ICR is necessary to comply with FMCSA's financial and operating statistics requirements at chapter III of title 49 CFR part 369 titled, ''*Reports of Motor Carriers.*''

DATES: Please send your comments by December 27, 2021. OMB must receive your comments by this date in order to act quickly on the ICR.

ADDRESSES: You may submit comments identified by Federal Docket Management System (FDMS) Docket Number FMCSA–2021–0154 using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001 between 9 a.m. and 5 p.m. E.T., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the Agency name and docket number. For detailed instructions on submitting comments, see the Public Participation heading below. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov,* and follow the online instructions for accessing the dockets, or go to the street address listed above.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

Public Participation: The Federal eRulemaking Portal is available 24 hours each day, 365 days each year. You can obtain electronic submission and retrieval help and guidelines under the ''help'' section of the Federal eRulemaking Portal website. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard, or print the acknowledgement page that appears after submitting comments online. Comments received after the comment closing date will be included in the docket and will be considered to the extent practicable.

FOR FURTHER INFORMATION CONTACT: Mr. Jeff Secrist, Office of Registration and Safety Information, Department of Transportation, Federal Motor Carrier Safety Administration, West Building 6th Floor, 1200 New Jersey Avenue SE, Washington, DC 20590–0001. Telephone: 202–385–2367; email *jeff.secrist@dot.gov*.

SUPPLEMENTARY INFORMATION:

Background: Section 14123 of title 49 of the United States Code (U.S.C.) requires certain for-hire motor carriers of property, passengers, and household goods to file annual financial reports. The annual reporting program was implemented on December 24, 1938 (3 FR 3158), and it was subsequently transferred from the Interstate Commerce Commission (ICC) to the U.S. Department of Transportation's (DOT) Bureau of Transportation Statistics (BTS) on January 1, 1996. The Secretary of Transportation delegated to BTS the responsibility for the program on December 17, 1996 (61 FR 68162). Responsibility for collection of the reports was transferred from BTS to FMCSA on August 17, 2004 (69 FR 51009), and the regulations were redesignated as 49 CFR part 369 on August 10, 2006 (71 FR 45740). FMCSA collects carriers' annual reports and furnishes copies of the reports when requested under the Freedom of Information Act (FOIA). Annual financial reports are filed on Form M (Class I and II for-hire property carriers, including household goods carriers) and Form MP–1 (Class I for-hire passenger carriers). For-hire motor carriers (including interstate and intrastate) subject to the Federal Motor Carrier Safety Regulations are classified on the basis of their gross carrier operating revenues.[1]

The data and information collected is publicly available through FOIA requests. FMCSA has created electronic forms that may be prepared, signed electronically, and submitted to FMCSA via *https://ask.fmcsa.dot.gov/app/ask/.* FMCSA revised Form M to ensure that it solicits only that information required by statute, and also added an option to allow filers to upload their own document in lieu of filling out either Form M or MP–1 (as applicable), so long as the document includes all of the information listed on the form.

Title: Annual Report of Class I and Class II For-Hire Motor Carriers.

OMB Control Number: 2126–0032.

Type of Request: Renewal of a currently-approved information collection.

Respondents: Class I and Class II For-Hire Motor Carriers of Property and Class I For-Hire Motor Carriers of Passengers.

Estimated Number of Respondents: 102 total (34 per year).

Estimated Time per Response: 9 hours for Form M and 0.3 hours for Form MP–1.

Expiration Date: May 31, 2022.

Frequency of Response: Annually.

Estimated Total Annual Burden: 306 hours [306 hours (Form M) + 0 hours (Form MP–1)].

Estimated annual respondents for Form M decreased from 43 in the

[1] For purposes of the Financial and Operating Statistics (F&OS) program, carriers are classified into the following three groups: (1) Class I carriers are those having annual carrier operating revenues (including interstate and intrastate) of $10 million or more after applying the revenue deflator formula as set forth in Note A of 49 CFR 369.2; and (2) Class II carriers are those having annual carrier operating revenues (including interstate and intrastate) of at least $3 million, but less than $10 million after applying the revenue deflator formula as set forth in 49 CFR 369.2.

previously approved ICR to 34 in the current ICR. Estimated annual burden hours for Form M decreased by 78 hours [306 proposed hours − 384 currently approved hours = −78 hours]. Estimated annual respondents for Form MP–1 stayed the same. The previously approved ICR had 0 annual hours. The current ICR has 0 annual hours. This estimate is based on the number of Form M and Form MP–1 submissions received by the Agency between 2018 and 2020, which results in these estimates of annual respondents/responses for the upcoming information collection period.

Labor costs to industry have decreased by $2,276, annually [$14,494 in proposed costs −$16,770 currently approved costs = −$2,276]. This is due to the decreased estimates of annual respondents/responses. Other annual costs to respondents (*i.e.,* associated with mailing completed forms to FMCSA) have decreased by $9 [($34 in proposed mailing costs for Form M + $0 in proposed mailing costs for Form MP–1) − ($43 in previously approved mailing costs for Form M + $0 in previously approved mailing costs for Form MP–1) = $ − 9]. This change is also due to the decreased estimates of annual respondents/responses.

For the Federal Government, annual costs have increased by $6 [$79 in proposed costs −$73 in previously approved costs = $6]. This increase is due to a revision in the federal government employee load rate, which was revised to be consistent with other FMCSA ICRs.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for FMCSA to perform its functions; (2) the accuracy of the estimated burden; (3) ways for the FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information.

Issued under the authority delegated in 49 CFR 1.87.

Thomas P. Keane,

Associate Administrator, Office of Research and Registration.

[FR Doc. 2021–23378 Filed 10–26–21; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Revision of an Approved Information Collection; Comment Request; Company-Run Annual Stress Test Reporting Template and Documentation for Covered Institutions With Total Consolidated Assets of $250 Billion or More Under the Dodd-Frank Wall Street Reform and Consumer Protection Act

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 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 a revision to a regulatory reporting requirement for national banks and federal savings associations titled, ''Company-Run Annual Stress Test Reporting Template and Documentation for Covered Institutions with Total Consolidated Assets of $250 Billion or More under the Dodd-Frank Wall Street Reform and Consumer Protection Act.''

DATES: Comments must be received by December 27, 2021.

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:* Chief Counsel's Office, Attention: Comment Processing, Office of the Comptroller of the Currency, Attention: 1557–0319, 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 ''1557–0319'' 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 by the method set forth in the next bullet. Following the close of this notice's 60-day comment period, the OCC will publish a second notice with a 30-day comment period.

- *Viewing Comments Electronically:* Go to *www.reginfo.gov.* Hover over the ''Information Collection Review'' tab and click on ''Information Collection Review'' dropdown. 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 ''1557–0319'' or ''Company-Run Annual Stress Test Reporting Template and Documentation for Covered Institutions with Total Consolidated Assets of $250 Billion or More under the Dodd-Frank Wall Street Reform and Consumer Protection Act.'' 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.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, OCC Clearance Officer, (202) 649–5490, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7 St. SW, Washington, DC 20219. In addition, copies of the templates referenced in this notice can be found on the OCC's website under News and Issuances (*http://www.occ.treas.gov/tools-forms/forms/bank-operations/stress-test-reporting.html*).

SUPPLEMENTARY INFORMATION: The OCC is requesting comment on the following revision to an approved information collection:

Title: Company-Run Annual Stress Test Reporting Template and Documentation for Covered Institutions with Total Consolidated Assets of $250 Billion or More under the Dodd-Frank

Wall Street Reform and Consumer Protection Act.

OMB Control No.: 1557–0319.

Description: Section 165(i)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act [1] (Dodd-Frank Act) requires certain financial companies, including national banks and federal savings associations, to conduct annual stress tests [2] and requires the primary financial regulatory agency [3] of those financial companies to issue regulations implementing the stress test requirements.[4] Under section 165(i)(2), a covered institution is required to submit to the Board of Governors of the Federal Reserve System (Board) and to its primary financial regulatory agency a report at such time, in such form, and containing such information as the primary financial regulatory agency may require.[5]

On October 9, 2012, the OCC published in the **Federal Register** a final rule implementing the section 165(i)(2) annual stress test requirement.[6] This rule describes the reports and information collections required to meet the reporting requirements under section 165(i)(2). These information collections will be treated as confidential (to the extent permitted by law.[7]

In 2012, the OCC first implemented the reporting templates referenced in the final rule.[8] The OCC uses the data collected to assess the reasonableness of the stress test results of covered institutions and to provide forward-looking information to the OCC regarding a covered institution's capital adequacy. The OCC also may use the results of the stress tests to determine whether additional analytical techniques and exercises could be appropriate to identify, measure, and monitor risks at the covered institution. The stress test results are expected to support ongoing improvement in a covered institution's stress testing practices with respect to its internal assessments of capital adequacy and overall capital planning.

The OCC recognizes that many covered institutions with total consolidated assets of $250 billion or more are required to submit reports using Comprehensive Capital Analysis and Review (CCAR) reporting form FR Y–14A.[9] The OCC also recognizes the Board has made modifications to the FR Y–14A and, to the extent practical, the OCC will keep its reporting requirements consistent with the Board's FR Y–14A in order to minimize burden on covered institutions.[10]

The OCC's proposed changes include only limited updates to reflect the changes made by the Board, and the proposed OCC reporting forms will substantially resemble the forms used by the OCC last year. Some of the changes made by the Board are inapplicable to OCC-regulated institutions and involve new items that would not be collected by the OCC under the proposed changes. For example, the OCC's, Board's, and Federal Deposit Insurance Corporation's January 6, 2021 final rule revising risk-based capital requirements included new items on the FR Y–14A that are inapplicable at the depository institution level (for example, ''outstanding eligible long-term debt'') and will therefore not be collected under the OCC's proposed revisions. Similarly, in 2021 the OCC's reporting forms did not collect other items collected on the 2021 FR Y–14A (for example, line items related to the stress capital buffer), and the OCC's proposed changes also do not include these items. The OCC's proposed changes include the minimal adjustments necessary to align line items with placement on the 2021 FR Y–14A. If the FRB proposes additional changes to the FR Y–14A reporting forms after the publication of this notice, the OCC expects to make corresponding changes to the OCC reporting forms to minimize inconsistencies and reduce burden.

Type of Review: Revision.

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 8.

Estimated Total Annual Burden: 4,212 hours.

The OCC believes that the systems covered institutions use to prepare the FR Y–14 reporting templates to submit to the Board will also be used to prepare the reporting templates described in this notice. Comments submitted in response to this notice will be summarized and included in the request for OMB approval. All comments will 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 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.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2021–23398 Filed 10–26–21; 8:45 am]

BILLING CODE 4810–33–P

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

[2] 12 U.S.C. 5365(i)(2)(A).

[3] 12 U.S.C. 5301(12).

[4] 12 U.S.C. 5365(i)(2)(C).

[5] 12 U.S.C. 5365(i)(2)(B).

[6] 77 FR 61238 (October 9, 2012) (codified at 12 CFR part 46).

[7] 5 U.S.C. 552(b)(4).

[8] *See,* 77 FR 49485 (August 16, 2012) and 77 FR 66663 (November 6, 2012).

[9] *http://www.federalreserve.gov/reportforms.*

[10] 86 FR 708 (Jan. 6, 2021); 86 FR 7927 (Feb. 3, 2021).

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Action

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing an update to the identifying information of one individual currently included on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List).

DATES: See Supplementary Information section for effective date.

FOR FURTHER INFORMATION CONTACT: OFAC: Andrea Gacki, Director, tel.: 202–622–2480; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*www.treasury.gov/ofac*).

Notice of OFAC Action

On October 21, 2021, OFAC updated the SDN List for the following individual, whose property and interests in property continue to be blocked under the Foreign Narcotics Kingpin Designation Act.

Individual

1. GONZALEZ HIGUERA, Jaime Humberto (a.k.a. ''EL TUNCO''; a.k.a. ''TUNCO''),

Mexico; DOB 25 Mar 1986; POB Sinaloa, Mexico; nationality Mexico; Gender Male; C.U.R.P. GOHJ860325HSLNGM02 (Mexico) (individual) [SDNTK]. Designated pursuant to section 805(b)(2) of the Foreign Narcotics Kingpin Designation Act (Kingpin Act), 21 U.S.C. 1904(b)(2), for materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of, Sergio VALENZUELA VALENZUELA.

The listing for the individual now appears as follows:

1. GONZALEZ HIGUERA, Jaime (a.k.a. ''EL TUNCO''; a.k.a. ''TUNCO''), Mexico; DOB 07 Mar 1972; POB Sinaloa, Mexico; nationality Mexico; Gender Male; C.U.R.P. GOHJ720307HSLNGM00 (Mexico) (individual) [SDNTK]. Designated pursuant to section 805(b)(2) of the Foreign Narcotics Kingpin Designation Act (Kingpin Act), 21 U.S.C. 1904(b)(2), for materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of, Sergio VALENZUELA VALENZUELA.

Dated: October 21, 2021.

Gregory Gatjanis,

Associate Director, Office of Global Targeting, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2021–23393 Filed 10–26–21; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0666]

Agency Information Collection Activity: Information Regarding Apportionment of Beneficiary's Award

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before December 27, 2021.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0666'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 1717 H Street NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0666'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: 38 U.S.C. 5307.

Title: Information Regarding Apportionment of Beneficiary's Award (VA Form 21–0788).

OMB Control Number: 2900–0666.

Type of Review: Revision of a currently approved collection.

Abstract: VA Form 21–0788, associated with the proposed rule RIN #2900–AP67, will be used to determine whether benefits may be apportioned under and, if so, the amount. A veteran's benefits may be paid to his/her spouse and children if the veteran is incarcerated or is deemed incompetent and hospitalized at government expense. This form will be completed to obtain the information needed to determine whether benefits may be apportioned and the amount payable. Without this collection of information, VA would be unable to properly authorize apportionments of compensation and pension benefits.

This form is being revised to remove the information pertaining to income and net worth data and the burden estimate is decreasing from 30 minutes to 15 minutes.

Affected Public: Individuals and households.

Estimated Annual Burden: 204 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: Once.

Estimated Number of Respondents: 815.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2021–23380 Filed 10–26–21; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0695]

Agency Information Collection Activity: Application for Reimbursement of Licensing or Certification Test Fees

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before December 27, 2021.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0695'' in any

correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 1717 H Street NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0695'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: 38 U.S.C. 5101(a), 3689, 3034(a), 3241(a), 3471 and 3513.

Title: Application for Reimbursement of Licensing or Certification Test Fees.

OMB Control Number: 2900–0695.

Type of Review: Revision of a currently approved collection.

Abstract: VA will use the information collection specific to licensing or certification test reimbursement to decide whether the claimant should be reimbursed the amount of the fee charged for taking a licensing or certification test and the amount.

Affected Public: Individuals and Households.

Estimated Annual Burden: 1,050 hours.

Estimated Average Burden Time per Respondent: 15 minutes.

Frequency of Response: Occasionally.

Estimated Number of Respondents: 4,202.

By direction of the Secretary.

Dorothy Glasgow,

VA PRA Clearance Officer (Alt.) Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2021–23338 Filed 10–26–21; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0386]

Agency Information Collection Activity: Interest Rate Reduction Refinancing Loan Worksheet

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Benefits Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Refer to ''OMB Control No. 2900–0386.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 1717 H Street NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0386'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: 44 U.S.C. 3501–21.

Title: Interest Rate Reduction Refinancing Loan Worksheet (VA Form 26–8923).

OMB Control Number: 2900–0386.

Type of Review: Revision of a currently approved collection.

Abstract: VA is revising this information collection to incorporate regulatory collection requirements previously captured under OMB control number 2900–0601. The purpose is to consolidate information collection requirements applicable only for interest rate reduction refinance loans (IRRRLs) under one information collection package.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 86 FRN 46090 on August 17, 2021, pages 46090.

Affected Public: Individuals or Households.

Estimated Annual Burden: 156,735 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: Frequency of response is generally one time per IRRRL.

Estimated Number of Respondents: 662,165.

By direction of the Secretary.

Dorothy Glasgow,

VA PRA Clearance Officer (Alt.), Office of Enterprise and Integration, Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2021–23339 Filed 10–26–21; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

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Part II

Library of Congress

Copyright Royalty Board

37 CFR Part 380

Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies To Facilitate Those Performances (Web V); Final Rule

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 380

[Docket No. 19–CRB–0005–WR (2021–2025)]

Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies To Facilitate Those Performances (Web V)

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 two statutory licenses (permitting certain digital performances of sound recordings and the making of ephemeral recordings) for the period beginning January 1, 2021, and ending on December 31, 2025.

DATES:

Effective date: October 27, 2021.

Applicability date: The regulations apply to the license period beginning January 1, 2021, and ending December 31, 2025.

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 19–CRB–0005–WR (2021–2025).

FOR FURTHER INFORMATION CONTACT: Anita Blaine, CRB Program Assistant, (202) 707–7658, *crb@loc.gov*.

SUPPLEMENTARY INFORMATION:

Final Determination

The Copyright Royalty Judges (Judges) hereby issue their written determination of royalty rates and terms to apply from January 1, 2021, through December 31, 2025, to digital performance of sound recordings over the internet by nonexempt, noninteractive transmission services and to the making of ephemeral recordings to facilitate those performances.

The rate for commercial subscription services in 2021 is $0.0026 per performance. The rate for commercial nonsubscription services in 2021 is $0.0021 per performance. The rates for the period 2022 through 2025 for both subscription and nonsubscription services shall be adjusted to reflect the increases or decreases, if any, in the general price level, as measured by the change in the Consumer Price Index for All Urban Consumers (U.S. City Average, all items) (CPI–U) from that published by the Bureau of Labor Statistics (BLS) in November 2020, as set forth in the regulations adopted by this determination.

The rates for noncommercial webcasters are: $1,000 annually for each station or channel for all webcast transmissions totaling not more than 159,140 Aggregate Tuning Hours (ATH) in a month, for each year in the rate term. In addition, if, in any month, a noncommercial webcaster makes total transmissions in excess of 159,140 ATH on any individual channel or station, the noncommercial webcaster shall pay per-performance royalty fees for the transmissions it makes on that channel or station in excess of 159,140 ATH at the rate of $0.0021 per performance in 2021. The rates for transmissions over 159,140 ATH per month for the period 2022 through 2025 shall be adjusted to reflect the increases or decreases, if any, in the general price level, as measured by the changes in the CPI–U from that published by BLS in November 2020, as set forth in the regulations adopted by this determination.

The Judges also determine herein details relating to the rates for each category of webcasting service, such as minimum fee and administrative terms, in the following analysis. ''Exhibit A'' to this determination contains the regulatory language codifying the terms of the Judges' determination.

I. Background

A. Purpose of the Proceeding

The licenses at issue in the captioned proceeding, *viz.,* licenses for commercial and noncommercial noninteractive webcasting, are compulsory. Title 17, United States Code (Copyright Act or Act), establishes exclusive rights reserved to copyright owners, including the right to ''perform the copyrighted work publicly by means of a digital audio transmission.'' *See* 17 U.S.C. 106(6). The digital performance right is limited, however, by section 114 of the Act, which grants a statutory license for nonexempt noninteractive internet transmissions of protected works. 17 U.S.C. 114(d). Eligible webcasters are entitled to perform sound recordings without an individual license from the copyright owner, provided they pay the statutory royalty rates for the performance of the sound recordings and for the ephemeral copy of the sound recording necessary to transmit it. 17 U.S.C. 114(f), 112(e). Licensee webcasters pay the royalties to a Collective, which distributes the funds to performing artists and copyright owners. The statutory rates and terms apply for a period of five years. The Act requires that the Judges ''establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.'' 17 U.S.C. 114(f)(2)(B). The marketplace the Judges look to is a hypothetical marketplace, free of the influence of compulsory, statutory licenses. *Web II,* 72 FR 24084, 24087 (May 1, 2007). The Judges ''*shall* base their decision on economic, competitive[,] and programming information presented by the parties . . . .'' 17 U.S.C. 114(f)(2)(B), 112(e)(4) (emphasis added). Within these categories, the Judges' determination shall account for (1) whether the internet service substitutes for or promotes the copyright owner's other streams of revenue from the sound recording and (2) the relative roles and contributions of the copyright owner and the service, including creative, technological, and financial contributions, and risk assumption. *Id.* The Judges *may* consider rates and terms of comparable services and comparable circumstances under voluntary, negotiated license agreements. *Id.* The rates and terms established by the Judges ''*shall* distinguish'' among the types of services and ''*shall* include'' a minimum fee for each type of service. *Id.* (emphasis added).

B. Procedural Posture

Following the timeline prescribed by the Act, the Judges published notice of commencement of this proceeding in the **Federal Register**. 84 FR 359 (Jan. 24, 2019). Twenty parties in interest filed petitions to participate in the proceeding. Nine of those petitioners subsequently withdrew from the proceeding, and the Judges dismissed one of the petitioners because the Judges determined that he lacked the requisite substantial interest in the proceeding.[1]

[1] The following parties filed petitions to participate: Accu Radio LLC (withdrew), College Broadcasters Inc. (settled), David Powell (dismissed), Educational Media Foundation (joined case of NRBNMLC), Live365 Broadcaster LLC (withdrew), LA RAZA MEDIA GROUP LLC (withdrew), Pandora Media LLC (Pandora), Radio Coalition LLC (withdrew), Sirius XM Radio, National Religious Broadcasters Noncommercial Music License Committee (NRBNMLC), National Association of Broadcasters (NAB), Feed Media, Inc. (withdrew), Dash Radio, Inc. (withdrew), Tunein Inc. (withdrew), National Public Radio (settled), Radio Paradise Inc. (withdrew), SoundExchange, Inc. (SoundExchange) (filing jointly on behalf of The American Federation of Musicians and the United States and Canada, Screen Actors Guild/American Federation of Television and Radio Artists, The American Association of Independent Music, Sony Music Entertainment, UMG Recordings, Inc., Warner Music Group Corp., and Jagjaguwar Inc.), iHeart Media Inc., ICON Health & Fitness Inc. (withdrew), and Google Inc.

1. Negotiated Settlements

The Judges received two settlements, one between SoundExchange and certain public broadcasters and the other between SoundExchange and certain educational webcasters.

a. Public Broadcasters

One of the settlements, among SoundExchange, National Public Radio (NPR), and the Corporation for Public Broadcasting (CPB), addressed rates and terms for certain internet transmissions by public broadcasters, NPR, American Public Media, Public Radio International, Public Radio Exchange, and certain other unnamed public radio stations for the period from January 1, 2021, through December 31, 2025. The Judges published the terms of the settlement in the **Federal Register** on October 29, 2019. The Judges received no comments on the proposal and approved the settlement on February 28, 2020.[2]

b. Educational Webcasters

The other settlement, between SoundExchange and College Broadcasters, Inc. (CBI), addressed rates and terms for certain internet transmissions of sound recordings by college radio stations and other noncommercial educational webcasters for the period from January 1, 2021, through December 31, 2025. The Judges published the terms of the settlement in the **Federal Register** on October 30, 2019. The Judges received no comments on the proposal and approved the settlement on March 4, 2020.[3]

2. The Current Proceeding To Adjudicate Rates and Terms

The Act provides that the Judges shall make their determinations ''on the basis of a written record, prior determinations and interpretations of the Copyright Royalty Tribunal, Librarian of Congress . . .'' and their own prior determinations to the extent those determinations are ''not inconsistent with a decision of the Register of Copyrights . . . .'' 17 U.S.C. 803(a). Pursuant to 17 U.S.C. 803(b), the Judges conduct a hearing to create that ''written record.'' To that end, non-settling parties appeared before the Judges virtually for an evidentiary hearing. At the hearing, SoundExchange represented the interests of licensors. Several non-settling licensees also participated in the hearing.[4]

The hearing commenced on August 4, 2020, and concluded on September 9, 2020.[5] The parties submitted proposed findings and conclusions (and responses thereto) in writing, prior to their closing arguments on November 19, 2020. During the hearing, the Judges heard oral testimony from 33 witnesses (some of them for both direct case and rebuttal testimony) and considered the testimony of eight witnesses on the papers. The witnesses included 13 qualified experts. The Judges admitted 748 exhibits into evidence, consisting of over 900,000 pages of documents (9227 MB of electronic files in eCRB), and considered numerous illustrative and demonstrative materials that focused on aspects of the admitted evidence and the permitted oral testimony.

Pursuant to section 803(c)(1), the initial Determination in this matter was due no later than December 16, 2020 (*i.e.,* 15 days before the expiration of the current statutory rates and terms). *See* 17 U.S.C. 803(c)(1). On July 6, 2020, the Acting Register of Copyrights, at the request of the Judges, exercised her authority under 17 U.S.C. 710 to ''toll, waive, adjust, or modify'' the timing provision in section 803(c)(1) to account for the disruption and delay caused by the COVID–19 pandemic. The Acting Register extended the Judges' deadline for issuing an initial Determination by up to 120 days, effectively making the deadline April 15, 2021. *See Public Notice Regarding Timing Provisions for Persons Affected by COVID–19,* U.S. Copyright Office, *https://www.copyright.gov/coronavirus/* (last visited Jan. 11, 2021). The Register of Copyrights announced an additional 60-day extension on March 29, 2021, in the Copyright Office's NewsNet, Issue No. 889.

II. Context of the Current Proceeding: Prior Rate Determinations

Congress created the exclusive sound recordings digital performance copyright in 1995. *See* Digital Performance Right in Sound Recordings Act of 1995, Public Law 104–39, 109 Stat. 336 (1995). At the same time, Congress limited that performance right by granting noninteractive subscription services a statutory license to perform sound recordings by digital audio transmission. In 1998, Congress created the ephemeral recording license and further defined and limited the statutory license for digital performance of sound recordings. *See* Digital Millennium Copyright Act, Public Law 105–304, 112 Stat. 2860 (1998) (DMCA).

A. Web I-Web III

The Judges summarized the history of webcasting determinations from *Web I* through *Web III* in detail in their *Web IV* determination. *See Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings,* Final rule and order, 81 FR 26316, 26317–19 (May 2, 2016) (*Web IV*). The Judges hereby incorporate that discussion by reference into this Determination.

B. Web IV Determination and Appeals

The Judges commenced the *Web IV* proceeding in January 2014. SoundExchange and a *pro se* petitioner, George Johnson d/b/a GEO Music, represented the interests of licensors. Seven licensees also participated in the hearing.[6] The Judges approved two negotiated agreements, one for public broadcasters between SoundExchange and NPR and CPB, and the other for educational webcasters between SoundExchange and CBI.

The Judges concluded that ''there is continued support in the marketplace for a different rate structure for commercial and noncommercial webcasters.'' 81 FR 26316, 26320 (May 2016). The Judges therefore adopted separate rate structures for noncommercial and commercial webcasters. With respect to noncommercial webcasters, the Judges adopted a $500 per station or channel fee for all transmissions by noncommercial webcasters up to a threshold of 159,140 aggregate tuning hours (ATH) for 2016 through 2020. For transmissions in excess of 159,140 ATH, the Judges set a rate of $0.0017 per performance for 2016, which would be adjusted annually for changes to the CPI–U for the years 2017–2020. *Id.* at 26396.

The Judges also identified a distinction between two different types of copyright owners. Based on the

[2] 85 FR 11857 (Feb. 28, 2020).

[3] 85 FR 12745 (Mar. 4, 2020).

[4] The non-settling licensees were Google, iHeart Media, NAB, NRBNMLC, Pandora, and Sirius XM.

[5] The hearing was originally scheduled to commence on March 16, 2020, but was delayed due to the coronavirus pandemic. *See Order Granting Joint Motion for Continuance of Hearing* (Mar. 12, 2020) (delaying commencement of hearing until April 28, 2020. In consultation with the participants, the Judges granted several additional continuances, until ultimately scheduling a virtual hearing employing videoconferencing technology to commence on August 4, 2020. *See Order Granting Joint Motion for Second Continuance of Hearing* (Apr. 1, 2020); *Order Granting Joint Motion for Third Continuance of Hearing* (May 1, 2020); *Order on Hearing Schedule and Related Pre-Hearing Matters* (Jun. 10, 2020); *Order Setting Virtual Hearing and Addressing other Hearing-Related Matters* (Jun. 25, 2020); *Order Postponing Virtual Hearing* (Jul. 14, 2020); *Order Rescheduling Virtual Hearing* (Aug. 3, 2020).

[6] The licensees were Harvard Radio Broadcasting, Inc., IBS, iHeartMedia, NAB, NRBNMLC, Pandora, and Sirius XM.

record, the Judges observed that ''in the marketplace, Services have agreed to pay higher rates to'' major record labels (Majors) than to so-called independent labels (Indies). *Id.* at 26319. To gain clarity on whether the Judges could establish different rates based on differences among copyright owners, the Judges referred to the Register of Copyrights (Register) the novel question of whether the Act permits the Judges to differentiate based on types of licensors. The Register concluded that the Judges' question did not meet the statutory criteria for referral and declined to answer it. *Id.* In the absence of an adequate record to support such differentiation, the Judges declined to adopt separate rates for Majors and Indies. *Id.*

The Judges also addressed potential distinctions between groups of licensees. In particular, NAB argued that simulcasting is different from other forms of commercial webcasting and therefore simulcasters (*i.e.,* terrestrial radio stations that simulcast over-the-air broadcasts on the internet) should pay a lower rate than other commercial webcasters. *Id.* at 26320. Based on the record in *Web IV,* however, the Judges concluded that NAB did not satisfy its burden to demonstrate that simulcasting differs in ways that would cause willing buyers and willing sellers to agree to a lower royalty rate in the hypothetical market. Therefore, the Judges did not adopt a different rate structure for simulcasters than that which applied to other commercial webcasters. *Id.*

SoundExchange and Pandora each proposed different greater-of rate structures employing a per-play rate and a percentage-of-revenue rate. All of the Services, other than Pandora, opposed such a two-pronged approach. The Judges concluded that the record did not support a greater-of rate structure in the rate period at issue in *Web IV. Id.* at 26323. Rather, the Judges found that the statutory rate should continue to be set on a per-play basis for commercial webcasters. *Id.* at 26325.

The Judges set two separate rates for commercial noninteractive webcasting. One applied to performances on subscription-based commercial noninteractive services. A separate rate applied to performances on nonsubscription services (*i.e.,* advertising supported services that are free to the listener). *Id.* at 26404. The Judges set each of the rates for 2016 (the first year of the five-year statutory license term) and then applied an inflation-based adjustment to the rates for the remaining years of the license. The Judges looked to separate benchmarks to establish the rates. For commercial noninteractive subscription services, the Judges used a benchmark developed by SoundExchange's expert, Dr. Rubinfeld, to which the Judges applied a 12% ''steering'' reduction to reflect a lack of competition in that particular segment of the market among the providers of the copyright works. The Judges also credited a rate established in an agreement between Pandora and Merlin. Those two rates formed a zone of reasonableness, within which the Judges chose a per-performance rate of $0.0022 for 2016. *Id.* at 26405.

With respect to the rate for commercial nonsubscription services, the Judges identified two usable benchmarks. One was based on a rate in an agreement between iHeart and Warner. The other was based on a rate from an agreement between Pandora and Merlin. *Id.* at 26405. The first represented an agreement between a service and a Major and the second between a service and Indies. The Judges used these rates to form a zone of reasonableness. The Judges selected a rate for 2016 of $0.0017, which took into account a greater number of streams from Major sound recordings as opposed to the percentage of streams from Indie sound recordings. The rates for 2017 through 2020 would be adjusted to account for changes in the CPI. The rate for the Section 112 license would constitute 5% of the royalty services would pay for performances under the Section 114 license. *Id.* at 26406.

SoundExchange and George Johnson appealed the Judges' determination to the U.S. Court of Appeals for the D.C. Circuit. The court affirmed. *SoundExchange, Inc.* v. *Copyright Royalty Bd.,* 904 F.3d 41 (Sep. 18, 2018).

III. The Role of Effective Competition in Setting Webcasting Rates

A. The Concept of ''Effectively Competitive'' Rates

In *Web IV,* the Judges held that the Copyright Act either required them, or permitted them, in their discretion, ''to set a rate that reflects a market that is *effectively competitive.*'' *Web IV,* 81 FR at 2633 (emphasis added). The D.C. Circuit affirmed the Judges' conclusion that they had the discretionary authority ''to determine rates through the lens of an effective-competition standard'' (but held that the Judges were not required to do so). *SoundExchange,* 904 F.3d at 57.

More particularly, the D.C. Circuit found reasonable the Judges' construction of the statutory ''willing seller/willing buyer-marketplace'' standard as calling for the establishment of rates that would have been set in an effectively competitive market. In that regard, the D.C. Circuit pointed to testimony and record evidence—referenced approvingly by the Judges—stating that ''neither sellers nor buyers can be said to be 'willing' partners to an agreement if they are coerced to agree to a price through the exercise of overwhelming market power.'' *SoundExchange,* 904 F.2d at 56 (quoting *Web IV,* 81 FR at 26331).

Additionally, the D.C. Circuit grounded its affirmance on its finding that the statutory willing buyer/willing seller-marketplace standard was inherently ambiguous. Because of this ambiguity, the D.C. Circuit held that the Judges had properly exercised their statutory duty by considering ''the clear statutory purpose, applicable prior decisions, and the relevant legislative history.'' *SoundExchange,* 904 F.3d at 55 (quoting *Web IV* at 26332). In particular, the D.C. Circuit took note of the Judges' reliance on their own webcaster rate determination that had immediately preceded *Web IV*:

> The [Judges] relied on one of [their] prior determinations in reasoning that, ''[b]etween the extremes of a market with 'metaphysically perfect competition' and a monopoly (or collusive oligopoly) market devoid of competition there exists in the real world . . . a mind-boggling array of different markets, all of which possess varying characteristics of a 'competitive marketplace.' '' [*Web IV,* 81 FR at 26333 (quoting *Web III Remand,* 79 FR at 23114 n.37)].

SoundExchange, 904 F.3d at 57.

In fact, the D.C. Circuit not only found that the Judges acted reasonably in this regard, but also that—when exercising their discretion—the Judges ''*must* consider 'competitive information''' contained in the hearing record, in order ''to identify *the relevant characteristics of competitiveness* on which to base [their] determination of the statutory rates.'' *SoundExchange,* 904 F.3d at 56–57 (emphasis added).

Consistent with the D.C. Circuit's decision affirming *Web IV,* the Judges in this *Web V* proceeding again apply the standard that royalty rates for noninteractive services should be set at levels that reflect those that would be set in an effectively competitive market. Further, the Judges note that no party in this proceeding challenges the application of this effective competition standard, although SoundExchange and the Services offer vastly different understandings of how the Judges should apply the standard in this case.

In *Web IV,* the Judges applied the concept of ''effective competition'' as a

counterweight to the ''complementary oligopoly'' power of the Majors. *Web IV,* 81 FR at 26368 (identifying the ''complementary oligopoly that exists among the Majors,'' allowing them to ''utilize their combined market power to prevent price competition among them . . . .''). Simply put, the Judges found that each Major is a ''Must Have'' licensor for noninteractive services (in the hypothetical unregulated market), meaning that each noninteractive service ''must have'' a license for the entire repertoires of Sony, Universal and Warner, in order to remain in business. Also, because the *interactive* market was proffered as a benchmark market in *Web IV* (as in the present proceeding), the Judges performed the same inquiry for that market, concluding that interactive licensees likewise ''must have'' access to the repertoires of each Major in order to survive commercially. *Web IV,* 81 FR at 26340, 26342. From a more technical economic viewpoint, the ''Must Have'' status of the three Majors rendered each a ''complementary oligopolist.''[7] As explained in *Web IV,* this status allows each Major to wield the individual economic power of a monopolist, but the exercise of that power leads to royalty rates that are even greater than those that would be set by a single monopolist. Specifically, the Judges held:

> '[I]f the repertoires of all [Majors] were each required by webcasters (*i.e.,* if the repertoires were necessary complements) . . . each [Major] would have an incentive to charge a monopoly price to maximize its profits . . . constitut[ing] *higher monopoly costs* . . . paid by webcasters to each of the [Majors].' . . . The Judges in this determination adopt this economic reasoning and will not allow such complementary oligopoly power to be incorporated into the statutory rate.

Web IV, 81 FR at 26368 & n.142 (*quoting Web III Remand,* 79 FR at 23114); *see also Web IV,* 81 FR at 26342–43 (summarizing corroborating economic expert testimony as (i) stating that the complementary oligopoly structure is ''*even worse than a market controlled by a single monopoly supplier* . . . [as] first identified by Antoine Cournot in 1838''; and (ii) explaining that Universal had argued to the Department of Justice that its merger with EMI ''would lead to lower prices because it would remove the Cournot Complements pricing effect'' between the merging entities.).

In *Web IV,* the dispute regarding the ''effective competition'' standard focused essentially on the absence of *horizontal price competition between and among the Majors*—and whether such horizontal competition could be generated by noninteractive services in the *hypothetical* (*i.e.,* unregulated) market.[8] Based on the record in that proceeding, the Judges determined that the Services had successfully demonstrated how effectively competitive rates had been set, (*i.e.,* via steering, discussed *infra*) even in the face of a complementary oligopoly.[9]

The foregoing findings regarding the ''Must Have'' status of the Majors in the *interactive* benchmark market are not challenged in this proceeding. However, SoundExchange argues that, unlike in the *Web IV* period, the benchmark interactive market now generates effectively competitive rates, because the present record demonstrates that Spotify has gained licensee-side power sufficient to offset, in whole or in part, the Majors' ''Must Have'' status. SoundExchange's Second Corrected Proposed Findings of Fact and Conclusions of Law ¶ 89 *et seq.* (and record citations therein) (SX PFFCL). The Services dispute the assertion that the record shows Spotify to have acquired such power or that the interactive market has otherwise become effectively competitive. Services' Joint Proposed Findings of Fact and Conclusions of Law ¶ 62 *et seq.* (Services PFFCL). (This issue is discussed in detail *infra,* section III.B.).[10]

Thus, the present record raises a new question: Have there have been changes in bargaining power between the Majors and Spotify in the interactive benchmark market such that the royalty rates in their agreements are consonant with the ''effectively competitive'' standard?

In order to address this new question, the Judges find it first necessary to consider the concept of ''effective competition'' in a context dictated by the present record, one that did not arise in *Web IV.* To put this analysis in proper economic context, it is helpful and, indeed, necessary, to begin by identifying the aspects of the ''effective competition'' standard that were addressed and determined in *Web IV.* In summary, those points are the following:

1. The Majors possess ''complementary oligopoly power'' in the actual (unregulated) interactive market and in the hypothetical (unregulated) noninteractive market that ''thwart[s] price competition and [is] inconsistent with an 'effectively competitive market' . . . .'' *Web IV,* 81 FR at 26335.

2. Because there are a ''mind-boggling'' number of markets with various competitive characteristics, there exists a range of rates that may satisfy the ''effectively competitive'' standard—between the statutorily-created *de facto* zero rate for terrestrial sound recordings and the complementary oligopoly rate generated by the Majors' power as complementary oligopolists—each of which can be seen as a ''bookend'' for the range of potential rates. *Web IV,* 81 FR at 26334.[11]

3. The ''essence of a competitive standard is that it suggests a continuum and differences in degree rather than in kind,'' which dovetails with the Judges' statutory charge to ''weigh competitive information'' in order to ''decide whether the rates proposed adequately provide for an effective level of competition.'' *Web IV,* 81 FR at 26334.[12]

4. When the hearing record provides *actual evidence* allowing the Judges to

[7] ''Complementary oligopolists'' supply products or, as here, offer licenses, for access to products, that are ''perfect complements,'' meaning that the products or licenses they offer are essential, *i.e.,* ''Must Haves,'' for a buyer/licensee in order to operate its business. Such products/licenses are known in economics as ''Cournot Complements.'' *See Web IV,* 81 FR at 26342–43.

[8] The section 114 statutory rate supplants an unregulated market rate, so the Judges must ascertain the rates that would have been set in such a *hypothetical* market. *See Web IV,* 81 FR at 26316, 26333. In *Web IV,* though, in addition to receiving evidence regarding the *hypothetical* market, the Judges were presented with *actual* market evidence of effectively competitive rates from the noninteractive market. *Id.* at 26343 (''[T]he Judges are not left with mere hypotheticals . . . . Rather, the Judges were presented with hard and persuasive evidence that . . . reduced royalty rates in the noninteractive market and would do so in the hypothetical market as well.'').

[9] The more particular issue was whether noninteractive services could foment such horizontal price competition among record companies through the services' expressed intent to ''steer'' their algorithmically or humanly curated plays toward those licensed by Majors who agree to royalty rates lower than those of their competitors. *Web IV,* 81 FR at 26348 (''[T]he ability of noninteractive services to steer away from higher priced recordings and toward lower priced recordings (or threaten to do so) serves as a buffer against the supranormal pricing that arises from the impact of complementary oligopoly pricing . . . .'').

[10] However, the Services dispute the assertion that all three Majors would be ''Must Have'' licensors in the hypothetical *noninteractive* market. Services PFFCL ¶ 195 *et seq.* That issue is discussed *infra,* section IV.C.2.b in the Judges' consideration of Pandora's ''Label Suppression Experiments.''

[11] To borrow from Tolstoy, perfectly competitive and perfectly monopolist markets all gravitate toward well-understood equilibria in the same way, but oligopolistic markets move in different ways.

[12] Economists have acknowledged the pragmatic nature of applying the ''effective competition'' standard. *See, e.g.,* Alfred E. Kahn, *Antitrust Policy,* 67 Harv. L. Rev., 28, 35, (1953) (''[T]here exists no generally accepted economic yardstick appropriate to . . . determine what degree [of monopoly power] is compatible with [effective] competition.''); J. Markham, *An Alternative Approach to the Concept of Workable Competition* 349, 361 (1950) (The concepts of ''market competition are essentially pragmatic'').

determine whether a rate is effectively competitive, that evidence and the adjudicatory process vitiate the theoretical absence of an *a priori* ''bright line'' to distinguish effectively competitive and noncompetitive rates. *Web IV.* 81 FR at 26343.

In *Web IV,* the evidence demonstrated only one potential method for the amelioration of the ability of the Majors, as complementary oligopolists, to set noncompetitive rates. Specifically, Pandora and iHeart introduced evidence of agreements with Merlin and Warner, respectively, that incorporated ''steering'' into those agreements. ''Steering'' in this context means the presence of contract provisions by which a licensee will increase the number of plays of the counterparty record company above its historic market share, in exchange for the record company's agreement to accept a lower royalty rate than other record companies. *Web IV,* 81 FR at 2366 (''The Judges find that steering in the hypothetical noninteractive market would serve to mitigate the effect of complementary oligopoly . . . and therefore move the market toward effective, or workable, competition'' together with ''the ever-present 'threat' that competing [licensors] will undercut each other in order to [license] more . . . .'').

But *Web IV* does not consider in detail whether evidence of any *other economic factors* could also serve to offset or ameliorate the complementary oligopoly power present on the licensor/record company supply-side of the market. And further, the Judges never intimated—let alone determined—that steering was the *sole* method by which the complementary oligopoly power on the licensor side could be ameliorated.[13] Indeed, the *Web IV* Determination clearly explains that the steering adjustment is not a *sui generis* device for adapting a benchmark rate, but rather ''is of a class with any other adjustments necessary to harmonize the benchmark rate with the statutory requisites.'' *Web IV,* 81 FR at 26368.[14]

Web IV also must be understood as limited by the fact that the parties implicitly agreed (given the facts of that case) to apply a particular conception of ''competition''—''price competition.'' In fact, although the parties and the Judges discussed extensively the meaning of ''*effective* competition,'' they intentionally did not provide a rigid definition for the concept of ''competition.'' This absence is unsurprising because the only form of competition at issue in *Web IV* was price competition—a standard neoclassical variant. *Web IV,* 81 FR at 26366 (''The Judges find that steering in the hypothetical noninteractive market would serve to mitigate the effect of complementary oligopoly on the prices paid by the noninteractive services and therefore move the market toward effective, or workable, competition. Steering is synonymous with *price competition* in this market . . . .'') (emphasis added). But the Judges did not have cause to examine in any detail whether, beyond price competition, it was appropriate to consider other dimensions of competition, of which there are several. *See generally* Donald J. Harris, *On the Classical Theory of Competition,* 12 Cambridge J. of Econ., 139, 141, 146 (1988) (contrasting the ''relative tranquility [of] the *neoclassical conception of competition* . . . formalized in a vast array of modern textbooks'' with ''a structure of oligopolistic firms *in which price competition is simply one component* . . . of a broader process of *strategic rivalry* among leading firms [and] other possible behavioural rules on price formation.'') (emphasis added).

So, although the importance of effective price competition cannot be disputed, the Judges must consider whether, if such competition is lacking, other forms of market behavior either substitute for price competition or otherwise generate prices consonant with those that would be established through price competition in an effectively competitive market. In fact, as discussed below, the Judges have engaged in such analyses in prior cases.

The first case in which the Judges considered other economic dimensions beyond price competition was the *SDARS III* proceeding. In that case, the Judges again addressed the complementary oligopoly power of the Majors, albeit in connection with a different and now superseded statutory rate-setting standard. *SDARS III,* 83 FR at 65320 n.82.[15] There, the Judges noted that the licensor-side complementary oligopoly power could be ameliorated by the ''*countervailing power*'' of a licensee (Sirius XM in that case) that possessed a large share of the downstream market at issue (a monopoly share of the satellite radio market in that case). *SDARS III,* 83 FR at 65238.[16]

And, in the next rate-setting case, *Phonorecords III,* the Judges (in the majority *and* in the dissent) found that the licensors—owners of the copyrights for musical works—possessed complementary oligopoly power. The majority Determination found that this noncompetitive effect could be ameliorated—not only by steering or another form of price competition—but by the application of economic game theoretic modeling (specifically, the Shapley Value approach) that economic experts testified would have such an effect. *Phonorecords III,* 84 FR at 1947, 1950 (''The Judges look to the Shapley Analyses . . . as one means of deriving a reasonable royalty rate (or range of reasonable royalty rates) . . . . The Judges . . . find that the Shapley Analysis . . . eliminates the 'holdout' problem that would otherwise cause a rate to be unreasonable, in that it would fail to reflect effective (or workable) competition.'').[17]

The *Phonorecords III Dissent,* although certainly not discounting the value of the Shapley Value approach, asserted instead that the complementary oligopoly power could be better ameliorated by adopting the benchmark proposed by the interactive streaming service-licensees, which was essentially

[13] In fact, *Web IV* makes clear that the Judges found the injection of steering into the market (actual or hypothetical) could be ''*sufficient*'' to ameliorate the anticompetitive impact of complementary oligopoly power—not that an injection of steering was *necessary* to do so. *See Web IV,* 81 FR at 26367–68; *see also id.* at 26369 (Professor Shapiro noting that steering is only ''an example of price competition at work.'').

[14] In *Web IV,* the Judges did touch upon the potential for countervailing licensee power as a potential mitigating or offsetting factor. SoundExchange asserted that Pandora had significant (monopsony) market power in its own right in the noninteractive market that generated rates below effectively competitive rates in its benchmark agreement with Merlin. But the Judges rejected SoundExchange's argument, finding—in reliance on an analysis presented by Pandora's economic expert witness, Professor Shapiro—that ''Pandora's share of the Merlin Labels' [overall] revenues is far short of the level that would be necessary for Pandora to have undue market power in its negotiations with Merlin.'' *Web IV,* 81 FR at 26371. Implicitly, the Judges there indicated that, had Pandora possessed sufficient market power, that fact may have weighed in the Judges' calculus in reducing the effective competition adjustment, thereby increasing the effectively competitive statutory rate.

[15] The superseded statutory standard was set forth in 17 U.S.C. 801(b)(1). Despite the different standard, the Judges applied the same hypothetical market approach in *SDARS III,* before considering whether that hypothetical market rate should be adjusted to account for factors set forth in the now superseded statute. *SDARS III,* 83 FR. at 65237, 65253.

[16] That countervailing power, the Judges noted, existed if the market in which the licensee operated is not subject to meaningful potential substitution from listening via another form of music delivery. *Id.*

[17] Although the D.C. Circuit vacated and remanded the *Phonorecord III Determination,* the general point stands: The Judges consider factors and methods other than price competition (via steering or otherwise) to determine whether a rate is ''effectively competitive'' and, more specifically, whether such other factors or methods counterbalance the rate inflation caused by the complementary oligopoly effect.

the *Phonorecords II* rate structure, *i.e.,* a benchmark based on the rates in effect in the prior rate period that had been adopted in a settlement between industrywide trade associations, the NMPA and DiMA, representing licensors and licensees, respectively. *Phonorecords III,* 84 FR at 1993 (dissent) (''settlement agreements tend to eliminate complementary oligopoly inefficiencies, and provide guidance as to an effectively competitive rate.''). Thus, once again, a Copyright Royalty Judge applied a factor—countervailing power—other than the presence of price competition, to determine an effectively competitive rate.

In this regard, it is important to note that the concepts of ''effective competition'' and ''countervailing power'' are not mutually exclusive, but are better understood as *complementary*. Professor John Kenneth Galbraith, who developed the concept of ''countervailing power,'' defined it as follows:

> [W]ith the widespread disappearance of competition in its classic form . . . it was easy to suppose that since competition had disappeared, all effective restraint on private power had disappeared . . . . [However,] [i]n fact, new restraints on private power did appear to replace competition . . . . [T]hey appeared not on the same side of the market but on the opposite side, not with competitors but with customers or suppliers . . . *countervailing power*.

John Kenneth Galbraith, American Capitalism: The Concept of Countervailing Power 111 (1952).

In *Web IV,* the Judges recognized the economist J.M. Clark as the individual who introduced into microeconomics analysis the concept of effective competition, which he originally described as ''workable competition.'' *Web IV,* 81 FR at 26341 n.96 (citing J. M. Clark, *Toward a Concept of Workable Competition,* 30 Am. Econ. Rev. 241 (1940)). Two decades hence, Professor Clark wrote a book that served, in his words, as an ''elaboration of [the] line of inquiry'' dating from his seminal 1940 article. John Maurice Clark, Competition as a Dynamic Process at *ix* (1961). In that volume, Professor Clark took note of the compatibility between the concept of ''countervailing power'' and his own concept of workable/effective competition. Clark, supra at 5 (noting approvingly Professor Galbraith's view that, if competition is found wanting, ''countervailing power'' serves as a ''rough substitute'' that can ''deprive monopoly of its arbitrary power . . . .'').[18]

Likewise, in *American Capitalism,* Professor Galbraith expressly acknowledges the interplay between Professor Clark's conception of effective/workable competition and the principle of ''countervailing power'':

> There remains the possibility that within the structure of the market shared by a few firms there are practical restraints on economic power—that there is an attenuated but still *workable competition which minimizes the scope for exercise of private market power* . . . . This line of argument has emphasized results . . . . The notion of workable competition takes cognizance of the . . . point that over-all consequences, while in theory are deplorable, are often in real life quite agreeable . . . . [W]hat is unworkable in principle becomes workable in practice . . . because *the active restraint [on the exercise of market power] is provided not by competitors but from the other side of the market by strong buyers*.

Galbraith, *supra* at 57–58, 112 (emphasis added); *see also id.*158 n.912 (noting the ''originality of Professor J.M. Clark'' and crediting his 1940 article for the development of the concept of workable competition).[19]

In sum, the inclusion of the concepts of price competition and countervailing power into microeconomic analysis—as already applied by the Judges in several determinations—makes it clear that the Judges must consider record evidence regarding both of these economic concepts in order to fulfill their statutory mandate to establish rates that would be set between willing sellers and willing buyers in the marketplace. The Judges discuss and apply both of these economic concepts below.

B. Evaluation of Arguments Concerning Effective Competition

1. SoundExchange's Claim That Spotify has Downstream Pricing Power That Mitigates or Offsets the Majors' Complementary Oligopoly Power

SoundExchange asserts several bases for its claim that the complementary oligopoly power of the Majors has been mitigated in part, or offset in full, by the increase in Spotify's market power, which has manifested in the latter's ability to [REDACTED]. More particularly, in the agreements between Spotify and the Majors that immediately preceded their 2017 agreements,[20] the contract rate for [REDACTED]. In all three subsequent 2017 agreements between Spotify and the Majors, [REDACTED]. Trial Ex. 5609 ¶ 24 (WDT of Aaron Harrison) (Harrison WDT); Trial Ex. 5611 ¶ 10 (WDT of Reni Adadevoh) (Adadevoh WDT); Trial Ex. 5613 ¶ 31 (WDT of Mark Piibe) (Piibe WDT) ([REDACTED]).

SoundExchange identifies the following three interrelated sources for Spotify's alleged increase in pricing power in 2017 that generated this [REDACTED]:

1. Spotify now generates [REDACTED]. SX PFFCL ¶ 306 *et seq.*
2. Spotify can now [REDACTED]. SX PFFCL ¶ 311 *et seq.*
3. Spotify now has the ability to steer a significant number of plays on Spotify-curated playlists. SX PFFCL ¶ 346 *et seq.*

The Judges examine each of these assertions seriatim below.

a. Has Spotify's Increased Share of each Major's Revenue provided Spotify with Leverage to Obtain [REDACTED]?

SoundExchange asserts that—between 2014 and 2017—there has been explosive growth in the subscription on-demand format. More specifically, SoundExchange notes that, whereas in 2013, U.S. retail revenue from on-demand services was approximately $0.9 billion, by 2016, this revenue total had increased to approximately $2.8 billion and, by 2017, to approximately

[18] In his 1961 treatise, Professor Clark expressly ''shift[s] . . . from 'workable' to 'effective competition''', because ''[t]he theory of effective competition is dynamic theory,'' going beyond ''the analysis of static equilibrium'' to ''bring[] in *the . . . interplay between aggressive and defensive forms of competition* . . . .'' *Id.* at *ix.* (emphasis added).

[19] Despite Professor Galbraith's well-known progressive leanings, his concept of ''countervailing power'' as a means for more competitively dividing profits between input oligopolists and oligopsonists has been well-received by ardent free market economists as well, including a Nobel Prize winner. *See, e.g.,* George J. Stigler, *The Economist Plays with Blocs,* 44 Am. Econ. Rev., no.2, 7, 9, 13–14 (1954) (papers and proceedings) (agreeing that Galbraith's concept of ''countervailing power'' describes a context in which ''a monopsonist or a set of oligopsonists arises and shares the gains of a previously unhampered monopolist or set of oligopolists,'' because ''[i]t is true that as countervailers they might share monopoly profits . . . .''). However, Professor Stigler disagreed vehemently with the notion that the bilateral oligopolies formed through the exercise of countervailing power ''reduce prices to consumers'' or ''should in general eliminate, and not merely redistribute, monopoly gains.'' *Id.* at 9, 13. But such downstream effects are irrelevant to the Judges' statutory task of setting an effectively competitive royalty rate in the upstream market. Moreover, Professor Stigler cautioned that the presence of ''countervailing power'' in a market will not necessarily ''place groups on a basis of *equality* with respect to one another . . . .'' *Id.* at 14 (emphasis added). Accordingly, even if Spotify has acquired some additional bargaining power, *that does not mean that its bargaining power is equal* to the complementary oligopoly of the Majors. That is, any new bargaining power enjoyed by Spotify could mitigate the Majors' complementary oligopoly power but not necessarily offset it in full.

[20] The 2017 agreements were the most recent agreements available for inclusion in the record in this *Web V* proceeding.

$4.2 billion. This growth has continued, with 2018 retail revenue from on-demand services greater than $5.4 billion, and, by 2019, reaching $6.8 billion. *See* Trial Ex. 5604 app. 2 (WDT of Catherine Tucker) (Tucker WDT); Trial Ex. 4115 at 3.[21]

Accordingly, SoundExchange maintains that the Majors have now become increasingly reliant on income generated by all the interactive services. Because of this changed circumstance, SoundExchange avers that the balance of pricing power as between the Majors and Spotify has changed, with the latter now in a position to bargain more aggressively for favorable rates and terms. *See* Trial Ex. 5602 ¶¶ 119–131 (WDT of Jon Orszag) (Orszag WDT).

The Services assert that this is merely a re-tread of the SoundExchange argument the Judges rejected in *SDARS III.* Although the Services dispute neither the growth in music industry revenue nor the growth of interactive streaming *industry* revenue from 2014 through 2017,[22] they assert that the revenue data does not support Sound Exchange's argument that *a single service's growth—here, Spotify's* revenue growth—supports the assertion that the Majors' complementary oligopoly power has been compromised. More specifically, the Services maintain that the important metric is *the percentage of the music industry's total revenue* generated by Spotify. In this regard, the Services take note that Spotify accounted for [REDACTED] [REDACTED] of the Majors' total U.S. revenue in 2017, and only [REDACTED] in 2018. Trial Ex. 1105 ¶ 64 (AWRT of Steven Peterson) (Peterson WRT); Trial Ex. 4107 at 10 & n.17 (WRT of Carl Shapiro) (Shapiro WRT). Additionally, the Services' economic expert witnesses reject the idea that the Majors' complementary oligopoly power vis-à-vis Spotify has been compromised because of the latter's contribution to the Majors' revenue stream. These witnesses further aver that, because Spotify and its on-demand service competitors offer essentially the same service at the same downstream subscription price, if one Major's repertoire was unavailable on Spotify, subscribers would turn to its competitors, thus abandoning Spotify in the process. 8/25/20 Tr. 3713–14 (Peterson); 8/19/20 Tr. 2859 (Shapiro).

The Judges agree with the Services reasoning and conclusion, finding that the increase in revenues from the *entire interactive services sector* cannot support SoundExchange's argument that *Spotify's* pricing power vis-à-vis the Majors has strengthened.[23] The Judges find that *Spotify's relative pricing power* must be evaluated in the context of *Spotify's particular economic position.* The Judges find nothing in the record to demonstrate that Spotify provides an on-demand service that is so unique to listeners as to imbue it with greater bargaining leverage.[24] More particularly, even acknowledging that, *ceteris paribus,* a Major would prefer to avoid the loss of Spotify's [REDACTED] to overall music revenues, the substitutability of the on-demand subscription services indicates to the Judges that the potential loss of *Spotify's* royalty payments to a Major would be quickly offset in the form of increased royalties from Spotify's *competitors,* as subscribers substituted alternative on-demand subscription services that offered the music licensed by all the record companies. Thus, there is no basis for the Judges to conclude that a Major would be willing to capitulate to Spotify by [REDACTED].

To make this argument from a different perspective, SoundExchange also looks at Spotify's U.S. revenue through the narrower prism of total U.S. subscription interactive revenues—noting that Spotify was responsible in 2016 and 2017 for a more considerable portion—almost [REDACTED]% of such domestic royalties. Orszag WDT ¶ 124, tbl.11. However, the Services aver that this [REDACTED]% figure needs to be placed in an appropriate temporal context. Specifically, they note that Spotify's share of U.S. gross subscription interactive revenues has actually fallen from 2015, when it was [REDACTED]% of the total, to 2018, when it accounted for [REDACTED]% of the total. *See* Orszag WDT ¶ 124, tbl.10.

Because the specific issue under consideration is the alleged *change* in Spotify's pricing power since the execution of the parties' 2013 agreements, the Judges find that the *dynamic* changes in subscription revenue shares during the relevant period is a more meaningful metric than the static [REDACTED]%-[REDACTED]% market share measure. Because Spotify's share of domestic revenues has diminished [REDACTED] since 2015—*according to Mr. Orszag's own written testimony*—there is no basis to support SoundExchange's claim that the Majors had become *more* dependent upon Spotify's revenue stream over this period. Moreover, because the decrease in Spotify's share of domestic on-demand subscription revenue coincided with the rapid growth of Apple Music's entry into the market, these data further confirm the substitutability of interactive services among the listening public, further diminishing the Majors' dependence on any single interactive service.

Placing Spotify's royalty revenues in the context of two Majors' internal contract renewal discussions, SoundExchange relies on the testimony of two witnesses, for Sony and Warner

[21] The Services do not dispute the fact of significant growth in the subscription on-demand market over this period, but they assert that Professor Tucker's data appear to include ad-supported on-demand revenue as well as subscription on-demand revenue. *Compare* SX PFFCL ¶ 306, *with* Tucker WDT app. 2. This specific potential discrepancy does not alter the substance of the parties' dispute nor the Judges' analysis of this issue.

[22] ''The Services agree that streaming accounts for a larger percentage of the overall revenue for recorded music, however the industry's total revenue has increased substantially since 2013.'' Services RPFFCL ¶ 308.

[23] The Services are correct in noting that the Judges rejected the same argument when asserted by SoundExchange in a prior proceeding. *See SDARS III,* 83 FR at 65238, 65245. However, each proceeding considers the facts as presented in the record of that pending proceeding, so the Judges are not constrained here by the factual record as presented in *SDARS III.*

[24] In the language of economics, Spotify and the other on-demand services—such as Apple Music, Google, Amazon, and others with a smaller market footprint—may provide somewhat *differentiated* on-demand experiences *inter se,* but nothing in the record suggests that whatever differences exist make them anything other than mere ''monopolistic competitors,'' rather than buyers/licensees with enhanced pricing power. *See generally* Robert S. Pindyck & Daniel L. Rubinfeld, Microeconomics 451 (8th ed. 2012) (In a ''monopolistically competitive market . . . [f]irms compete by selling differentiated products that are highly substitutable for one another. . . . [T]he cross-price elasticities of demand are large but not infinite . . . [t]here is free entry and exit . . . [and] [i]n long-run equilibrium . . . the firm earns zero profit even though it has monopoly power [over its own brand].''). Further, the essential products offered by interactive services, as SoundExchange's industry witnesses all tout, are their sound recording repertoires, which makes a listener's selection of any particular streaming service of secondary concern compared to the ability to access all the music. *See* Harrison WDT ¶ 5 (identifying, as examples, 23 Universal artists who are ''some of the best known and most popular recording artists in the world''); Piibe WDT ¶¶ 6–7 (listing, as examples, Sony's own 23 artists who are ''superstars'' and ''legendary recording artists''); Adadevoh WDT ¶ 3 (listing, as examples, 10 Warner artists who are among ''today's most popular artists, within a roster of ''some of the most celebrated artists in recorded music history''). These artists and their recordings are not available only on Spotify.

The chronic lack of profits and essentially identical downstream subscription prices persuade the Judges that the Services are correct that the on-demand streaming services lack of market power downstream and an absence of pricing power upstream. Further, the meteoric growth of Apple Music in the streaming market and the recent strong growth of Amazon and Google in the on-demand sector, show that the on-demand streaming market has characteristics of a competitive market. *See* Orszag WDT tbl.4.

respectively.[25] First, according to the Sony witness, the [REDACTED] 9/2/20 Tr. 5228 (Piibe); Trial Ex. 5467 at 1. Moreover, Sony believed that Spotify was [REDACTED]. 9/2/20 Tr. 5368 (Piibe).

Second, Warner also emphasized the impact of [REDACTED]. In its internal documents discussing negotiations with Spotify, Warner executives expressed the importance of [REDACTED], with one executive stating: ''[REDACTED]'' Trial Ex. 4025 at 1. However, the Services point out that, in the very same document, Warner executives were also emphasizing that [REDACTED] and that Warner [REDACTED] Trial Ex. 4025 at 1.[26]

Moreover, although the internal [REDACTED] deliberations summarized in Trial Ex. 4025 reference the [REDACTED], the recitation of that latter point is not economically relevant, let alone dispositive. Internal business documents that reflect information such as historical revenue or other accounting data but ignore crucial economic information regarding, for example, the fluidity of market shares, the elasticity of market demand, and the absence of barriers to entry, are not only lacking in economic relevancy, they obscure the identification of relevant economic evidence. *See* Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement* and *Adjudication,* 47 Ariz. L. Rev. 654 (2005) (noting in the analogous area of antitrust law, ''[r]eliance on accounting data, market characterizations, and statements of intent by economic actors threatens to undermine the economic foundations of antitrust jurisprudence, and thus the purpose of the antitrust laws.''). This caution extends from comments made by negotiators in the trenches up to discussions in corporate boardrooms. *See William Inglis & Sons Baking Co.* v. *ITT Cont'l Baking Co.,* 668 F.2d 1014, 1028 (9th Cir. 1982) (discounting the probative value of ''boardroom ruminations'' in antitrust cases). In fact, Mr. Orszag is in agreement with regard to the primacy of economic testimonial analysis over such other evidence. 8/11/20 Tr. 1338 (Orszag) (''It's well understood in competition economics . . . that . . . *economic analysis should play a dominant role*'' relative to the role of statements of the commercial actors and internal company documents.) (emphasis added).[27]

In sum, the Judges find that Spotify's share of the Majors' downstream revenue does not explain why [REDACTED].

b. Can Spotify [REDACTED]?

SoundExchange asserts that the Majors could not reasonably [REDACTED], because [REDACTED]. SX PFFCL p. 105 *et seq.* First, Sony's testifying witness, Mr. Piibe, explained that the [REDACTED]. 9/2/20 Tr. 5229–30 (Piibe). Further, according to a Warner analysis, [REDACTED]. Trial Ex. 5077. *See also* Harrison WDT ¶ 35 (''It would take time to [REDACTED] . . . .''). From this testimony and evidence, SoundExchange concludes that ''[REDACTED] . . . .'' SX PFFCL ¶ 317 (and record citation therein).

The Services emphasize in response that this argument again ignores the fundamental bargaining point: That because [REDACTED]. Services' Corrected Reply to SoundExchange's Proposed Findings of Fact and Conclusions of Law ¶ 311 (and record citations therein) (Services RPFFCL). To that end, the Services point to the testimony of a [REDACTED] witness, who said that [REDACTED]. 9/9/20 Tr. 5932 ([REDACTED]). *See also* 9/2/20 Tr. 5424–25 ([REDACTED]) (noting that if [REDACTED]).

With regard to the distinction between short-run and long-run effects, Professor Shapiro contextualizes the issue in an economic manner. Shapiro WRT at 7 n.16 (''the economics of bargaining teaches that bargaining power depends on the long-run impact on both parties of failing to reach an agreement, with future impacts suitably discounted as are all cash flows.''). That is, he considers the problem as a weighing of present discounted values to Spotify, on the one hand, and to a Major, on the other, over a one-year period,[28] of a license negotiation impasse that leaves Spotify without the Must Have Major and, reciprocally, leaves the Major without the Spotify platform. The Judges find his analysis highly persuasive, and thus quote it at some length below:

> [C]onsider as an example the negotiations between Spotify and Sony. Sony is ''must-have'' for Spotify (as Mr. Orszag concedes), so if Spotify fails to sign a license with Sony, Spotify's interactive service will decline, fail to be commercially viable, and be forced to close down. Unquestionably, that makes an impasse very costly for Spotify, so Sony has a great deal of bargaining power in its negotiations with Spotify.
>
> Mr. Orszag['s] claim[ ] that Spotify has comparable pricing power comparable to that of a ''must-have'' service for Sony . . . does not withstand scrutiny. If Sony does not sign a license with Spotify, so Spotify is forced to stop offering Sony tracks, Sony will immediately suffer a loss of royalty income from Spotify . . . . According to Table 13 in the Orszag WDT, Sony received [REDACTED]% of its total revenue from Spotify in 2017.
>
> Mr. Orszag provides no explanation of why Sony losing up to [REDACTED]% of its revenue from recorded music is comparable, in terms of impact and thus bargaining power, to Spotify having to shut down its service altogether. Moreover, the [REDACTED]% figure for Spotify's share of Sony's revenue in 2017 is far too high as a measure of the revenue that Sony would have lost, had Sony music no longer been available on Spotify. Crucially, the [REDACTED]% figure represents the *immediate* impact on Sony, before any Spotify subscribers respond to the absence of Sony music.
>
> *Quite soon, Sony's loss of income would be much smaller. As emphasized repeatedly by SoundExchange—indeed as a foundational pillar of its entire case here—a ''must-have'' record company bears a substantial opportunity cost of licensing to a music service because without its music listeners to that service will shift their listening time to other forms of music listening. By definition, that implies that when Sony does not license to Spotify, Sony will gain substantial revenue from other licensees and other forms of listening.* As a matter of arithmetic, that means that Sony would lose less than [REDACTED]% of its revenue.
>
> As an illustrative example, suppose that Spotify would shut down after one year, due to its lack of Sony's ''must-have'' repertoire, and suppose that all of the former Spotify subscribers would replace their Spotify subscriptions with subscriptions to other interactive services that pay royalties comparable to those paid by Spotify. In that case, Sony would be made entirely whole after the first year. In that situation, Spotify would have very little pricing power in its negotiations with Sony, far less than Sony's power as a ''must-have'' record company.

[25] The Judges discuss the separate negotiations between Spotify and the three Majors in detail *infra.*

[26] As the Judges *discuss* in greater detail *infra,* the interest Warner (or either of the other Majors) had in [REDACTED] is the only economically credible rationale for [REDACTED].

[27] In *Web IV,* the Judges found that the existence of negotiations between Must Have record companies and interactive services did not prove that the latter had pricing power, because expert economic testimony explained that even monopolists will negotiate in order to estimate their counterparties' willingness-to-pay. Thus, the Judges held: ''[T]he mere existence of . . . negotiations is *uninformative* as to whether the rates negotiated between the interactive services and the Majors are competitive.'' *Web IV,* 81 FR at 26343. Thus, evidence of negotiations must be examined contextually—on a case-by-case basis—to ascertain whether that evidence in fact reflects an effectively competitive environment.

[28] It was agreed that [REDACTED]. Peterson WRT ¶ 66; 9/3/20 Tr. 5928–30 ([REDACTED]); *see also* 8/11/20 Tr. 1293–94 (Orszag) (''obviously there's a longer-term effect that would occur that would be adverse to Spotify''); Leonard WRT ¶ 77 (''[A] label would have a greater ability to wait out the impasse, given that it would continue to receive royalties from other sources, whereas the service's entire subscription revenues would potentially be at risk . . . .'').

Mr. Orszag and the label witnesses on which he relies emphasize the *short-term* cost to a record company of not licensing to Spotify. However, economic theory tells us that the correct measure of the cost to Sony of not licensing to Spotify in a bargaining context is the *present discounted value* of the revenue that Sony would lose in total. The present discounted value includes short-term *and* long-term effects, weighting them appropriately given the time value of money.

This is a critical point in understanding relative bargaining power in the upstream interactive services market. The underlying idea is relatively simple and hopefully intuitive: When two parties are bargaining, their bargaining power does not just depend upon how costly an impasse would be for each of them over the first day or week, but rather upon how costly an impasse would be over time. Mr. Orszag's analysis is unreliable because he focuses excessively on the short-term cost to a major record company of not licensing to Spotify and fails to account for the long-term effects.

Shapiro WRT at 7–8 (emphasis added; footnotes omitted).

Applying an 8% annual discount factor—that Professor Shapiro found to be a reasonable cost of capital to use for generating present value—as well as other assumptions not challenged as unreasonable by SoundExchange—Professor Shapiro found that not licensing to Spotify would: (i) Cause Sony to lose only [REDACTED]% of the present discounted value of its royalty income; and (ii) by [REDACTED] contrast, cause Spotify to lose approximately 95% of the present discounted value of its revenue and profits. Shapiro WRT at 9. Accordingly, Professor Shapiro concludes that ''[c]learly, in this situation Sony would be in the driver's seat in negotiating with Spotify.'' Shapiro WRT at 9.

The only rejoinder by SoundExchange, through Mr. Orszag, is that the record reflects a [REDACTED] than the weighting reflected in a present value approach that did not incorporate this [REDACTED]. However, the record is barren of any analysis [REDACTED] The Judges find this alternative not credible. Moreover, even if the Majors did [REDACTED], they would surely recognize (and, indeed, do not dispute) that [REDACTED].

Indeed, the Services emphasize that the testimony of Majors' witnesses regarding the impact of [REDACTED] was speculative and lacked support—particularly as it related to [REDACTED]. *See* 9/2/20 Tr. 5388 (Piibe) ([REDACTED]); 9/3/20 Tr. 5731–32 (Harrison) (admitting that [REDACTED]).

Given the dearth of analysis in the record of the relative harms to Spotify and the Majors from a prolonged blackout, and the fact that such a consequence would spell Spotify's commercial demise, the Judges find that SoundExchange's assertion that [REDACTED], beggars belief.

The Services also seek to diminish the evidentiary value of Trial Ex. 5077, on which [REDACTED] relies. That document, the Services note, is a [REDACTED]. Moreover, the Services point out that this document [REDACTED]. Services RPFFCL ¶ 315 (and record citations therein).[29]

In sum, the Judges find that SoundExchange's claim that the effect on a Major of its loss of the Spotify platform (*i.e.,* going dark on Spotify) has altered the power dynamic between Spotify and the Must Have Majors to be incomplete at best, and almost certainly incorrect. In order to demonstrate that the power complementary oligopolists bring to the market and thus to the bargaining table had been neutralized to any degree, [REDACTED] needed to do more than [REDACTED]. Because the context of this analysis is to ascertain relative negotiating power, SoundExchange needed to demonstrate that the economic impact to the Majors of going dark on Spotify would at least approximate the impact of such an event on Spotify. This SoundExchange decidedly did not do. Rather, the evidence is clear—and the economic logic of maximizing the present value of profits and minimizing the present value of losses is compelling—that a Major going dark on Spotify would work expeditiously to contain losses and entice Spotify subscribers to maximize their own self-interest by moving to an interactive service that continued to play that Major's music.

SoundExchange alternatively seeks to show that the Majors' bargaining power has been compromised vis-à-vis Spotify because Spotify [REDACTED]. SX PFFCL ¶¶ 318–327 (and record citations therein). In response, the Services note the absence of testimony from artists themselves regarding whether they might depart from a Major who failed to secure a license deal with Spotify. In fact, the Services point out that testimony upon which SoundExchange does rely—[REDACTED]—indicates [REDACTED] [REDACTED].'' 9/2/20 Tr. 5426–27 (Jennifer Fowler). And, in terms of the legal and practicable ability of [REDACTED]. 9/9/20 Tr. 5952–54 (Sherwood); 9/3/20 Tr. 5738 (Harrison).

The Judges find compelling the absence of the testimony from any artists as to how they would react if the Major with which they had contracted lost the Spotify platform because of an impasse in licensing negotiations. In the absence of such testimony, the Judges put particular weight on the testimony, cited above, from [REDACTED] indicating that [REDACTED].

SoundExchange also suggests that a Major would suffer several miscellaneous injuries if it reached an impasse with Spotify that resulted in that Major going dark on the Spotify platform. First, the Major would [REDACTED]. *See generally* Trial Ex. 5017; SX PFFCL ¶ 328 (and record citations therein). However, the Judges agree with the Services that a Major's ongoing ability to obtain data from other interactive services would reduce the impact of such a data loss, especially as erstwhile Spotify subscribers—unhappy with the loss of a Major's repertoire—migrated to other on-demand services. Moreover, even the prospect of a short-term data loss is quite low, given the futility of a Spotify strategy of actually forcing a Must Have to go dark.

Another damage which SoundExchange posits derives from the testimony of a Universal executive who was concerned that a [REDACTED] could [REDACTED] Harrison WDT ¶ 35; 9/3/20 Tr. 5724 (Harrison). The Judges find this testimony to constitute mere speculation, and meritless speculation at that. The Judges find it bordering on the absurd to contemplate that a licensing impasse between a single service and a single Major [REDACTED]. Other interactive services that are already competing vigorously in the market stand at the ready to acquire Spotify's subscribers and, given the low barriers to entry for streaming services, the concept of contestable competition means that a new competitor could also enter and compete for a share of the market. *See* Shapiro WRT at 9.[30]

[29] The Services also note that the reference to a [REDACTED] reflects a situation that arose in Mexico and that there is no evidence or testimony to support [REDACTED] implication that this foreign event is representative of what would occur in the United States. *See* Trial Ex. 5077; Services RPFFCL ¶ 317.

[30] Further, Spotify's competitors (as well as aggrieved artists and social and mass media) would likely spread the word publicly regarding the music missing from Spotify in the event of a blackout of a Major, hastening the transition of Spotify customers to other interactive services. Ironically, as discussed *infra,* this is the very sort of accelerating demise that, according to SoundExchange (in convincingly criticizing Pandora's Label Suppression Experiments), would befall a noninteractive service that attempted to black-out a Major. If noninteractive ad-supported listeners—*who pay nothing out-of-pocket to listen to music curated by the service*—would switch away from the service if they became aware of the blackout of a Major, then, *a fortioiri,* Spotify's interactive subscribers—*who do pay out-of-pocket to listen to music they demand*—would certainly switch away from Spotify if it likewise blacked-out a Major's entire repertoire.

Continuing with its speculation regarding miscellaneous harm, SoundExchange argues that, upon a licensing impasse with a Major, Spotify's subscribers would not abandon it because (i) subscribers pay monthly or yearly for their subscriptions, (ii) Spotify delivers well-customized recommendations, (iii) subscribers have invested time in building their music collection, (iv) subscribers who purchased Spotify as a part of a bundle may be less likely to cancel their subscription, and (v) subscribers might anticipate a quick resolution to the licensing dispute. SX PFFCL ¶¶ 339–343 (and record citations therein). The Judges agree though with the Services that these assertions are little more than rank speculations. As the Services point out, because on-demand plays account for [REDACTED]% of Spotify listening hours, the idea that subscribers would tolerate the loss of any Majors' repertoire because of behavioral impediments is not only unexplored, it assumes a remarkable irrationality among subscribers with regard to their own tastes and preferences. Further, SoundExchange's assertion of this speculative *status quo outcome* is *180 degrees* from its immediately preceding speculative assertion that *the entire subscription concept and market would collapse* if a single Major went dark on Spotify. While there may be a *rational* argument why either outcome could occur, neither extreme is reasonable or based on record evidence. Moreover, it is not rational to posit that such a licensing disagreement would cause the industry both to remain in stasis and to disappear. Indeed, by making both arguments simultaneously without evidentiary support, SoundExchange seems willing to engage in the evidentiary equivalent of throwing spaghetti against the wall to see if any of it sticks.[31]

In sum, the Judges find insufficient evidence to support SoundExchange's argument that a Major going dark on Spotify would lead to a ''parade of horribles'' befalling that Major so substantial as to imbue in Spotify a market power sufficient to [REDACTED].

c. Does Spotify's technological ability to steer plays on spotify-curated playlists provide it with pricing power sufficient to mitigate or offset the Majors' complementary oligopoly power?

The bulk of Spotify's argument in support of its claim that Spotify has a pricing power commensurate with the overall bargaining power of the Majors is based on Spotify's *technological* ability to steer plays of sound recordings toward or against a record company. This emphasis on steering is unsurprising, because in *Web IV* the Judges relied on evidence of the *noninteractive* services' ability to steer, and their credible threats to do so, as ameliorating the anticompetitive effect of the Majors' complementary oligopoly.

More particularly, SoundExchange asserts that Spotify developed a substantial ability to influence listening on its platform subsequent to the execution of its 2013 Agreements with the Majors. *See, e.g.,* Orszag WDT ¶¶ 138–151; 9/2/20 Tr. 5414 (Fowler); 9/2/20 Tr. 5197–98 (Piibe). Spotify's purported power to influence market share, according to SoundExchange, flowed mainly from its alleged ability to influence market share through economically strategic placement of sound recordings within Spotify-controlled playlists. Orszag WDT ¶¶ 141–146.[32] By way of background, in July 2015, Spotify launched playlists personalized for its subscribers, including Discovery Weekly, to assist subscribers in identifying new music tailored to their listening preferences. Orszag WDT ¶ 62. Contemporaneously, Spotify began to prioritize those playlists and additional Spotify-curated playlists, for various genres, by giving them prominent and superior locations in its search and display features. Trial Ex. 5619 ¶¶ 15, 17 (CWDT of Jennifer Fowler). *See also* SX PFFCL ¶¶ 359–360 (and record citations therein). From 2015 to 2017, these Spotify-curated playlists increased as a share of listening on Spotify from less than 20% to approximately 31% of Spotify platform listening. Orszag WDT ¶ 142.

According to SoundExchange, the economic value of these Spotify-curated playlists extends beyond a subscriber's initial accessing of songs on the playlist. Listeners also can add songs from those playlists onto their own playlists and into their own music collections, and, having positively experienced music curated by Spotify, they are more likely to search for music from the same artists, and thus from the same record company. SX PFFCL ¶¶ 363–364, 366 (and record citations therein).

Consequently, SoundExchange avers that record companies consider playlists to be [REDACTED], and thus they devote considerable effort and resources to the development and implementation of playlist strategies. SX PFFCL¶¶ 365, 367 (and record citations therein). Further, the [REDACTED]. *See* Trial Exs. 5070–5072; Harrison WDT ¶¶ 49, 52. SoundExchange further relies on the testimony of Michael Sherwood, a Warner Senior Vice President responsible for overseeing its Spotify and other streaming service accounts, Trial Ex. 5620 ¶¶ 1–2 (WDT of Mike Sherwood), who testifies that [REDACTED]. 9/9/20 Tr. 5921–22 (Sherwood).

Moreover, SoundExchange emphasizes that Pandora's own economic expert witness, Professor Shapiro, acknowledges that, by the time Spotify and the Majors were negotiating their 2017 Agreements, Spotify already possessed the ability to influence listening and record company market share through its selection and placement of songs on Spotify-curated playlists. 8/19/20 Tr. 2868 (Shapiro) (''Spotify has some ability to influence listening through a service-generated playlist. [Mr. Orszag] emphasizes that. I agree that they definitely have that ability.'').

SoundExchange relies yet again on Professor Shapiro's testimony to argue that, when a streaming service such as Spotify has the technical ability to steer, its credible threat to steer against a Major during contract negotiations can constitute sufficient leverage by which Spotify can negotiate better terms for itself. *See* 8/20/20 Tr. 3067–68 (Shapiro). SoundExchange's expert is in full agreement, testifying that in negotiations related to steering, as in negotiations generally, ''it is often the threat that can influence outcomes . . . *as long as the threat is credible.*'' 8/11/20 Tr. 1255 (Orszag) (emphasis added); *see also id.* at 1211–13, 1347–48.

Continuing its attempt to build its steering argument on the back of Professor Shapiro's own testimony, SoundExchange points out that he admitted that a steering threat could be implicit as well as explicit. 8/20/20 Tr. 3066–67 (Shapiro). Moreover, the evidence of [REDACTED], might be seen, Professor Shapiro recognizes, [REDACTED]. 8/20/20 Tr. 3052 (Shapiro). For these reasons,

[31] SoundExchange also posits that whatever injury would befall the domestic industry would also injure the global music market. SX PFFCL¶¶ 337–338. However, this assertion is likewise devoid of evidentiary support, as there is no adequate record support that foreign agreements are affected by the existence, *vel non,* of licensing agreements in U.S. interactive markets. *See* Services RPFFCL ¶ 338. As a general rule, the Judges have eschewed reliance on developments in foreign markets when the proofs are insufficient to demonstrate a posited connection between foreign and U.S. market that is relevant to these proceedings. *SDARS II,* 78 FR at 23058 (and precedent cited therein).

[32] SoundExchange further notes that [REDACTED] has [REDACTED]. SX PFFCL ¶¶ 370–71 (and record citations therein); Orszag WDT ¶ 148. Less significantly, SoundExchange avers that Spotify can also leverage its [REDACTED]. Orszag WDT ¶ 147.

SoundExchange emphasizes, in *Web IV* Professor Shapiro testified that ''if the services have substantial ability to steer'' then the market can be ''workably competitive'' notwithstanding that each Major remains a Must Have. *See* 8/20/20 Tr. 3036 (Shapiro).

SoundExchange does recognize that, for Spotify to be able to transform its *technological* ability to engage in editorial steering into [REDACTED], its threats must be *credible* to a Major, so that actual steering is neither needed nor implemented. SX PFFCL ¶ 354 (citing Orszag WDT ¶ 149). On this score, Professor Shapiro likewise is in full agreement. He testifies that steering threats are ''depend[ent] on the *credibility* of these threats'' as well as the ''fallback'' positions of the parties in the event the threat of steering leads to a failure of the parties to enter into a licensing agreement. 8/20/20 Tr. 3053 (emphasis added).

The Services strongly disagree with SoundExchange's steering argument. First, they minimize the economic importance of playlist listening—where steering might take place—notwithstanding its recent growth. In particular, they criticize Mr. Orszag for trumpeting that 31% of all Spotify listening is to Spotify-curated playlists, when this figure obviously means that approximately 69% of all listening remains on-demand in nature and thus *outside of Spotify's curatorial gatekeeping capacity.* Thus, the Services argue, the defining feature of Spotify (and other interactive services) remains the offering to a subscriber of access to a virtually complete repertoire of songs for on-demand listening. Services RPFFCL ¶ 358 (and record citations therein). Google's economic expert, Dr. Leonard, takes note of a behavioral study of Spotify users [REDACTED] *See* Trial Ex. 2122 at 8. Dr. Leonard takes from the 69%:31% split referenced above and the [REDACTED] that ''[a] user's ability to play any song on demand remains a defining characteristic of interactive services and a driver of user demand for these services.'' Trial Ex. 2160 ¶ 73 (CWRT of Gregory Leonard) (Leonard WRT).

Further, on a fundamental level, the Services assert that SoundExchange misapprehends the concept of steering, untethering the concept from its economic significance. The relevant form of ''steering'' for purposes of this proceeding, the Services maintain, is one that generates price competition among the Majors. Services PFFCL ¶ 64 (citing *Web IV,* 81 FR at 26343 (''[s]teering is synonymous with price competition in this market'') and *SoundExchange,* 904 F.3d at 52 (affirming the Judges' decision that ''the likely effect of steering in the music industry would be to promote price competition'')).

The Services distinguish *Web IV* in this regard by emphasizing that the Judges in that case had relied on two agreements that contained *explicit* steering provisions designed to generate lower royalty rates in exchange for additional plays—what the Services characterize as the essence of steering. First, the Services point to the agreement between Pandora and Merlin for Pandora's noninteractive service, which provided that ''the [REDACTED]'' as set out in the agreement. *Web IV,* 81 FR at 26356. Second, the Services refer to the *Web IV* Judges' description in that determination of an ''iHeart/Warner Agreement [that] incorporates the same economic steering logic as the Pandora/Merlin Agreement.'' *Id.* at 26375.

But, in the present case, the Services aver that the Majors had [REDACTED]. In fact, the Services maintain, Mr. Orszag concedes this point, testifying in response to a question from the Judges that [REDACTED].'' 8/12/20 Tr. 1536 (Orszag); *see also id.* at 1711 (Orszag) (''[REDACTED].''); Shapiro WRT at 16 (summarizing lack of evidence in Orszag WDT and noting ''when Mr. Orszag discusses how the major record companies have responded to the growing role of service-generated playlists, he does *not* claim they have reduced their royalty rates to encourage increased plays of their material''). In this regard, Google's economic expert witness, Dr. Peterson, noted that [REDACTED]. Peterson WRT ¶ 74.

The Services also point to the hearing testimony of [REDACTED], who acknowledged that [REDACTED]. Specifically, they note that: (1) [REDACTED] 9/2/20 Tr. 5371–72 ([REDACTED]) (emphasis added); (2) [REDACTED].'' 9/3/20 Tr. 5698 ([REDACTED]) (emphasis added); and (3) [REDACTED] 9/3/20 Tr. 5531–32, 5480–81 ([REDACTED]) (emphasis added); *see also* Trial Ex. 4014 at 3 (''[REDACTED].'').

Accordingly, the Services maintain that [REDACTED] present no evidence or testimony that [REDACTED]. *See* 9/02/20 Tr. 5435 (Fowler); 9/09/20 Tr. 5949–50 (Sherwood). Accordingly, the Services note that, [REDACTED], Mr. Orszag was compelled to concede that competition for playlist slotting is not based on royalty rate discounts (or side payments). 8/11/20 Tr. 1313 (Orszag). The Services maintain that this testimony is powerful evidence ''undermining [the] theory that playlist competition is an outgrowth of steering-based price competition.'' Services RPFFCL ¶ 359. In fact, the Services note, [REDACTED]. *See* Services PFFCL ¶ 66 ([REDACTED]) (and record citations therein).

The Services also take issue with Spotify's claim that the 31% of listening that occurs on Spotify-curated playlists is entirely subject to Spotify's steering capabilities. Specifically, the Services note that 17 percentage points of that listening (more than half of the 31%) occurs on algorithmically-curated playlists that are personalized for each user based on his or her listening behavior and thus outside Spotify's control.'' *See* Orszag WDT ¶ 61. Moreover, no SoundExchange witness provided any evidence that Spotify exerts any price-based influence over this algorithm (or over the autoplay algorithm), such as in the Pandora/Merlin agreement relied upon by the Judges in *Web IV. See* 9/2/20 Tr. 5406 (J. Fowler); 8/11/20 Tr. 1316 (Orszag).

The Services also assert that SoundExchange is exaggerating the importance of playlists within Spotify's entire streaming platform. It notes [REDACTED] indicating that ''[REDACTED]'' Trial Ex. 2074. In the same vein, the Services take note of the testimony of a [REDACTED], who acknowledged that, for [REDACTED] 9/2/20 Tr. 5432–33, 5443 ([REDACTED]). Furthermore, the Services emphasize that SoundExchange relies essentially on supposition that playlist listening drives listeners' subsequent on-demand streaming decisions, noting the absence of any detailed studies that would confirm this hypothesis. Services RPFFCL ¶¶ 365–366 (and record citations therein).

The Services further note that, in the [REDACTED]. 9/2/20 5370–71 (Piibe); 9/3/20 Tr. 5537–39 (Adadevoh).

According to the Services, [REDACTED]. Essentially, according to the Services, [REDACTED]t. *See* Services PFFCL ¶¶ 151–156 (and record citations therein).

To make clear the scope of the relevant [REDACTED], the Services rely on the exact language of the 2017 agreements between the Majors and Spotify. The Services assert that this contract language, set forth below, [REDACTED], thus disposing of the very notion that [REDACTED]:

The Sony-Spotify Agreement

[REDACTED]

Trial Ex. 5011 at 36 (Sony-Spotify 2017 Agreement); *see also* Trial Ex. 5074 at 22 ([REDACTED] in Sony-Spotify immediately prior 2013 Agreement) (emphasis added).

The Universal-Spotify Agreement

[REDACTED]

Trial Ex. 5037 at 45, 96 (Universal-Spotify 2017 Agreement); *see also* Trial Ex. 2062 at 38 ([REDACTED] in Universal-Spotify 2013 Agreement).

The Warner-Spotify Agreement

[REDACTED]

Trial Ex. 5020 at 20, 36 (Warner-Spotify 2013 Agreement).[33]

The Services note a consensus between SoundExchange and Services' expert witnesses that [REDACTED]. *See, e.g.,* 8/12/20 Tr. 1709 (Orszag); Leonard WRT ¶ 66. More particularly, they point to Dr. Leonard's testimony that [REDACTED]. Leonard WRT ¶¶ 60–63 (reviewing [REDACTED] provisions in the Spotify agreements); *see also* 8/25/20 Tr. 3716–17 (Peterson); *see also* Peterson WRT ¶¶ 69–70 (noting the [REDACTED]); 8/12/20 Tr. 1699–1701, 1704 (Orszag) (acknowledging that [REDACTED]).

SoundExchange maintains, though, that these [REDACTED] have not been sufficient to [REDACTED], as discussed *supra*). Specifically, SoundExchange argues:

1. [REDACTED]. *See, e.g.,* 9/3/20 Tr. 5702 (Harrison). SoundExchange notes that [REDACTED] construed the [REDACTED]. *See* Trial Exs. 4031 at 37 ([REDACTED]) & 5020 at 20 ([REDACTED]).

2. A service that curates its own playlist, such as Spotify, could [REDACTED]. *See* 9/3/2020 Tr. 5700–01 (Harrison) (discussing the Spotify-Universal agreement).

3. There are significant [REDACTED], including the Majors' [REDACTED]. Orszag WDT ¶ 150 (''[REDACTED].''). And, even if a record company [REDACTED]. *See id.* [REDACTED]). Moreover, the [REDACTED]. *See* 9/2/20 Tr. 5404–06, 5446–47 (J. Fowler).

4. Even [REDACTED]. 8/11/20 Tr. 1317–18 (Orszag); *accord* Trial Ex. 4017 at 4 (noting that [REDACTED]); Trial Ex. 2124 at 1 (''[REDACTED]); 9/2/2020 Tr. 5204 (Piibe) (''[REDACTED]).

5. Even if the [REDACTED], SoundExchange claims they would nonetheless be left with [REDACTED]. It asserts that [REDACTED]—but that would [REDACTED]. *See, e.g.,* Harrison WDT ¶ 56; Adadevoh WDT ¶ 34, 38 & n.27; Piibe WDT ¶¶ 29–30; 9/3/20 Tr. 5482 (Adadevoh).

Consequently, SoundExchange maintains, it is unsurprising that the record contains no evidence that [REDACTED]. *See, e.g.,* 9/3/20 Tr. 5481 (Adadevoh); *accord id.* at 5565 (Adadevoh) (noting that [REDACTED]). And, when Universal asserted to Spotify that the latter was [REDACTED]. 9/3/20 Tr. 5702 (Harrison).

Additionally, SoundExchange avers that, even assuming *arguendo* the [REDACTED] and effectively competitive. Specifically, SoundExchange explains that [REDACTED]. Accordingly, although Majors may want or need to [REDACTED] such as those quoted above, [REDACTED]. Rather, according to SoundExchange, Spotify is [REDACTED] or, importantly here, *to [REDACTED]. See* 8/11/20 Tr. 1254 (Orszag).

That is, as Mr. Orszag explains, once a streaming service has successfully used a *[REDACTED],* the Major may in turn seek [REDACTED]. *See* 8/11/20 Tr. 1331–32 (Orszag). By similar economic logic, a Major that had entered a negotiation [REDACTED] may decide [REDACTED]. *See* 9/2/20 Tr. 5203–05 (Piibe).

Thus, SoundExchange maintains, *the mere presence* of [REDACTED], on which the Services rely, is hardly conclusive evidence that the market lacks effective competition. Rather, as Professor Shapiro himself acknowledges, in an effectively competitive market, a service might agree to accept an [REDACTED]. 8/19/20 Tr. 3089–92 (Shapiro).

The Services respond, though, that the notion that the [REDACTED] was contradicted by SoundExchange's own witnesses. Specifically, as the Majors and Spotify negotiated over terms in 2016 and 2017, they *[REDACTED]. See, e.g.* 9/3/20 Tr. 5551 (Adadevoh) (agreeing that [REDACTED]''); *see also* 9/3/20 Tr. 5704–05 (Harrison).

Moreover, the Services aver, the terms of [REDACTED] with the [REDACTED]. *See, e.g.,* Peterson WRT ¶ 69. That is, while Spotify negotiated [REDACTED], Spotify remained [REDACTED]. Trial Ex. 5074 at 22; Trial Ex. 5020 at 20, 36. *Indeed, SoundExchange's own witness, Mr. Orszag, concedes that throughout Spotify's presence in the United States streaming market, [REDACTED]* 8/12/20 Tr. 1703–04 (Orszag); *see also* Services PFFCL ¶ 100 (summarizing additional evidence).

The Services also assert that there is no evidence that, as SoundExchange maintains, the Majors negotiated for [REDACTED]. Instead, the Services point to the Majors' imposition of [REDACTED]. *See* Shapiro WRT at 22 (noting the Majors' recognition that [REDACTED]).

More particularly, the Services explain that the Majors' [REDACTED] ensured that a [REDACTED]. That is, unless other labels [REDACTED]. 8/20/20 Tr. 3058 (Shapiro); *see also* 8/13/20 Tr. 1905–06 (Orszag) ([REDACTED]''). The Services also rely on the testimony by Mr. Harrison, the Universal executive appearing at trial, who agreed that [REDACTED],'' and that ''[[REDACTED]'' 9/3/20 Tr. 5705–06 (Harrison).[34]

Importantly, SoundExchange's position—that the [REDACTED] in the 2017 agreements reflect a [REDACTED]—is inconsistent with SoundExchange's argument, itemized *supra,* that, for ''[REDACTED]'' SX PFFCL ¶ 388.

In addition to their rejoinders to SoundExchange's [REDACTED] assertions, set forth *supra,* the Services take issue with each of SoundExchange's additional arguments regarding the [REDACTED]. First, they note that the only example SoundExchange could muster regarding potentially [REDACTED] was related to [REDACTED] entered into between [REDACTED]. However, there is no evidence in the record regarding how [REDACTED] interpreted the [REDACTED] and, further, that the context for any possible disagreement [REDACTED]. Further, there is no record evidence indicating that Pandora had the intent to influence, or did influence, [REDACTED]'s streams. Moreover, the Services note that there is no sufficient proof that the [REDACTED] in the [REDACTED] agreement are the same in all respects as those in the [REDACTED] agreement. Services RPFFCL ¶¶ 389–390.

The Judges find that SoundExchange's reliance on [REDACTED] is unavailing because [REDACTED]. Moreover, although [REDACTED] is a participant in these proceedings (represented by SoundExchange and its counsel), no [REDACTED] witness testified that [REDACTED] sound recordings was—to its understanding—a [REDACTED]. More broadly, the Judges find wholly undeveloped SoundExchange's speculative assertion that a service and a label may have [REDACTED]. Of course, they might have (or claim to have) [REDACTED], but that possibility hardly indicates that [REDACTED]. Moreover, the parties (services and labels) spend substantial sums on attorneys to draft contract language [REDACTED], the Judge are unwilling to

[33] [REDACTED]. *See* Trial Ex. 5038 at 24 (''[REDACTED]''). *See also* 9/3/20 Tr. 5549–51, 5557–61 (Adadevoh) (acknowledging these provisions were intended to [REDACTED]).

[34] Because Mr. Harrison testified, without dispute, that Universal ([REDACTED]) could only use the [REDACTED], Universal apparently could not, for example, [REDACTED].

find that industrywide [REDACTED], as a class, are [REDACTED].

Second, the Services' assert as meritless SoundExchange's argument that, even under [REDACTED], Spotify could [REDACTED]. The Services point out that [REDACTED]—the only label SoundExchange cites for this argument—prohibits ''any form of preferential or otherwise enhanced *positioning, placement or status*'' and provides that *[REDACTED]* Trial Ex. 5037 at 45, 96.

Moreover, the Services aver that the Majors do not [REDACTED]. In fact, the Services note, in 2017, [REDACTED]. *See* Trial Ex. 4014; 9/3/20 Tr. 5537–39 (Adadevoh) (reviewing Trial Ex. 4014, an internal Warner analysis of [REDACTED] and agreeing that Warner had found [REDACTED]'').[35]

The Judges find that there is insufficient evidence to support SoundExchange's claim that it is hamstrung in attempting to [REDACTED]. Given the ostensible greater importance the Majors place in this proceeding on [REDACTED]—*see* Trial Ex. 2124 at 1 (''[REDACTED]—the Judges find that a Major would [REDACTED]. Moreover, [REDACTED].

Further in this regard, the Services disagree with SoundExchange's claim that record companies would have ''[REDACTED].'' Rather, the Services point to, *inter alia,* Trial Ex. 2108, in which [REDACTED]. Trial Ex. 2108 at 2–3. The Services assert that this [REDACTED] shows the Majors have an available [REDACTED]. Further, the Services maintain that the mere fact that [REDACTED] is consistent with [REDACTED] rather than with speculation that [REDACTED]. *See* Services RPFFCL ¶ 395 (and record citations therein).

The Judges find there is inadequate evidence to demonstrate that the Majors [REDACTED], for the reasons given by the Services. Further, consistent with the Judges comment regarding legal representation *supra,* the Majors have at their disposal highly talented commercial, corporate and litigation attorneys, who receive handsome fees for [REDACTED]. Although [REDACTED], a sufficient record of [REDACTED] must be demonstrated by a more persuasive record than exists in this proceeding. Finally, in this regard, if the Majors [REDACTED], why does SoundExchange argue that the [REDACTED]? *If [REDACTED]?* Indeed, the fact that there is [REDACTED] in the record, as discussed *supra,* does not mean that [REDACTED]; it points to the value of such [REDACTED]. The Majors' claims (1) that [REDACTED] and (2) that [REDACTED], are blatantly inconsistent.

Accordingly, on balance the Judges find that there is insufficient evidence to demonstrate that [REDACTED] in their stated intent. The Judges take particular note of SoundExchange's acknowledgement, discussed *supra,* that the Majors (1) had [REDACTED], (2) did not [REDACTED], (3) found it difficult to [REDACTED], (4) asserted [REDACTED], (5) failed to [REDACTED], and (6) agreed to [REDACTED].

Shifting from the issue of [REDACTED], the Services disagree with SoundExchange regarding the economic importance of this issue. They note that, pursuant to an internal Sony document, [REDACTED] comprise[REDACTED] and that, [REDACTED], replacing those [REDACTED] with [REDACTED] would only [REDACTED]. Trial Ex. 4017 at 4. *See also* 9/03/20 Tr. 5544–45 (Adadevoh) ([REDACTED]); Trial Ex. 4014 at 3.

The Judges agree with the Services that Spotify's [REDACTED] to suggest a sea change in Spotify's pricing power. And, there is no evidence that Spotify could alter its business model by engaging in a wholesale [REDACTED] with subscribers remaining indifferent to such a fundamental change in the service. This is critical because the Judges do not lose sight of the purpose of this particularized analysis of the benchmark interactive service, which is to determine if Spotify has changed in a manner that lessens or eliminates the complementary oligopoly power of the Majors, such that an effective competition adjustment in the target noninteractive statutory market is either unnecessary or should be reduced. A [REDACTED] (themselves generating but a minority of Spotify's listening) is wholly uninformative as to this issue.[36]

d. The (Partial) Evidence and Testimony Regarding the Majors' Negotiations With Spotify Leading to Their 2017 Agreements

In addition to its foregoing arguments, SoundExchange relies on evidence and testimony regarding the negotiations between Spotify and the three Majors. Sound Exchange avers that this evidence and testimony show that in the run-up to the execution of the 2017 Agreements [REDACTED]. Accordingly, the Judges next consider that evidence and testimony.

Before they weigh the record in that regard, the Judges take note of the nature and sequencing of that evidence and testimony. *First,* SoundExchange proffered this information in a disjointed manner. Multiple documents from the archives of the three Majors were introduced—primarily email correspondence between and among various executives within each Major—discussing the Spotify negotiations. However, none of the individuals who actually negotiated with Spotify—and virtually none of the authors or recipients of these internal emails—provided oral or written testimony at the hearing. Rather, SoundExchange proffered witnesses from the Majors who had some knowledge of these documents and second-hand knowledge of the oral negotiations between their employers and Spotify.[37] The Judges would have much preferred to hear from first-hand witnesses from the Majors' negotiating teams, who actually bargained with Spotify, in order to appreciate how the usual bargaining dominance of the Majors might (or might not) have been usurped by Spotify. Further, the documents to which the Majors' second-hand

[35] The Services also note that SoundExchange separately claims that the Majors [REDACTED]. This claim [REDACTED], belies SoundExchange's claim that it [REDACTED] The Judges agree with the Services.

[36] The Judges discuss the negotiation of ''[REDACTED]'' with Spotify later in this Determination. But, the Judges note here that they find unavailing Mr. Orszag's attempt to de-contextualize the impact of [REDACTED] by his noting that a [REDACTED]% loss in Sony's market share would equate to a $[REDACTED] annual revenue loss. Mr. Orszag reports that in 2018 Sony's digital music U.S. revenue totaled $[REDACTED]. Orszag WDT tbl.13. Thus, the $[REDACTED] short-term revenue loss posited by Mr. Orszag equals [REDACTED] about [REDACTED] one percent of Sony's total annual U.S. digital music revenue. Although $[REDACTED] is a large sum in many contexts, it is small in the present context, especially because the purpose of the exercise is to determine Spotify's pricing power relative to the complementary oligopoly market power of the Majors. Clearly the $[REDACTED] figure fails to reflect the appropriate magnitude of the impact of Spotify's [REDACTED]. Such distorted use of monetary sums is inappropriate. *Cf.* Pablo J. Barrio *et al., Improving the Comprehension of Numbers in the News,* Proc. 2016 Conf. Hum. Factors Computing 1 (Ass'n for Computing Mach. 2016) (''Unfamiliar measurements make up much of what we read, but unfortunately carry little or no meaning . . . as they can be difficult to interpret without the appropriate context.'') (available on *Google Scholar* at *www.cs.columbia.edu* (accessed June 9, 2021).

[37] The Judges admitted these documents into the record, finding them sufficiently authenticated, and, exercising their discretion to admit hearsay evidence, the Judges did not exclude these documents on that basis. But the issue of *admissibility* does not raise the same concerns regarding the *weight* to be given to documents written or received by relevant actors who were not called to testify to explain the context, completeness and ambiguities, if any, relating to those documents. Further, the actual negotiators could have been called to testify regarding oral negotiations (the Majors are all parties in this proceeding) and to explain and contextualize statements contained in internal emails. Thus, to the extent the record evidence of the Spotify-Majors negotiations is incomplete or uncertain, the Judges find that SoundExchange must bear the consequences of such deficiencies.

witnesses testified are not always models of clarity, and these second-hand witnesses could not go beyond the four corners of the documents to explain, identify or provide a sufficient economic context for these documents. *See* Manne & Williamson, supra at 645; *see also Web IV,* 81 FR at 26352 (When ''the Judges' task is to determine . . . *economic significance* . . . the contracts are but one . . . piece of evidence . . . [and] [w]here . . . a transaction is part of a complex . . . business relationship it is appropriate—*even necessary*—for the Judges *to consider other evidence and analysis to determine the true economic value of the transaction.*'') (emphasis added). And, to the extent oral negotiations between Spotify and the Majors, or between the Majors' negotiating teams and their superiors, were never summarized or were summarized in writings not in evidence, the record is incomplete in the absence of testimony from the Majors' negotiators and other direct decision-makers.

Second, SoundExchange proffered only correspondence from the licensor side, that is, from the Majors. The record does not contain any documentary evidence (or testimony, for that matter) *from Spotify* regarding its negotiations with the Majors. Accordingly, there is an incomplete and one-sided record of the negotiations upon which SoundExchange relies.[38] SoundExchange asserts that this incompleteness is inconsequential because what is relevant are the Majors' understandings and perceptions of [REDACTED].

The Judges agree that the Majors' understanding of Spotify's position [REDACTED] is the *ultimate* relevant factor in explaining how and why the Majors responded as they did in negotiations. However, to determine whether the Majors' claimed understanding is *credible,* and to weigh the value of each factor, the Judges would need to know much more about how Spotify bargained and the representations it made. The actual negotiators would have been the best witnesses to provide that level of detail to assist the Judges in determining whether the Majors' [REDACTED] is factually persuasive.

This is crucial for two reasons. First, the Services offer up a quite different explanation. They argue that the Majors were simply utilizing their complementary oligopoly power to [REDACTED]. *See* Services PFFCL ¶¶ 138–150 (and record citations therein). SoundExchange is making an argument that relies on facts that, if relied upon by the Judges, would lead to a radical departure from the bargaining analysis they identified and adopted in *Web IV*—one which is consistent with the economic framework of complementary oligopoly that has an unchallenged lineage dating back to the 19th century work of the economist A.A. Cournot. *See Web IV,* 81 FR at 26342. Such a departure from the prior bargaining framework is certainly conceivable, but the hearing record necessary to support the task should be substantial; instead, SoundExchange's presentation appears to the Judges to have been stitched together and, for the reasons discussed *supra,* lacking a sound basis in economics, as well as in the very principles and dynamics of bargaining that it applies to the hypothetical noninteractive market.[39]

The Judges keep these considerations in mind as they analyze below the parties' arguments regarding the import of the relevant strands of evidence and testimony regarding Spotify's negotiations with the Majors.

i. The Universal-Spotify Negotiations

Universal and Spotify began their negotiations to replace their 2013 agreement in [REDACTED], *see* Trial Ex. 4027 at 1, and completed the negotiations at [REDACTED]. *See* Trial Ex. 5037 at 1. Early in the negotiations, according to an internal company document, Universal identified [REDACTED] as an issue to be addressed. Trial Ex. 5410 at 1. SoundExchange notes that Universal's subsequent internal communications reflect its [REDACTED]. Trial Ex. 4016 at 1 (''[REDACTED]''); *see also* Trial Exs. 4019, 5429 at 1. Further, some Universal negotiators—again, *who did not testify*—expressed in internal documents their belief that [REDACTED], Trial Ex. 5422 at 1, with the author of an internal Universal email, adding [REDACTED]. Trial Ex. 5221 at 5.[40]

When apprised of [REDACTED], according to an internal Universal email, Spotify acknowledged to Universal that it [REDACTED]. Trial Ex. 5413 at 1. Consistent with [REDACTED], Universal's testifying witness, Aaron Harrison, acknowledged that [REDACTED]. 9/3/20 Tr. 5701 (Harrison).

In an attempt to [REDACTED], Universal ultimately proposed that [REDACTED]. Trial Ex. 5410 at 1. However, Universal's internal emails indicated that Spotify had [REDACTED] Trial Ex. 5421 at 1. Rather, Spotify took the position that it would be ''[REDACTED].'' Trial Ex. 5414 at 1. Ultimately, the final 2017 Agreement included [REDACTED]. *See generally* Trial Ex. 5037. (However, as noted above, the 2017 Agreement included [REDACTED].

In response, the Services point out, as an initial matter, that the statements in Trial Ex. 5414 constitute double hearsay, in that they repeat [REDACTED] (the first hearsay) to a [REDACTED], which were then repeated in the exhibit (the second hearsay). The Services also argue that the Judges should give no weight to Trial Ex. 5521, which also contains double hearsay, *viz.,* [REDACTED] [REDACTED] (the first hearsay), repeated in an internal email (the second hearsay). In any event, the Services maintain, no part of the [REDACTED] that would generate price competition.

Moreover, the Services aver that these statements are flatly inconsistent with the acknowledgement by Universal's testifying witness, Mr. Harrison, that Universal [REDACTED], but rather Universal sought to [REDACTED] Trial Ex. 4016 at 1. Thus, Universal's negotiating stance, according to the Services, was to [REDACTED]. To that extent, the Services do acknowledge that Universal [REDACTED]—*see* Harrison WDT ¶ 56; 9/3/2020 Tr. 5743–5744 (Harrison)—but Universal was [REDACTED]. *Id.* at 5744 (Harrison). Accordingly, Universal had to rely on the [REDACTED]. Harrison WDT ¶ 56. Additionally, the Services note that the 2017 Agreement [REDACTED].

The Services also contest SoundExchange's characterization of [REDACTED]. Specifically, the Services point to the [REDACTED], which requires that Spotify [REDACTED] and that Spotify would ''[REDACTED]'' Trial Ex. 2062 at 53–54 (2013 Spotify-Universal Agreement).

In fact, Trial Ex. 5429 (a 2016 negotiation email cited by SoundExchange) acknowledged that the [REDACTED] Trial Ex. 5429 at 4. Moreover, according to the Services, Spotify's [REDACTED] rendered dubious, unsubstantiated, and unwarranted Universal's [REDACTED].

Further, as an economic matter, the Services assert that Universal's [REDACTED] gives away the game—

[38] In previous proceedings, the Judges have considered negotiation documents when the record contained such material from *both* counterparties. That is not the case with the record here.

[39] By contrast with the problematic record relating to the effects of Spotify's supposed new-found pricing power, and as discussed in detail *infra,* the Majors' internal documents and hearing testimony reveal [REDACTED]. As also discussed *infra,* the Majors' [REDACTED].

[40] Because the author of the email did not testify, the unusual placement and styling of this alleged quote (itself hearsay) was not the subject of examination at the hearing.

Universal was seeking to [REDACTED] that the Services characterize as a ''perverse conception of 'price competition' to say the least.'' Services RPFFCL ¶¶ 419–421 (and record citations therein). Moreover, the Services aver, in any event, the presence of [REDACTED] Spotify's agreements with the [REDACTED]. *See* Services RPFFCL ¶ 425

The Judges find that the evidence and testimony relating to these negotiations, relied upon by SoundExchange, are insufficient to demonstrate that Spotify had acquired any greater pricing power in connection with the negotiation of the 2017 Agreement. The [REDACTED] in the 2013 Agreement [REDACTED] in the 2017 Agreement, as confirmed in Universal's own internal email. Further, as the Services point out, Universal's testifying witness, Mr. Harrison, contradicted the key point that SoundExchange is attempting to make with regard to these negotiations: [REDACTED] 9/3/20 Tr. 5701 (Harrison). *This broad statement clearly undermines SoundExchange's assertion that [REDACTED].*[41] Further, because Universal's agreement to [REDACTED], the Judges agree with the Services that Universal's pointed attempt to have Spotify agree to [REDACTED] demonstrates that *Universal was [REDACTED].*

On a more general basis, the Judges find SoundExchange's portrayal of Universal as essentially a ''pitiful helpless giant'' in negotiations to be at odds with the reality of its status as a complementary oligopolist wielding a Must Have repertoire. It did not have to [REDACTED], but rather, *ceteris paribus,* could have [REDACTED].

Additionally, SoundExchange's assertion that Universal [REDACTED] in the 2017 Agreement is problematic for two reasons. First, Universal claimed to be [REDACTED], so why did Universal [REDACTED]? Again, SoundExchange's characterization of this largest Must Have Major as some sort of pitiful helpless giant (like Gulliver restrained by the Lilliputians) is simply not credible, because, as discussed elsewhere in this Determination, Spotify would be out of business [REDACTED] without a Major's repertoire, whereas Universal and the other Majors would continue in business, as Spotify's listeners would migrate to a substitute streaming service. And, if the [REDACTED] as SoundExchange claimed (because, as discussed *supra,* a Major could not [REDACTED] then why was Universal (or any Major) [REDACTED]—especially given that SoundExchange proffered evidence that the Majors claimed [REDACTED].

Moreover, in *Web IV,* SoundExchange provided substantial detail regarding how the Majors would respond to thwart an attempt by a service to engage in steering as a means of price competition. A Major would threaten to black out its repertoire on that service or actually do so (a threat that remains viable, as discussed in this Determination). Second, a Major could demand that all royalties be paid up front on a non-refundable basis, according to historic market shares, making subsequent market share deviations costly (*i.e.,* the marginal cost of deviating toward a Major beyond its historic share would be a positive royalty, compared to the zero marginal cost of playing a marginal sound recording as part of a Major's historic share, because the royalties based on historic market share had been prepaid). Finally, in *Web IV,* SoundExchange noted that each Major could insist on an MFN or similar anti-steering/anti-discrimination clause, making deviations from historic share play a breach of contract. *Web IV,* 81 FR at 26364–65.[42]

In *Web IV,* the Judges acknowledged the capacity of the Majors to engage in such conduct, and the Judges characterized such conduct as simply alternate expressions of their complementary oligopoly power that, under the statute, the Judges were intending to mitigate, in order to identify rates that would be set in an effectively competitive market. *Web IV,* 81 FR at 26373–74. In the present proceeding, SoundExchange has not provided a sufficient evidentiary basis to show that Spotify would be immune from such tactics. Moreover, it would be in each Major's long-run interest, acting alone, *yet consciously aware of the parallel incentives of the other Majors,* to threaten and, if necessary, follow through on such actions, because of each Major's individual Must Have status (and each Major's knowledge of the other Majors' Must Have status).[43] Simply put, the Majors' power provides them with multiple tactics, which, if triggered, would confront Spotify with certain and prompt economic ruin, as its subscribers expeditiously defected to Apple, Amazon, Google, or one of Spotify's smaller competitors.

Accordingly, the Judges reject the argument that Spotify's economic position generated a change in bargaining and market power [REDACTED]. Rather, it is apparent to the Judges that Universal must have had [REDACTED].[44]

ii. The Warner-Spotify Negotiations

At the outset of negotiations regarding the 2017 Agreement, Spotify represented to Warner that it had [REDACTED]. 9/3/20 Tr. 5479; 5526–27 (Adadevoh).

In response to a Spotify proposal for [REDACTED], Warner explored with Spotify a [REDACTED]. *See* Trial Exs. 5264 at 4; 5265 at 2; 9/3/2020 Tr. 5495–96 (Adadevoh). According to Warner's testifying witness, Ms. Adadevoh—*who did not participate in the negotiation sessions with Spotify*—Spotify rejected this [REDACTED] proposal, and [REDACTED]. *See* Trial Exs. 5264 at 4; 5265 at 2; 9/3/2020 5495–97 (Adadevoh). According to Warner,

[41] The Judges find startling, though, the Services' dismissal—as a ''perverse conception of 'price competition' ''—of SoundExchange's more nuanced claim that [REDACTED]. This is precisely the phenomenon that Professor Shapiro enthusiastically endorsed in *Web IV* and which the Judges adopted. *Web IV,* 81 FR at 26366 (Professor Shapiro testifying that it was ''absolutely'' correct that ''the threat of steering . . . pushes [the record companies] . . . towards their original [market share] percentages to avoid being that odd man out who was the holdout for the higher price . . . .''). In any event, Mr. Harrison's testimony that [REDACTED] renders moot the Services' jarring attempt to repudiate the notion of a Major agreeing to lower rates in exchange for protection from steering. Moreover, if, hypothetically, the facts had demonstrated [REDACTED], then [REDACTED] might have made sense as a way for a Major to avoid the situation where it [REDACTED]. However, under SoundExchange's *own* theory of the case, as discussed elsewhere in this Determination, the idea that the Majors thought [REDACTED], would be a chimera, given that the Majors aver that [REDACTED].

[42] The very concept of licensors requiring historic shares to be maintained appears inconsistent with effective competition. In *Web IV,* the Judges noted that ''demands by the Majors to prevent steering by insisting that a noninteractive service not deviate from an historical (''natural'') division of market shares would be a classic example of anticompetitive conduct.'' *Web IV,* 81 FR at 26373 (citing *Blue Cross & Blue Shield United of Wisconsin* v. *Marshfield Clinic,* 65 F.3d 1406, 1415 (7th Cir. 1995) (Posner, J.).

[43] Indeed, an important point made by Professor Willig, SoundExchange's Shapley Value and bargaining expert, regarding the noninteractive market is fully applicable here. Each Major, as a Must Have, would recognize its power to withhold (or threaten to withhold) a license in order to maximize the benefit of the bargain. *See also* Richard A. Posner, *Oligopoly and the Antitrust Law: A Suggested Approach,* 21 Stan. L. Rev. 1067, 1081a n.39 (1969) (A ''meeting of the minds'' among oligopolists is ''illuminated by game theorists [who note that] mutual dependence . . . demands . . . collaboration [that is] . . . tacit if not explicit . . . .''). There is no reason to believe that this phenomenon does not exist in the unregulated interactive music licensing market. Kristelia A. Garcia, *Facilitating Competition by Remedial Regulation,* 31 Berkeley Tech. L.J. 183, 188 (2016) (''In an industry like music licensing . . . parallel pricing and tacit collusion can . . . remov[e] the threat of meaningful competition from the marketplace.'').

[44] That [REDACTED] is discussed *infra,* section III.B.2, after the Judges consider the evidence regarding the negotiations between Spotify and Sony and between Spotify and Warner.

Spotify also rejected its subsequent proposal for [REDACTED]. Trial Ex. 4020 at 1.

In February 2017, Warner alternately proposed that, in consideration of a [REDACTED], Spotify [REDACTED]. However, Spotify refused. Trial Exs. 5520 at 2; 5038; 9/3/20 Tr. 5505 (Adadevoh).

Ultimately, Warner agreed to [REDACTED]. According to Ms. Adadevoh, Warner agreed to [REDACTED], motivated in part by [REDACTED]. SoundExchange avers that Warner's [REDACTED] was reasonable because Spotify had [REDACTED]. Trial Ex. 5401 at 3. In this regard, Ms. Adadevoh testified at the hearing that Warner's perception of Spotify's [REDACTED] 9/3/20 Tr. 5490–91 (Adadevoh). Accordingly, she testified that Warner [REDACTED]. 9/3/20 Tr. 5531 (Adadevoh).

During these negotiations, Warner attempted to determine whether its speculation was justified that Spotify might have [REDACTED]. Through this analysis, Warner was [REDACTED]. Nonetheless, according to SoundExchange, Warner's [REDACTED], but rather reflected the [REDACTED]. SX PFFCL ¶ 435 (citing Trial Ex. 4014 at 1; 9/3/20 Tr. 5601–02 (Adadevoh)).

Ms. Adadevoh testified that—notwithstanding the [REDACTED] that Spotify had [REDACTED]—Warner [REDACTED]. Trial Ex. 5612 ¶ 12 (WRT of Reni Adadevoh); 9/3/20 Tr. 5530–31 (Adadevoh). The importance of [REDACTED] was noted in an email written by Warner's lead negotiator with Spotify, who wrote that ''[REDACTED]'' the effect on WMG's [REDACTED] would be [REDACTED]. Trial Ex. 2124 at 1. The same email also stated that the [REDACTED] in Warner's 2013 agreement with Spotify did not [REDACTED]. Trial Ex. 2124 at 1; Adadevoh WDT ¶ 12.

To underscore Warner's purported concern that Spotify might [REDACTED], SoundExchange also notes discussions on a Warner [REDACTED] regarding [REDACTED]. Trial Ex. 4025 at 1.

Ultimately, Warner agreed to [REDACTED], which was included in its 2017 Agreement with Spotify. Trial Ex. 5038; Adadevoh WDT ¶¶ 11–12. According to Ms. Adadevoh, Warner [REDACTED] because ''[REDACTED]'' 9/3/20 Tr. 5480.

The Services respond first by noting that SoundExchange has ignored the import of Warner's complementary oligopoly power in connection with the bargaining dynamics. Absent consideration of this fact, they argue that Ms. Adadevoh's assertion that [REDACTED] is simply conclusory and hardly credible. Additionally, the Services maintain that there is no evidence linking [REDACTED] to either (1) a [REDACTED] or (2) a [REDACTED].

The Services also assert that a key document on which SoundExchange relies, Trial Ex. 4022, actually identifies [REDACTED] in its 2017 Agreement with Spotify.[45] Among these drivers, according to the Services' understanding of this Warner document, was [REDACTED]. *See* Trial Ex. 4011 at 1 (''[REDACTED]'').

The Services also note that another document on which SoundExchange relies regarding the Warner-Spotify negotiations, Trial Ex. 5264, consists of double hearsay—providing a second-hand report of Spotify statements. Moreover, the Services claim the statements contained therein cannot even unambiguously be attributed to specific sources—making it difficult to tell whether certain text reflects a Spotify statement, Ms. Gardner's reaction thereto, or something else entirely. Moreover, the Services point out that the testifying Warner witness, Ms. Adadevoh, did not claim to have personal knowledge sufficient to provide the requisite clarity.

The Services also characterize as misleading SoundExchange's attempt to portray [REDACTED] as an example of Spotify's market power. Rather, they claim that an examination of Trial Ex. 5265 reveals that Spotify was [REDACTED] in the 2017 Agreement; rather, Spotify was making the practical observation that if a [REDACTED]. Trial Ex. 5265 at 4–5. And, the Services add, allowing a [REDACTED] noted *supra* in Trial Ex. 4011.

The Services also dispute SoundExchange's assertion that Spotify's refusal to provide Warner with [REDACTED] demonstrates Spotify's increased bargaining or market power. They note that it was Spotify's [REDACTED]. Moreover, the Services note that Warner made its proposal [REDACTED] (*see* Trial Ex. 5520) *[REDACTED],* belying Ms. Adadevoh's suggestion that [REDACTED]. Additionally, the Services point out that Trial Ex. 5520 also reveals that Warner sought to [REDACTED]—underscoring the degree to which Warner recognized that it, too, [REDACTED]—and that Warner was willing to agree to [REDACTED] because of [REDACTED]. *See* Trial Ex. 5520 at 3.

More broadly, the Services argue that, if it was true that Spotify had been [REDACTED], the negotiation files would have been [REDACTED], and yet, by contrast, the quantum of evidence on which Warner relies is remarkably slender. Services RPFFCL ¶ 434 (and record citations therein). And, with regard to the extant record evidence, the Services characterize as insufficient and unconvincing SoundExchange's attempt to recharacterize Warner's internal [REDACTED]. *See* Trial Ex. 4014. Continuing its attack on what it describes as SoundExchange's purported misstatement of the evidentiary record, the Services point to another SoundExchange document, Trial Ex. 2124, which includes, [REDACTED]—contradicting SoundExchange's argument that the [REDACTED] (as discussed *supra*).

Continuing its attack on the usefulness of the evidence relied upon by SoundExchange relating to Warner's negotiations with Spotify, the Services note that Trial Ex. 4025, apparently describing [REDACTED] is replete with double hearsay, in the form of a declarant's summary of third-party statements by other declarants. The Services state that there is no indication that any particular comment in this exhibit reflects Warner's final or official position, or that they are not merely the opinions of each individual. On the substance of this exhibit, the Services point out that this document contains [REDACTED], ignored by SoundExchange, which [REDACTED]. Services RPFFCL ¶ 438 (and record citations therein).

The Judges find the Services' arguments convincing. Warner's internal correspondence indicates it was [REDACTED]. But, when it [REDACTED] Warner's contract with Spotify. On these facts, the Judges cannot find support for Spotify's supposed new-found power [REDACTED].

Further, there is no persuasive evidence [REDACTED] included in that contract. The Judges will not presume such a *[REDACTED]* when the record does not reflect that this [REDACTED] occurred. Alternatively stated, SoundExchange is asserting that the Judges should find causation—that the [REDACTED] and vice versa—when the evidence [REDACTED]. Here, the absence of testimony from the actual negotiators looms large; if there had been evidence of such [REDACTED] (which is not in the present record) in first-hand testimony from the negotiators, the Judges could have weighed their direct and cross-examination testimony to assist in

[45] The Services also identify several other ''drivers'' that led Warner to agree to the terms of the 2017 Agreement, predominantly relating to Warner's [REDACTED]. These other points are discussed *infra*.

making a finding as to this issue. But, no such record exists. Accordingly, the possibility that [REDACTED] were the consequence of Spotify's new market power [REDACTED] is not more plausible than the Services' position that the [REDACTED] were included, [REDACTED], to [REDACTED], and that Warner's agreement to the [REDACTED] was [REDACTED].

Additionally, the fact that Spotify refused to [REDACTED] Warner does not reflect any pricing power possessed by *Spotify*. Rather, *it reflects the power of[REDACTED]* to [REDACTED], *thus undermining price competition.*

Finally, the Warner [REDACTED] document on which SoundExchange relies is unpersuasive. Not only does it consist of double-hearsay—as the Services note, it also fails to identify the speakers and their business affiliations [REDACTED] (which also are not provided in hearing testimony)—but rather, the email reflects [REDACTED] regarding the pending Spotify-Warner 2017 Agreement. In that regard, it contains [REDACTED], allegedly voiced by the unidentified participants. As the Judges noted *supra,* corporate documents, including [REDACTED] are often likely to fail to shed light on the economic factors relevant to a proceeding. *See William Inglis & Sons Baking,* 688 F.2d at 1028.

Here, the Warner [REDACTED] document is even more problematic, as it merely recites [REDACTED]. The problem with this document—*emblematic of the problem with all of these hearsay documents*—was highlighted in a fruitless attempt by SoundExchange's counsel to cross-examine Professor Shapiro regarding the meaning of a double hearsay declaration in this Warner [REDACTED] document, Trial Ex. 4025. Presented with language in this exhibit stating: ''[REDACTED]'' Professor Shapiro responded by stating: ''I'm not sure what this [REDACTED] means,'' and adding: ''I don't know what it means [REDACTED].'' 8/20/20 Tr. 3076–77 (Shapiro). The witness then asks SoundExchange's counsel: ''Could you help me out on that?,'' to which SoundExchange's counsel then had no choice but figuratively to throw up his hands and lament: ''Well, . . . *let's just leave it since we don't have the fact witness here.*'' 8/20/20 Tr. 3077 (Shapiro) (emphasis added). The Judges share that frustration.

iii. The Sony-Spotify Negotiations

According to Sony, at the outset of negotiations, Spotify sought [REDACTED]. 9/2/20 Tr. 5218 (Piibe). However, Sony was [REDACTED] particularly because Sony believed the proposed [REDACTED]. Piibe WDT ¶ 20; 9/2/20 Tr. 5195–96 (Piibe); Trial Ex. 4018 at 1. The Services find this opening salvo—made about a year before the parties ultimately executed their 2017 Agreement—to be wholly unremarkable. Professor Shapiro characterizes this start to negotiations as merely ''[REDACTED]'' 8/20/20 Tr. 3082 (Shapiro).

When [REDACTED] appeared [REDACTED] Sony decided that, ''[REDACTED],'' [46] it would offer to [REDACTED]. Trial Ex. 5461 at 7, 35 (offering increasing [REDACTED]); [47] *see also* Trial Ex. 4026 at 1, 4 (offering a more general framework for [REDACTED]); Piibe WDT ¶ 22 (the thinking behind the [REDACTED] was simply that, [REDACTED]).

The Services' rejoinder to this assertion is consistent with their explanation of the problem regarding the [REDACTED]: As long as Spotify remained [REDACTED], Spotify was [REDACTED] Services RPFFCL ¶ 442 (and record citations therein).

Because Sony understood that Spotify had the [REDACTED], Piibe WDT ¶ 25, Sony recognized that a consequence of [REDACTED]. As Mr. Piibe explained, in [REDACTED]. Piibe WDT ¶ 26. Moreover, Sony asserted that it [REDACTED]—because it believed that Spotify could [REDACTED] Piibe WDT ¶ 26 (emphasis added).

More particularly, Sony asserts that it was concerned about Spotify's [REDACTED]. *See* Trial Ex. 5451 at 1 (noting that Spotify [REDACTED]); Trial Ex. 5461 at 40 (noting that [REDACTED]); Trial Ex. 5514 at 3 (noting that [REDACTED] and identifying [REDACTED]); Trial Ex. 4017 at 4 (noting that [REDACTED]). Sony was concerned because it believed its [REDACTED] Trial Ex. 5461 at 40; *accord* Trial Ex. 5514 at 3 (asserting that Sony's [REDACTED]). Trial Ex. 5468 at 2.

The Services aver that these purported [REDACTED] reflect mere possibilities, which Sony [REDACTED] in contract negotiations. First, regarding [REDACTED], the 2017 Agreement included a [REDACTED] More particularly, the Services note the dynamics of the negotiations that led to [REDACTED]. In Spotify's initial contract proposal, Trial Ex. 5461, it sought a [REDACTED] However, in the final 2017 Agreement, Trial Ex. 5011, the [REDACTED] was [REDACTED] to Sony.

Moreover, the Services point to what they consider to be a blatant inconsistency between Mr. Piibe's WDT regarding this [REDACTED] and Mr. Piibe's deposition testimony in this proceeding, with which he was confronted at the hearing, as set forth below:

[Hearing Question]: [L]et me ask you to take a look at . . . your deposition. . . .

[Deposition Question]:
[REDACTED]?

* * * * *

[Deposition Answer]
[REDACTED].

[Hearing Question]
[W]as that answer correct at the time?

[Hearing Answer]
Yes.

9/2/20 Tr. 5339–40 (Piibe) (emphasis and bolding added).

Further, the Services note (as discussed *supra*) that the [REDACTED] in the Sony-Spotify 2017 Agreement contained a [REDACTED] Trial Ex. 5011 at 36. There is no basis in the record, the Services maintain, to conclude that this [REDACTED] would [REDACTED], two areas regarding which Sony claimed to be concerned.

SoundExchange also finds a [REDACTED] in a statement supposedly made by Spotify (contained in an internal Sony email), [REDACTED] There, Mr. Piibe recounted what he heard from a Sony employee regarding a statement allegedly made by a Spotify negotiator, to the effect that, [REDACTED]. Trial Ex. 5469 at 1. Mr. Piibe asserts that, in response to that and [REDACTED], Sony ''determined that [REDACTED]'' Piibe WDT ¶¶ 24, 26.

The Services respond by noting that this [REDACTED]—of questionable veracity given the double-hearsay nature of its representations—[REDACTED]. Further, the Services contrast what they characterize as [REDACTED] with what they indicate to be Mr. Orszag's [REDACTED] characterization of the statement in his oral testimony as a ''[REDACTED]'' in which Spotify said, ''[REDACTED].'' 8/12/20 Tr. 1743 (Orszag). Ultimately, Sony determined that it was [REDACTED] that, according to its testifying witness Mr. Piibe, caused a ''[REDACTED].'' Piibe WDT ¶ 23. According to Mr. Piibe, Sony, in fact, [REDACTED]. Piibe WDT ¶ 36. And, during the hearing, he elaborated, testifying:

[REDACTED].

9/2/20 Tr. 5228 (Piibe) (emphasis added). Moreover, on behalf of Sony,

[46] The relevancy of Spotify's ''importance'' to Sony and the other Majors, in terms of the subscription royalty rate [REDACTED], is discussed *infra*.

[47] To put this proposal in context, Sony's market share for interactive subscription plays in 2018 was [REDACTED]%. Orszag WDT, tbl.2.

Mr. Piibe speculated that Spotify was [REDACTED]. 9/2/20 Tr. 5228, 5368 (Piibe). Consequently, Sony negotiators, according to an internal Sony email, concluded that [REDACTED]. Trial Ex. 5467 at 1.

The Judges find, for several reasons, that the evidence proffered by SoundExchange regarding the Sony-Spotify negotiations does not support the assertion that Spotify's supposed new pricing power was [REDACTED]. First, Spotify's [REDACTED] was simply consistent with the [REDACTED]. Thus, such [REDACTED] was not [REDACTED].

Next, SoundExchange's assertion that Sony alternatively sought [REDACTED] in order to [REDACTED] was unambiguously refuted by Mr. Piibe's deposition testimony. As noted above, in that testimony, he admitted that [REDACTED]. His testimony in this regard also neutralizes the claim by SoundExchange that [REDACTED].

Finally, the Judges take note of Mr. Piibe's exaggerated hearing testimony regarding Sony's decision [REDACTED]. In that testimony, Mr. Piibe indicated that the very [REDACTED] was ''[REDACTED]'' to the point that he was ''stuttering'' in an attempt to ''process'' the idea. The Judges find this over-the-top testimony not only lacking in credibility, but also a fine example of the adage ''the lady doth protest too much.''[48] Mr. Piibe was a polished witness who spoke carefully and with fluidity. The question that he was asked that led to his ''stuttering'' response was the following: ''[REDACTED]?'' 9/2/20 Tr. 5228 (Piibe).

This question was straightforward, simple, and posed to him on *direct* examination, thus unlikely to have caught him by surprise. Moreover, the [REDACTED] is the [REDACTED]. The Judges cannot fathom that a Major, a sophisticated corporation, would not [REDACTED] when it is undisputed in the present record, and supported by the economic analysis discussed in this Determination, that [REDACTED]. Indeed, a substantial component of SoundExchange's case-in-chief (presented in the testimony of Professor Willig) turns on the contributions each party makes to the value of a music service and their fallback values.[49] What the Judges find inconceivable is Mr. Piibe's claim that [REDACTED]. Thus, the Judges find this exaggerated testimony to lack credibility, indicating that there must have been another reason for [REDACTED].

e. Other Record Evidence and Testimony Contradict SoundExchange's Claim That Spotify's Pricing Power Had Neutralized the Majors' Complementary Oligopoly Power

If Spotify, in fact, had become so powerful by virtue of its market size, ability to [REDACTED] and ability to [REDACTED], as a Sony executive wrote, to [REDACTED]. Trial Ex. 2137. However, the evidence indicates that the Majors were [REDACTED]. The Judges find telling the following colloquy between the bench and Michael Sherwood, a senior Warner executive:

[THE JUDGES]
[REDACTED]?

[MR. SHERWOOD]
[REDACTED]. . . .

[THE JUDGES]
Why [REDACTED]?

[THE WITNESS]
[REDACTED].

[THE JUDGES]
Okay. Did you have an understanding as to why [REDACTED]?

[MR. SHERWOOD]
I [REDACTED].

[THE JUDGES]
When you say [REDACTED], you mean [REDACTED], so to speak?

[MR. SHERWOOD]
Correct. That was my impression of it.

[THE JUDGES]
Okay. And how did you come to that impression?

[MR. SHERWOOD]
Through conversations with our business development team at Warner Music Group.

[THE JUDGES]
Okay. Who, in particular, do you recall, by name?

[MR. SHERWOOD]
I don't, unfortunately. That team has had some turnover since that time.

[THE JUDGES]
I see. Who was the head of the team at the time you came to that conclusion?

[MR. SHERWOOD]
[REDACTED].

* * * * *

[THE JUDGES]
Okay. And at a more general level, separate and apart from this particular negotiation and [REDACTED], how would you [REDACTED]?

[MR. SHERWOOD]
Well, if that circumstance were to come to light, [REDACTED].

9/9/20 Tr. 5930–32 (Sherwood) (emphasis added).

The Judges find Mr. Sherwood's testimony, quoted at length above, to be highly informative, and the Judges found him to be a highly credible witness. He has been a Warner employee for 21 years, and he is currently the Senior Vice President of Streaming and Revenue, responsible for overseeing all of the revenue-generating commercial accounts, which include digital service providers, including Spotify. 9/9/20 Tr. 5912–13 (Sherwood). Moreover, he was one of the few Major employees that SoundExchange chose to testify in this proceeding, out of the numerous individuals who had duties related to the streaming services or who wrote or received emails regarding the issues raised in the present proceeding.

His testimony indicates that [REDACTED] what the Services have argued repeatedly—that *Spotify [REDACTED]* when it [REDACTED]. Not only did Mr. Sherwood agree with that [REDACTED], but he also identified the negotiating team within Warner itself as having informed him that [REDACTED] This testimony supports the Services' characterization of Spotify's weak pricing power and overall bargaining position, further confirming the dubiousness of SoundExchange's claim that the Majors did not [REDACTED] that [REDACTED] continued into the negotiations over the 2017 Agreements.

Perhaps even more importantly, Mr. Sherwood's testimony regarding [REDACTED] speaks even more persuasively than his words. Warner was [REDACTED], as he testified he would do if a [REDACTED].

Mr. Sherwood's testimony also underscores the problem created by SoundExchange's decision not to call witnesses with first-hand experience negotiating with Spotify, such as [REDACTED], who could have shed direct light on the Majors' analysis of Spotify's [REDACTED] in the 2016–2017 period.[50]

Finally, Mr. Sherwood's testimony [REDACTED] gives real-world evidence of the substitutability and cross-elasticity of these various downstream services addressed by the Services' economic expert witnesses. Likewise, this testimony shows [REDACTED], consistent with SoundExchange's direct case criticisms of Pandora's Label Suppression Experiments for their failure to address how the industry

[48] William Shakespeare, Hamlet act III, sc. 2.

[49] Professor Willig refers to the opportunity cost of a Major that is a complementary oligopolist when negotiating with a potential licensee as the [REDACTED] opportunity cost. [REDACTED]

[50] This portion of Mr. Sherwood's testimony does not contain inadmissible hearsay, as it is in the nature of testimony regarding an admission and/or declaration against interest by Warner. Moreover, no objection was lodged by SoundExchange (which would have been awkward, given that he was its own witness and the testimony had been elicited by the Judges) and, even if the testimony constitutes hearsay, the Judges invoke their discretion to allow hearsay testimony pursuant to 37 CFR 351.10(a).

would respond to such a going-dark scenario.

One of SoundExchange's internal Major documents from an executive who actually negotiated with Spotify took a [REDACTED] than SoundExchange regarding Spotify's pricing power—[REDACTED] consistent with the Judges' findings herein that Spotify had not acquired pricing power sufficient to [REDACTED]. The document was an email written by [REDACTED] 9/2/20 Tr. 5247 (Piibe). Mr. [REDACTED] wrote the following in a December 13, 2016 email—REDACTED] in a response to [REDACTED]:

[REDACTED]
[REDACTED]
[REDACTED]
[*REDACTED*].

Trial Ex. 5467 (emphasis and bolding added).

In the succinct, colloquial, and mildly vulgar statement emphasized above, Mr. [REDACTED] concisely summed up [REDACTED] The Judges find Mr. [REDACTED] observation consistent with the economic analysis on which the Judges have relied in this Determination, supporting the finding that Spotify lacked the pricing power to mitigate or offset the complementary oligopoly power of the Majors.

But, as the quoted document—indeed, the quoted sentence—*also* reveals, Mr. [REDACTED] took note of [REDACTED], stating that he ''[REDACTED]'' Trial Ex. 5467. Thus, Mr. [REDACTED], in one sentence, also summed up a conundrum that is at the heart of the question: Why did three complementary oligopolists decline to exercise their market power [REDACTED]?

The Judges consider that conundrum below.[51]

2. The Majors' Action to [REDACTED]

a. Introduction

The record discussed *supra* reflects an apparent disconnect between the facts discussed above and the relevant economic principles. The Majors agreed to [REDACTED]. Why did that occur? The upstream benchmark agreements at issue were consummated in a market where the licensors, the Majors, are complementary oligopolists with ''Must Have'' repertoires, and the licensee, Spotify—despite being arguably the largest interactive service—lacked long-term bargaining power and pricing power sufficient to affect, let alone dictate, the terms of trade.[52]

The further factual record though, when analyzed through the lens of economics, provides the answer to this facial conundrum; the Majors were intent on surviving as powerful licensors vis-à-vis their licensees.[53] As discussed below, the Majors were [REDACTED], enabling them to [REDACTED].[54] One way the Majors could attempt to avoid this development and survive as economically powerful licensors was to [REDACTED] that were rapidly expanding in the interactive market.

Accordingly, as the record (discussed below) reveals, [REDACTED], the Majors [REDACTED] in order to [REDACTED].[55]

The Judges' evidence-based analysis in this section is not the story that SoundExchange chooses to emphasize. SoundExchange prefers the story in which the Majors are the *[REDACTED].* It is not immediately obvious why SoundExchange prefers that story to the facts that actually match economic theory to reality—that the Majors perceived themselves as *[REDACTED].*[56]

The forgoing analysis is also not the story told by the Services. Although they discuss the same record facts as relied upon by the Judges (discussed *infra*), they aver that these facts demonstrate merely that the Majors were behaving as complementary oligopolists always behave—[REDACTED], without regard for the bargaining power of their counterparties. As explained in more detail *infra,* the Services' understanding of the facts is neither supported by the record nor relevant to the Judges' task of identifying an effectively competitive rate.

b. The Majors' [REDACTED]

Nested within its assertions of Spotify's pricing power, *discussed supra,* SoundExchange presented witness testimony and advanced

[51] SoundExchange notes that Apple has [REDACTED]. Moreover, it notes that Apple [REDACTED] [REDACTED]. 9/3/20 Tr. 5681–82 (Harrison); Harrison WDT ¶ 31. Subsequently, Apple also [REDACTED]. Piibe WDT ¶ 46. *See generally* 8/13/20 Tr. 1899–1900 (Orszag); 8/11/20 Tr. 1367 (Orszag). According to SoundExchange, these facts indicate that Apple, [REDACTED] was able to [REDACTED]. *See* SX PFFCL ¶ 468 (and record citations therein).

However, the Judges are struck by the fact that the record regarding Apple's relationship with the Majors is barren, even in comparison to the meager and disjointed proofs SoundExchange proffered regarding Spotify's negotiations with the Majors. There are no internal documents from the Majors describing their relationship with Apple, including [REDACTED], nor is there any evidence that Apple [REDACTED]. *Accord,* Services' Response to SX PFFCL ¶ 466 (noting the [REDACTED] the setting and level of its rates). Moreover, as the Services note, Mr. Orszag did not use the Apple rate as a benchmark in this proceeding. *Id.* ¶ 465. In fact, Mr. Orszag did not identify in the materials upon which he relied in preparing his WDT any documents memorializing any aspect of Apple's negotiations with any of the Majors, and he could not recall with any certainty having reviewed such documents prior to preparing that written testimony. 8/12/20 Tr. 1646–48 (Orszag).

The Judges also note that the fact that Apple *[REDACTED]* is consistent with the Judges' understanding of the Majors' [REDACTED]. That is, the Majors negotiated [REDACTED], so to speak.

For these reasons, the Judges find that there is insufficient evidence that Apple's [REDACTED] is supportive of SoundExchange's argument that an interactive service's mere market share [REDACTED]. (The Judges note that this is not the first time the Judges have declined to give weight to SoundExchange's underdeveloped record as it related to an Apple agreement. *See Web IV,* 81 FR at 26352 (declining to rely on ''SoundExchange's analysis and use of [an] Apple agreement'' because ''there is insufficient evidence in the record'')).

[52] To better appreciate the Judges' discussion of this conundrum, they note here a distinction among different types of economic power as used in this analysis.

The Judges use the phrase ''pricing power'' to reflect the ability of a seller or buyer (or licensor or licensee) to influence price (royalty rates) because of its own ''market power,'' arising from strengths, such as monopoly, monopsony, oligopoly, or oligopsony positions, as derived from whatever source. Here, the Majors have ''pricing power'' derived from their status as complementary oligopolists; Spotify lacked ''pricing power,'' for the reasons discussed *supra.*

The Judges use the phrase ''countervailing power,'' as discussed *supra,* to reflect a contracting party's power, again from whatever source, that offsets, in whole or in part, the pricing power of a counterparty. (Thus, it is a power defined in relative terms compared to the opposing commercial power.).

These two types of power collide in the negotiation process, allowing each party to exert a measure of ''bargaining power.'' *See* Orszag WDT ¶ 110 (and citations therein) (''Bargaining power can be defined as the advantage one player has over another in establishing desired terms [and] can arise from a number of sources, including market power, better information (*e.g.,* knowledge of the true value of what is being negotiated), and credible threats to retaliate or steer business away from the other player. A player with enhanced bargaining power tends to extract greater surplus through better terms.'').

[53] *See* Manne & Williamson, supra at 620 (''In the end, whatever business people *think* they are maximizing, whatever they do or wish to do, *survival is ultimately an economic matter.*'') (emphasis added).

[54] Despite their complementary oligopoly power, the [REDACTED] is a contemporary example of the literary adage: ''Uneasy lies the head that wears a crown.'' William Shakespeare, *King Henry IV,* act III, sc. 1. From the drier economic perspective, the [REDACTED].

[55] An IPO is a process offering shares of a private corporation to the public in a new stock issuance that allows the corporation to raise capital from public investors. *See* Investopedia.com (search term ''Initial Public Offering'') (last accessed May 12, 2021). Ultimately, Spotify decided to forego an IPO and instead engaged in a ''Direct Placement'' (a/k/a ''Direct Public Offering'' or ''Direct Listing'') by which the corporation does not raise new capital, but rather enables its existing shareholders to sell their stock to the public. *See Spotify's Wall Street Debut is a Success,* New York Times (Apr. 3, 2018); *See generally Corporatefinanceinstitute.com* (search term ''Direct Placement'') (last accessed May 14, 2021).

[56] It may be that SoundExchange was reluctant to emphasize a countervailing power argument that was not based on a licensee's pricing power because pricing power (through steering) was the rationale applied in *Web IV.*

arguments that the [REDACTED]—in the interactive service market.[57] Some of the most compelling testimony in this regard was provided by Aaron Harrison, Universal's Senior Vice President, Business & Legal Affairs, responsible for overseeing the teams that negotiate licensing agreements with digital music services. Harrison WDT ¶ 1.

In his written direct testimony, Mr. Harrison emphasized the [REDACTED]:

> [S]ome on-demand services are part of companies that dwarf [Universal] and dominate digital markets. Amazon, Apple and Google, for example, can rely on their size to absorb any losses from their streaming services *and [REDACTED].*

Id. ¶ 41 (emphasis added); *see also* Orszag WDT ¶ 39 n.56 (relying on a 2019 trade publication article stating that Amazon Music is reportedly growing faster than Spotify and Apple Music).[58] At the hearing, Mr. Harrison elaborated on this [REDACTED]. 9/3/20 Tr. 5752 (Harrison) (acknowledging that Universal's [REDACTED]).

The relevance of the *size* of the tech firms must be distinguished from the *market* power of a Must Have Major. The latter has what Professor Willig aptly describes as ''walk away'' *market* power, *see* Trial Ex. 5600 ¶ 14 (CWDT of Robert Willig) (Willig WDT), in that a service cannot operate when it lacks a license for the sound recordings from each of the three Majors. Therein lies the power of ownership and control over essential inputs possessed by complementary oligopolists. The tech firms, however, possess a different type of power. Their advantage is based on *sheer size,* affording them the potential to dominate a market they decide to enter.[59] Thus, if they were to control the downstream interactive streaming market [REDACTED], they would be well-positioned to threaten blacking out one (or more) Majors and to follow through on that threat by, as Mr. Harrison testified, [REDACTED]. *See* SX PFFCL ¶ 336 (''the music business is a rounding error for these big-tech services.'').[60]

Accordingly, [REDACTED]. As Mr. Harrison further acknowledged on cross-examination, it was his view that ''[REDACTED]'' 9/3/20 Tr. 5721 (Harrison). Moreover, Mr. Harrison agreed that the economic [REDACTED] would not only [REDACTED], but also would ''[REDACTED].'' 9/3/20 Tr. 5721 (Harrison).

The Services do not dispute that the Majors [REDACTED]. In fact, relying on Mr. Harrison's testimony, the Services argue that the Majors [REDACTED]

> [to] [REDACTED] . . . .

Services PFFCL ¶ 147.[61] The Services argue that this testimony reveals that ''[t]he unmistakable implication of Mr. Harrison's testimony [is that Universal] [REDACTED] Services PFFCL ¶ 147.

The Judges find that the Services misconstrue the import of this aspect of Mr. Harrison's testimony. His point is *[REDACTED].* (In fact, [REDACTED] make that apparent. *See* Orszag WDT tbls.15 & 16.). Rather, the point is that the *[REDACTED]* would [REDACTED] would [REDACTED]. For example, [REDACTED]. *See generally* J. Baker & J. Farrell, *Oligopoly Coordination, Economic Analysis, and the Prophylactic Role of Horizontal Merger Enforcement,* 168 U. Pa. L. Rev. 1985 (1986). Thus, [REDACTED].[62]

Whether [REDACTED] generates an effectively competitive rate *in the interactive benchmark market* is of no consequence in this proceeding regarding *the noninteractive market.*[63] Rather, *the important issue for the present benchmarking purposes is whether the royalty rate the Majors agree to accept from Spotify is less influenced, on balance, by the complementary oligopoly power of the Majors [REDACTED].*

Mr. Harrison's testimony clearly shows that [REDACTED]. This is the economic reality that spawned Spotify's bargaining power—a reality created by Spotify's successful 2011 entry into the U.S. market. That is, it is a power that Spotify created, not merely a marketplace factor that the Majors, as complementary oligopolists, chose to exploit. Further, this particular bargaining power cannot be characterized and explained away like SoundExchange's other attempts to explain Spotify's bargaining power—

[57] The rapid rise of the tech firms in the interactive market is undisputed. The record reveals that [REDACTED], account for [REDACTED] of U.S. interactive subscribers respectively, and [REDACTED] has already [REDACTED]. Orszag WDT, tbl.4.

[58] As noted above, SoundExchange does not emphasize this argument. In this regard, Mr. Harrison buries this [REDACTED] in a section of his WDT entitled, ''[REDACTED],'' Harrison WDT at 12, where he notes there are ''several reasons'' why *[REDACTED].* But the fourth (and final) reason he provides, the one addressed in the accompanying text, *see id.* ¶ 41, pertains *only* [REDACTED]. Thus, this final reason resides as something of a non sequitur within a section explaining why Mr. Harrison believed *[REDACTED].*

[59] This distinction between market power and power derived from sheer corporate size is a specific example of a broader contemporary issue in competition law, especially with regard to these tech firms. *Compare* Tim Wu, The Curse of Bigness 15, 21 (2018) (asserting that the power of ''just a handful of giants . . . *Amazon, Google and Apple* . . . *transcend[s] the narrowly economic*'') *with* J. Wright *et al., Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust,* 51 Az. St. L.J. 293, 362 (2019) (criticizing the new emphasis on sheer corporate size as ''call[ing] for nothing less than the complete dismantling of the consumer welfare standard and the consensus . . . among antitrust practitioners, enforcers and academics . . . about how to promote competition.'').

[60] The ability of tech firms to dominate markets, including music markets, and the implications of that power has been noted by economists who have studied the issue. *See* Alan B. Krueger, Rockonomics at 103, 200–201 (2019) (''Superstar firms, including *Google, Apple and Amazon,* have probably benefited from . . . deploying the technological innovations that enable them to take advantage of enormous economies of scale [b]ut there is also a concern that such firms use their dominant position to stifle competition. . . . Spotify's long-run existential challenge is exacerbated by the fact that [tech firms] can sustain losses . . . *rais[ing] the question of whether Spotify can be sustainable as a stand-alone company.*'') (emphasis added).

[61] The idea that [REDACTED]. In *Web II,* 72 FR 24084 (2007), the Judges set rates for all noninteractive services at $0.0008 for 2006, rising annually to $0.0019 in 2010, after a hearing that included the large tech services of that era—Yahoo, Microsoft, and AOL. After the passage of the Webcaster Settlement Acts of 2008 and 2009, SoundExchange negotiated a substantially *lower* per-play royalty rate regime for the pureplay noninteractive services—beginning at the same $0.0008 for 2006, but then lower in every subsequent year until reaching a 2010 rate of $0.00097, only 51% of the *Web II* rate. (The pureplay rate was part of a greater-of structure including a 25%- of-revenue prong, but that prong was not triggered.). In addition, the pureplay settlement rates continued through 2015 and were substantially lower than the *Web III* rates. For example, in the final year of the *Web III* rate period (2015), the pureplay rate was $0.0014, only 61% of the *Web III* rate of $0.0023 (with similar disparities in the prior years of the *Web III* rate period). The Webcaster Settlement Acts prohibited a party from using the settlement rates as precedent or evidence in subsequent proceedings. *See generally* Jeffrey A. Eisenach, *The Sound Recording Performance Right at a Crossroads: Will Market Rates Prevail?,* 22 CommLaw Conspectus 1 (2014).

[62] The Services also construe Mr. Harrison's testimony as [REDACTED] at ''market segmentation.'' Services PFFCL ¶ 147. However, market segmentation in the music streaming markets is typically undertaken to effectuate price discrimination. There is no sufficient evidence that is occurring here. The record does not indicate that Apple, Amazon, Google, and Spotify compete among themselves by each appealing principally to different segments of the listening public based on the varying willingness-to-pay among listeners (although each has tiers and products intended to appeal to categories of listeners varying based on willingness-to-pay).

[63] [REDACTED]). *See generally* David T. Scheffman & Richard S. Higgins, *Twenty Years of Raising Rivals' Costs: History Assessment, and Future,* 12 Geo. Mason L. Rev. 371, 375 (2003). An economist who specializes in the analysis of music markets has noted that licensees and licensors have the power to strategically manipulate relative streaming royalty rates. Kristelia A. Garcia, *Facilitating Competition by Remedial Regulation,* 31 Berkeley Tech. L.J. 183, 221 (2016) (''the owners of popular songs . . . acting alone or in tacit collusion with similarly situated entities [can] act anticompetitively by . . . offering favorable rates to one service over another.'').

[REDACTED]. Quite the contrary: [REDACTED] [64] [REDACTED]

Mr. Harrison's testimony as considered above was echoed by Mr. Piibe, Sony's principal witness. Relying on Mr. Piibe's written testimony, SoundExchange argues as follows:

If Spotify was out of the market, record companies would have faced a material reduction in their relative bargaining power with other services. . . . [REDACTED].

SX PFFCL ¶ 333 (quoting Piibe WDT ¶ 48) (emphasis added).[65]

SoundExchange also makes this bargaining point, in the form of a response to Professor Shapiro's argument that the Majors should have instead gone on offense, using their complementary oligopoly power ''[REDACTED].'' 8/20/20 Tr. 3102–04 (Shapiro). In response to this argument, SoundExchange convincingly stated:

Had record companies leveraged their must-have status to walk away from Spotify, as Professor Shapiro suggests they were willing to do, Spotify's exit would have strengthen[ed] Apple Music significantly, and also strengthen[ed] Amazon and Google. [REDACTED].

SX PFFCL ¶ 335 (citing 8/11/20 Tr. 1273–75 (Orszag); Orszag WDT ¶ 33, tbl.4; 9/3/20 Tr. 5733 (Harrison) (emphasis added)).

To illuminate further how Spotify's role as a bulwark against the tech firms influenced the Majors' bargaining position with Spotify, SoundExchange states:

Put simply, leveraging must-have status to put Spotify out of business would risk making Apple Music dominant in the market. [REDACTED], the result would be a material increase in their relative bargaining power. The outcome would put the record companies in a precarious position, given that *the music business is a rounding error for these big-tech services.*

SX PFFCL ¶ 336 (citing 8/11/20 Tr. 1273–75 (Orszag); 9/3/20 5733 (Harrison) (emphasis added)). *See also* 8/11/20 Tr. 1274–75 (Orszag) (noting that the absence of Spotify would increase the market shares of the tech firms).[66] SoundExchange's point is reasonable. Indeed, given that the record makes it clear [REDACTED].

c. The Majors Demonstrated [REDACTED]

Early in the negotiations, the [REDACTED]. Mr. Harrison's further testimony on behalf of SoundExchange and Universal, in colloquy with the Judges, made that clear:

The Judges: [W]as it your understanding that [REDACTED]?

Mr. Harrison: [REDACTED]

9/3/20 Tr. 5748 (Harrison) (emphasis added).

The documentary evidence regarding the negotiations between Spotify and the Majors, relied on by SoundExchange, is consistent with the testimony considered above. More particularly, this evidence also reveals that *[REDACTED]*.[67]

In an email to Stefan Blom, Spotify's then Chief Strategy Officer, dated December 7, 2016—approximately one-half year prior to the execution of the Spotify-Sony 2017 Agreement—*Sony's* President, Global Digital Business & U.S. Sales, Dennis Kooker, wrote:

[REDACTED].

Trial Ex. 4026 (emphasis added).[68] *See also* SX PFFCL ¶ 441 (acknowledging that Trial Ex. 4026 [REDACTED].[69] And, as testified to by Mr. Piibe (who reported to Mr. Kooker), Spotify requested [REDACTED]*s.* 9/3/20 Tr. 5323 (Piibe). Thus, from the [REDACTED] that the former [REDACTED] through, *inter alia,* [REDACTED].

As generally acknowledged by Mr. Harrison's testimony, discussed *supra,* Universal's internal documents [REDACTED]. Eight months before the parties concluded negotiations and entered into the April 2017 Agreement, Johnathan Dworkin, Universal's Senior Vice President of Digital Strategy and Business Development, wrote the following in an internal email to other Universal executives dated August 27, 2016:

[REDACTED]Trial Ex. 4023. *See also* SX PFFCL ¶ 473 (SoundExchange conceding that in Trial Ex. 4023 [REDACTED].'').

In a subsequent internal email to other Universal executives dated September 4, 2016, Jeffrey Harleston, Esq., Universal's General Counsel and Executive Vice President of Business & Legal Affairs, wrote the following—still *seven month prior* to the execution of Universal's 2017 Agreement with Spotify:

[REDACTED].

[64] Tech firm dominance would not necessarily be limited to the exertion of their power in vertical negotiations with the Majors. The tech firms could integrate upstream and develop their own record companies and poach artists from the Majors, Such an event is not unlikely, given that (1) Amazon has already integrated upstream to create or purchase television and film content through Amazon Studios, (2) Apple has already integrated upstream with original content television shows, movies and documentaries available via Apple TV, and 3) Google has made a similar foray, through YouTube Originals. *See generally https://www.fastcompany.com/3058507/apple-facebook-google-and-alibaba-take-hollywood* (accessed June 2, 2021). Further, there is historical precedent for downstream distributors integrating upstream to compete with licensors, such as in 1939, when the NAB, representing radio station licensees, created Broadcast Music, Inc. (BMI) in the mid-20th century to compete with ASCAP, the dominant musical works licensor, after the latter sought a substantial increase in royalty payments. *See, https://www.bmi.com/about/history* (accessed June 2, 2021).

[65] [REDACTED] Mr. Piibe's testimony, repeated by SoundExchange, [REDACTED], the Judges do not credit other portions of that testimony. Specifically, the Judges do not agree that, in the context of vertical negotiations involving complementary oligopolists, [REDACTED], complementary oligopolists prefer multiple downstream licensees whose competition, *inter se,* allows the complementary oligopolists to avoid ''double marginalization'' (oligopolistic profits shared by upstream licensors and downstream sellers) and thus to capture for themselves the entirety of the supranormal profits generated by their market structure. *See Web IV,* 81 FR at 26342 & n.98 (Professor Katz testifying that ''actually, *the more intense the competition downstream, the greater the incentive to charge a high price upstream* because you don't have to worry about so-called double marginalization) (emphasis added). Also, Mr. Piibe oddly omits from his list of benefits arising from a better Sony bargaining position its ability to increase its own profits—listing only artist income and investment recoupment as the benefits of a more advantageous bargaining environment. It is curious when a businessman fails to identify his company's own ability to increase profits as a worthy goal, as if acknowledging a desire to maximize profits is somehow inappropriate, so it is better to be disingenuous than disreputable. And, in that vein, Mr. Piibe joins in the Orwellian language of several of the Majors' other fact witnesses—identifying their streaming service counterparties as their ''partners.'' Parties seeking to promote their own interests at the expense of their counterparties is a fundament of negotiation to be anticipated and welcomed, but the counterparties are hardly ''partners.'' (Although in the context of [REDACTED] the Judges find it appropriate to note that the [REDACTED]).

[66] More precisely, using Mr. Orszag's subscriber data, if Spotify left the market and its subscriber share was distributed proportionately among its existing competitors, [REDACTED] *See* Orszag WDT, tbl 4. Alternatively, if Spotify were to be acquired by another large tech firm (*e.g.,* Facebook) and no longer be ''independent,'' then adding Spotify's share to the existing tech firm shares would place [REDACTED]% of the interactive subscription in the hands of the large tech firms.

[67] [REDACTED] Spotify with a countervailing power that generated a more level bargaining table, in contrast to the one-sided bargaining where a ''Must Have'' Major could threaten—in Professor Willig's terminology—to ''walk away'' from the negotiations. This change explains why the [REDACTED] other terms resulted in [REDACTED], as discussed *infra.*

[68] Mr. Kooker testified in *Web IV.* SoundExchange did not call him as a witness in this *Web V* proceeding.

[69] The Judges understand the Majors' expressed interest in a [REDACTED] to be a specific example of how the Majors' could [REDACTED]. It is also true, as the Services point out, the record reflects that the [REDACTED] (and the ultimate Direct Placement [REDACTED]. *See https://seekingalpha.com/article/4408328-direct-listing-explained* (accessed June 2, 2021). However, there is no record evidence regarding the cost (including opportunity cost) incurred by the Majors to [REDACTED], so the Judges cannot find sufficient evidence that the Majors' [REDACTED] was an independent or material motive for [REDACTED]. *See also* Services PFFCL ¶ 144 (*the Services* acknowledging that Spotify's [REDACTED] (emphasis added).

Trial Ex. 5421 (emphasis added).[70] In this exhibit, Mr. Harleston added that the [REDACTED] Trial Ex. 5421. As discussed further *infra,* the Judges find Spotify's [REDACTED] to be consistent with [REDACTED].

Rounding out the early documentary evidence, the third Major, Warner, in internal notes written by its chief Spotify negotiator, Tracey Gardner, dated October 12, 2016—*eight months out from the eventual Warner-Spotify 2017 Agreement*—recorded Spotify's [REDACTED] . . . .'' Trial Ex. 4022 (emphasis added). According to these notes, Warner conveyed [REDACTED] Trial Ex. 4022 (emphasis added). Thus, Warner, [REDACTED], had indicated to Spotify early in the negotiations that [REDACTED].[71]

As negotiations proceeded, [REDACTED] remained an important element [REDACTED]. Specifically, in a December 13, 2016 internal Universal email, Trial Ex. 4052, written [REDACTED] of the Universal-Spotify 2017 Agreement, Universal's Michael Nash, Executive Vice President of Digital Strategy, included a draft[72] letter to Spotify that stated the following:

[REDACTED].

Trial Ex. 4052 (emphasis added). This language not only *re-affirms* Universal's [REDACTED], it also *strongly emphasizes* the importance to Universal of [REDACTED].

In sum, the Judges find that the negotiation-related documents and testimony[73] show [REDACTED].[74]

d. The Services' Contrary Explanation of the [REDACTED] as Based Solely on the Majors' Complementary Oligopoly Is Unavailing

The Services do not acknowledge this countervailing power argument. Rather, they attempt to explain away Spotify's value and power—[REDACTED]—by treating that phenomenon as purely the consequence of the Majors' complementary oligopoly power.

In this regard, the Services assert that the [REDACTED] was merely the [REDACTED]—telltale behavior of a complementary oligopolist rather than a price competitor. They rely on testimony by Messrs. Harrison and Orszag that Universal [REDACTED] not to [REDACTED], but rather [REDACTED]. Services PFFCL ¶ 148 (and record citations therein). The Services also cite testimony by Professor Shapiro in which he opines that when licensors are [REDACTED] 8/19/20 Tr. 2881 (Shapiro) (emphasis added). This basic principle, according to the Services, explains why ''[REDACTED]'' Services PFFCL ¶ 149 (citing 8/19/20 Tr. 2864, 2870, 2880 (Shapiro)) (emphasis added).

SoundExchange asserts there is a serious flaw in this reasoning, which undermines the Services' assertion that the Majors' complementary oligopoly status explains the sum and substance of the relative bargaining power of the Majors and Spotify. Specifically, SoundExchange avers that if the Majors were [REDACTED] they would have [REDACTED]. However, the record indicates that the Majors only negotiated [REDACTED].[75] In support of this point, SoundExchange refers to particular testimony by Professor Shapiro in a colloquy with the Judges. When asked by the Judges why the Majors [REDACTED]—given that [REDACTED]—Professor Shapiro responded, [REDACTED] 8/19/20 Tr. 2880 (Shapiro) (emphasis added).

The Judges agree with SoundExchange and find Professor Shapiro's response unpersuasive. His theory of complementary oligopoly as the single cause of the [REDACTED] is premised on the idea that it was *[REDACTED]*—at monopoly rates rather than complementary oligopoly rates. 8/19/20 Tr. 2880–81 (Shapiro). But, if it was [REDACTED], there would have been no need [REDACTED]; rather, in their own interest the Majors would have [REDACTED]. Moreover, SoundExchange is persuasive in its argument that because the Majors [REDACTED], a fact acknowledged by Professor Shapiro, *see* Shapiro WRT at 23, fig. 1; 8/20/20 Tr. 3108–09 (Shapiro), the [REDACTED].

Alternatively, Professor Shapiro noted that Spotify may have [REDACTED] because it was the ''leader'' among interactive services. But the Judges find the record to demonstrate, as discussed above, that Spotify's ''leader'' status was important because it was the leader among *[REDACTED]*. Google's economic expert witness, Dr. Peterson, though, did acknowledge the importance of [REDACTED], testifying that [REDACTED] 8/25/20 Tr. 3723 (Peterson).[76]

[70] Mr. Harleston, also, testified in *Web IV,* but SoundExchange did not proffer him as a witness in this proceeding.

[71] As the quoted language provides, Warner indicated that there was [REDACTED]. Although that point is self-evident and economically rational, stating so in negotiations is obviously strategically prudent. But the salient point here is that *[REDACTED]—thus allowing Spotify to negotiate on a more level playing field than would otherwise exist when it lacked such countervailing power in negotiations with a Must Have Major.*

[72] Although the letter is identified in the email as a draft, SoundExchange does not claim that correspondence containing this or substantively similar language was not in fact transmitted to Spotify. *See* SX RPFFCL (to Services) at 83 n.35 (noting the correspondence within Trial Ex. 4052 is identified as a draft but not denying it was sent to Spotify). Clearly, SoundExchange and Universal could have provided documentary evidence and/or testimony in an attempt to demonstrate the draft correspondence (or its sum and substance) had not been transmitted to Spotify. Because SoundExchange did not present such evidence or testimony, the Judges find that this correspondence, or a substantively similar version, was transmitted by Universal to Spotify.) In any event, this draft email demonstrates Mr. Nash's state of mind regarding the importance to Universal of [REDACTED].

[73] *These* business documents are probative because they provide facts relating to the parties' state of mind during negotiations that are *[REDACTED]. See* Manne & Williamson, *supra* at 626–627 (''business documents can be useful in demonstrating 'economic realities' [that are] relevant . . . [and] it is ''permissible to . . . consider evidence of intent, belief, or motivation to demonstrate that the act intended did, in fact, happen.).

[74] In an attempt to explain away the statements made by the Major's executives contained in the documents discussed above—[REDACTED]—SoundExchange asserts that these statements are [REDACTED] For example, [REDACTED] testified that [REDACTED].'' [REDACTED] instead [REDACTED] 9/2/20 Tr. 5265 (Piibe); SoundExchange's Corrected Replies to the Services' Joint Proposed Findings of Fact and Conclusions of Law ¶ 145 (SX RPFFCL (to Services)). *See also* SX RPFFCL (to Services) at 81 nn.30, 33, 35; SX PFFCL at 147 n.17, ¶ 441 (multiple assertions by hearing *witnesses* that [REDACTED]). This argument highlights the serious defect in SoundExchange's failure to call as witnesses the negotiators and executives identified in the Majors' documents, who are the individuals who could testify as to their own state of mind when making those statements. Moreover, if these declarants [REDACTED] For these reasons, the Judges afford no weight to any testimony by SoundExchange witnesses who offer hearsay or opinion testimony regarding the so-called ''true meaning'' of statements made by declarants contained in the documentary record.

[75] Apparently, [REDACTED], 9/3/2020 Tr. 5681–82 (Harrison), but that is not the same as a Major [REDACTED] as complementary oligopolists, in accordance with the Services' theory of the case. The Judges address the paucity of the record relating to this [REDACTED], *supra* note 51.

[76] By contrast, it is not clear that Professor Shapiro had recognized, acknowledged or recalled the importance of Spotify's [REDACTED], until the Judges brought the issue to his attention. *Compare* 8/19/20 Tr. 2882 (Shapiro) (stating in response to the Judges' inquiry that he did not recall reviewing correspondence indicating that [REDACTED]) *with* 8/20/20 Tr. 3080 (Shapiro) (Professor Shapiro testifying the next hearing day that it was his ''sense'' that because Spotify was [REDACTED]the Majors ''[REDACTED].'') *and* Shapiro WRT at 18 n.58 (Professor Shapiro quoting from Sony's December 7, 2016 internal document (later marked in evidence as Trial Ex. 4026 and discussed *supra*) stating that [REDACTED] (emphasis added). Additionally, it is noteworthy that Professor Shapiro did not specifically address the point in Harrison WDT ¶ 41 where Mr. Harrison identified [REDACTED] because he identified the Harrison WDT as a document upon which he relied in

Continued

Indeed, were it not for [REDACTED], its position [REDACTED] would make it [REDACTED], because [REDACTED]. That is, the Majors, as complementary oligopolists, would prefer to keep downstream competition roiling to avoid a downstream extraction of monopoly profits (double marginalization) that would reduce the Majors' revenues, as discussed in *Web IV* and noted earlier in this Determination.

The Judges note that, ultimately, in their post-hearing briefing, the Services do appear to acknowledge that the Majors [REDACTED] Services RPFFCL ¶ 477 (emphasis added). The Services assert, though, that this reflects only that Spotify has ''*[REDACTED],* which, they contend, would explain why the Majors [REDACTED]. Services RPFFCL ¶ 477 (emphasis added). But, the Judges find this assertion to be fully consistent with their finding that Spotify's much different circumstances explain why it had countervailing power—generated by the confluence of (1) [REDACTED] and (2) its own status as the [REDACTED].[77]

Finally, according to the Services, the Majors' [REDACTED] ''does not inform the demonstrated reasons why they *[REDACTED]* Services RPFFCL ¶ 477. The Judges partially agree: the Majors' decision [REDACTED] is not informative—*standing alone*—to explain why they did [REDACTED]. However, the Services are simply in error when they say the Majors' [REDACTED] was disconnected from [REDACTED]. As the record discussed above reveals, the connection is clear: SoundExchange provided ample evidence that the Majors [REDACTED]. And, to reiterate, Spotify came to possess that power because it had developed a market-leading business while [REDACTED].[78]

e. There Is Agreement That Spotify's Subscription Royalty Rate Is [REDACTED] Set Through the Exercise of Complementary Oligopoly Power Alone

Notwithstanding the foregoing analytical disputes, Professor Shapiro acknowledges that Spotify's subscription royalty rate equates with a rate he identifies as set without the anticompetitive effect of complementary oligopoly power. As SoundExchange explains—relying on Professor Shapiro's own testimony—in the course of developing his proposed competition adjustment, he calculates [REDACTED]'s effective per-play interactive royalty rate at $[REDACTED]. Ex. 4094 at 40 & tbl.10 (SCWDT of Carl Shapiro) (Shapiro WDT). Then, he characterizes this $[REDACTED] rate as an effectively competitive rate (as a base for comparison with other rates he identifies as not effectively competitive). *Id.* at 40; 8/19/20 Tr. 2850 (Shapiro).[79]

SoundExchange notes that, according to Professor Shapiro's own calculations, *Spotify's* effective subscription per-play rate is $[REDACTED], Shapiro WDT at 40, tbl.10, *[REDACTED] to the [REDACTED] rate he characterizes as free of the complementary oligopoly effect.* 8/20/20 Tr. 3112–13 (Shapiro); *see also* 8/10/20 Tr. 1170 (Orszag). SoundExchange further notes that Professor Shapiro acknowledges, as he must, that these two rates are [REDACTED] 8/20/20 Tr. 3113 (Shapiro). Given this [REDACTED], Mr. Orszag opines that, at most, a competition adjustment should measure the difference between the Spotify effective rate ($[REDACTED]) and the [REDACTED] effective rate ($[REDACTED]). Orszag WDT ¶ 114. This difference would lead to a [REDACTED]% effective competition adjustment.[80]

After first conceding [REDACTED] the Services attempt to dismiss the importance of this equivalency—in a reply, quoted below—that is off-point and unconvincing:

> In an attempted ''gotcha,'' Mr. Orszag argues that if [REDACTED]'s per-play rate of $[REDACTED] reflects the lack of must-have power, and if [REDACTED] pay $[REDACTED] per performances (*see* Shapiro WRT at 30 fig. 3), then the record companies must not be must-have for those services either—in which case there is no need to adjust the Spotify rates any further for effective competition (or to make an adjustment of only [REDACTED][81] ([REDACTED])). Orszag WRT ¶ 114. . . . Mr. Orszag is resorting to sleight-of-hand. Because he artificially excludes all the discounted plans from his calculations, the effective per-play rate of Spotify plans on which he actually relies for his benchmark is $[REDACTED], not $[REDACTED]. Moreover, as explained at length above, he does not use the per-play rate at all, but rather alters the *Web IV* methodology by starting from Spotify's percent-of-revenue royalty. . . .
>
> Were Mr. Orszag actually working from a $[REDACTED] per performance benchmark and following the *Web IV* methodology [by] . . . drop[ping] his industry-wide interactive per-play benchmark . . . he might have a point—but he does not.

Services PFFCL ¶ 160.

This criticism is off-the-mark because it explains why the Services believe that *Mr. Orszag* improperly ignored Spotify's $[REDACTED] effective per-play subscription rate. But the point here is not what Mr. Orszag did or did not do with this data point, but rather that Professor Shapiro identified two [REDACTED] royalty rates as simultaneously satisfying and not satisfying the effective competition requirement (inconsistent with the principle of transitivity). The Services' response fails to address that point.

The Judges find that the [REDACTED] is generally confirmatory of the fact that Spotify's [REDACTED] is not—as the Services maintain—a product solely of the Majors' complementary oligopoly power.[82]

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preparing his rebuttal testimony. Shapiro WRT app. A.

[77] As the Judges have explained in other circumstances, licensors will also charge different licensees different royalties to promote price discrimination and in recognition of a licensee's lower willingness-to-pay (often as a function of its lower ability-to-pay). But, a licensor will not offer a licensee a lower rate if that licensee's presence serves to cannibalize the business of services paying higher royalties (as Professor Willig explains well in this proceeding). Here, after the [REDACTED] [REDACTED]. Thus, providing [REDACTED]. There was; and that particular attribute—as the record demonstrates—was [REDACTED].

[78] Additionally, the Judges reject the Services' argument as reductive. That is, the Services treat the complementary oligopoly *structure* of the licensor side of the market as wholly explanatory of the [REDACTED]. In other words, they essentially assert that because the licensors are complementary oligopolists *any* [REDACTED] must be a matter of pure self-interest. But, that structural explanation ignores the dynamic and strategic *competitive effects* revealed by the present record: [REDACTED]; [REDACTED]; and the interplay of those two forces that provides Spotify with a countervailing power [REDACTED]. The Services' argument also is inconsistent with the fundamental economic concept of ''Pareto Optimality,'' which posits that any consensual transaction between private actors is efficient, in the sense that it benefits each party (or else it would not enter into the transaction). To be sure, if a party is not a willing buyer or seller, whether because of a counterparty's excessive market power or otherwise, this optimality is not realized, but here the Majors and Spotify found it in their interest, through the exercise of their countervailing power, to enter into agreements containing [REDACTED]. Accordingly, it is incorrect to state, as the Services do, that the negotiated [REDACTED] cannot be in the *mutual* interest of Spotify and the Majors.

[79] Professor Shapiro reaches this opinion based on the limited repertoire available on [REDACTED], which he understands to demonstrate that customers ''do not expect to find all their favorite artists and recordings on the service.'' Shapiro WDT at 40. Thus, he opines that, for [REDACTED], no record company is a Must Have, making the rate effectively competitive. 8/20/20 Tr. 3110–11, 3117–19 (Shapiro).

[80] [REDACTED]/[REDACTED] = [REDACTED] [REDACTED] – [REDACTED] = [REDACTED]%.

[81] This [REDACTED]% calculation appears to be a computational error, as indicated by the math in the immediately preceding footnote.

[82] However, the Judges do not find that the [REDACTED] of Spotify's effective per play rate with [REDACTED]'s per play rate limits the effective competition adjustment to the [REDACTED] in those rates. Rather, as discussed elsewhere in this Determination, the Judges agree with Dr. Peterson (Google's expert economic witness) that the 12% steering adjustment from *Web*

f. The Majors' [REDACTED] Explains the [REDACTED] of the Ongoing Negotiations

The Majors' [REDACTED] explains the flow of the ongoing negotiations between the Majors and Spotify. Unlike a negotiation in which the complementary oligopolists' ''Must Have'' status allows them to dictate terms, they [REDACTED].

In this regard the Services describe these negotiations as follows:

> [W]hat is apparent from the evidentiary record is [REDACTED] . . . *par for the course in a deal negotiation* . . . .

Services RPFFCL ¶¶ 426–427 (and record citations therein).

But, the point of complementary oligopoly power is that a ''Must Have'' supplier/licensor *[REDACTED]* to its buyers/licensees. And yet, here the Services acknowledge that the Spotify-Major negotiations were marked by a [REDACTED], as happens in *any* negotiation. Clearly, given that the Majors remained ''Must Have'' licensors, something else [REDACTED], and, as discussed above, that ''something else'' is Spotify's countervailing power flowing from its status as the [REDACTED].[83]

The [REDACTED] is clear in the record. Among the provisions that the Majors prevailed on (and, thus reciprocally, as to which [REDACTED] were four important items: (1) [REDACTED], (2) [REDACTED], (3) [REDACTED], and (4) [REDACTED]. Services PFFCL ¶ ¶ 146, 157–158 (and record citations therein).

And, on the other side of the ledger, among the provisions as to which *[REDACTED]* in negotiations (and, thus reciprocally, as to which [REDACTED]) were the following important items: (1) [REDACTED], (2) [REDACTED], (3) [REDACTED] [REDACTED], and (4) [REDACTED] [REDACTED]. SX PFFCL ¶ ¶ 293, 413, 431–432, 444; SoundExchange's Corrected Replies to the Services' Joint Proposed Findings of Fact and Conclusions of Law ¶ 158 (and record citations therein) (SX RPFFCL (to Services)). This [REDACTED]led the Services to describe that process as typical of an ordinary bargaining process when each counterparty has bargaining leverage. *See* Services RPFFCL ¶¶ 413; 424, 426–427 (and record citations therein) (it is ''*unsurprising*'' that ''*each party* to the negotiation [REDACTED]; it is ''*inevitable* [that] *not all* [REDACTED] will form part of the . . . agreement''; and ''what the [Warner-Spotify negotiation] record shows is [REDACTED] (emphasis added). These descriptions are not consistent with the one-sided negotiations between complementary oligopolists and their relatively powerless counterparties, belying the Services' assertion that these negotiations reflected the one-sided power of the Majors' complementary oligopoly status.[84]

Finally, consistent with the idea that the Majors would continue to bargain ([REDACTED]—is the following succinct colloquy (referred to *supra*) between Spotify and Warner negotiators in October 2016, as recounted in one of Warner's internal documents:

> [REDACTED]
>
> [REDACTED]

Trial Ex. 4022 (emphasis added). As noted *supra,* Warner was making a basic economic point: It understood that Spotify, as a [REDACTED]. The [REDACTED] realized by the Majors reflect [REDACTED] to incur for this benefit, and the Majors' [REDACTED] reflect [REDACTED] to incur.

In sum, the Judges find that the negotiation documents on which SoundExchange relies reflect bargaining that is consistent with: (1) The testimony of the Majors' witnesses regarding [REDACTED] and (2) the economic principle of countervailing power that, as discussed *supra,* could and did blunt some of the Majors' complementary oligopoly power, [REDACTED] toward an effectively competitive rate, even in the absence of horizontal price competition.[85]

C. The Price Competition Adjustment Necessary To Set an Effectively Competitive Rate

In the exercise of their statutory duty to ''to decide whether the rates proposed adequately provide for an effective level of competition,'' *SoundExchange, Inc.* v. *Copyright Royalty. Bd.,* 401 F.2d 41, 57 (D.C. Cir. 2018), the Judges find that the 12% effective competition adjustment that they set in *Web IV* remains an appropriate measure for an effective competition adjustment (before any necessary adjustment to reflect Spotify's countervailing power). To recap, the 12% effective competition adjustment was based on a factual record that included Pandora Steering Experiments, a steering-based agreement between Pandora and Merlin,[86] and a steering-based agreement between iHeart and Warner. The *Web IV* Judges defined steering in the same manner as defined by the parties in this proceeding, *i.e.,* as a licensee's ''ability to control the mix of music that's played on the service in response to differences in royalty rates charged by different record companies.'' *Web IV,* 81 FR at 26356.

The Judges in *Web IV* construed the economics of steering in the following manner:

> [S]teering in the hypothetical noninteractive market would serve to mitigate the effect of complementary oligopoly on the prices paid by the noninteractive services and therefore move the market toward effective, or workable, competition. *Steering is synonymous with price competition in this market, and the nature of price competition is to cause prices to be lower than in the absence of competition, through the ever-present ''threat'' that competing sellers will undercut each other in order to sell more goods or services.*

Web IV, 81 FR at 26366 (emphasis added). Moreover, the *Web IV* Judges noted that the steering evidence was especially probative because it consisted of ''a *combination* of benchmarks, experiments and expert economic theorizing using fundamental principles of profit maximization and opportunity cost . . . [a] combination of proofs and arguments [that] is actually *more*

IV remains applicable here. But, as also described elsewhere herein, that 12% downward adjustment must be offset by use of the [REDACTED]), as applied to the segments of the Spotify market for which the [REDACTED] applied. *See* Peterson WDT fig. 5 ([REDACTED]). Further, by limiting the application of the [REDACTED]'' adjustment only to Spotify market segments to which that rate actually applied, the Judges have allayed a final argument by the Services, *viz.,* that the evidentiary value of the Spotify and [REDACTED] should not apply beyond the subscription tier. *See* Services PFFCL ¶ 161.

[83] The Services maintain that, as a general rule, complementary oligopolists, like monopolists, negotiate with their counterparties, but that does not demonstrate the existence of effective competition. Shapiro WRT at 1; *see also Web IV,* 81 FR at 26344 (monopolists and complementary oligopolists bargain with their customers to establish discriminatory prices that increase the sellers' profits). That is certainly true, but it is insufficient for the Services simply to maintain, *ipse dixit,* that *any* ''give-up'' by a Major in negotiations represents the foregoing elements of negotiation rather than a ''give-up'' generated by identifiable countervailing power.

[84] By contrast, SoundExchange, in its zeal to portray Spotify as [REDACTED] in these negotiations, studiously ignores the fact that Spotify [REDACTED]. The Judges see this as ''hyperbole-by-omission.'' The Judges reject any notion that Spotify had acquired unilateral power to dictate terms; rather, its [REDACTED] provided it with a power to countervail the Majors' Must Have power.

[85] The Majors' [REDACTED]. As noted *supra,* in an internal Sony email from a Sony line negotiator, Andre Stapleton, to Mr. Piibe, Trial Ex. 5467, discussed *supra,* the [REDACTED]. By contrast, Mr. Sherwood, a Warner witness, [REDACTED], testifying, as noted *supra,* that [REDACTED]. 9/9/20 Tr. 5931 (Sherwood).

[86] Merlin is referred to in the music industry as ''the fourth major.'' *See, e.g., https://theindustryobserver.thebrag.com/heres-to-ten-years-of-merlin/ (accessed* June 7, 2021).

persuasive to the Judges than a mere benchmark standing alone.'' *Web IV,* 81 FR at 26367 n.141. Relying on all the steering evidence presented, the *Web IV* Judges determined that benchmark rates that were inflated by the complementary oligopoly effect needed to be adjusted downward by 12%, in order to establish an effectively competitive rate. *Web IV,* 81 FR at 26404–05.

Additionally, crucial evidence that supported the Judges' *Web IV* finding of a 12% adjustment is part of the *present* record, having been designated as such by Pandora. Specifically, Pandora designated as part of the *Web V* record the *Web IV* Written Direct Testimony and hearing testimony of Stephan McBride, Pandora' Senior Scientist responsible for the Pandora Steering Experiments on which the Judges relied. *See* Trial Exs. 4104 & 4105; *see generally* 37 CFR 351.4(b)(2) (permitting a party to designate ''past records and testimony'' for inclusion in its Written Direct Statement).

The Judges in *Web IV* described the Pandora Steering Experiments as follows:

> Pandora's . . . steering experiments . . . consist of comparisons between randomly selected groups of listeners, one group receiving a manipulated experience (the ''treated'' group) and the other group receiving the standard Pandora experience (the ''control'' group). . . . These experiments are randomized, controlled, and blind . . . .
>
> Pandora initiated the steering experiments because . . . it recognized that, as a noninteractive service it has the economic incentive to ''steer'' its performances toward music owned by a particular record company if that music is available at a lower royalty rate. . . . Therefore, Pandora decided to determine through its steering experiments whether and to what extent it could use this technological ability to steer performances *without negatively affecting listenership.*
>
> . . .
>
> The Steering Experiments consisted of a group of 12 experiments. Each experiment involved a combination of one of three target ownership groups (UMG, Sony or WMG) and a target ''deflection'' in share of spins (treatment group) as compared to spins that would occur according to the standard Pandora music recommendation results (control group
>
> *The experiments demonstrated that Pandora was able to steer +15% or − 15% for all three Majors without causing a statistically significant change in listening behavior. McBride WDT ¶ 21. However, Pandora was unable to steer +30% or − 30% for Universal or Sony without creating a statistically significant change in listening behavior.*

Web IV, 81 FR at 26357–58 (emphasis added).

As noted above, the Judges also relied on provisions in two agreements. First, *Web IV* noted that ''the central piece'' of the agreement between Pandora and Merlin was a ''reduced per-play rate in exchange for increased plays''—the very essence of steering. *Web IV,* 81 FR at 26357. The second agreement the Judges relied on in *Web IV* was the iHeart/Warner agreement which the *Web IV* Judges described as ''incorporat[ing] the same economic steering logic as the Pandora/Merlin Agreement [by] [c]reat[ing] an incentive for iHeart to increase Warner's share of performances substantially.'' *Web IV,* 81 FR at 26375. As with the Pandora/Merlin Agreement, the *Web IV* Judges described this ''steering aspect'' of the contract as reflective of ''price competition—an increase in quantity (more performances) in exchange for a lower price (a lower rate).'' *Web IV,* 81 FR at 26383.

SoundExchange argues that this evidence of steering is now ''stale,'' because the experiments are outdated, as are the two cited agreements, SX PFFCL ¶¶ 490–91.[87] But the dates of the experiment and those agreements are insufficient to wash away the importance of steering as a price competition mechanism applicable to the noninteractive market. The Judges note that SoundExchange could have called a witness from Merlin in *Web V* (as it did in *Web IV*) to present testimony that may have shed light on *why* its [REDACTED] but elected not to.[88] By contrast, Pandora presented testimony from Professor Shapiro explaining that Merlin (and the Majors) had refused to agree to continue steering. Specifically, Professor Shapiro testified:

> Following the *Web IV* Determination, as a condition for obtaining the additional rights necessary to offer its non-statutory services, *[REDACTED].* These provisions appear to be the result of the complementary oligopoly power held by certain record companies in the market for licensing recorded music to interactive services. *Given these provisions, Pandora has been unable to offer to steer toward other labels in exchange for a discounted royalty rate from them, lest it jeopardize the share of other labels in violation of their anti-steering provisions. As a result, competition for incremental performances on Pandora in the form of steering has been snuffed out.*

Shapiro WDT at 9–10 (emphasis added); *see also* Trial Ex. 4090 ¶ 24 (WDT of Christopher Phillips) (Phillips WDT) (noting the existence of the [REDACTED]).

In response, SoundExchange asserted that: (1) Pandora had not offered any further evidence or testimony beyond the testimony cited above; (2) it was not clear that [REDACTED]; (3) Pandora had ''considerable leverage in negotiations'' because it could default to the statutory rate. SoundExchange's Corrected Replies to Pandora and Sirius XM's Corrected Proposed Findings of Fact and Conclusions of Law ¶ 21 (SX RPFFCL (to Pandora/Sirius XM)).

The Judges find SoundExchange's arguments unavailing. As already noted, SoundExchange could have attempted to rebut Pandora's testimony by calling a Merlin representative, as it had in *Web IV,* yet it declined to do so. When a party is in a position to proffer testimony or evidence that would elucidate a point, or rebut an adverse point, but declines to do so, a finder of fact may determine that the testimony would not have been supportive of that party's position. *See Huthnance* v. *District of Columbia,* 722 F.3d 371, (D.C. Cir. 2013) (Under the ''missing evidence rule, when a party has relevant evidence [which includes testimonial evidence] within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him . . . .''). The Judges infer that the absence of a Merlin witness indicates that the testimony of a Merlin witness would not have been favorable to SoundExchange's argument on this steering issue. Moreover, there is simply *no* evidence to contradict the testimony of Professor Shapiro in this regard.

In the present case, the absence of a Merlin witness is particularly noteworthy. As Dr. Peterson recounted in his testimony, SoundExchange had in the recent past—*after Web IV*—cautioned Indies that entering into direct agreements with services, even though they appear advantageous to the Indies, may ultimately be used in rate proceeding as evidence to support a *lowering* of statutory royalty rates. 8/25/20 Tr. 3673 (Peterson); Trial Ex. 2113 (SoundExchange's 2015 notice informing labels they ''should . . . keep in mind that any direct deals might be used against artists and record companies as evidence,'' and that because ''[d]igital radio services are intensely focused on how market evidence will be used in their case, . . . you should be as well.''). Although there is no evidence that SoundExchange repeated that cautionary communication in the run-up to *Web V,* there is also no evidence that it has ever retracted this warning. Thus, in this context, the

[87] The Pandora/Merlin agreement was executed on June 16, 2014, the iHeart/Warner agreement was entered into on October 1, 2013, and the Pandora Steering Experiments were conducted between June 4 and September 3, 2014. *Web IV,* 81 FR at 26355, 26357, 26375.

[88] The [REDACTED]. *See* SX PFFCL ¶ 1168 (and record citations therein).

absence of a Merlin witness to explain the [REDACTED] is of even greater importance.

Further, SoundExchange's assertion that steering beneficial to Pandora may have remained possible under its agreement with Merlin—and yet Pandora nonetheless acted against its self-interest and [REDACTED]—is simply bewildering; the Judges do not assume that sophisticated commercial entities engage in economically irrational conduct. Also, SoundExchange's assertion that Pandora enjoyed ''considerable leverage in the negotiations'' with Merlin is purely speculative (given the absence of record evidence demonstrating such leverage) and also runs counter to an essential premise of SoundExchange's case-in-chief, presented through Professor Willig, that as a matter of bargaining strategy and modeling, the record companies would not engage in steering because it would thwart the maximization of their ''Must Have'' value. *See* 8/10/20 Tr. 1077–78 (Willig).

Additionally, [REDACTED] was one of the very devices SoundExchange claimed in *Web IV* that record companies would use to defeat steering-based price competition. *Web IV,* 81 FR at 26364. In response, the Judges found such a contract term would constitute an exertion of the licensors' complementary oligopoly power, frustrating the setting of an effectively competitive rate. *Web IV,* 81 FR at 26373–74 (''the hypothetical use by the majors of anti-steering clauses in response to the threat of price competition-via-steering would thwart 'effective competition.' ''). Here too, it would be anomalous (in the nature of a Catch–22) for the Judges to disregard the capacity of price-competitive steering to offset a complementary oligopoly effect because a record company had used such power to thwart the continuation of such steering.

Further, the Judges' task is to set a rate that equates with an effectively competitive rate that would have been agreed to by willing buyers and sellers in a *hypothetical* market. The Pandora/Merlin and iHeart/Warner agreements demonstrate that *actual* steering has occurred in the market. *A fortiori,* steering is clearly an element of the hypothetical market (as shown by the Pandora Steering Experiments) that the Judges must construct.

The Judges also note that in the present case, Dr. Leonard, the economic expert for the NAB, adopts the 12% steering adjustment applied by the Judges in *Web IV* in order to establish an effectively competitive rate. Trial Ex. 2150 ¶ 115 (CWDT of Gregory Leonard) (Leonard WDT). In his oral testimony, Dr. Leonard testified that any initial reluctance he may have had to ''reuse'' this 12% adjustment was outweighed by the fact that this adjustment: (1) Is based contractual agreements; (2) is the product of agreements entered into ''not that long ago''; and (3) is ''conservative'' and ''small'' relative to the complementary oligopoly effect in the present circumstances. 8/24/10 Tr. 3410 (Leonard).

In addition, Google's economic expert, Dr. Peterson, testified in favor of utilizing this same economic evidence to support the steering adjustment in the present case. Dr. Peterson's testimony in this regard is well worth quoting:

> In a *hypothetical* effectively competitive market, statutory streaming services, such as custom radio services, have the potential to steer the music they use toward or away from particular labels [because] [m]usical recordings are differentiated but substitutable products. . . . [T]he service can reduce the number or share of plays for a given label's recordings if the license rate is too high. This response to rate differences is called steering. . . . [I]it is appropriate that the *hypothetical negotiation* between statutory streaming services and licensors reflect some degree of competition from steering or the ability of the streaming services to substitute one label's recordings for another's relative to the rates that the labels charge acting as Cournot oligopolists.
>
> The evidence available to me in this proceeding does not include recent licenses with steering adjustments built into them as was the case in the *Web IV* proceeding. However, *I am aware of no evidence that a stand-alone statutory webcaster would not be able to steer toward or away from labels, which would lead to their competing at the margin for additional plays on the service.*
>
> *In the absence of new benchmarks, it can be appropriate to use previous benchmarks. In the Web IV proceedings, there was ample evidence of the ability of statutory streaming services to steer toward or away from record labels.* Thus, the evidence indicates that listener behavior permits statutory webcasters to engage in substantial steering without negatively affecting their user base. In the *hypothetica*l effectively competitive marketplace for licensing statutory webcasters, licensors would not be in the position of Cournot oligopolists because their high license fees would affect the spins of their works directly.

Trial Ex. 1103 ¶¶ 37, 58–61, 64 (emphasis added) (CWDT of Steven Peterson) (Peterson WDT). Relying on this analysis, and also considering other evidence, Dr. Peterson opined that a reasonable range for the steering-based effective competition adjustment was between 11% and 23% (which includes the Judges' 12% adjustment). Peterson WDT ¶ 65.

The Judges agree with Dr. Peterson. They emphasize that *basic economic principles* do not change with the mere passage of a few years. Although new probative factual evidence or advances in economic theory or modeling presented by an expert witness *could* show either that the principle is factually inapplicable or needs to be revisited, no such record has been presented in this proceeding. Accordingly, the Judges find that the economic experts cited above [89] have properly relied on the evidence supporting the *Web IV* steering adjustment to establish the appropriate steering adjustment in this proceeding.[90]

A final aspect of the *Web IV* and *Web V* proceedings adds to the ample evidence supporting the use of a steering adjustment to establish an effectively competitive rate. In this *Web V* proceeding, Professor Willig, a SoundExchange economic witness, while testifying in support of his Shapley Value Model, emphasized repeatedly that Majors were ''Must Haves'' in the noninteractive market because their repertoires included the bulk of sound recording ''hits'' that listeners wanted to hear. *See, e.g.,* 8/5/20 Tr. 400 (Willig) (''Must Have'' status is ''really about the hits''); 8/5/20 Tr. 440 (Willig) (the hits are ''terribly important'' to the overall value of listening); 8/5/20 Tr. 448 (Willig) (the Majors' collection of hits is what makes them ''Must Haves''); 8/6/20 Tr. 807 (Willig) (the level of spin rates on noninteractive services is a function of the plays of current hits); Trial Ex. 5601 ¶ 28 & n.46 (WRT of Robert Willig) (Willig WRT) (Universal has a [REDACTED]% share of the streams but accounts for [REDACTED]% of the top 100 hits according to 2019 *Billboard* data relied on by Professor Willig).

Similarly, in *Web IV,* the Judges took note of the importance of hits (''top spins'') to a noninteractive service. *Web*

[89] Pandora's economic expert, Professor Shapiro, although presenting in this proceeding a ''carriage competition'' model relying on the Label Suppression Experiments, rather than a steering-based adjustment, nonetheless has acknowledged previously that ''a streaming service that possesses an ability to ''steer'' towards certain recordings, and away from others, will have 'much more bargaining power and be able to negotiate a lower royalty rate,'' reflecting ''price competition at work,'' and the workings of an ''effectively competitive market.'' *Web IV,* 81 FR at 26356–57. Thus, experts for all the commercial services are on record as supporting the use of a steering adjustment to generate an effectively competitive rate.

[90] The Judges have also not hesitated to apply evidence from a prior proceeding when they have found the prior evidence to be superior to the evidence presented in the new proceeding. *SDARS II,* 78 FR at 23063 (''The Judges rely [*inter alia*] . . . on . . . the unadjusted upper bound in *SDARS–I* to guide the determination of what the upper bound should be in this proceeding.'').

IV, 81 FR at 26373 n.155 (" 'top spin' figures are indicative of the 'must have' aspect of the Majors' repertoire . . . suggest[ing] to the Judges that the popularity of the Majors' spins is the reason why steering away from their repertoires cannot be pursued beyond a certain level, and why [Professor] Shapiro candidly declined to reject the idea that the Majors' repertoires were 'must haves' . . . .").

Professor Willig's emphasis in this proceeding on the Majors' possession of many of the ''hits'' puts a fine point on the steering issue. The noninteractive services need to play the ''hits'' (at intervals consistent with the sound recording performance complement) in order to remain attractive to their listeners and subscribers. That necessity renders the Majors ''Must Have'' licensors. However, the flip-side of this appropriate emphasis on the ''hits'' is a de-emphasis on less popular sound recordings, *and therein lies the ability of the noninteractive services to engage in price competition by embedding steering into their algorithmic or human curation system.*

That is, noninteractive services can (and, in the case of [REDACTED], *did*) steer curated songs that were not necessarily the hits/top spins, in a manner that [REDACTED]. *See Web IV,* 81 FR at 26368–69 (explaining why substituting a curated song with a [REDACTED] did not impact listeners but improved the bottom lines of the services and labels that engaged in steering). When the Judges consider this point together with Professor Willig's testimony regarding the need of noninteractive services to obtain licenses necessary to play all the hits, the economic coexistence *of the noninteractives' steering ability and the Majors' ''Must Have'' status remains clear.*

Finally, the Judges note that none of SoundExchange's arguments indicates that the fundamental economics of noninteractive services have changed in any manner that would make steering by such services a less useful tool for applying an appropriate steering adjustment. Rather, as Dr. Peterson testified, ''the ability to steer for a non-interactive statutory service is pretty much bred right into the nature of the service where it's choosing the songs.'' 8/25/20 Tr. 3668 (Peterson).

In sum, the Judges find it appropriate—for the reasons discussed above—to apply a 12% steering adjustment (prior to the offsets discussed below) in order to generate a competitive rate.

D. The Countervailing Power Offset to the Price Competition Adjustment

As discussed more fully elsewhere in this Determination, the Judges find that Spotify, through its success as a market leader among interactive services and as the dominant independent pureplay interactive service, has acquired a significant measure of bargaining power in its licensing negotiations with the Majors. To summarize very briefly, the evidence demonstrates that Spotify's [REDACTED]—in the interactive market. *See supra,* section III.B.2.

Spotify's bargaining power allowed it to bargain for [REDACTED].[91] This reduction is a function of the countervailing power discussed *supra,* which can serve as a means for reducing prices (and rates) *toward* a level indicated by the processes of price competition that are the hallmark of traditional neoclassical microeconomics.

In this regard, it is noteworthy that one of SoundExchange's economic expert witnesses, Mr. Orszag, acknowledges that the 12% effective competition adjustment can be applied, if [REDACTED]. 8/25/20 3837 (Orszag) (''[REDACTED]'').[92]

Here, [REDACTED]. A 12% price competition adjustment is warranted. But [REDACTED]. Thus, an appropriate adjustment for rates using this benchmark is 12%—[REDACTED], or [REDACTED]%.

However, as explained *infra,* that [REDACTED]% adjustment applies only to a headline rate that serves as a benchmark in this proceeding and that is consistent with [REDACTED] in the *effective* per-play rate. To the extent the [REDACTED]% adjustment does not apply to discounted subscriptions, such as student plan subscriptions, or to ad-supported plans, then the [REDACTED]% reduction is not applicable. Rather, in such instances, the full 12% competition adjustment applies.[93]

IV. Commercial Webcasting Rates

A. Evaluation of Survey Evidence

1. Zauberman Music-Listening Behavior Survey

a. Description of the Zauberman Survey

Professor Willig's opportunity cost approach is dependent upon the results of the consumer behavior surveys.[94] The Judges, therefore, test the underlying survey data on which he relied to assess their reliability or their strength in supporting Professor Willig's conclusions.

SoundExchange engaged Professor Gal Zauberman to measure the music-listening behavior of listeners to streaming radio services.[95] Trial Ex. 5606 ¶¶ 1, 4(WDT of Gal Zauberman) (Zauberman WDT). Professor Zauberman conducted an internet-based survey with the assistance of the Brattle Group, an economic consulting firm, and Dynata, a marketing research company with extensive experience in conducting surveys. Zauberman WDT ¶ 28. Specifically, the survey explored how consumers of streaming radio services that are eligible for the webcasting statutory license would listen to music if those streaming radio services were not available. Zauberman WDT ¶ 12. The survey respondents were asked about their listening behavior in a hypothetical world in which either

[91] [REDACTED]% – [REDACTED]% = [REDACTED]%. [REDACTED]%/[REDACTED]% = [REDACTED]%.

[92] The Judges do not agree with Mr. Orszag's levels of adjustment to reduce the 12% factor, but his concept is the one the Judges are applying in this proceeding.

[93] The Judges recognize, as they did in *Web IV,* that estimating a rate that reflects effective competition is not an exact science. *See Web IV,* 81 FR at 26334 (''The very essence of a competitive standard is that it suggests a continuum and differences in degree rather than in kind.''). However, the *quality* of the steering evidence in *Web IV* allowed the Judges to identify with some precision the ''range of potential steering adjustments, notwithstanding the otherwise inherently 'fuzzy' nature of the 'bright line' . . . between effectively competitive and noncompetitive rates.'' *Web IV,* 81 FR at 26344. Here, applying that steering evidence together with the offset indicated by the *Web V* record represents another application of specific evidence to put into focus the necessary size of the effective competition adjustment. Mr. Orszag likewise acknowledges that identifying the impact of market developments on the ascertainment of an effective competition adjustment cannot be determined with absolute precision. 8/11/20 Tr.1276 (Orszag) (''[T]hese are areas of gray. . . . [M]arkets can be less workably competitive or less effectively competitive and more effectively competitive.''). And, to compare markets over time to identify the change to the level of an effective competition adjustment, Mr. Orszag opines that ''[f]rom an economic perspective, what one can do is utilize calibration or empirical evidence to understand how markets have changed. 8/12/20 Tr. 1653 (Orszag). The Judges quite agree, and that is what they have undertaken in this Determination—to use the empirical data and related evidence to calibrate the extent to which an effective competition adjustment is required in the noninteractive subscription and ad-supported markets.

[94] One input in calculating a record company's opportunity cost of licensing its repertoire to a statutory webcaster is a diversion ratio, which measures how listening is spread across a range of alternative listening sources in the event that listeners stop listening to a statutory webcaster because a label's repertoire is no longer available.

The Judges discuss Professor Willig's economic modeling *infra,* section IV.C.1.

[95] Professor Gal Zauberman, is the Joseph F. Cullman 3rd Professor of Marketing at the Yale School of Management, who specializes in consumer judgment and decision-making, financial decision-making, and survey methodology. Zauberman WDT ¶¶ 1, 4.

free or paid streaming radio services were no longer available. Zauberman WDT ¶ 13.

The Zauberman Survey consisted of three key types of questions: Respondents were asked about which music-listening options they have used in the past 30 days, either a free or paid streaming radio service (Q1), which replacement music-listening options they would choose instead of the free or paid streaming radio service set forth in their assigned hypothetical scenario (Q2), and (in some cases) how they would allocate their replacement time music-listening options (Q3, 3A) among replacement options. Zauberman WDT ¶ 51.[96]

Among the 6,146 respondents who were asked which type of music-listening options they had used in the prior 30 days (Q1), 66 percent (4,029 respondents) responded that they had used a free streaming radio service in the past 30 days, and 21 percent (1,278 respondents) responded that they had used a paid streaming radio service in the past 30 days. Altogether, 71 percent (4,369 respondents) said they had used either free or paid streaming radio (or both), and 15 percent (938 respondents) said they had used both free and paid streaming radio services in the past 30 days. Zauberman WDT ¶ 68.

Out of the 1,552 respondents who were not excluded and completed the survey, a total of 989 respondents were assigned to the scenario in which free streaming radio services are no longer available (Q2). The survey assigned 563 respondents to the scenario in which paid streaming radio services are no longer available. Zauberman WDT ¶ 56. After being provided with the respective scenario in which free or paid streaming radio services were no longer available, respondents were asked a series of questions about how they would replace the time they currently spent listening to music on their free or paid streaming radio services. Respondents were then presented a variety of music-listening options with the exception of the streaming radio option that was no longer available in their given scenario. Zauberman WDT ¶ 57.

Out of 989 respondents who completed the survey and were told that *free* streaming radio services were no longer available, the (Q2) responses indicated that 33 percent of current listeners of free streaming radio services would instead listen to paid streaming radio services, 80 percent would instead listen to free On-Demand streaming services, 39 percent would instead listen to paid On-Demand streaming services, 31 percent would instead listen to Sirius XM satellite radio services on a satellite receiver, 85 percent would instead listen to AM/FM radio on a traditional radio receiver, 69 percent would instead listen to CDs, vinyl records, or MP3 files they currently own or would purchase, and 48 percent would instead do something other than listen to music.[97] Zauberman WDT ¶ 24, 72, fig. 8.

Out of 563 respondents who completed the survey and were told that paid streaming radio services were no longer available, the (Q2) responses indicated that 84 percent of current listeners of paid streaming radio services would instead listen to free streaming radio services, 83 percent would instead listen to free On-Demand streaming services, 71 percent would instead listen to paid On-Demand streaming services, 52 percent would instead listen to Sirius XM satellite radio services on a satellite receiver, 79 percent would instead listen to AM/FM radio on a traditional radio receiver, 67 percent would instead listen to CDs, vinyl records, or MP3 files they currently own or would purchase, and 50 percent would instead do something other than listen to music. Zauberman WDT ¶ 25, 74, fig. 9.

The respondents who answered the (Q2), saying that they would replace their streaming radio service that is no longer available with either (a) a free On-Demand service or (b) a free streaming radio service (if their paid streaming radio service were no longer available), and who chose at least one other music-listening option (or ''[d]o something other than listen to music'') as a replacement for their streaming radio service that is no longer available, were asked (in Q3) if they would expect to listen to their streaming radio service one week from the day on which the respondent was taking the survey, if it were available.[98] Zauberman WDT ¶ 75.

This form of questioning was designed to account for the possibility that time spent listening to music may vary from day to day for different people and across the respondents' allowed measurement of listening time across all days of the week. The day of week question format was also designed to be as specific as possible about the occasion that they are estimating and to have the estimation day not too far into the future. Zauberman WDT ¶ 61–62.

The respondents who answered ''Yes'' to Q3 were then asked to allocate their time among replacement options they chose in the replacement question, Q2. They were asked (in Q3A) to allocate any number from 0 through 100 to reflect the percentage of time they would listen to each particular option. Respondents were shown all of the services they said they would use to replace free or paid streaming radio in response to Q2. Zauberman WDT ¶ 64, 76.[99]

The responses to Q3A indicated that current listeners of *free* streaming radio services who were asked to allocate their time indicated that they would replace 16 percent of the time they would have spent listening to their free streaming radio services by listening to paid streaming radio services, 32 percent of that time by listening to free On-Demand streaming services, 25 percent of that time by listening to paid On-Demand streaming services, 19 percent of that time by listening to Sirius XM satellite radio services on a satellite receiver, 27 percent of that time by listening to AM/FM radio on a traditional radio receiver, 18 percent of that time by listening to CDs, vinyl records, or MP3 files they currently own or would purchase, and 16 percent of that time by doing something other than listen to music. Zauberman WDT ¶ 26, 77, fig. 10.

The responses to Q3A also indicated that current listeners of *paid* streaming radio services who were asked to allocate their time indicated that they would replace 24 percent of the time they would have spent listening to their paid streaming radio services by listening to free streaming radio services, 20 percent by listening to free On-Demand streaming services, 24 percent by listening to paid On-Demand streaming services, 21 percent by listening to Sirius XM satellite radio services on a satellite receiver, 18 percent by listening to AM/FM radio on a traditional radio receiver, 14 percent by listening to CDs, vinyl records, or MP3 files they currently own or would purchase, and 10 percent by doing something other than listen to music. Zauberman WDT ¶ 27, 78, fig. 11.

[96] A total of 21,335 respondents entered the survey: 6,146 respondents answered Q1 and 2,151 respondents answered Q2. Of these, 1,552 qualified respondents completed the survey without being excluded for selecting ''Unsure'' for any of the options in Q1 or Q2. These 1,552 respondents did not include 88 respondents who were excluded for completing the survey in what was judged to be too little time or too much time. Zauberman WDT ¶ 53.

[97] The percentages add up to more than 100% because respondents were permitted to select multiple replacement options. *See* Zauberman WDT app. D.

[98] For example, respondents who took the survey on a Wednesday would be asked if they would expect to listen to their streaming radio service on the following Wednesday.

[99] The ''day of week'' variable was designed to function in the same manner as in Q3.

b. Services' Criticisms of the Zauberman Survey

The Services offer a number of critiques of Professor Zauberman's surveys, including those noted below. Services PFFCL ¶¶ 288–302.

The Services assert that the survey erroneously toggles between an initial definition of ''free streaming radio service'' and an incorrect definition that described ''on-line streams of AM/FM radio stations'' as services that ''allow you to listen to customized radio stations with advertisements,'' like Pandora. Services PFFCL¶¶ 288–290, Proposed Findings of Fact and Conclusions of Law of the National Association of Broadcasters ¶¶ 190–191 (NAB PFFCL), 8/27/20 Tr. 4245–51 (Zauberman).[100] The Services point out that in his hearing testimony, Professor Zauberman conceded that, contrary to the language of his erroneous definition, simulcasts are not customizable, and that including different definitions for the exact same term in a survey is not a best practice in his field. Services PFFCL¶¶ 288–290; 8/27/20 Tr. 4246–47, 4253.

The Services also suggest Professor Zauberman's survey suffers from ''cheap-talk'' or hypothetical-bias problems. Services PFFCL ¶¶ 291–294. These concepts are described by Professor Hauser and Dr. Leonard as problems arising where respondents are allowed to choose multiple options, in which case they are more likely to select paid options that they would not in fact pay for in the real world, or otherwise do not really consider how much things cost or their budget constraint. Services PFFCL ¶ 291; 8/27/20 Tr. 4346–48 (Hauser); 8/24/20 Tr. 3421–23 (Leonard). Dr. Leonard also referenced academic literature addressing issues with the hypothetical nature of the ''payment'' in surveys, which can lead respondents to overstate their true willingness to pay. *See* Leonard WRT ¶¶ 19–21 & n.37 (citing Franziska Voelckner, *An Empirical Comparison of Methods for Measuring Consumers' Willingness to Pay,* 17 Marketing Letters 137 (2006); James J. Murphy et al., *A Meta-analysis of Hypothetical Bias in Stated Preference Valuation,* 30 Envtl. Resource Econ. 313 (2005).). Dr. Leonard's testimony suggests that aspects of responses to Q3, the time allocation question, indicate that respondents would not actually pay for their survey selections in the real world. Services PFFCL ¶ 291; Leonard WRT ¶ 21; 8/24/20 Tr. 3447–48 (Leonard) (addressing instances in which a service option was selected but no listening time was allocated to the option, a concept known in the economics literature as ''hypothetical bias'').

The Services, through their expert witness Professor Hauser, suggest that the Zauberman Survey's instruction to focus on music-listening options is biased and could suggest to respondents that the researcher was interested only in respondents switching to music-listening options, which could prompt respondents to favor the music-listening options rather than the stated option to do something other than listen to music. Professor Hauser points out the absence of specificity about what ''do something other than listen to music'' might entail and offers that respondents may not have immediately known, recalled, or considered alternatives that were available to them if they were not listening to music, leading them to select music-listening options instead. Services PFFCL ¶ 295; 8/27/20 Tr. 4364–65; Trial Ex. 2161 ¶¶ 7, 28–30 (WRT of John Hauser) (Hauser WRT).

The Services point to the Zauberman Survey's inability to distinguish between a respondent who did not have an existing paid subscription and a respondent who had an existing paid subscription but did not use it in the past thirty days. This concern was highlighted by the testimony of Dr. Leonard and Mr. Harrison who both address the occurrence of consumers having inactive paid subscriptions. Services PFFCL ¶¶ 297–298; Leonard WRT ¶ 18; 9/3/20 Tr. 5732 (Harrison) (explaining how users who bill subscriptions through a credit card might have a service for months without realizing they were still a subscriber). Professor Hauser also criticizes the survey's inability to distinguish between a respondent who did not have an existing paid subscription and a respondent who had an existing paid subscription but did not remember using it in the past thirty days. Services PFFCL ¶ 299. Professor Hauser stated that both academic research and his own survey pretest indicate that thirty days is too long for respondents to remember their own listening behavior accurately. The inability to distinguish between respondents who did not have an existing paid subscription, or who had one but did not use it or remember using it in the past thirty days, likely resulted in an upward bias in estimated switching to new, paid subscriptions. Hauser WRT ¶¶ 24–27; *see also* 8/27/20 Tr. 4360.

The Services find fault with the Zauberman Survey's failure to allow respondents to distinguish between their listening to CDs, vinyl, or digital music files they owned already, and listening to CDs, vinyl, or digital files they would purchase. They point to Professor Zauberman conceding that a respondent who had a large existing collection of downloads or CDs would have no way of indicating that she would listen to her existing collection, rather than purchasing new CDs. Services PFFCL ¶ 300; 8/27/20 Tr. 4240. The Services point out that Professor Willig described the effect of this on the Zauberman Survey results as an ''inaccuracy.'' Services PFFCL ¶ 300; 8/6/20 Tr. 843–47. The Services also note that both the Hauser and Hanssens surveys and industry data suggest that far more people would listen to existing collections than purchase new CDs or digital music files, suggesting that Professor Zauberman's survey likely would have demonstrated the same if he had given respondents the opportunity to make this distinction. *See* Hauser WRT ¶¶ 47–48; Trial Ex. 4095 tbls.4, 8 (CWDT of Dominique Hanssens) (Hanssens WDT); Leonard WRT ¶ 19; 8/24/20 Tr. 3448 (Leonard); Trial Exs. 2037, 2038, 2041 at 6 (showing declining sales and use of CDs and digital downloads).

The Services contend that the Zauberman Survey contained a fundamental error of failing to include attention checks to confirm respondents were sufficiently engaged in the survey and were providing reliable responses. *See* Hauser WRT ¶¶ 31–34. Professor Hauser explained that attention checks represent best practices in survey research, and not including them could have exacerbated the asserted flaws in the Zauberman Survey. *See id.* ¶¶ 8, 31–32; 8/27/20 Tr. 4334–35.

The Services suggest that some respondents in the Zauberman Survey who indicated they would listen to physical or digital recordings of music may in fact obtain pirated copies of recordings, thus calling into question the results. *See* 8/6/20 Tr. 799 (Willig); 8/10/20 Tr. 1089–92 (Willig). And, NAB takes issue with the Zauberman Surveys for not taking into account properly respondents who listened to zero hours of simulcasts. *See* NAB PFFCL ¶ 126.

c. Responses to Criticisms of the Zauberman Survey

In response to criticism of the Zauberman Survey, SoundExchange

[100] Q1: ''A free streaming radio service, such as personalized radio services like free Pandora and free iHeart Radio, and on-line streams of AM/FM radio stations, where you cannot choose a specific song, and must listen to advertisements.''

Q2: ''Free streaming radio services—services, such as personalized radio services like free Pandora and free iHeart Radio, and on-line streams of AM/FM radio stations, allow you to listen to customized radio stations with advertisements, but you cannot choose a specific song.''

characterizes the altered definitional language as a ''slight discrepancy,'' noting that the word ''customized'' appeared only in introductory language, and not in any survey response option. SoundExchange offers that the Services provide no basis to conclude that the difference in definitions had any effect on Professor Zauberman's data or that respondents were ever confused or noticed the discrepancy. SoundExchange suggests that the word ''customized'' in Q2 would not signal to respondents that AM/FM streaming was not a free streaming radio service because every time the survey describes free streaming radio services, it provides examples of services that fall into this category, including the example ''on-line streams of AM/FM radio stations.'' SoundExchange argues that if respondents had noticed and been confused by the variation in language, the survey results would have shown an increase of ''unsure'' responses with respect to free streaming radio services once alternate language was introduced, and that no such evidence of confusion exists. SX RPFFCL (to Services) ¶¶ 288–290.

SoundExchange also suggests that Professor Zauberman adequately clarified in his testimony that simulcast listeners do have some ability to customize their experiences. Professor Zauberman testified that ''there are multiple ways in which we customize our experiences or select the world around us'' and that, with regard to opportunities to personalize on-line streams of AM/FM radio stations, station choice is one aspect of customization. 8/27/20 Tr. 4271. SoundExchange then offers that other experts in this proceeding have a shared understanding of the functionality available through simulcasts. SX RPFFCL (to Services) ¶ 288; 8/26/20 Tr. 4121–25 (Hanssens) (simulcasts of AM/FM broadcasts and free streaming radio services like Pandora are ''very comparable mediums'' that ''share key attributes'' and compete with one another).[101]

SoundExchange adds that Professor Zauberman's testimony regarding variations in definitional language not constituting a best practice was not his ultimate conclusion. SX RPFFCL (to Services) ¶ 290; 8/27/20 Tr. 4217 (Zauberman) (the suggested ultimate conclusion being that the Zauberman Survey provides the most reliable data of any survey or experiment in the proceeding and that its findings are highly consistent with the Hanssens and Simonson Surveys).

SoundExchange offers that Professor Hauser's trial testimony regarding ''cheap talk'' is beyond the scope of his written testimony and unsupported by the academic literature he mischaracterized at trial. SX RPFFCL (to Services) ¶ 291; SX PFFCL ¶¶ 1259–1261. SoundExchange adds that even if the asserted ''cheap talk'' effect did exist, the Services have not attempted to quantify it, with regard to Professor Zauberman's survey or any other survey in this proceeding. SX RPFFCL (to Services) ¶ 291. SoundExchange also offers that the critique of Q3 is misplaced, as a zero time allocation on one specific day in the following week is not unreasonable nor does it indicate that respondents would not actually pay for their survey selections in the real world. SX RPFFCL (to Services) ¶ 292.

SoundExchange submits that Professor Zauberman's focus on music listening was entirely appropriate in light of the focus and scope of this proceeding. It adds that Professor Zauberman's approach struck an appropriate balance between providing a comprehensive list of options (including ''do something other than listen to music'') and the risk of making his survey unwieldy and confusing. SoundExchange points out that the Services offer no evidence that survey respondents actually had difficulty remembering what non-music options are available to them in the world. SX RPFFCL (to Services) ¶¶ 295–296.

SoundExchange notes that Professor Zauberman's testimony indicates why he chose the survey format. With regard to respondents who may have had an existing paid subscription but did not use it in the past thirty days, Professor Zauberman designed the survey order to avoid ambiguity or complicating the survey and creating non-uniformity that risked privileging some options over others. SX RPFFCL (to Services) ¶ 297; 8/27/20 Tr. 4181–82, 4184–85, 4239 (Zauberman). SoundExchange offers that Dr. Leonard's testimony that inactive subscriptions are ''not uncommon'' is poorly supported by the record. SoundExchange also criticizes, as conflicting, the NAB's argument that thirty days is too long for respondents to remember their own listening behavior accurately, and that thirty days is not long enough because a respondent may not have used his or her subscription service in the past 30 days SX RPFFCL (to Services) ¶¶ 297–299. SoundExchange posits that the Services' critique regarding new versus existing physical copies of recordings flows from an unwarranted assumption: That respondents who would go back to their existing CD collections and start listening to them again would not also make new purchases in order to supplement their collections with new music. SX PFFCL ¶ 780; 8/6/20 Tr. 843–47 (Willig). It also points out that the Hanssens and Simonson Surveys, which do distinguish between new purchases and existing collections, find over twice the amount of diversion to new purchases of physical copies as the Zauberman Survey does. SX PFFCL ¶ 781, *Compare* Willig WDT ¶ 47, fig.6 (14.8% diversion to new CDs, vinyl records, and MP3s based on Zauberman Survey), *with* Trial Ex. 5608 app. F at tbl.4B (CWRT of Itamar Simonson) (Simonson WRT) (comparing data from the Hanssens Pandora Survey, Simonson's Modified Hanssens Survey, and Hanssens Replication, reflecting a range of 27.8% to 29.9% diversion to new physical or digital recordings of music).

SoundExchange offers that all of the survey experts acknowledged that tools other than attention checks can be used to ensure that respondents are engaged in a survey and that such tools were used in the Zauberman Survey. SX PFFCL ¶¶ 766, 716–717. SoundExchange also points to Professor Hauser's testimony on attention checks, which according to SoundExchange, indicates that attention checks are not currently viewed as required under best practices, noting his statement that attention checks are now ''becoming widely used.'' SX PFFCL ¶ 766; 8/27/20 Tr. 4334–35 (Hauser).

Addressing criticism of the Zauberman Survey's failure to address the possibility that some respondents would in fact pirate sound recordings, SoundExchange observes that none of the surveys in the proceeding asks respondents whether they might obtain music through piracy. 8/10/20 Tr. 1118–19 (Willig). SoundExchange offers that there is no reason to think respondents would truthfully answer that they would engage in illegal activity. 8/26/20 Tr. 4143–44 (Hanssens). Moreover, Professor Hanssens made clear that he would not expect respondents to interpret the term ''own'' to encompass theft. *Id.* at 4142–43 (Hanssens). He also noted that the survey gave respondents options such as diverting listening to ''other'' sources, through which respondents could express their intent to steal recordings. *Id.* at 4143 (Hanssens).

SoundExchange suggests that while a number of respondents to the Zauberman Survey allocated zero time to a replacement option they had

[101] SoundExchange also references Orszag WRT ¶ 35 (given that users can choose to listen to a particular genre of music for both simulcast and custom radio, the user experience is not necessarily much different).

previously selected, any attempt to convert this observation into a critique misunderstands the structure of Professor Zauberman's time allocation questions. It offers that there is no inconsistency in respondents indicating that they would replace a noninteractive streaming service with a particular music-listening option and also indicating that they do not expect to listen to that option on one specific day of the following week. SX PFFCL ¶ 784–785; 8/27/20 Tr. 4197–98 (Zauberman); 8/6/20 Tr. 848–50 (Willig). SoundExchange goes on to offer that the Services cite to no evidence to support the insinuation of inconsistency in the survey results. SX PFFCL ¶ 787.

d. Judges' Conclusions on the Zauberman Survey

Upon consideration of the entirety of the record, including the facts and arguments indicated above, on balance, the Judges find the Zauberman Survey to be reasonably reliable evidence. There is some validity to the criticisms regarding definitional inconsistency and diversion related to existing/owned physical recordings. However, viewed in light of the results of the other surveys, these criticisms of the Zauberman Survey seems to have had a minimal effect. At most, the criticisms go to the weight assigned to the Zauberman Survey results.

2. Share of Ear Report

Professor Willig used data from Edison Research's quarterly ''Share of Ear'' study as a secondary data source as a basis for fallback values inputted into his theoretical models, and as a sensitivity check to the Zauberman Survey. The Services assert that the Share of Ear data contain troublesome ambiguities. Services PFFCL ¶¶ 265–268; Leonard WRT ¶¶ 23–29.

SoundExchange responds to the criticism of the Share of Ear data by pointing out that such concerns have essentially been mooted. Professor Willig acknowledged at trial that, for purposes of computing diversion ratios and calculating opportunity cost, Share of Ear is ''is not nearly as well founded . . . as making use of the Hanssens Survey or the modified Hanssens Survey or the Zauberman Survey.'' SX RPFFCL (to Services) ¶ 265.

3. Hanssens Pandora Survey and Sirius XM Survey

a. Description of the Hanssens Surveys

i. Purpose and Design

Several experts relied, in part, on the results of the Hanssens Surveys. *See, e.g.,* Shapiro WDT at 16; 20–21, tbl.2; 28, tbl.5; Willig WRT ¶¶ 30–35. The Judges, therefore, test the underlying survey data on which he relied to assess their reliability or their strength in supporting various modeling conclusions.

Sirius XM and Pandora retained Professor Dominique Hanssens to conduct two consumer surveys—the ''Pandora Survey'' and the ''Sirius XM Survey. The Hanssens Surveys measured how consumers would respond if their noninteractive streaming services changed by the loss of access to any given record company's repertoire, including what alternative sources of music, if any, listeners of free internet radio services music on Sirius XM over the internet would change their listening to as a result of hypothetical loss of music options. Hanssens WDT ¶¶ 13, 33, 39–40 & app. 6. The Pandora Survey addressed listeners of free internet radio and his Sirius XM Survey addressed listeners of Sirius XM's subscription webcasting service. *Id.* ¶ 20. The two surveys pose comparable hypotheticals and proceed in parallel. *Id.* ¶¶ 33, 66 & Apps. 6 & 12.

Professor Hanssens sought to answer the following questions: (a) Whether listeners would change their listening if they were dissatisfied because music selection across the category was ''degraded'' as described in the hypothetical given to respondents,[102] (b) whether listeners would change their listening to alternative sources of music (as opposed to non-music) in that instance, (c) which alternative sources of music they would increase listening to, if any, and (d) how listeners would allocate increased listening, if any, across the alternative music sources they identified).[103] *Id.* ¶¶ 21–22.

The Pandora Survey indicated that 60.1 percent of the sample of listeners of free internet radio services would decrease listening to free internet radio services in the event that the music selection across all free internet radio services were degraded. Of the respondents who indicated that they would decrease listening to free internet radio services or listen to free internet radio about the same amount, 63.5 percent would increase listening to alternative sources of music under this scenario. When forced to make a tradeoff between multiple options of alternative sources of music, the sample of listeners indicated that they would increase their watching or listening to music in videos on YouTube or social media the most (11.6 points on average), followed by listening to live radio broadcasts of music through a radio (9.8 points on average), and then followed by listening to music on a new free On-Demand music streaming service (7.7 points on average). Hanssens WDT ¶ 18.[104]

The Sirius XM Survey indicated that 36 percent of the sample of listeners of music on Sirius XM over the internet would decrease their listening to that service in the event that the music selection available on that service were degraded. Of the respondents who indicated that they would decrease listening to music on Sirius XM over the internet or listen to about the same amount of music on that service, 58.9 percent would increase listening to alternative sources of music under this scenario. When forced to make a tradeoff between multiple options of alternative sources of music, by an allocation of points on average, the sample of listeners indicated that most of their increased listening would be on an existing Sirius XM satellite radio subscription. Hanssens WDT ¶ 19.

Professor Hanssens's surveys were conducted by respondents on a traditional desktop computer, laptop notebook computer, or tablet computer. The surveys included several screening questions. Qualified respondents had to pass several standard attention check questions and satisfy certain demographic quotas to ensure the survey respondents were not statistically different from the typical demographics of Pandora or Sirius XM on the internet users, depending on the particular survey. The survey response rate, completion rate, and incidence rate were all within the typical range for internet surveys, and the sample size was large enough to draw conclusions regarding the key questions posed in the survey. Additionally, the survey was extensively pretested. *Id.* ¶¶ 26–29, 36–37, 56–59, 65–67.

[102] The study considered the hypothetical that services were limited by the loss of access to any given record company's repertoire, which was addressed in the survey by asking respondents what they would do in the event that they noticed all relevant services stopped streaming songs by some popular artists and some newly released music. Hanssens WDT ¶¶ 13, 21–22. This approach was intended for the focus to be on cases where that change in music availability is noticed and therefore generates responses to that specific scenario, as opposed to the more general scenario of simple label suppression. 8/26/20 Tr. 4091 (Hanssens).

[103] The Hanssens survey thus posits a *degradation* of a listening option (*i.e.,* loss of repertoire), as distinguished from the Zauberman survey, which posited the *unavailability* of a listening option.

[104] Respondents were asked to allocate 100 points across the alternative music sources they previously selected based on how much they would listen to these different sources. Hanssens WDT app. 12.

Professor Hanssens applied other quality assurance measures designed to ensure that respondents provided informed and reliable responses. In the Pandora Survey, prior to the first substantive question (P20), Professor Hanssens provided respondents with descriptions and well-known examples of free internet radio, On-Demand Music Streaming, and Paid internet Radio categories. *Id.* ¶ 32. Additional preliminary questions helped identify the target population for the Pandora Survey and were designed to provide respondents with an accurate set of alternative music options in the main questionnaire, in which they were asked to identify services they would listen to more if the music selection on free internet radio services were degraded. *Id.* ¶ 30.

ii. Pandora Survey Results

In order to assess which alternative sources of music respondents would choose in the event that a webcaster lost access to a particular record company's repertoire, Professor Hanssens instructed respondents, ''Imagine you were not satisfied with [a free internet radio service the respondent indicated listening to in a typical week] because you noticed that it had stopped streaming songs by some of your favorite artists and some newly released music. Imagine that all other free internet radio services stopped streaming those same songs as well.'' Hanssens WDT ¶ 33; 8/26/20 Tr. 4091 (Hanssens) (explaining that this language is intended for the focus to be on cases where that change in music availability is noticed and therefore generates responses to that specific scenario, as opposed to the more general scenario of simple label suppression).

The Hanssens Pandora survey then proceeded as follows.

Respondents were asked (in question P20), ''Which of the following actions, if any, would you consider taking in the event that you were not satisfied with free internet radio services because their selection of songs changed in this way?'' The survey offered the following answer choices: ''I would use free internet radio services less; I would use free internet radio services about the same amount; I would use free internet radio services more; Don't know/unsure.'' *Id.* ¶¶ 34, 39; Appendix 7 at 120; 8/26/20 Tr. 4097 (Hanssens).

Among the 506 respondents to question P20, 60.1 percent responded that they would use free internet radio services less, 35.8 percent responded that they would use free internet radio services about the same, and 4.2 percent responded that they did not know or were unsure about how their listening habits would change. Hanssens WDT ¶ 40.[105] Those who indicated that they did not know or were unsure about how their listening habits would change were not included in subsequent calculations as it is not possible to know what they would do if the music selection across all free internet radio services were degraded. Hanssens WDT ¶ 40 n.46.

Respondents who indicated that they would listen to free internet radio services less or about the same amount were asked question P30: ''Which other actions from the following, if any, would you consider taking in the event that you were not satisfied with free internet radio services because their selection of songs changed in this way?'' Those respondents were provided the following two categories: ''Consume non-music entertainment content'' and ''Listen to music using ways other than free internet radio'' and, for each, were asked whether they would ''increase doing this, make no changes to how much I do this, decrease doing this, don't know/unsure.'' *Id.* ¶¶ 34, 42, Appendix 7 at 121.

In hearing testimony Professor Hanssens noted that, while the non-music options (and descriptive examples) were presented ''for completeness reasons,'' the results were not used as they are ''not the focus of [the] work.'' 8/26/20 4097–98 (Hanssens).

The results of P30 are reported in Table 2, below.

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Table 2

Summary of Reponses to Question P30 on Pandora Survey

	Number of Respondents	Percentage of Respondents
Listen to music using ways other than Free Internet Radio		
Increase doing this	308	63.5%
Make no changes	124	25.6%
Decrease doing this	38	7.8%
Don't know/unsure	15	3.1%
Total	**485**	**100.0%**
Consume non-music entertainment content		
Increase doing this	191	39.4%
Make no changes	260	53.6%
Decrease doing this	16	3.3%
Don't know/unsure	18	3.7%
Total	**485**	**100.0%**

Source: GBH Data

Note: Question P30 reads: "Which other actions from the following, if any, would you consider taking in the event that you were not satisfied with Free Internet Radio services because their selection of songs changed in this way?"

[105] The results of P20 are reported in Table 1.

Id. ¶ 42.

In the analyses that followed question P30, the 53 respondents who indicated in that they would listen to alternative sources of music less (35) or who did not know or were unsure about whether they would change their music consumption (15) were excluded. Hanssens WDT ¶ 43 n.50.

Respondents who indicated that they would increase listening to alternative sources of music were asked question P40: ''In which of the following ways, if any, would you increase listening to music in place of free internet radio in a typical week?'' Respondents were then provided specific alternative music sources to which they would consider increasing their listening, including the types of services the respondents had previously responded they were already using in their responses to the screening questions. Hanssens WDT ¶¶ 34. 46–48, Appendix 7 at 122; 8/26/20 Tr. 4098 (Hanssens).

The results of P40 are reported in Table 3, below.

Table 3

Summary of Responses to Question P40 on Pandora Survey

Respondents indicated that they would increase listening to music via...	Number of Respondents	Percentage of Respondents
A new free On-Demand music streaming service they do not already use	198	45.8%
A free On-Demand music streaming service they already use	88	20.4%
A new paid On-Demand music streaming service they do not already use	92	21.3%
A paid On-Demand music streaming service they already use	127	29.4%
A new Paid Internet Radio service they do not already use	115	26.6%
A Paid Internet Radio service they already use	25	5.8%
A new Sirius XM subscription and through a satellite radio receiver	55	12.7%
An existing Sirius XM subscription and through a satellite radio receiver	54	12.5%
A new Sirius XM subscription and through Sirius XM over the Internet	66	15.3%
An existing Sirius XM subscription and through Sirius XM over the Internet	52	12.0%
New purchases of physical or digital recordings of music	129	29.9%
Physical or digital recordings of music they already own	213	49.3%
Borrowed copies of music recordings	113	26.2%
Live radio broadcasts of music through a radio	222	51.4%
Music channels through a cable or satellite television subscription	174	40.3%
Videos on YouTube or social media	241	55.8%
Other [Please specify _____]	7	1.6%
Total	**432**	

Source: GBH Data

Note: Question P40 reads: "In which of the following ways, if any, would you increase listening to music ["in place of Free Internet Radio" IF RESPONDENT ANSWERED "I would use Free Internet Radio services less" FROM Question P20] in a typical week? The 432 respondents in Table 3 include 124 respondents who indicated in Question P30 that they would not change how much they would listen to music using ways other than Free Internet Radio in the event that the music selection across all Free Internet Radio services were degraded. These respondents are treated as having indicated that they would not increase listening to any of the options in Question P40.

Hanssens WDT ¶ 49.

The final substantive question, P50, presented respondents who had responded to question P40 that they would increase listening to multiple alternative music sources with the alternative music sources they selected in P40 and instructed them to ''Please divide 100 points across the different ways of listening to music based on how much you think you would use each alternative in a typical week.'' *Id.* ¶¶ 34, 52, Appendix at 123. This question was designed to allow the individual listener to rank the relative importance of answer options. 8/26/20 Tr. 4098 (Hanssens). Professor Hanssens explained that he asked this question in terms of point allocations rather than in absolute time or percentages of time in order to avoid the cognitively difficult ''quantification of time,'' and to better assess relative importance, which may be obscured by absolute expressions of time. 8/26/20 Tr. 4099 (Hanssens).

The results of P50 are reported in Table 4, below.

Table 4

Summary of Responses to Question P50 on Pandora Survey

Respondents indicated that they would increase listening to music via...	Number of Respondents	Percentage of Respondents	Average Number of Points Allocated Across All Responses	Standard Error
A new free On-Demand music streaming service they do not already use	178	41.2%	7.7	0.7
A free On-Demand music streaming service they already use	81	18.8%	3.7	0.5
A new paid On-Demand music streaming service they do not already use	82	19.0%	4.0	0.6
A paid On-Demand music streaming service they already use	112	25.9%	5.4	0.7
A new Paid Internet Radio service they do not already use	102	23.6%	4.2	0.5
A Paid Internet Radio service they already use	22	5.1%	0.8	0.2
A new Sirius XM subscription and through a satellite radio receiver	42	9.7%	1.5	0.3
An existing Sirius XM subscription and through a satellite radio receiver	49	11.3%	2.4	0.4
A new Sirius XM subscription and through Sirius XM over the Internet	55	12.7%	1.4	0.2
An existing Sirius XM subscription and through Sirius XM over the Internet	48	11.1%	1.7	0.3
New purchases of physical or digital recordings of music	106	24.5%	2.7	0.3
Physical or digital recordings of music they already own	196	45.4%	7.0	0.6
Borrowed copies of music recordings	96	22.2%	2.0	0.3
Live radio broadcasts of music through a radio	201	46.5%	9.8	0.8
Music channels through a cable or satellite television subscription	155	35.9%	4.6	0.4
Videos on YouTube or social media	232	53.7%	11.6	0.8
Other [Please specify _____]	10	2.3%	0.4	0.2
Total	**432**			

Source: GBH Data

Note: Question P50 reads: "Please divide 100 points across the different ways of listening to music based on how much you think you would use each alternative in a typical week." The 432 respondents in Table 4 include 124 respondents who indicated in Question P30 that they would not change how much they would listen to music using ways other than Free Internet Radio in the event that the music selection across all Free Internet Radio services were degraded. These respondents are treated as having entered zero points to all of the options in Question P50.

Hanssens WDT ¶ 53.

4. Simonson's Replicated and Modified Hanssens Surveys

a. Description of the Simonson Surveys

SoundExchange also engaged Professor Simonson to assess the testimony of several witnesses, including Professor Hanssens. As part of that task, Professor Simonson ran a replication of the Hanssens Pandora Survey (Hanssens Replication survey), as well as a modified version of that survey (Modified Hanssens survey). Simonson WRT ¶ 12.

Professor Simonson adopted the same methodology and screening criteria that Professor Hanssens used in the Hanssens Pandora Survey. *Id.* ¶¶ 88; 8/27/20 Tr. 4282–83 (Simonson). The Modified Hanssens survey retained all aspects of the original Pandora survey, except it omitted any mention of user dissatisfaction. The Modified Hanssens survey modified the instructions given to respondents, which Professor Hanssens had intended to focus on cases where listeners noticed the change in music availability. Professor Simonson made the change out of concern that one may assume that the Hanssens Surveys' results apply only to those listeners who would have been dissatisfied by the change in repertoire, perhaps relying on the Reiley Label Suppression Experiments to support assumptions that very few users would in fact be dissatisfied and change their listening. Therefore, the scenario changed from:

> Imagine that you were not satisfied with this service because you noticed that it had stopped streaming songs by some of your favorite artists and some newly released music. Imagine that all other free internet radio services stopped streaming those same songs as well.

to

> Imagine that this service stopped streaming songs by some of your favorite artists and some newly released music. Imagine that all other free internet radio services stopped streaming those same songs as well.

Simonson WRT ¶¶ 94–95. The Modified Hanssens survey also removed the instruction that ''you were not satisfied'' in other places throughout the survey. *Id.* ¶¶ 94–96.

Additionally, in the Modified Hanssens survey, for those respondents who indicated that they ''would use free internet radio services less'' in the hypothetical scenario, respondents were asked an additional question, intended to allow analysis of the magnitude of these respondents' likely change in listening:

> You indicated that you would use free internet radio services less in the event that all free internet radio services had stopped streaming songs by some of your favorite artists and some newly released music. In that case, how much less time would you spend listening to free internet radio services in a typical week?
>
> Select one only.
>
> 1. 1–9% less
> 2. 10–24% less
> 3. 25–49% less
> 4. 50–74% less
> 5. 75–99% less
> 6. 100% less
> 7. Don't know/unsure

Simonson WRT ¶ 89.

Professor Simonson indicated at trial that the results of the Replication survey and Modified Hanssens survey indicate that the Hanssens Pandora Survey is reliable because it can be replicated with a different panel and at a different time of year. 8/27/20 Tr. 4283 (Simonson). Additionally, Professor Simonson stated that ''removing the 'you are unsatisfied' instruction from the Modified Hanssens Survey did not generally result in large alterations to the data, relative to either the original Pandora Survey or the Replication Survey. This similarity indicates that the survey data largely applies to all relevant listeners, not only to the subgroup who would be dissatisfied with a change in repertoire.'' Simonson WRT ¶ 99 (footnote omitted).

The results of the respective surveys regarding the actions respondents would take if free internet radio services were degraded (Hanssens question P20) are reflected below.[106]

[106] Professor Simonson's analysis of the Hanssens survey data only included the respondents who were not excluded by reason of their responses to the screening questions and P20 and P30, as described above, the number of such respondents totaling 432. The total number of qualifying respondents in the Replication survey was 424. The total number of qualifying respondents in the Modified Hanssens survey was 372.

Table 1B.
Comparison of Simonson and Hanssens Results
Q20/120/220 Responses, Qualifying Respondents Only

	Hanssens	Simonson		Hanssens	Simonson	
		Cell 1	Cell 2		Cell 1	Cell 2
I would consider using Free Internet Radio Services...				N = 432	N = 424	N = 372
Less	267	270	232	61.8%	63.7%	62.4%
About the same amount	165	154	140	38.2%	36.3%	37.6%
More	0	0	0	0.0%	0.0%	0.0%
Don't know/Unsure	0	0	0	0.0%	0.0%	0.0%
Total	432	424	372	100.0%	100.0%	100.0%

Notes and Sources:
[1] Only respondents who chose "Less" or "Same" in Q20, "More" or "Same" in Q30 (for music), and "4" in Q60 were included in this analysis.
[2] Q20: Which of the following actions, if any, would you consider taking in the event [that you were not satisfied with Free Internet Radio Services because their selection of songs changed in this way/that Free Internet Radio Services' selection of songs changed in this way]?
[3] Hanssens results were from "Pandora Raw ALL STARTS.xlsx", and Simonson results were from "12.11.19_N1075 - 19077 Music Survey Daily Data Export.xlsx."

Simonson WRT ¶ 98.

The results of the respective surveys regarding other actions, if any, respondents would consider taking in the event that free internet radio services were degraded (original Hanssens question P30) are reported below. Simonson WRT 244.

Table 3B.
Comparison of Simonson and Hanssens Results
Q30/130/230 Responses, Qualifying Respondents Only

	Total Respondents			Percent of Respondents		
	Hanssens	Simonson		Hanssens	Simonson	
		Cell 1	Cell 2		Cell 1	Cell 2
I would consider...				N = 432	N = 424	N = 372
Listening to music using ways other than Free Internet Radio						
More	308	308	250	71.3%	72.6%	67.2%
Same amount	124	116	122	28.7%	27.4%	32.8%
Less	0	0	0	0.0%	0.0%	0.0%
Don't know/Unsure	0	0	0	0.0%	0.0%	0.0%
Consuming non-music entertainment content						
More	168	156	136	38.9%	36.8%	36.6%
Same amount	240	233	204	55.6%	55.0%	54.8%
Less	12	15	14	2.8%	3.5%	3.8%
Don't know/Unsure	12	20	18	2.8%	4.7%	4.8%
Total	432	424	372	100.0%	100.0%	100.0%

Notes and Sources:
[1] Only respondents who chose "Less" or "Same" in Q20, "More" or "Same" in Q30 (for music), and "4" in Q60 were included in this analysis.
[2] Q30: Which other actions from the following, if any, would you consider taking in the event [that you were not satisfied with Free Internet Radio Services because their selection of songs changed in this way/that Free Internet Radio Services' selection of songs changed in this way]?
[3] Hanssens results were from "Pandora Raw ALL STARTS.xlsx", and Simonson results were from "12.11.19_N1075 - 19077 Music Survey Daily Data Export.xlsx."

The results of the respective surveys regarding which of the following ways, if any, respondents would increase listening to music in place of free internet radio in a typical week (original Hanssens question P40) are reflected below.

Table 4B.
Comparison of Simonson and Hanssens Results
Q40/140/240 Responses, Qualifying Respondents Only

	Hanssens	Simonson	
In place of [listening to] Free Internet Radio in a typical week, I would...	N = 432	Cell 1 N = 424	Cell 2 N = 372
Sign up for and listen to a new free On-Demand music streaming service with ads	45.8%	48.8%	40.1%
Listen more to a free On-Demand music streaming service with ads	20.4%	21.2%	22.3%
Purchase a new subscription for an ad-free On-Demand	21.3%	21.9%	12.4%
Listen more to an ad-free On-Demand music streaming service	29.4%	30.9%	32.8%
Purchase a new subscription for an ad-free Paid Internet Radio service	26.6%	23.3%	16.9%
Listen more to an ad-free Paid Internet Radio service	5.8%	5.0%	2.7%
Purchase a new Sirius XM subscription and listen to music on Sirius XM through a satellite radio receiver	12.7%	8.3%	5.6%
Use an existing Sirius XM subscription and listen to music on Sirius XM through a satellite radio receiver	12.5%	13.0%	15.1%
Purchase a new Sirius XM subscription and listen to music on Sirius XM over the internet	15.3%	12.0%	8.9%
Use an existing Sirius XM subscription and listen to music on Sirius XM over the internet	12.0%	13.0%	14.5%
Purchase new physical or digital recordings (downloads) of music	29.9%	27.8%	29.0%
Listen more to physical or digital recordings (downloads) of music I already own	49.3%	51.2%	49.5%
Listen to borrowed copies of recordings from friends, family, or the public library	26.2%	26.2%	22.0%
Listen to live radio broadcasts of music from radio stations through a radio	51.4%	55.2%	50.8%
Listen more to music channels I have access to as part of a cable or satellite television subscription	40.3%	44.3%	33.6%
Watch or listen to music in videos on websites such as YouTube or through social media	55.8%	56.1%	55.4%
Other	1.6%	1.4%	2.2%

Notes and Sources:
[1] Only respondents who chose "Less" or "Same" in Q20, "More" or "Same" in Q30 (for music), and "4" in Q60 were included in this analysis.
[2] Q40/140/240: In which of the following ways, if any, would you increase listening to music in place of Free Internet Radio in a typical week?
[3] Hanssens results were from "Pandora Raw ALL STARTS.xlsx", and Simonson results were from "12.11.19_N1075 - 19077 Music Survey Daily

Simonson WRT ¶ 98.

The Modified Hanssens survey results for regarding the magnitude of respondents' likely change in listening (Q225) are reflected below.

Table 2B.
Summary of Responses to Simonson's Additional Question
Simonson Q225 Responses, Qualifying Cell 2 Respondents Only

I would use Free Internet Radio Services...	N	%
1 - 9% less	4	1.7%
10 - 24% less	33	14.2%
25 - 49% less	54	23.3%
50 - 74% less	77	33.2%
75 - 99% less	35	15.1%
100% less	21	9.1%
Don't know/unsure	8	3.4%
Total	232	100.0%

Notes and Sources:
[1] Only respondents who chose "Less" or "Same" in Q20, "More" or "Same" in Q30 (for music), and "4" in Q60 were included in this analysis.
[2] Q225: You indicated that you would use Free Internet Radio Services less in the event that all Free Internet Radio Services had stopped streaming songs by some of your favorite artists and some newly released music. In that case, how much less time would you spend listening to Free Internet Radio Services in a typical week?
[3] Simonson results were from "12.11.19_N1075 - 19077 Music Survey Daily Data Export.xlsx".

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Simonson WRT 243.

b. Criticisms of the Hanssens Surveys

SoundExchange engaged Professor Itamar Simonson to examine whether the Hanssens surveys were likely to produce unbiased, reasonably accurate estimates regarding the impact of a loss of access to any given record company's repertoire on listening to the free internet radio services at issue and on switching to alternative sources of music. Simonson WRT ¶ 66. While Professor Simonson found the Hanssens surveys relatively reliable, he asserted the surveys contained several flaws. Simonson WRT ¶¶ 64–65. SoundExchange also engaged Professor Zauberman to examine the Hanssens Surveys calculation. Trial Ex. 5607 ¶¶ 1–2 (WRT of Gal Zauberman) (Zauberman WRT).

Professor Simonson criticized the Hanssens survey questions for mixing music with unrelated categories, such as videogames and movies, leading to a ''diversification bias,'' which allegedly encouraged respondents to select to non-music switching options and an underestimation of switching from one music service to another. He pointed to research, demonstrating that the mere fact that respondents are presented simultaneously with multiple options causes them to spread their choices among the options instead of choosing only the option they like most. He indicated that a survey designer can decrease the percentage of respondents who indicate they will switch from one music service to another by presenting respondents with options from a wide range of options and that the Hanssens Surveys do just that by leading respondents to consider a wide set of switching options, including options that are unrelated to music. Simonson WRT ¶¶ 67–74 (citing Itamar Simonson, *The Effect of Purchase Quantity and Timing on Variety Seeking Behavior,* 27 J. Marketing Research 150 (1990); Daniel Read & George Loewenstein, *Diversification Bias: Explaining the Discrepancy in Variety Seeking Between Combined and Separated Choices,* 1 J. Experimental Psychol.: Applied 34 (1995); and Schlomo Benartzi & Richard H. Thaler, *Naive Diversification Strategies in Defined Contribution Saving Plans,* 91 Am. Econ. Rev. 79 (2001); and Craig R. Fox, David Bardolet & Daniel Lieb, *How Subjective Grouping of Options Influences Choice and Allocation: Diversification Bias and the Phenomenon of Partition Dependence,* 134 J. Experimental Psychology: Gen. 538 (2005); Craig R. Fox, David Bardolet & Daniel Lieb, *Partition Dependence in Decision Analysis, Resource Allocation, and Consumer Choice,* 3 Experimental Bus. Research 229 (2005)).

Professor Simonson also took issue with the sequence of Hanssens survey questions. He criticized the surveys for asking about the various options the respondents may consider before asking them to select among those options. In Professor Simonson's opinion, informed by published research, asking respondents to consider a long list of options biases the respondents' subsequent responses. He opined that while offering such ''consideration set'' options may be appropriate in scenarios involving costly and often relatively irreversible decisions, it is not appropriate in the context of selecting a music service, which involves low cost, low risk, and easily changed purchase decisions. Relatedly, Professor Simonson suggested that research suggests that an unrealistic consideration set can also create bias in follow-up questions such that the list of considered options is likely to influence subsequent choices made by respondents. Simonson WRT ¶¶ 75–81 (citing Barbara E. Kahn & Donald R. Lehmann, *Modeling Choice Among Assortments,* 67 J. Retailing 274 (1991); Itamar Simonson, *The Effect of Product Assortment on Consumer Preferences,* 75 J. Retailing 347 (1999); Armin Falk & Florian Zimmermann, *A Taste for Consistency and Survey Response Behavior,* 59 CESifo Econ. Studies, no.1, 181 (2012); and Itamar Simonson, *The Effect of Buying Decisions on Consumers' Assessments of Their Tastes,* 2 Marketing Letters 5 (1991)).

Professor Simonson indicated that the Hanssens Surveys ignored the impact that a change in repertoire would have on services' ability to attract new users. He noted that while Hanssens Surveys attempted to measure whether existing service users might change their listening behavior, the surveys did not examine or attempt to quantify the impact of offering a more limited music

repertoire on a services' ability to attract new users. Professor Simonson posited that ignoring the impact on potential users, Professor Hanssens understated the impact that the loss of a label's content would have on the relevant services. Simonson WRT ¶¶ 82–84. SoundExchange also notes that this focus on existing customers indicates that the surveys at most measure only part of the impact that losing a record label would have on these services. SX PFFCL ¶ 788.

Professor Zauberman faulted the Hanssens surveys for not allowing respondents to respond on their smartphones, despite the fact that a large proportion of users stream music via smartphone. Zauberman WRT ¶¶ 82–88. He noted that other relevant surveys could be completed on smartphones and suggested that those surveys tended to have younger participants who are likely to listen to more music, and to replace Free Streaming Radio with Paid streaming services at higher rates than those who took the survey on other devices. Zauberman WRT ¶¶ 86–88. SoundExchange alleges that this may cause any calculation of diversion ratios based on the Hanssens surveys to be conservative. SX PFFCL ¶ 758.

Professor Zauberman asserted that the Hanssens surveys were confusing for respondents, offering that survey practices dictate that hypotheticals should be posed simply, not as instructions about how respondents should feel. He added that the surveys contained too many response options that are overly wordy, making it difficult for a respondent to keep track of all relevant information. Professor Zauberman alleged that respondents were presented with too many response options that were zero-royalty options causing the responses to be biased towards such zero-royalty options. He also faulted the surveys for use of the typical week as a timeframe for respondents as being contrary to best survey design practices, and suggested that a time frame described as ''a typical week'' may be ambiguous to some respondents. Zauberman WRT ¶¶ 88–95.

c. Responses to Criticisms of the Hanssens Surveys

In response to criticism of the Hanssens surveys, Pandora/Sirius XM offers, in part, that Professor Simonson demonstrated convincingly that the Hanssens surveys were reliable by replicating them using an entirely new sample, and obtaining very similar results. Pandora and Sirius XM's Corrected Proposed Findings of Fact and Conclusions of Law ¶ 111 (Pandora/Sirius XM PFFCL). Pandora/Sirius XM offers that the Hanssens surveys actually overestimate diversion, in that his scenario contemplates the loss of consumers' favorite artists, which does not necessarily simulate real-world conditions given that the loss of a label may not be coincident with the loss of all of the works of an artist and may not be coincident with the loss of a favorite artist. Pandora/Sirius XM PFFCL ¶ 112; 8/26/20 Tr. 4091–96, 4099–4101 (Hanssens). Pandora/Sirius XM adds that the Hanssens surveys reflect only the subset of Pandora users who would actually be affected by the degradation in the sense that they noticed it and were dissatisfied as a result, not simply any Pandora user subject to the suppression. 8/26/20 Tr. 4093, 4101, 4154–56.

Pandora/Sirius XM notes that Professor Hanssens did not actually use the non-music data but, rather, included it merely for completeness reasons. Pandora/Sirius XM PFFCL ¶ 115. Pandora/Sirius XM also states that no empirical analysis of alleged diversification bias was offered. Instead, they indicate, Professor Simonson only offered citations to academic articles discussing the phenomenon. Pandora/Sirius XM PFFCL ¶ 114. Similarly, Pandora/Sirius XM indicates that Professor Simonson did not offer any empirical evidence to support his critique that the sequence of Professor Hanssens's questions, requiring respondents to consider options before choosing them, could have biased his results. Pandora/Sirius XM PFFCL ¶ 116. Pandora/Sirius XM adds that the survey was designed to minimize any confusion, including instructing respondents to take their time reviewing the questions and providing a link to the descriptions and examples in every subsequent question. Pandora/Sirius XM PFFCL ¶ 110. Additionally, Pandora/Sirius XM clarifies that the intent of the Hanssens survey was to evaluate the behavior of listeners, not potential listeners. Pandora/Sirius XM PFFCL ¶ 117. The Services also observe a lack of empirical evidence that a failure to conduct the surveys on smartphones had any effect on the results. Services RPFFCL ¶ 760.

d. Criticism of Professor Simonson's Modified Hanssens Surveys

Pandora Sirius XM offers that Professor Simonson conceded that his modified surveys, designed to test the impact of including language of explicit dissatisfaction, did not, generally, result in large alterations to the data relative to either the original Pandora Survey or the Replication Survey. Pandora/Sirius XM PFFCL ¶ 118; Simonson WRT ¶ 99; 8/27/20 Tr. 4285 (Simonson); *id.* at 4315–16; 8/26/20 Tr. 4094 (Hanssens) (noting same). Pandora Sirius XM points out that both Professor Simonson and Professor Hanssens agreed that this lack of impact on Professor Hanssens's survey is likely due to the fact that dissatisfaction is implicit in a hypothetical referencing the loss of some of respondents' favorite artists and some newly released music. Pandora/Sirius XM PFFCL ¶ 119.

Pandora Sirius XM indicates that Professor Simonson's question 225, intended to allow analysis of the magnitude of respondents' likely change in listening, is flawed and unreliable. Pandora/Sirius XM PFFCL ¶ 122. Professor Hanssens posited that the question does not accurately measure the likely change in listening. He asserts that the loss of a particular label fundamentally differs from the loss of favored artists or newly released music because artists are presented on more than one label, and many people do not know which labels represent which artists. 8/26/20 Tr. 4092–96 (Hanssens). He adds that the question is limited to people who actually notice the change and are negatively affected by it, which he notes is not coincident with all Pandora listeners. And, he offers that, without a proper basis for a respondent's volume of listening, it is not possible for a respondent to generate a reliable response on the amount that would be lost. 8/26/20 Tr. 4096 (Hanssens). Finally, Professor Hanssens criticizes the answer ranges offered in Question 225, asserting that they are so wide and unequal that they are imprecise, biased, and unreliable. 8/26/20 4096 (Hanssens).

e. Responses to Criticisms of Professor Simonson's Modified Hanssens Surveys

SoundExchange counters that the criticism of the language of explicit dissatisfaction is essentially an acknowledgment that there is no need to instruct respondents to imagine they are dissatisfied by label blackout because dissatisfaction follows naturally from the loss of content. SX RPFFCL (to Pandora/Sirius XM) ¶ 119.

SoundExchange indicates that any notion that the loss of a label differs fundamentally from loss of favored artists or newly released music is unsupported by the evidence and contrary to Professor Hanssens's own testimony, including his describing the loss of access to any given record company's repertoire. SX RPFFCL (to Pandora/Sirius XM) ¶ 122, 112. SoundExchange rejects the notion that

the survey is limited to a subset of users, instead asserting that it addresses aggregate consumer reaction in the event consumers are aware of label blackout, as they would be in any real world circumstance. SX PFFCL (to Pandora/Sirius XM) ¶ 122. Finally, SoundExchange offers that the suggestion that respondents should have been asked to report their current listening time is undermined by the fact that allocations of absolute time are notoriously difficult for respondents to answer. SX RPFFCL (to Pandora/Sirius XM) ¶ 122.

f. Judges' Conclusions Regarding the Hanssens and Simonson Surveys

Upon consideration of the entirety of the record, including the facts and arguments indicated above, on balance, the Judges find the Hanssens Pandora Survey as well as the Simonson's Replicated and Modified Hanssens Surveys to be probative as to diversion behaviors of listeners of noninteractive streaming services regarding a loss of content and on switching to alternative sources of music. Notwithstanding the criticisms of the surveys, the Judges find the overall conduct of the surveys to have been rigorous and generally faithful to applicable best practices. Further, the replication and modification of the surveys, with generally consistent results, reinforce the Judges' finding that the collective results are probative in this proceeding. The Judges find that Professor Simonson's modifications (removing indications of dissatisfaction) ultimately had little impact on the results. Additionally, the Judges are persuaded that the issues raised regarding question 225 in the modified Hanssens survey, especially the criticism of the response ranges and interpretation of them, while not completely discounting of the results, do have merit. Therefore, the Judges rely more heavily on the results of the two consistent and replicated surveys.

The overall structure of the Sirius XM survey was the same as the structure of the Pandora survey, and Professor Hanssens simply substituted ''Sirius XM over the Internet'' for ''free Internet radio services'' where necessary. Hanssens WDT ¶ 59. It included 150 respondents, with only 131 non-excluded respondents. Hanssens WDT ¶ 70 n.93. SoundExchange alleges that the sample size of Professor Hanssens's Sirius XM Survey was very small, making the results imprecise. Zauberman WRT ¶ 96. Professor Zauberman's analysis of Professor Hanssens's Sirius XM Survey indicated confidence intervals that are extremely wide. Professor Zauberman testified that the level of imprecision is problematic, especially when the estimates are then used for subsequent analyses. *Id.,* citing Table 6. Pandora/Sirius XM asserts that the sample size of the Sirius XM survey was sufficient to draw statistically valid conclusions. Pandora/Sirius XM PFFCL ¶ 109. The Judges agree with the critique of the sample size of the unreplicated survey. Therefore, the Judges do not find sufficient basis to rely on the Sirius XM Survey.

B. Evaluation of Benchmark Evidence

1. The Subscription Benchmark/Ratio-Equivalency Models

A SoundExchange economic expert witness, Mr. Orszag, presents a benchmark analysis to estimate the statutory royalty rate to be paid by noninteractive subscription services. Orszag WDT ¶¶ 76–86. On behalf of Pandora, Professor Shapiro presents his benchmark analysis for this subscription royalty rate. Shapiro WDT at 39–40; *see also id.* at 30–38 (Professor Shapiro's ad-supported benchmark analysis containing elements also applicable to his subscription benchmark analysis).

Mr. Orszag and Professor Shapiro each claims that his benchmarking model faithfully applies the Judges' ''ratio equivalency'' benchmarking model applied in *Web IV*. Unsurprisingly, therefore, each of them criticizes the other's model as failing to follow that *Web IV* model. The Judges first set forth the *essential* elements of Mr. Orszag's adaptation of the *Web IV* ''ratio equivalency'' model and the criticisms of that approach. The Judges then engage in the same approach with regard to Professor Shapiro's model—identifying its *essential* elements—followed by Mr. Orszag's critiques. The Judges then proceed to a more granular analysis of the dueling positions of these economists and set forth factual findings in these regards. Finally, the Judges set forth the benchmark rates that follow from their analysis and findings regarding the models proffered by these two experts.

a. Mr. Orszag's Ratio-Equivalency Model

As noted above, Mr. Orszag engages in a benchmark analysis to estimate an appropriate statutory royalty to be paid to record companies by noninteractive services for subscription services. Orszag WDT ¶ 9. Mr. Orszag concludes that rates set in the *interactive subscription service* market are reasonable and appropriate benchmark rates, subject only to a downward adjustment to reflect the added value of interactivity in that proposed benchmark market. *Id.* ¶¶ 9, 11. By his approach, Mr. Orszag estimates a $0.0033 per-play royalty rate for performances on subscription services. Orszag WDT ¶¶ 9, 86 & tbls.6,7. He proposes that the Judges adjust the rates to reflect annual changes in the Consumer Price Index, in a manner similar to the approach adopted in *Web IV*. Orszag WDT ¶ 8.

Mr. Orszag finds the subscription interactive market to be an appropriate benchmark for the target noninteractive subscription market because (1) the sellers/licensors (record companies) are identical; (2) the buyers/licensees, although not identical, are sufficiently similar; and (3) the right being sold/licensed is identical in both markets, *i.e.,* the right to play a sound recording. *Id.* ¶¶ 54–56.

In his benchmark comparison, Mr. Orszag avers that he is following the ''ratio equivalency'' approach undertaken by the Judges in *Web IV*. Orszag WDT ¶ 74. In *Web IV,* the Judges set forth the ''ratio equivalency'' formula as follows:

A/B = C/D

In this *Web IV* ratio equivalency approach:

[*A*] = Avg. Retail *Interactive* Subscription Price
[*B*] = *Interactive* Subscriber Royalty Rate
[*C*] = Avg. Retail *Noninteractive* Subscription Price
[*D*] = *Noninteractive* Subscriber Royalty Rate

Web IV, 81 FR at 26337–38.[107]

However, Mr. Orszag does not define inputs [A], [B], and [C] as they had been identified in *Web IV.* Instead, he defines these four inputs as follows:

[*A*] = Total Benchmark Subscription Revenue
[*B*] = Total Benchmark Subscription Royalty Payments
[*C*] = Total Noninteractive Subscription Revenue
[*D*] = Noninteractive Subscriber Royalty Rate

8/11/20 Tr. 1224–1226 (Orszag).[108]

[107] The ''ratio equivalency'' adopted by the Judges had been proffered by SoundExchange's economic expert witness, Professor Daniel Rubinfeld. *Web IV,* 81 FR at 26337. The Judges' reliance on Professor Rubinfeld's rationale for the use of the ratio equivalency approach is relevant in the present proceeding, as discussed *infra.*

[108] Input [C] is identified above as revenue from ''noninteractive'' services. However, Mr. Orszag used three mid-tier services with limited interactivity—Pandora, iHeart and Napster (Rhapsody)—as his proxies for statutory noninteractive services. Mr. Orszag's use of these proxy services creates a dispute separate from the overarching modeling dispute considered here, and that dispute is addressed *infra* when the Judges examine the more granular issues relating to these

Continued

Mr. Orszag testifies that he departs from the Judges' *Web IV* definitions of inputs [A], [B], and [C] for two reasons, neither of which, he asserts, contradicts the Judges' rationale for using the ''ratio equivalency'' approach in *Web IV.* Quite the contrary, he testifies that these departures were *required,* in order to make the *Web IV* approach meaningful in the present proceeding. First, Mr. Orszag notes that in *Web IV,* the Judges used *per play* rates as input [B] because ''none of the percentage-of-revenue prongs in the greater-of agreements in the record has been triggered, which may suggest that the parties to those agreements viewed the per-play rate as the rate term that would most likely apply for the length of the agreement.'' *Web IV,* 81 FR at 26325. In other words, in *Web IV* the per-play rates *were* the effective rates.

Second, Mr. Orszag testifies that this *Web IV* factual basis for using a stated per-play rate is no longer applicable because royalty payments under current interactive agreements are predominantly made pursuant to ''percentage of revenue'' prongs'' rather than per-play prongs, which are included ''only occasionally'' in current interactive agreements. Instead, according to Mr. Orszag, most current interactive agreements in the market instead contain a ''greater of'' rate formulation that includes a ''per-subscriber'' prong together with the ''percent-of-revenue'' prong. Orszag WDT ¶ 77.

As the value for his conception of [A], Mr. Orszag uses the gross revenues generated by Spotify from the performance of sound recordings from the three Majors and the Merlin-affiliated Indies over the most recent twelve-month period, April 2018–March 2019. Orszag WDT ¶¶ 76, 83–84, 86, tbl.7.[109]

For his version of [B], Mr. Orszag uses the royalties paid by Spotify to the Majors and the Indies. Again, he selected Spotify data over the same period, April 2018–March 2019, out of the seven total interactive services he considered. *See supra* note 109.

To identify a percent-of-revenue rate from inputs [A] and [B], Mr. Orszag calculates the reciprocal of ([A])/([B]), which is the percent of revenue paid as royalties (*i.e.,* ([B])/([A])). The A/B ratio of these data for Spotify over the relevant period is set forth below:

Revenues [A] = $[REDACTED]
Royalties [B] = $[REDACTED]

The ([A])/([B]) ratio of the above figures equals [REDACTED]:1. Expressing this ratio factor as a reciprocal ([B])/([A])—thus expressing a percent of revenue royalty—results in a royalty rate calculation of [REDACTED]% (rounded). Orszag WDT ¶¶ 84–85 & tbl.7.[110]

In order to obtain a value for [C] in his model, Mr. Orszag selects Pandora, iHeart, and Rhapsody as his mid-tier proxies for the noninteractive service sector. Orszag WDT tbl.6. He testifies that he chose these three services because they had entered into direct licenses with record companies, thereby allowing him access to royalty statements containing reliable and necessary information. Orszag WDT ¶ 85 & tbl.7.

Having obtained values for [A], [B], and [C], Mr. Orszag can calculate a value for [D], his proposed statutory royalty rate for subscription services. He begins by multiplying the percent-of-revenue rate he derives from the left side of his model ([REDACTED]%) by the total revenues ([C]), $[REDACTED], for his three noninteractive proxies. Orszag WDT ¶ 85 & tbl.7.

Despite computing a percent-of-revenue rate in the benchmark market SoundExchange does not propose a percent-of-revenue statutory royalty rate; rather, it proposes a per-play rate. According to Mr. Orszag, a per-play rate is preferable in order to avoid difficulties arising out of (1) defining revenue across business models; (2) separating out the sound recording revenue royalty base when music is bundled downstream with the sale of other items; and (3) accounting for a service's potential business practice of strategically lowering downstream prices. Orszag WDT ¶ 82. Accordingly, Mr. Orszag needs to apply his [REDACTED]% royalty percentage—derived from the left-hand/interactive benchmark market—so as to calculate a per play royalty rate for the right-hand/noninteractive target market.

To effect this conversion to a per play metric, Mr. Orszag divides the foregoing revenue figure by the number of plays on Pandora, iHeart, and Rhapsody over the relevant period (May 2018–April 2019), which is [REDACTED] plays. The quotient of that division equals $0.0033 per play, which is the value for [D] in Mr. Orszag's model and therefore his recommended per play rate for noninteractive subscription services. Orszag WDT ¶¶ 85–86 & tbl.7.[111]

b. Pandora's Criticisms of Mr. Orszag's Application of the ''Ratio Equivalency'' Model

The Services claim that the ''first and foremost error'' in Mr. Orszag's subscription benchmark analysis is his failure to correctly apply the *Web IV* ''ratio equivalency model.'' Shapiro WRT at 24–27. This alleged error supposedly begins with Mr. Orszag's insertion of different inputs into that *Web IV* model.

More specifically, the Services point out that Mr. Orszag's benchmark royalty input [B] is not a contractual per-performance royalty rate as in *Web IV* but rather the total royalties paid by his benchmark service, Spotify. 8/19/20 Tr. 2892–93 (Shapiro). Similarly, the Services note that Mr. Orszag did not use in the two numerators of his ''ratio equivalency'' formula (*i.e.,* [A] and [C]), respectively) the ''average monthly retail subscription prices'' that were used in the *Web IV* formulation of the model. Rather, Mr. Orszag substituted for [A] Spotify's total subscription revenue and for [C] the total subscription revenue earned by Pandora, iHeart, and Rhapsody, his ''mid-tier'' (*i.e.,* limited interactive) proxies for a noninteractive subscription services. *See* Services PFFCL ¶ 163 (and record citations therein).

The Services take issue with Mr. Orszag's method of solving for [D], total

two benchmarking models. Also, note that item [D] in the *Web IV* formula and Mr. Orszag's model are identical because [D] is not a modeling input but rather the output generated by the formula *(i.e.,* the proposed statutory royalty rate).

[109] Mr. Orszag also analyzes data from Apple Music, Pandora, Amazon Music Unlimited, iHeart, Google, and Rhapsody, in addition to Spotify. He also obtains revenue data for the calendar year 2018. Orszag WDT tbls.6–7. However, he only uses the Spotify revenue data for the more recent of the two periods. Mr. Orszag also relies solely on Spotify royalty data from the same time period. Relying on the Spotify data for the most recent period ultimately yields [REDACTED] royalty rates in terms of percent-of-revenue and per-play rates [REDACTED] interactive services across each time period, *id.,* which is [REDACTED] for the noninteractive services within Mr. Orszag's data set.

Mr. Orszag states that he utilizes this lower royalty rate because he believes that [REDACTED]—a factor that weighs against any downward adjustment for the Majors' complementary oligopoly market power. Orszag WDT ¶ 86. This market power issue is discussed at length elsewhere in this Determination.

[110] In calculating the benchmark revenue and royalty totals (*i.e.,* [A] and [B]) Mr. Orszag excludes all plans which Spotify offered at discounts off full retail prices, *e.g., S*potify's family, student, employee, and trial plans, as well as its promotional offerings. Orszag WDT ¶ 85 tbl.7. Pandora criticizes his decision to omit from his analysis the revenues, royalties and play counts generated by these discount plans, as discussed *infra.*

[111] Determining this per-play rate from the same Figure 7 data in another manner, Mr. Orszag notes that his three proxies for noninteractive subscription services had a combined average revenue per play of $[REDACTED] ($[REDACTED] [REDACTED] divided by [REDACTED] billion plays) in the May 2018–April 2019 period. Multiplying this average revenue per play by the [REDACTED]% royalty rate for interactive subscription services results in the per-play royalty of $0.0033. Orszag WDT ¶ 85 & tbl.7.

royalties to be paid. Again, Mr. Orszag multiplies his calculated [REDACTED]% interactive (benchmark) royalty rate by the total noninteractive revenue and (in the final step of his analysis) divides the total target [noninteractive] royalties [D] by the total plays on the three mid-tier services. *See* Services PFFCL ¶ 163 (citing Orszag WDT ¶ 85, tbls.6–7.)

According to the Services, the effect of Mr. Orszag's foregoing ''ratio equivalency'' approach is as follows:

> [R]ather than charging the target statutory services the same per-play rate as the benchmark services [before any adjustments], as in *Web IV,* his model is set up to compute a rate where the target market services . . . based on their prior revenues and play counts . . . instead pay the same *percentage of revenue* as the benchmark services.

Services PFFCL ¶ 164 (citing Shapiro WRT at 25); 8/19/20 Tr. 2897 (Shapiro).

The Services criticize the foregoing approach by Mr. Orszag on several grounds. First, the Services find his modeling to be irreconcilable with the *Web IV Determination* in which, they claim, the Judges affirmatively rejected a percentage-of-revenue royalty metric for the statutory license. Services PFFCL ¶ 24 (*citing Web IV,* 81 FR at 26325–26).[112]

Second, the Services find Mr. Orszag's approach to be ''unjustified'' (as well as ''roundabout'' and ''unnecessary'') because SoundExchange is not actually advocating for a percent-of-revenue royalty but rather for a per-play rate. 8/19/20 Tr. 2893 (Shapiro); Shapiro WRT at 27–28. Alternately stated, the Services claim that because the royalty being set is a per-play royalty and not a percentage-of-revenue rate, *the appropriate starting point* for the benchmarking exercise is a per-play rate derived in the benchmark market and then subjected to any adjustments necessary to correct for potential differences between the benchmark and target markets. Shapiro WRT at 24–25; Peterson WDT ¶¶ 13, 15.

As stated *supra,* before the Judges analyze Mr. Orszag's benchmark ratio equivalency approach and the objections thereto, they find it beneficial to next consider Professor Shapiro's benchmark ratio equivalency model and Mr. Orszag's objections thereto. Thereafter, the Judges can better compare and contrast these two benchmark models. The Judges proceed in that manner below.

c. Professor Shapiro's Subscription Model

Professor Shapiro also uses the interactive market as his benchmark, relying on direct licenses between eleven interactive services [113] and the three Majors (Sony, Universal, and Warner). Shapiro WDT at 41; 8/19/20 Tr. 2826 (Shapiro). He compares the interactive benchmark market to the noninteractive target market by purporting to use the *Web IV* framework. More particularly, Professor Shapiro asserts that he is using the same definitions as used in *Web IV* for inputs [A], [B], and [C] in his ''ratio'' equivalency model in order to generate output [D] as a per-play rate.

By his approach, Professor Shapiro proposes that the statutory rate for subscription services fall within a range between $[REDACTED] and $[REDACTED] per play. He also proposes that the range should be indexed to for inflation, using 2019 as the base year (*i.e.,* the same year from which he obtained data), over the 2021–2025 rate period. Shapiro WDT at 2.

To compute a value for [A] in his ratio equivalency model, Professor Shapiro utilizes the same category of values as used by Professor Rubinfeld in *Web IV*—the monthly retail price for undiscounted subscription plans—which is $9.99 per month. 8/19/20 Tr. 2828 (Shapiro) (''I'm following very closely what was done in *Web IV* by Professor Rubinfeld, actually, and then adopted by the Judges . . . based on the . . . retail prices for these plans, and that's [$]9.99 . . . .'').

To calculate input [B], Professor Shapiro analyzes the most recent 12-month period for which data was available, May 2018 through April 2019. He calculates the average ''effective'' per-performance royalty rates paid by ten of the eleven services (weighted by each service's percentage of total performances).[114] The plays by the largest interactive services, [REDACTED] and [REDACTED], account for [REDACTED]% and [REDACTED]% of total plays, respectively, thus dominating the weighted average. Shapiro WDT at 40 tbl.10. Professor Shapiro then divides (i) the total royalties paid by the ten interactive services in his model[115] by (ii) the number of interactive plays, to obtain a value for [B], $[REDACTED], his effective per-play rate in the interactive benchmark market. *Id.*[116]

Professor Shapiro avers that *his* only departure from the *Web IV* approach is in his calculation of input [B], a departure born of necessity. Specifically, he notes that he could not use a per-play rate in the interactive benchmark market because (as Mr. Orszag also acknowledges) the majority of contracts between the Majors and the interactive services no longer contains a stated (headline) per-play prong. Thus, he had no alternative but to substitute an ''effective'' per-play rate as input [B]. Shapiro WDT at 41.

Of particular note here is a distinction between Professor Shapiro's approach and that taken by Mr. Orszag because the latter *does not calculate a per-performance* ''*effective*'' *rate in the interactive benchmark market.* Rather, as discussed *supra,* Mr. Orszag calculates the ''effective'' *percent-of-revenue* paid as royalties in the benchmark interactive market ([REDACTED]%).

Claiming to continue to follow *Web IV,* Professor Shapiro next identifies the weighted average retail subscription price for the noninteractive proxies on the right-hand side of his ratio, $4.99/month, as the value for [C], the numerator in the right-hand side of the ''ratio equivalency'' formula. Shapiro WDT tbl.9; 8/19/20 Tr. 2828 (Shapiro). Thus, having identified values for inputs [A], [B], and [C], his model solves

[112] To be clear, in *Web IV, the Judges did not reject the use of* ''*percent-of-revenue*'' *royalties because they were legally or economically inappropriate.* Rather, the Judges there expressly rejected SoundExchange's proposed ''greater-of'' rate proposal and chose to utilize only the per play rates within such benchmarks because *the evidence* demonstrated that ''none of the percentage-of-revenue prongs in the greater-of agreements in the record has been triggered.'' *Web IV,* 81 FR at 26325. Thus, the Judges did not reject the concept of using a percent-of-revenue based royalty rate as a benchmark for noninteractive services for legal or economic reasons but rather for factual reasons particular to the *Web IV* record. *Cf. SDARS III,* 83 FR at 65221–22, 65229, *and Phonorecords III,* 84 FR at 1934 (both adopting percent-of-revenue royalty rates).

[113] The eleven interactive services are Amazon Prime, Amazon Unlimited, Apple, Deezer, Google Music, Napster, Pandora, Slacker, SoundCloud, Spotify, and Tidal. Shapiro WDT at 40 tbl.10.

[114] Professor Shapiro excludes [REDACTED] from the calculation ''due to insufficient data,'' but the exclusion has *de minimis* impact, he asserts, because [REDACTED] accounted for only [REDACTED]% of the 358.7 billion plays in Professor Shapiro's benchmark grouping. Shapiro WDT at 40.

[115] Unlike Mr. Orszag, Professor Shapiro calculates [B] (effective per-play rate) by utilizing the revenue and royalties generated by *all* interactive plans, including discounted interactive plans such as student, family and military plans, in addition to the revenue from undiscounted plans. And (because he is calculating an effective per-play rate in the benchmark interactive market), Professor Shapiro also incorporates into his calculation of [B] the number of interactive plays. 8/19/20 Tr. 2827 (Shapiro). By contrast, when calculating his value for [A], Professor Shapiro instead *uses only the full (undiscounted) retail price of an interactive service* rather than including in the value of [A] the retail price of *discounted* interactive plans. These issues are addressed in connection with the discussion of the more granular benchmark model issues, *infra.*

[116] The total interactive royalties and interactive plays thus are inputs used to calculate the value of [B] in Professor Shapiro's model rather than stated inputs in the ratio.

for [D], including an implicit interactivity adjustment[117] that is a function of the ratio equivalency formula. This value (before any further adjustments) is $[REDACTED] per play.[118]

d. SoundExchange's Criticisms of Professor Shapiro's Benchmark Model

As an initial matter, SoundExchange does not categorically reject Professor Shapiro's benchmarking approach. Rather, it asserts that identifying the effective per performance rate paid by the interactive services is not the ''*necessary*'' starting point for such an analysis. SX RPFFCL (to Pandora/Sirius XM) at 67 (emphasis added). In a similar vein, SoundExchange asserts that ''there is simply no reason why one *must* base the analysis on effective per-play rates in the benchmark market . . . .'' SX PFFCL ¶ 111 (emphasis added).

Nonetheless, SoundExchange finds Professor Shapiro's application of the *Web IV* approach wanting. As an initial matter, SoundExchange disagrees with Professor Shapiro's understanding that the *Web IV* model should be applied so as to generate a per-play rate *in the benchmark (interactive) market.* Rather, SoundExchange argues that in *Web IV* the Judges required that the denominators [B] and [D] should reflect the *effective* royalty rate—*in whatever manner that royalty rate was established in the benchmark market*—so that the ratios [A]/[B] and [C]/[D] would be equivalent. And, the present record reflects that most of the interactive (benchmark) rates are set, as a matter of contract (that is to say, in the market), as a percent of revenue. (This is in contrast to the record in *Web IV* which revealed that, pursuant to marketplace contracts, the royalty rate was set on a *stated* per-play basis).[119] Given this change in market reality, SoundExchange asserts that—for the ratios to be equivalent in the benchmark and target market—the ratio [B]/[A] *is* the effective benchmark royalty rate. SX PFFCL ¶ 105 (citing 8/11/20 Tr. 1226 (Orszag) (''[B] over [A] representing the effective percentage of revenue royalty rate paid by the benchmark service'')).

According to SoundExchange, it is for the foregoing reason that Professor Shapiro should not have taken his intermediate step of deriving an effective per-play rate in the benchmark (interactive) market. Rather, according to SoundExchange, he should have solved for [D] (the statutory rate, by (1) applying the benchmark (interactive) percentage derived from the ratio [B]/[A], (2) multiplying that percentage by [C], and (3) dividing that product by the number of noninteractive plays. Simply put, SoundExchange (unsurprisingly) asserts that, in order to follow the *Web IV* approach, Professor Shapiro needed to utilize Mr. Orszag's approach.[120]

e. The Judges' Analysis and Findings Regarding the ''Ratio Equivalency'' and Benchmarking Issues

SoundExchange and Pandora accuse each other of misapplying the Judges' ratio equivalency approach adopted in *Web IV.* However, the broadsides by each side miss the mark, as explained below. The parties' attacks are off-target because, in *Web IV,* the *effective* rates upon which the Judges relied *were also* the *stated* per-play rates in the benchmark (interactive) agreements.

Thus, Pandora is *incorrect* in arguing that Mr. Orszag misapplies *Web IV.* Rather, *consistent* with *Web IV,* he relies on and applies the royalty terms in the benchmark agreements which are based on a percent-of-revenue royalty prong within their greater-of rate formulae. Therefore, it is incorrect to say that Mr. Orszag acted in a manner inconsistent with *Web IV* by (1) using benchmark (interactive) total revenue as the metric for [A]; (2) using benchmark (interactive) total royalties for [B]; (3) calculating the reciprocal, [B]/[A], as the effective benchmark (interactive) percent-of-revenue royalty rate; and (4) applying that percent ([REDACTED]%) to the total revenue in the target (noninteractive) market.

But, neither has Professor Shapiro run afoul of *Web IV.* Consistent with *Web IV,* Professor Shapiro calculates an effective *per play* rate in the benchmark (interactive) market by applying the *actual* prong utilized in that market—the percent-of-revenue prong—and then identifies an [A]/[B] ratio to apply to the target (noninteractive) market. In *Web IV,* the Judges also explicitly identified a per-play rate as the appropriate rate to use for [B] and, as undertaken by Professor Shapiro, utilized the retail price for the benchmark (interactive) subscription as the value for [A].[121]

But, then a puzzle presents: How can both approaches be both correct and thus incorrect? Are we faced with a paradox analogous to that of ''Schrödinger's Cat''?[122] The resolution of the paradox lies in two points: (1) When the Judges in *Web IV* extracted the ratio equivalency methodology out of the record evidence, they intentionally eliminated the linkage between per-play rates and percent-of-revenue rates in the ''greater-of'' rate formulae present in the benchmark interactive market agreements; and (2) in the present proceeding, benchmark (interactive) royalties are paid predominantly as a ''percent-of-revenue,'' whereas in *Web IV* they were paid on a per-play basis.[123] The Judges analyze below the impact of these two factors on the application of the benchmark models in the present proceeding.

i. De-Coupling of Contractual Per-Play and Percent-of Revenue Rates in Web IV

The contrasting attempts by Mr. Orszag and Professor Shapiro to follow the *Web IV* ''ratio equivalency'' faithfully derive from the particular

[117] Note that Professor Shapiro also proposes an additional ''second interactivity adjustment,'' which the Judges address *infra* in their analysis of the details of Professor Shapiro's ratio equivalency benchmarking model.

[118] Professor Shapiro's $[REDACTED] per play (prior to adjustments other than an initial interactivity adjustment which is implicit in the model) is calculated as follows:

(1) $[REDACTED] divided by $[REDACTED] equals $[REDACTED] divided by [D]

(2) cross-multiplying: $[REDACTED] multiplied by [D] equals $[REDACTED] multiplied by $[REDACTED]

(3) calculating the above step: $[REDACTED] multiplied by [D] equals [REDACTED]

(4) dividing both sides by $[REDACTED] solves for [D] equals $[REDACTED] (rounded)

[119] SoundExchange also relies on statements in *Web IV* indicating that the Judges there were intending to set a per-play rate that effectively provided record companies with the same percentage of revenue in the target (noninteractive) market as in the benchmark (interactive) market. *See* SX RPFFCL (to Pandora/Sirius XM) ¶ 189 (citing *Web IV,* 81 FR at 26326, 26338). The Judges discuss *infra* how those *Web IV* statements bear on the ratio equivalency issues raised in the present proceeding.

[120] As noted *supra,* this criticism relates *solely to the modeling aspects* of Professor Shapiro's benchmark model. SoundExchange levels other criticisms at Professor Shapiro's *application of his benchmark model,* which are discussed *infra.*

[121] Moreover, as noted *supra,* SoundExchange does not reject Professor Shapiro's approach but rather asserts only that his starting point of identifying the effective performance rate paid by the interactive services is neither necessary nor mandatory. That is a far cry from an outright rejection. Further, the fact that such an approach might not be necessary or mandatory does not mean that it is inappropriate or without significant value.

[122] ''Schrödinger's Cat'' refers to a thought experiment regarding a theory of quantum mechanics involving a cat—sealed in a box with a flask of poison and a radioactive source—that, under the theory, conceptually may simultaneously be alive and dead. ''Schrödinger's Cat'' has been extended in popular culture as a way to identify something as a paradox, unfeasible, or working against itself. *See https://www.dictionary.com/e/tech-science/schrodingers-cat/?itm_source=parsely-api* (last visited May 25, 2021).

[123] In fact, the record reflects that [REDACTED] and that [REDACTED]. 8/11/20 Tr. 1207–08 (Orszag); 8/20/20 Tr. 3000 (Shapiro). *See* SX PFFCL ¶ 112 (and record citations therein).

Although the Services do not acknowledge such a sweeping abandonment of stated per-play rates, Professor Shapiro recognizes that ''[REDACTED].'' Shapiro WDT at 39.

factual and economic circumstances in *Web IV.* In that proceeding, SoundExchange had not proposed a *stand-alone* per-play rate. Rather, it had proposed that the Judges adopt a ''greater-of'' rate structure, in which the statutory subscription royalty rate would be the greater of (1) $0.0025 per play and (2) 55% of service revenue. *Web IV,* 81 FR at 26335. In support of that structure, SoundExchange, through its economic expert, Professor Daniel Rubinfeld, asserted, *inter alia,* that (1) ''the per-play prong provides a guaranteed revenue stream'' and (2) ''the percentage-of-revenue prong allows record companies to share in any substantial returns generated by a Service.'' *Web IV,* 81 FR at 26324. Thus, SoundExchange proposed the per-play rate—not as a *stand-alone value,* but rather as a *partial metric*—one that it believed served as a ''guarantee''—a floor on the percent-of-revenue effectively paid as royalties.[124]

As noted *supra,* in *Web IV* the Judges rejected the ''greater-of'' structure and adopted a per-play rate structure. But, their decision was not unrelated to the valuation of the royalty payments as a function of revenue. Rather, the Judges adopted the per-play rate approach in reliance upon Professor Rubinfeld's testimony that his ''ratio equivalency'' methodology resulted in a per-play royalty payment ($0.0025) that approximated 55% of service revenue, which, as noted above, was SoundExchange's percent-of-revenue royalty proposal. *Web IV,* 81 FR at 26324 n.44, 26326. Thus, in *Web IV* the Judges understood that the per-play rate was not proposed as a purely independent measure of the value of an individual play, but rather as a metric that was also designed to approximate a minimum royalty rate of 55% of revenue.

Importantly, when the Judges in *Web IV* de-coupled the percent-of-revenue and per-play rates, rejecting the former approach and adopting the latter, the Judges also eliminated the capacity of the per-play rate to serve its limited function as a form of ''guarantee.'' Thus, the royalty rate paid by noninteractive subscription services during the *Web IV* 2016–2020 rate period—as adjusted (for other reasons) by the Judges from $0.0025 to $0.0022 for 2016—did not correspond with any particular percent-of revenue floor. Rather, the effective percent-of-revenue paid as a royalty would vary with the level of noninteractive service *revenue* and quantity of plays.[125]

With *Web IV* having severed the link between percent-of-revenue and per-play rates, the attempts *in this proceeding* by Mr. Orszag and Professor Shapiro to adopt the *Web IV* ratio equivalency approach—in order to set a per-play rate derived from a percent-of-revenue rates—are problematic because, as in *Web IV,* the per-play rate is untethered to a percent-of revenue rate. Indeed, despite their best efforts, neither Mr. Orszag nor Professor Shapiro could synthesize what *Web IV* had (for good reason) torn asunder.

ii. In the Benchmark (Interactive) Market, Per-Play Rates Were Paid in the Web IV Era; but in the Web V Era Percent-of Revenue Rates Are Now Paid

Whereas in *Web IV* the actual rate in the benchmark (interactive) market and the proposed target statutory rate were both per-play rates, in this *Web V* proceeding the actual benchmark rate is now most often a percent-of-revenue rate. Despite this important change in the benchmark (interactive) market, the parties agree that the statutory rate should remain a per-play rate.

Accordingly, the parties' criticisms not only miss the mark, they fail to illuminate the issue at hand. The Judges need to revisit the economic principles identified in *Web IV* that undergird the ratio equivalency approach in order to apply that formula to the present record.

The concept of ratio equivalency is based on the principle that record companies, as licensors, in a hypothetical unregulated world ''would want to make sure that the marginal return that they could get in each sector [interactive and noninteractive] 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.'' *Web IV* 81 FR at 26344. This is an example of ''a fundamental economic process of profit maximization,'' *id.,* one that ''pervades much of [e]conomics: A rational seller or licensor will ''[a]llocate resources among alternative uses so as to keep the marginal returns equal, or as near equal as possible [because] if marginal products aren't equal, there's a gain to be had by reallocating some resources from the use with the lower marginal product and assigning them where the marginal product is higher.'' Armen A. Alchian & William R. Allen, Universal Economics at 102 (2018) (summarizing this principle as ''the equalization of marginals at the maximum aggregate return''). In the present case, this economic logic implies that rational profit-maximizing record companies will seek to earn the same return for each relevant ''unit'' of value across both the interactive and noninteractive markets.

In *Web IV,* the *metric* for the royalty rate was per play, *i.e.,* each individual performance of a copy of a sound recording. However, downstream *revenue* is not generated on a per-play basis. Rather, in the case of streaming subscriptions, marginal revenue can be generated by incremental increases in the number of subscriptions.[126] A record company would seek to avoid a scenario where it loses marginal royalty revenue on each subscription dollar if listeners who would otherwise have chosen to become interactive subscribers instead decide to become noninteractive subscribers. By equalizing the percent of revenue paid as royalties per subscription dollar, the rational record company is indifferent regarding to which of these two forms of music services a consumer decides to subscribe.[127] (And, it should also be noted, on the *cost* (supply) side, a particular feature of *copies* of sound recordings is that their transmission does not generate a marginal physical production cost. *See Phonorecords III Dissent,* 84 FR at 1976 (and citations therein)).[128]

This is the precise point on which Professor Rubinfeld relied and as to which the Judges in *Web IV* agreed. Thus, the actual economic concern in *Web IV* was setting rates based on a per-play rate that was a marketplace proxy for a minimum percent-of-revenue earned by an assumed substitute service, *i.e.,* interactive services (approximately 55%), which generates marginal opportunity costs.[129]

[124] Professor Rubinfeld apparently relied on per-play royalties as input [B] in his ''ratio equivalency'' approach because the per-play prongs were the ones triggered in the market and his intention was to faithfully utilize actual market data.

[125] By contrast, if the Judges had adopted only a percent-of-revenue structure, the royalty paid by a noninteractive service obviously would have remained at that fixed percentage.

[126] Services could also hypothetically increase marginal revenue simply by raising subscription prices. There is no evidence in the record, though, indicating that services have the market power to increase subscription prices charged within various segments of the retail market.

[127] Of course, concern for substitution is appropriate only if the two services are indeed substitutes among consumers. This important point is considered *infra.*

[128] The *Phonorecords III* majority Determination does not conflict with this economic point.

[129] To be clear, that concern is not the end of the story. Potential adjustments also need to be considered to reflect effective competition,

Continued

In the present case, SoundExchange makes this point repeatedly, citing to language in the *Web IV* Determination. *See, e.g., id.* at 26338 (''[G]iven Dr. Rubinfeld's assumption that the ratios should be equal in both markets, the per-play royalty rate for noninteractive services [*D*] (*i.e.,* the statutory rate) would also have to provide record companies with *the same minimum percentage of revenue out of [C] (the average monthly retail noninteractive subscription price*).'') (emphasis added); *id.* at 26344 (''Dr. Rubinfeld acknowledged that his 'ratio equivalency' was intended to *create a rate whereby every marginal increase in subscription revenue would result in the same increase in royalty revenue,* whether that marginal increase in subscription occurred in the interactive market or the noninteractive market.'') (emphasis added); *id.* at 26324 n.44 (noting that Dr. Rubinfeld's ratio equivalency per-play methodology resulted in an interactive royalty payment generally ranging from 50% to 60% of subscription revenues, with most falling between 55% and 60%); *id.* at 26338 (the per-play rates relied upon by Dr. Rubinfeld implied these same express percent-of-revenue rates as set forth in the ''greater-of'' formulae in the interactive direct licenses). To buttress this point, SoundExchange notes that the Judges' restatement in *SDARS III* of the ''ratio equivalency'' model is consistent with the understanding that this approach is intended to equalize royalties as a percent of revenue. SX PFFCL 119 (citing *SDARS III,* 83 FR at 65243 n.137).

The Judges agree with SoundExchange's assertion in this regard. Accordingly, the Judges find that the *Web IV* ''ratio equivalency'' approach was properly intended to approximate and equalize percent-of-revenue royalties for interactive and noninteractive subscriptions—on the assumption that interactive and noninteractive subscriptions were 1:1 substitute products for consumers downstream. If and when such substitution exists, Mr. Orszag's ''ratio equivalency'' approach is the more appropriate methodology.

Nonetheless, based on the record in this proceeding, the Judges do not find good reason to apply Mr. Orszag's benchmark rate other than in a partial manner. That is, because the ''ratio equivalency'' approach is economically premised on a presumed high substitutability (cross-elasticity in economic parlance) between interactive and noninteractive subscriptions, this equivalency cannot be economically pertinent where, as here, the record presents the Judges with facts in conflict with that presumption.

Again, recall that in *Web IV,* the Judges stated: ''Dr. Rubinfeld's 'ratio equivalency' *assumes a 1:1 'opportunity cost'* for record companies, whereby, on the margin, a dollar of revenue spent on a subscription to a noninteractive service is a lost opportunity for royalties from a dollar to be spent on a subscription to an interactive service.'' *Web IV,* 81 FR at 26344–45 (emphasis added). To make clear that the *Web IV* Judges found this 1:1 substitutability to be a presumption (and certainly not an axiom), they rejected SoundExchange's attempt to extend this 1:1 substitution argument to the ad-supported market in order to equalize royalties as a percent of revenues in that market with the percent applicable in the subscription interactive market. In rejecting this attempted extension of the 1:1 substitutability presumption, the Judges took note of a sharp dichotomy in the willingness to pay (WTP) of listeners in each market. *Web IV,* 81 FR at 26345–46, 26353.

However, the Judges did apply a 1:1 substitutability of subscription interactive services for subscription noninteractive services in *Web IV* and noted its limited application:

> Dr. Rubinfeld's interactive benchmark is only applicable when, *inter alia:*
>
> Revenues in both markets are *derived from subscription revenues and are thus reflective of buyers with a positive WTP* for streamed music; [and] functional convergence and downstream competition for potential listeners indicate *a sufficiently high cross-elasticity of demand as between interactive and noninteractive services,* provided the noninteractive subscription rate is reduced to reflect the absence of the added value of interactivity . . . .

Web IV, 81 FR at 26353 (emphasis added). Applying these principles, *Web IV* held:

> When the segment of the market at issue consists of willing buyers/licensees who are providing access through subscription-based listening to listeners who have a WTP for either interactive or noninteractive services that are close substitutes, then Dr. Rubinfeld's ''ratio equivalency'' is reasonably based on revenues.

Web IV, 81 FR at 26348 (emphasis added).

These quoted portions of *Web IV* show that the Judges dichotomized between Dr. Rubinfeld's use of the ''ratio equivalency'' model by rejecting it for the ad-supported noninteractive services but applying it to subscription noninteractive services. But these quoted portions also demonstrate that the Judges applied a ''ratio equivalency'' across the benchmark and target subscription markets by *presuming* that *subscribers'* revealed positive WTP for both interactive and noninteractive services was sufficient to show the necessary cross-elasticity and, relatedly, that each product was a close substitute for the other (after making an adjustment for interactivity.[130]

In the present proceeding, a consumer survey in evidence, commissioned by SoundExchange—the Zauberman Survey—provides relevant information regarding the question of whether and to what extent subscription *interactive* services are substitutes for subscription *noninteractive* services. As analyzed and applied by one of SoundExchange's other economic expert witnesses, Professor Willig, the Zauberman Survey indicates that only 11.5% of subscribers to noninteractive services would divert to listening to subscription interactive services if their noninteractive subscription service were no long available. *See* Willig WDT ¶ 47 fig.6.[131] These survey results indicate there is far less than the 1:1 substitution ratio between subscription *interactive* services and subscription *noninteractive* services that was *presumed* in *Web IV*. This SoundExchange-proffered evidence indicates that Mr. Orszag's per-play rate—derived from his ratio equivalency approach—has only limited applicability.

Moreover, in *Web IV* and also in *SDARS III,* the Judges laid out this precise critique of a ratio equivalency approach proffered by Mr. Orszag, with the Judges also relying on survey evidence to make the point:

> *The survey results* highlight a . . . criticism . . . of Mr. Orszag's ratio equivalency approaches. . . . [T]he *economic rationale* support[ing] a ratio equivalency approach *requires* '*significant competition, or a high cross-elasticity of demand,* between

differences in WTP for substitutes (for example, because of interactivity differences), and inconsistent definitions of a ''play'' between service types (the ''skips'' issue).

[130] Such an assumption was not unreasonable as there were no ''opportunity cost'' surveys such as in the present case indicating the extent of cross-elasticity or substitutability of interactive and noninteractive subscriptions. As discussed, *infra,* that evidentiary absence does not exist in the present proceeding. Also, in *Web IV,* the $0.0025 benchmark (adjusted to $0.0022) that presumed this 1:1 substitutability was consistent with Pandora's own proposed benchmark derived from its *noninteractive* market agreement with [REDACTED]. *Web IV,* 81 FR at 26405.

[131] The Hanssens Survey indicates, according to Professor Shapiro, that this diversion to new interactive subscriptions would be even smaller, measuring [REDACTED]%. Shapiro WDT at 28 tbl.5. This lower figure would not alter the weights assigned to the benchmarking and ratio-equivalency models.

[the target market] and [the benchmark market] . . . . *[A] limited degree of head-to-head competition . . . will not suffice. . . .' Web IV,* 81 FR at 26353 . . . .

In *Web IV,* the Judges stated that the ratio equivalency approach might be appropriate if the record reflected . . . *a sufficiently high cross-elasticity of demand as between interactive and noninteractive services,* provided the noninteractive subscription rate is reduced to reflect the absence of the added value of interactivity. . . . 81 FR at 26353.

In the present case, Mr. Orszag did not provide either qualitative or quantitative evidence of a sufficiently high cross-elasticity. . . . [T]he survey results reported by SoundExchange's own survey witnesses . . . indicated that there is no such high substitutability between subscribership to interactive services and [the target market.] *These survey conclusions negate any complete or overwhelming ratio equivalency Mr. Orszag has posited.*

SDARS III, 83 FR at 65247 (emphasis added).[132]

iii. The Judges' Application of Mr. Orszag's and Professor Shapiro's Models

In sum, Professor Shapiro's model is more of a traditional benchmarking model. He identifies the interactive market as similar in terms of licensors, licensees, and licensed works, and he proposes adjustments (discussed *infra*) that allegedly correct for differences between the otherwise analogous benchmark and target markets. On the other hand, Mr. Orszag's approach is essentially an ''opportunity cost'' model more than it is a traditional ''benchmark model.'' Because SoundExchange's survey evidence, as applied by Professor Willig, reveals the limited applicability of the opportunity cost approach, the model cannot be extended to the entire market.

Therefore, the Judges find it necessary to apportion the applications of Professor Shapiro's benchmark result and Mr. Orszag's benchmark result. The Judges find it reasonable to apportion 11.5% of Mr. Orszag's proposed benchmark rate toward the subscription benchmark rate.[133] The Judges apply the remaining and greater weight, 88.5% (*i.e.,* 1–.115), to the more traditional benchmark approach undertaken by Professor Shapiro that relies on the broad similarities in terms of rights, licensors, and licensees, without adding assumptions regarding substitution patterns between the target noninteractive subscription market and the benchmark interactive subscription market.

The Judges will apply these apportionments to each expert's proposed rate *after* the Judges consider the more granular criticisms of each expert's approach and the proposed adjustments to those rates.

iv. The Parties' Granular Criticisms of Their Adversary's Subscription Benchmarking

Having resolved the differences between Mr. Orszag and Professor Shapiro regarding the *overarching issue* of how to apply ratio equivalency and benchmarking principles, the Judges now turn to the *detailed* critiques of each approach.

(A) SoundExchange's Granular Criticisms of Professor Shapiro's Benchmarking and the Judges' Analysis and Findings Regarding Those Criticisms

(1) Professor Shapiro's Inclusion of Discount Plan Royalties and Play Counts in Calculating a Value for [B], the Effective Per-Play Royalty in the Benchmark (Interactive) Market

SoundExchange criticizes Professor Shapiro for including the royalties and play counts associated with interactive services' *discount plans* in order to calculate the value of [B] in his benchmarking model. More precisely, Professor Shapiro calculates an effective interactive (benchmark) per-play royalty rate [B] by including in his numerator the total royalties paid and, in his denominator, the play counts—*not only for the interactive services' full-price ($9.99) subscription plans but also for discount plans, such as student, family, and military plans.* 8/19/20 Tr. 2931 (Shapiro); Shapiro WDT, app. D.1.B n.7.

According to Mr. Orszag, this has the effect of lowering the effective per-play rates in the benchmark market and therefore the proposed rates for the target market. To make this point, he compares his calculation of the weighted average subscription per-play rate *excluding* discount plans—$[REDACTED] per play—with Professor Shapiro's effective per-play rate for the same services *including* discount plans—$[REDACTED] per play. Trial Ex. 5603 ¶ 88 (WRT of Jon Orszag) (Orszag WRT).

In response, Professor Shapiro asserts that it would be inappropriate to hand-pick a subset of the market (*i.e.,* just the full-price plans) in order to generate the per-play rate because the statutory rate will apply to royalties generated by all subscribers regardless of whether they subscribe to a full-price or discounted plan. 8/19/20 Tr. 2852–53, 2898–99 (Shapiro).

The Judges agree with Professor Shapiro that the identification of a per-play benchmark rate in his model for subscription services should be based on the royalties and play counts of all plans. There is no valid reason to cherry-pick among the plans when calculating this benchmark input because all noninteractive services offering subscription plans will pay the calculated per-play royalty across all plans, whether full price or discounted.[134]

(2) Professor Shapiro's Use of Full Subscription Prices Rather Than Average Revenue per User (ARPU) for the Values of [A] and [C]

SoundExchange also criticizes Professor Shapiro's inputs for the values for [A] and [C] in his benchmarking model, which represent the monthly

[132] The Judges are perplexed by SoundExchange's decision to propose a per-play rate as opposed to a percent-of-revenue rate. Mr. Orszag could have more simply applied his [REDACTED]% percent-of-revenue rate as the applicable benchmark rate (subject to any warranted adjustments). Further, the Judges note that the Majors and the services revealed their *[REDACTED]* in the interactive market—*a market that is unregulated and [REDACTED] to the record companies than the noninteractive market. Compare* Orszag WDT tbl.4 (2018 U.S. *interactive* subscription revenue was $[REDACTED]) with *id.* tbl.6 (2018 U.S. subscription revenue for Mr. Orszag's *noninteractive* proxies (including Pandora) was $[REDACTED], [REDACTED]% of the interactive revenue). There is no reason provided in the record to explain why SoundExchange and Mr. Orszag would find practical issues relating to revenue definition—which were insufficient to reject a percent-of-revenue rate in the far larger and unregulated interactive market—to be so vexing in the noninteractive market as to necessitate the conversion of the benchmark percent-of-royalty rate into a statutory per-play rate.

[133] The Judges prefer Mr. Orszag's approach over Professor Shapiro's approach for the portion of the market in which the relevant cross-elasticity/substitutability is high. As the Judges noted in *SDARS III, if and when the opportunity cost approach is appropriate,* it can be superior to a benchmark approach in estimating the statutory rate. *SDARS III,* 81 FR at 65231 (''*When properly weighted,* the opportunity cost approach is tantamount to a useful benchmark, because the weightings are quite analogous to (and more precise than) the 'adjustments' the Judges consistently make to proposed benchmarks.'') (emphasis added).

[134] Mr. Orszag claims that interactive discount plans should be ignored because [REDACTED] engages in much less discounting. He claims that this difference requires the Judges to look only at full-price plans in order to make an ''apple-to-apples'' comparison. SX RPFFCL (to Pandora/Sirius XM) ¶ 186 (citing 8/11/20 Tr. 1215 (Orszag)). But, Pandora analogizes to another food group (characterizing *this* point as a ''red herring''), namely one that is unresponsive to the need to consider that all noninteractive subscription services will pay the statutory per play rate, regardless of whether they engage in discounting. Pandora/Sirius XM PFFCL ¶ 186 (citing 8/19/20 Tr. 2852–53 (Shapiro)). The Judges disagree with SoundExchange's reliance on the different degrees of discounting. Discount plans are forms of price discrimination, designed to increase overall revenue. There is no reason why the manner in which different services generate revenue should affect the calculation of per play rates in this benchmarking exercise, unless the Judges were asked by the parties to consider setting different royalty rates for full-price and discount subscription plans (which no party has requested).

downstream retail price of the interactive benchmark subscriptions and the proxies for the noninteractive services, respectively. 8/19/20 Tr. 2936–37 (Shapiro). SoundExchange asserts that Professor Shapiro should have used the Average Revenue per User (ARPU) for these values (which would have incorporated any lower discounted retail prices) rather than the full retail subscription prices for [A] and [C], which were $9.99 and $4.99, respectively. *For the first time in this proceeding,* at the hearing, SoundExchange, through Mr. Orszag, sought to raise a concern that Professor Shapiro's use of retail prices rather than ARPU for [A] and [C] is improper. He maintained that because Professor Shapiro used all plans, including discounted plans, to calculate the effective per-play rate ([B]), as described above, while neglecting the discount plans' ARPU when providing values for [A] and [C], Professor Shapiro's model ''[REDACTED].'' 8/11/20 Tr. 1387–88 (Orszag).[135] In Mr. Orszag's opinion, because Professor Shapiro calculates effective per-play royalty rates in a manner that includes all plans (including discount plans), he likewise should have based the interactivity adjustment on the effective payment for all plans, including discount plans. 8/10/20 Tr. 1164–67 (Orszag).

Further to this argument, SoundExchange notes that Professor Shapiro acknowledges that identifying what customers actually pay on a per-subscriber basis is preferable to relying on an undiscounted price that is paid by many, but not all, of the subscribers. SX PFFCL ¶ 136 (citing 8/19/20 Tr. 2939 (Shapiro)). In addition, SoundExchange explains that, although the use of discount plans is a form of price discrimination, Professor Shapiro concededly did not build this price [REDACTED] only on the full prices for subscriptions as his values for [A] and [C]. SX PFFCL ¶ 137 (citing 8/19/20 Tr. 2958–59 (Shapiro)).

SoundExchange then uses its post-hearing PFFCL submissions to set forth its proposed new analysis, in which it suggests several different potential ARPU levels that could be used to substitute for [A], the retail price paid in the benchmark interactive market. *See* SX PFFCL ¶¶ 139–140 (and references cited therein).

However, the Services emphasize that none of SoundExchange's witnesses raised an objection in their written rebuttal testimonies to Professor Shapiro's use of retail prices as the metric for [A] and [C] in any of the witnesses. The Services further aver that no witness at the hearing proffered alternative ARPU calculations for use as values for [A] and [C]. *See* Pandora/Sirius XM PFFCL ¶ 191. Moreover, the Services note that this issue has already been resolved at the hearing, when a proffer by SoundExchange of testimony from Mr. Orszag was met with a motion by the Services to bar such testimony. At the hearing, after extended argument and colloquy, 8/25/20 Tr. 3821–28 (argument and colloquy), the Judges sustained the Services' objections to the presentation by Mr. Orszag of his belated attempt to raise this issue and attempt to utilize ARPU data for the first time from the witness stand in an attempt to support that new analysis because such 11th-hour testimony and data review would constitute delinquent and thus improper ''new analysis.'' 8/25/20 Tr. 3821–28 (Chief Judge Feder) (''[T]his is a new analysis. The objection is sustained.'').

Moreover, the Services note that contrary rebuttal arguments were certainly available for them to raise, if SoundExchange had advanced this assertion in a timely fashion. First, they take note that there is no established manner by which the industry calculates ARPU for discount plans. As Professor Shapiro and Mr. Orszag both testify, there is no uniform method employed by the various services for making that calculation, and SoundExchange has provided no evidence to the contrary. 8/19/20 Tr. 2943–44 (Shapiro); 8/11/20 Tr. 1199–1200 (Orszag) (conceding that ''there are some differences between how [the Majors]'' account for family plans in their ARPU calculations). Second, they note that the several discount-based ARPU ratios [A]:[C] suggested by SoundExchange as supporting Mr. Orszag's unadmitted ''new analysis'' are themselves contradicted by the ARPU-based ratio for Pandora's own interactive ''Premium'' service and its Pandora Plus service. 8/19/20 Tr. 2853–54, 2855–56 (Shapiro).

Additionally, Professor Shapiro opines that his reliance on the ratios of full price retail subscriptions to effective per-play rates is a cleaner method to isolate the value of interactivity, and an inclusion of discount plans would inject confounding issues relating to the bundling of use by family plan members. 8/26/20 Tr. 3932 (Shapiro) (distinguishing (1) his use of royalties and plays from all plans as identifying an effective per-play rate to cover all plays from all plans from (2) the attempt to measure the ''value of interactivity, that's $9.99 versus $4.99, nicely isolated for particular individual undiscounted plans''); *see also* Pandora/Sirius XM PFFCL ¶ 190.

The Judges find that SoundExchange cannot resurrect this belated argument in its post-hearing submissions, through counsel, after the Judges had already ruled that the issue had been delinquent when presented for the first time at the hearing. Moreover, SoundExchange has not presented any argument in its post-hearing submissions to suggest that the Judges should revisit their decision. Indeed, the dispositive effect of SoundExchange's delinquency in making this argument remains manifest; having had no timely and proper notice of this argument, the Services and their witnesses had no ability to prepare a contrary argument.

Additionally, as the Judges note *supra,* the Services have identified specific rejoinders to Mr. Orszag's ''new analysis,'' which could not be explored thoroughly because SoundExchange did not raise this issue in a timely manner. Further, the Judges note that Professor Shapiro's reliance on the use of undiscounted retail prices as his values for [A] and [C] was consistent with the Judges' formulation of the ratio equivalency approach in *Web IV*.

For these reasons, the Judges do not give any weight to SoundExchange's arguments in this regard.[136]

(3) Professor Shapiro's Generation of a Per-Play Rate in the Benchmark Market

SoundExchange also asserts that Professor Shapiro's generation of an effective per-play rate in the benchmark interactive market ''is inconsistent with market reality.'' SX PFFCL ¶ 112. This is an odd critique, in that Mr. Orszag and SoundExchange are themselves proposing a per-play rate structure, the very approach it claims to be at odds with ''market reality.'' *See* Services RPFFCL ¶ 112 (''If the . . . shift from interactive services paying under per-play metric to a percentage-of-revenue metric really had . . . market-wide relevance . . . one would have expected [Mr. Orszag] to propose a percentage-of-revenue rate for statutory purposes.''). Further, because both SoundExchange and Pandora propose a per-play rate generated from a non-per-play benchmark, a conversion to a per-play rate must occur *at some point in the analysis,* and SoundExchange does not

[135] As noted *supra,* the first of Professor Shapiro's proposed two-part interactivity adjustment is implicit in the ratio equivalency approach and, for presentation purposes, is more naturally considered as an element of the modeling rather than as a stand-alone adjustment.

[136] To be clear, the Judges are not making any substantive finding regarding how they would rule if a timely argument were to be made in a subsequent proceeding regarding the merits of using ARPU values for numerators [A] and/or [C].

adequately explain why making this conversion in the benchmark market (early in the analysis) is any more in accord with ''market reality'' than engaging in the conversion in the target noninteractive market as a final step. Indeed, as noted at the outset of the Judges' presentation of SoundExchange's critique of Professor Shapiro's benchmark, they explicitly assert only that his setting of a per-play rate in the benchmark market is neither necessary nor mandatory—not that it was improper. *See supra,* section IV.B.1.d.

(B) The Services' Criticisms of Mr. Orszag's Benchmarking and the Judges' Analysis and Findings Regarding Those Criticisms

(1) SoundExchange's Reliance on Pandora's Data

The Services criticize Mr. Orszag for relying only on Pandora's revenue and play counts in his ratio equivalency approach. Services PFFCL ¶ 29 (and record citations therein). However, SoundExchange responds by noting that Pandora Plus has an [REDACTED]%+ market share, making it a highly suitable data source. Further to this point, SoundExchange notes that, when appropriate, the Judges have relied in past proceedings on facts and data attributable to entities with significant market share. SX RPFFCL (to Services) ¶ 29.

The Judges find the Services' criticism to be without merit. Mr. Orszag acted reasonably and in a manner consistent with the Judges' past reliance upon data from a significant industry participant. Moreover, as the Judges have said on several other occasions, the statutory rate-setting process does not instruct the Judges to protect any particular business model. Thus, Mr. Orszag's decision to rely on data from the largest noninteractive service with arguably the most successful business model (in terms of market share) can hardly be considered improper.

(2) Mr. Orszag's Model Will Not Generate a Royalty Equal to [REDACTED]% of Revenue Across Noninteractive Services

The Services also object to Mr. Orszag's approach because his model's per-play royalty rate will not equate with [REDACTED]% of any noninteractive service's revenue (including Pandora) unless, by coincidence, it has revenues and a play count that generate that effective percentage royalty level. Accordingly, the Services maintain that Mr. Orszag's approach cannot even generate its ''foundational premise'' of ''ratio equivalency,'' whereby noninteractive services pay the same percentage of revenue rate as paid by interactive services in the benchmark market. Shapiro WRT at 28; 8/19/20 Tr. 2893–95 (Shapiro). Relatedly, the Services claim that Mr. Orszag fails to identify revenue and play counts for any existing statutory service, and for this reason as well he thus had not analyzed whether any such service would in fact pay [REDACTED]% of its revenues in royalties if it paid $0.0033 per performance. Services PFFCL ¶ 174.

The first criticism is correct but uninformative. It is but a specific example of a more general criticism: Any rate or rate structure set by the Judges can (and likely will) affect different regulated entities somewhat differently and also be rendered inaccurate or obsolete during the five-year rate term by changes in the marketplace. This is closely analogous to the well-known concept of ''regulatory lag'' in public utility regulation. *See* Alfred E. Kahn, 1 The Economics of Regulation 54 (1970) (''regulatory lag'' results from the fixing of a rate for a period of time and the inability of regulated companies to maintain rates of return that were deemed satisfactory at the inception of the rate period'').

The second criticism is also off-target. As SoundExchange states by way of response, Pandora's subscription service indeed would pay essentially [REDACTED]% of its revenue as royalties pursuant to Mr. Orszag's proposed per-play rate (because [REDACTED]), and Mr. Orszag multiplied his proxy revenues by his [REDACTED]% benchmark royalty rate and then divided by the number of noninteractive proxy plays) SX RPFFCL (to Services) ¶ 174. While it is true that Pandora Plus is not a statutory service, the parties (including Pandora) have used it as a proxy for such services in this proceeding, subject to adjustments for, *inter alia,* differences in interactivity, if appropriate.[137] Thus, the appropriate response by the Services is not to urge the Judges to reject outright this proxy-based analysis, but rather to: (1) Propose proper adjustments that would purportedly align the benchmark proxies to the statutory market; and/or (2) propose alternative benchmarks (which the Services have done).

(3) Mr. Orszag Fails To Identify a Per-Play Rate That Adequately Captures the Value of Individual Plays

Next, the Services assert that Mr. Orszag's reliance on a percent-of-revenue centric benchmarking approach fails to adequately capture a value attributable to each play of the sound recording, which is the metric he proposes. Shapiro WDT ¶ 47. The Judges reject this criticism. A fundamental rationale for Mr. Orszag's modeling approach, as the Judges discussed above, is that the value to be generated in this market for ''second copies'' of sound recordings lies not in the recordings of songs whose marginal (non-opportunity) cost is zero and whose marginal revenue is non-existent (because listeners do not pay per song as with a juke box), but rather in the revenue derived from subscribers (and advertisers in the ad-supported market). Thus, there is no economic ''value'' inherent in the ''second copies'' of the sound recordings from a marginalist perspective. Of course, there is tremendous value in the sound recordings themselves, in terms of the costs of artist discovery, development, recording and promotion, and—not to be deemphasized—the entrepreneurial profit generated by creating value through the assembly of such inputs. The record companies recoup those costs, avoid opportunity costs and generate profits by percent-of-revenue royalty pricing.

Thus, the Services' criticism of the fact that Mr. Orszag's approach does not capture some hypothetical inherent value of a sound recording is a red herring. *Cf. Phonorecords III,* 84 FR at 1931 n.64, 1946 n.110 (explaining why the existence of different pricing regimes for the same music demonstrates the absence of an ''inherent value'' in *copies* of musical works, notwithstanding the significant ''first copy'' value of musical works).

(4) Mr. Orszag's Rate Is Far Above the Present Statutory Rate

The Services note that Mr. Orszag's $0.0033 proposed benchmark rate is

[137] Further, if the Services wanted to avoid a per play rate that would generate different effective percent-of-revenue royalty rates for different entities, it could have proposed a percent-of-revenue rate, either in its direct case or as a rebuttal to Mr. Orszag's benchmark per play rate proposal. Instead, the Services, like SoundExchange, propose only a per-play rate, that will also necessarily generate different effective percent-of-revenue royalty rates for different noninteractive services, depending upon their revenues and play counts. Also, as discussed *infra* with regard to Professor Shapiro's proposed additional (second) interactivity adjustment, the record evidence does not demonstrate that the Pandora Plus mid-tier service, priced at $4.99, is more valuable downstream than a statutorily-compliant noninteractive service, making Mr. Orszag's use of mid-tier services, Pandora Plus, iHeart and Napster (Rhapsody), as proxies for revenue and play count-purposes a reasonable modeling choice. *See* Orszag WDT ¶¶ 176–179.

almost 50% above the statutory rate the Judges set in *Web IV* (originally $0.0022, now $0.0023 as adjusted for inflation)—using the same benchmarking approach Mr. Orszag claims to be following now. This substantial divergence is anomalous, according to the Services, and serves as a ''red flag'' that Mr. Orszag's methodology departs significantly from *Web IV. See* 8/19/20 Tr. 2896–97 (Shapiro).

The Judges find this criticism wholly unpersuasive. Each rate case is a *de novo* proceeding, based upon the contemporaneous circumstances in the relevant markets (benchmark and target) as demonstrated by the record evidence. *Cf. Phonorecords III,* 84 FR at 1944 (''The statute is plain in its requirement that the rates be established *de novo* each rate period''). There is no *a priori* reason why the rate in *Web V* should bear any particular relationship to the rate in *Web IV.* Moreover, this assertion appears self-serving because, as SoundExchange notes, Professor Shapiro advocates for a subscription royalty rate between $0.0005 and $0.0016, *far below* the current *Web IV* rate. Shapiro WDT at 2.

(5) Mr. Orszag's Proposed $0.0033 Per-Play Rate [REDACTED] Than the Effective Rate Paid by His Mid-Tier Proxies

Next, the Services assert that Mr. Orszag's use of the three mid-tier proxies to generate his $[REDACTED] per-play rate [REDACTED] than the $[REDACTED] effective per-play rate actually paid by mid-tier services under the applicable percent-of-revenue rate. Shapiro WDT at 37–39 & tbl.9; 8/12/20 Tr. 1564–65 (Orszag); Orszag WDT ¶¶ 84–85; 8/13/20 Tr. 1958–59 (Orszag).

The Judges find this argument unpersuasive. For the Judges to make a meaningful comparison of Mr. Orszag's proposed rate and the effective rates paid by mid-tier services, they would need evidence that sheds light on how those effective rates had been calculated from the actual percent-of-revenue rates (or other rate tiers) applicable to those mid-tier services. The Judges find that the record does not provide a basis to make such an examination.

(6) Mr. Orszag's Benchmark Interactive Rates [REDACTED] but He Proposes an Increase in the Statutory Noninteractive Rate

The Services criticize Mr. Orszag for—on the one hand—noting that benchmark interactive rates [REDACTED] while—on the other hand—calling for a significant increase in the noninteractive subscription royalty rate. But the Judges find that this reveals no *ipso facto* inconsistency. Factors particular to the noninteractive market could cause the rate in that market to increase and converge with the subscription interactive rate, which could be falling. Additionally, SoundExchange notes that the operative marketplace metric in the benchmark interactive market changed from the per-play metric to the percent-of-revenue measure from the *Web IV* to the *Web V* period.[138] Thus, Mr. Orszag (who was not a witness in *Web IV*) has relied on new, contemporaneous material to generate his opinion regarding changes in the market. The Judges find that the deviation between his proposed rate arising from his expert analysis, and the prior rate, does not raise a concern.

(7) Mr. Orszag's Exclusion of Revenues and Royalties From Discount Plans in His Calculation of Inputs [A] and [B] in His Ratio Equivalency Model

The Services assert that Mr. Orszag errs in excluding discount plans from his ratio equivalency model. SoundExchange responds by noting that the interactive services—Spotify in particular—engage in [REDACTED] discounting/price discrimination than the noninteractive services (or [REDACTED] in the model), such that including discount plans would fail to generate an apples-to-apples comparison. Orszag WRT ¶¶ 83, 87; 8/11/20 Tr. 1215 (Orszag).

This is essentially the reciprocal of SoundExchange's criticism of Professor Shapiro's *inclusion* of discount plans in calculating [B], his percent-of-revenue rate in the benchmark market (en route to a per-play rate in that market). Here, the Judges find no sufficient reason for Mr. Orszag's exclusion of discount plan royalty and revenue data from his calculation of [A] (his total revenue input) and [B] (his total royalty input (en route to his percent-of-revenue rate in the benchmark market). As the Judges explained in connection with the reciprocal argument pertaining to Professor Shapiro's inclusion of such data, because the statutory rate will apply to all plays across all plans the per-play rate should be derived from data across all plans.

But SoundExchange makes a point that at first blush is anomalous: It notes that, had Mr. Orszag included discounted plans in his analysis, the [REDACTED]% percent-of-revenue rate he calculates would have increased to [REDACTED]%, Orszag WRT ¶ 89 n.198.[139] This has the effect, Mr. Orszag notes, *of increasing the royalty rate in his benchmark interactive market from $0.0033 to $0.0035.* Orszag WRT ¶ 89 & n.198; *see also* SX PFFCL ¶¶ 95–96. *Moreover, the Services expressly do not dispute that their criticism in this regard causes Mr. Orszag's benchmark rate to increase. See* Services RPFFCL ¶¶ 95–96.

So, why did SoundExchange decline to include the discounted plans in its analysis? As noted above, Mr. Orszag claims that he ignored discount plan data because the target mid-tier [REDACTED] service has far fewer discount subscribers, and he wants to make an apples-to-apples comparison. But the clear appropriateness of including discount plan data, together with the fact that including such data would have been significantly in SoundExchange's interest, makes its decision to exclude discount plan data something of a mystery, to say the least.

To wrap this mystery in an enigma, *the Services continue their own apparent self-destructive argument,* asserting that (1) the noninteractive market indeed offers a wide array of subscription plan discounts, including in particular SiriusXM's internet service, and (2) in any event, no economic principle supports Mr. Orszag's requirement of this particular apples-to-apples approach. *See* Services RPFFCL ¶¶ 93–94. Perplexingly (at least initially), *SoundExchange still declines to forego this argument and declare victory,* and simply accept the higher [REDACTED]% rate arising from the Services' criticism.[140] Likewise, the Services refuse to ''let sleeping dogs lie'' and stop arguing against themselves for an analysis that generates a rate of [REDACTED]%—which is [REDACTED]% *above* [REDACTED]%.

One may reasonably inquire*: What is going on here?*[141] Why the facial

[138] The Judges discuss the significance of that change *supra,* section IV.B.1.e.ii.

[139] Because the percent-of-revenue rate is [REDACTED]%, the [REDACTED]% rate which is inclusive of discount plans necessarily includes royalties that were paid on other prongs in the [REDACTED] in Spotify's license agreement. In fact, Mr. Orszag's calculation of a [REDACTED]% ''undiscounted plan'' royalty rate (rather than exactly [REDACTED]%) likewise suggests that Spotify paid [REDACTED].

[140] The difference between these rates is certainly not *de minimis.* SoundExchange argues, for example, that the [REDACTED] paid by Spotify to the Majors in their most recent contracts, from [REDACTED]% to [REDACTED]%, reflects [REDACTED] in the competitive nature of the upstream interactive market.

[141] *See* John Kay & Mervyn King, Radical Uncertainty at 10 (2020) (Two prominent economists, John Kay and Mervyn King, note: ''The question 'What is going on here?' sounds banal, but it is not. . . . [R]epeatedly . . . people immersed in technicalities . . . have failed to stand back and ask, 'What is going on here?'")

anomaly of SoundExchange advocating for the *lower* [REDACTED]% of revenue rate and the Services arguing for the *higher* [REDACTED]%? The answer appears to lie in the fact that, under Professor Shapiro's approach, the higher royalty total in the benchmark market must be divided by the number of plays by subscribers. When Spotify's discount plans are included, the percentage increase in the total number of plays (the denominator) [REDACTED] than the percentage increase in royalties (the numerator). It appears to the Judges that Mr. Orszag and SoundExchange were willing to sacrifice applying the [REDACTED]% of revenue percentage that would have increased their proposed per-play rate to $0.0035, in order to avoid relying on discount plans whose inclusion would bolster Professor Shapiro's model that includes discount plan play counts which thus decreases the per-play rate in the benchmark market. Conversely, Professor Shapiro and the Services were willing to acknowledge that if Mr. Orszag had included discount plans in his model, and the Judges fully applied his approach, they risked a higher statutory rate of $0.0035 per play. But the Services were apparently willing to take that risk, in order to bolster their general position that discount plan data be included, a position that, if adopted by the Judges, would add evidentiary weight to Professor Shapiro's model. In sum, it seems to the Judges that a good dose of game theory motivated the litigation strategy of the parties.

As discussed *supra* in connection with Professor Shapiro's benchmark, the Judges find that all revenues, royalties and plays, regardless of whether they are generated via discounted or undiscounted plans, must be included in the benchmarking analyses. That means Mr. Orszag's benchmark of $0.0033 in fact should be increased to $0.0035 when all discounted revenues, royalties and plays are included.[142] Likewise, that means that Professor Shapiro's benchmark (interactive) effective per-play rate likewise properly considers all revenues, royalties and plays in that market. *See* Pandora/Sirius XM PFFCL ¶ 186 n.19 (''The effective per-play rate for *all plans,* as calculated by Professor Shapiro ($[REDACTED]), is [REDACTED] than the per-play rate for solely full-priced plans ($[REDACTED]).'').[143]

v. Explicit Adjustments to the Subscription Benchmarks of Professor Shapiro and Mr. Orszag

Having considered the structures of the benchmarking and ratio equivalency models of Mr. Orszag and Professor Shapiro, and having considered the granular criticism of their respective applications of their models, the Judges now turn their attention to the choices made by these experts regarding whether to apply any additional, explicit adjustments to the subscription rates they derive from their models. And, if the Judges find that any additional adjustments are warranted, they determine the size of any such adjustment.

(A) Professor Shapiro's Proposed Second Interactivity Adjustment

Professor Shapiro's first interactivity adjustment is discussed *supra,* as it is part and parcel of his ratio equivalency model. But Professor Shapiro also proposes a second additional (*i.e.,* cumulative) interactivity adjustment, to be added on to his first interactivity adjustment.

According to Professor Shapiro, his first interactivity adjustment, while necessary, is not sufficient. The insufficiency arises, he asserts, because the mid-tier services that he utilizes to identify a retail price ([C] in his model) are not statutory noninteractive services. Rather, as mid-tier subscription services, they offer limited interactivity, at a full retail price of $4.99 per month. Shapiro WDT at 37–38, tbl.9; 8/19/20 Tr. 2828 (Shapiro). Thus, Professor Shapiro proposes an additional *second* ''interactivity adjustment, which he avers is necessary to fully adjust for the difference between the value of a fully interactive service ([A] in his model) and a statutorily-compliant noninteractive service.

In support of this further adjustment, Pandora asserts that the general purpose for making an ''interactivity adjustment'' is to reflect the incremental downstream market value generated by interactive functionality. Pandora/Sirius XM PFFCL ¶ 188 (citing Shapiro WDT at 38–39, 42; 8/12/20 Tr. 1505–10 (Orszag). Professor Shapiro claims that his *first* interactivity adjustment follows the *Web IV* approach by identifying the ratio of: (1) Subscription retail prices for his selected interactive services (identified above) to (2) subscription retail prices for his selected target market, the mid-tier services (also identified above). Shapiro WDT at 37–38 & tbl.9; 8/19/20 Tr. 2828 (Shapiro); *see also Web IV,* 81 FR at 26348. The average monthly full subscription price of the interactive services he reviewed was $9.99. The average monthly subscription price of the mid-tier services he reviewed was $4.99. Thus, the ratio of [A]:[C] is 2:1. Shapiro WDT at 37–39; 8/19/20 Tr. 2828 (Shapiro).

But because that first (implicit) interactivity adjustment measures—at the retail level ([A]/[C])—the difference in the value of interactivity to consumers between a fully interactive service and *a partially interactive (mid-tier) service,* Professor Shapiro asserts that a *second* interactivity adjustment is necessary—to measure the value of the further difference between mid-tier level interactivity and a *non*interactive (statutory) service. Shapiro WDT at 38–39; 8/19/20 Tr. 2830–33 (Shapiro).

However, unlike with his *first* interactivity adjustment, Professor Shapiro does not measure the difference in value by identifying a difference in the *downstream* market between the (unregulated) retail values of: (1) The mid-tier *limited* interactive subscription services and (2) a measure of statutorily-compliant *non*interactive subscription services. Instead, Professor Shapiro examines the *upstream* market, comparing: (1) The effective per-performance *royalty* paid by consumers for his selected mid-tier subscription services, $[REDACTED]; to (2) the 2019 statutory royalty for noninteractive services, $0.0023, which was the most recent inflation-adjusted rate established by *Web IV.* Shapiro WDT at 37–39 & tbl.9. According to Professor Shapiro, using this upstream royalty

[142] The Judges could leave Mr. Orszag's proposed rate at $0.0033 per play, because he never revised his opinion to propose such a rate. However, the Judges take note that (as stated *supra*) the Services do not dispute the fact that including discount plans raise the per-play rate in Mr. Orszag's modeling to $0.0035. Further, because the Judges are including discounted plan data in Professor Shapiro's modeling in that it makes economic sense to do so, the Judges find it is their obligation under the section 114 rate setting standard to utilize consistent economic analysis when evaluating Mr. Orszag's proposed rate model and resultant rates, when, as here, there is an evidentiary record to support such consistency.

[143] These per-play differences indicate the monetary impact of SoundExchange's *exclusion* of discount plans, even though they increased Mr. Orszag's proposed statutory rate from $0.0033 to $0.0035. That is an increase of 6.1%. However, if discount plans were likewise excluded from Professor Shapiro's analysis, his effective per-play rate would be reduced from $[REDACTED] to $[REDACTED], a decrease of [REDACTED]%. These per-play differences likewise explain why the Services wanted to *include* discount plans, because that inclusion (compared to full price plans only) reduced Professor Shapiro's benchmark rate [REDACTED] Mr. Orszag's benchmark rate. Assuming quite reasonably that neither SoundExchange nor the Services could predict with any certainty which of the two benchmark approaches the Judges were more likely to adopt (if either), or in what proportions, it made rational sense for them to make their best prediction of the outcome and then choose the approach to the discount plan inclusion/exclusion issue based on which position maximized their litigation return. If that is not what they did, then the Judges are left with the absurdity of both parties arguing against their interests, even after the issue had been joined in the proceeding.

differential is actually more direct than using the downstream retail price differential as a proxy for upstream value, because the purpose of the analysis is to determine the value of interactivity within the licensed rights *in the upstream market.* 8/19/20 Tr. 2830–32 (Shapiro). Thus, Professor Shapiro's additional interactivity analysis results in a further adjustment, reducing his proposed statutory royalty (before any additional adjustments) by an additional [REDACTED]%. Shapiro WDT at 39.[144]

Professor Shapiro further asserts that this second interactivity adjustment is consistent with the express language in *Web IV.* There, the Judges relied on the ''ratio equivalency'' argument proffered by SoundExchange's economic expert, Professor Rubinfeld. As with Professor Shapiro's approach, Professor Rubinfeld first compared ratios of interactive services to limited interactive services. The Judges utilized the implicit first adjustment discussed above. But additionally, as Professor Shapiro notes, the Judges found that Professor Rubinfeld should have made this second adjustment, if sufficient data was in evidence, to account for the different value of interactivity in the limited interactive market and the statutorily-compliant noninteractive market. Shapiro 8/19/20 Tr. 2832–33 (Shapiro).

Relying on the foregoing point from *Web IV,* Professor Shapiro then combines his 2:1 initial interactivity adjustment—reducing the effective royalty rate he had derived from the interactive market, $[REDACTED] by 50%, down to $[REDACTED]—and then *further reducing* that rate by an additional [REDACTED]% pursuant to his second interactivity adjustment, down to $[REDACTED]).[145]

SoundExchange does not disagree with Professor Shapiro's assertion that a benchmark model consistent with *Web IV* requires an interactivity adjustment. However, SoundExchange avers that Mr. Orszag's model, which it contends is more faithful to the *Web IV* approach, properly adjusts implicitly for the value of interactivity (as discussed *infra).* SX PFFCL ¶ 100.

SoundExchange argues that Professor Shapiro's second interactivity adjustment is improper.[146] SoundExchange bases this argument on two assertions. First, SoundExchange notes that the additional functionality of the Pandora Plus mid-tier service (compared to the previous Pandora One statutory subscription service) [REDACTED], precluding reliance on a royalty rate nominally attached to a particular tier of service within that bundle. SX PFFCL ¶ 155 (and record citations therein). SoundExchange asserts that the [REDACTED] is confirmed by a Pandora executive, who testified that the purpose of this increased functionality in the mid-tier subscription service (compared with the noninteractive functionality of the former statutory subscription service) was to ''creat[e] additional opportunities to upsell subscribers over time to Pandora Premium.'' Phillips WDT ¶ 22. Accordingly, SoundExchange avers that Pandora's WTP $[REDACTED] for mid-tier functionality does not represent an unambiguous measure of the marginal value to Pandora of such functionality, but rather reflects, or certainly includes, the value of the mid-tier service as a marketing tool. Also, SoundExchange—relying on testimony from Professor Shapiro—speculates that [REDACTED]. SX RPFFCL (to Pandora/Sirius XM) ¶ 197 (citing 8/19/20 Tr. 2962 (Shapiro)).

SoundExchange also emphasizes that the retail monthly subscription price for the Pandora Plus mid-tier service is $4.99—the same price as Pandora charged for its predecessor Pandora One statutory service. Phillips WDT ¶¶ 18, 20; Orszag WDT ¶ 179; 8/19/20 Tr. 2960 (Shapiro). SoundExchange relies further on Professor Shapiro's testimony to assert that the absence of an increase in this subscription price demonstrates the absence of a marginal increase in market value from the additional mid-tier functionality, given that, under *Web IV,* the upstream demand for licensed interactivity is a ''derived demand,'' *i.e.,* it is a function of downstream retail demand. 8/19/20 Tr. 2959–2960 (Shapiro) (''[T] this is derived demand. Since we're talking about the subscription side, it would be based on the customers who were paying, the subscribers.'').

Pandora has a different explanation of how the concept of ''derived demand'' affects this second interactivity issue. Pandora asserts that it had anticipated, *ex ante* the Pandora Plus offering, that an increase in the downstream value of that service would be reflected in an increase in the *quantity* of Pandora Plus (mid-tier) subscriptions compared with the *quantity* of Pandora One (noninteractive) subscriptions, as Pandora maintained the $4.99 monthly subscription price. SoundExchange discounts the economic value of this argument, asserting that only an increase in *revenue per play* unit—not a potential increase in total revenue—is probative of an increase in the value of the increase in licensed functionality. Orszag WDT ¶ 179 (''[T]here is no reason to think that the difference in functionality between Pandora One and Pandora Plus changed the amount of revenue per play . . . .''); 8/12/20 Tr. 1574 (Orszag) (''[T]he right question then to ask is: Was there a change in revenue per-play?'').

The Judges find Professor Shapiro's attempt to make a second interactivity adjustment inappropriate. They find compelling the fact that the mid-tier retail $4.99 monthly subscription price was unchanged from the monthly price for Pandora's prior statutorily-compliant service (Pandora One). Also, the Judges find unwarranted Professor Shapiro's reliance on the difference between the effective per-play upstream royalty rate Pandora agreed to pay ($[REDACTED]) for its mid-tier Pandora Plus service and the statutory royalty rate of $[REDACTED]. The interactivity adjustment as described in *Web IV* reflects differences in retail prices ([A] and [C]) in the ratio equivalency model), not upstream royalty rates. As SoundExchange correctly notes, those upstream rates can be affected by the fact that they are set in a contract that [REDACTED]. Further, as Professor Shapiro conceded in a colloquy with the Judges during the hearing, the $[REDACTED] effective per-play rate—by Professor Shapiro's own conception

[144] $[REDACTED] – $[REDACTED] = [REDACTED]. This royalty difference, in percentage terms, is [REDACTED]% (rounded), *i.e.,* $[REDACTED]/$[REDACTED]. Professor Shapiro expresses this royalty difference, equivalently, as the ratio of $[REDACTED] ÷ $[REDACTED] = [REDACTED]:1 ([REDACTED] ÷ [REDACTED] = [REDACTED] (rounded), and [REDACTED] – [REDACTED] = [REDACTED], or [REDACTED]%).

[145] $[REDACTED] × [REDACTED] = $[REDACTED] (rounded up from $[REDACTED]).

[146] SoundExchange also contends that Professor Shapiro's first interactivity adjustment, implicit in his model, is improperly inflated because Professor Shapiro (consistent with *Web IV*) utilizes only full retail value for [A] and [C] to identify his 2:1 interactivity ratio (as had been calculated in *Web IV*). Instead, SoundExchange avers that Professor Shapiro should have used the overall ARPU attributable to all retail plans, including the discount plans, which would have been lower than the average retail prices, especially in the interactive benchmark market (input [A] in the model). The Judges have discussed this issue in detail *supra,* section IV.B.1.d, in connection with SoundExchange's criticism of Professor Shapiro's selection of values for [A] and [C]. As explained there, the Judges ruled at the hearing that SoundExchange had failed to timely raise this issue, as required, in its written rebuttal statement and included rebuttal testimonies, and that it therefore constituted delinquent and improper ''new analysis.'' Further, the Judges noted that the evidence in the hearing was inconclusive as to how ARPU is measured in the industry, and that the several ARPU values mentioned in other contexts were not sufficient to support the ''new analysis'' the Judges declined to admit into the record at the hearing.

of the Majors' complementary power—could also embody a premium for that market power. 8/19/20 Tr. 2838–39 (Shapiro) (''it's true that we might be getting a measure that is somewhat inflated [in] comparison [with] if there were more competition to offer those rights . . . . [Y]ou might want to give [the second interactivity adjustment] a haircut if you thought it was infected by complementary oligopoly power . . . .''); *see also* 8/25/20 Tr. 3644–46 (Peterson) (witness unable to preclude that the upstream royalty premium includes a market power effect that he treats as an interactivity value). However, Professor Shapiro did not parse the $[REDACTED] rate to separate out this additional factor. In similar fashion, Professor Shapiro does not consider the extent to which the mid-tier services allow subscribers unlimited skips (plays of less than thirty seconds) for which no royalty is owed, unlike statutory noninteractive services (as discussed *infra*). Because the Judges are making separate adjustments for effective competition (to curtail the effect of the Majors' complementary oligopoly power) and for skips, Professor Shapiro's second interactivity adjustment could double-count those adjustments, as Professor Shapiro acknowledged in his colloquy with the Judges, quoted above.[147]

Further, the second interactivity adjustment mentioned in *Web IV,* on which Professor Shapiro relies, did not provide for an adjustment based on an increase in the number of subscriptions sold and the increased revenue that may have resulted from those additional subscriptions. And, whether Pandora believed *ex ante* that it might generate additional revenue, or whether *ex post* some additional revenue may have been generated, there is no support for incorporating these revenue metrics into a model predicated on downstream retail prices.[148]

Accordingly, the Judges shall not make this second interactivity adjustment.[149]

(B) Professor Shapiro's Proposed Skips Adjustment

Professor Shapiro also proposes to apply a skips adjustment to his benchmark subscription rate. The skips adjustment, he avers, is necessary to account for the fact that [REDACTED], by contrast, noninteractive services do not have the right to avoid paying royalties for plays under thirty seconds under the Copyright Act. Shapiro WDT at 39. This difference in what constitutes a royalty-bearing play results in a [REDACTED] calculated per-play rate for on-demand services (who pay on a [REDACTED]) than for statutory services (who must pay for all plays). Peterson WDT ¶ 67.

In *Web IV,* as Professor Shapiro notes, the Judges applied a skips adjustment to correct for this disparity. *Web IV,* 81 FR at 26350–51, 26639; 8/19/20 Tr. 2847 (Shapiro). Moreover, the need to account for the play count differential in the benchmark and target markets is not disputed in this proceeding. 8/11/20 Tr. 1191 (Orszag); 8/25/20 Tr. 3632 (Peterson).

Applying the most current data for Pandora, Professor Shapiro determines that performances of less than 30 seconds constitute about [REDACTED]% of total performances. Shapiro WDT at 39. Accordingly, given Professor Shapiro's royalty rate of $[REDACTED], which includes the first interactivity adjustment (but not the second interactivity adjustment rejected by the Judges *supra*), this skips adjustment would reduce that rate by [REDACTED]%.

SoundExchange questions the data on which Professor Shapiro relies in making his skips adjustment. Specifically, it notes that the data he uses to calculate this [REDACTED]% skips adjustment applies to noninteractive plays that were available on all three tiers of Pandora's service—ad-supported, mid-tier and fully interactive. *See* 8/20/20 Tr. 3028–29 (Shapiro). According to Mr. Orszag, this multi-tier sourcing of the skips data indicates that the Pandora skips rate is probably overstated. He bases this conclusion on the fact that the subscription tiers (Plus and Premium), unlike statutory services, provide their subscribers with unlimited skips, likely resulting in subscribers to those tiers skipping more songs. Orszag WRT ¶ 120. SoundExchange notes that Professor Shapiro agrees. *See* 8/20/20 Tr. 3030–32 (Shapiro).

In rebuttal, Professor Shapiro characterizes this issue as overblown, because [REDACTED]. Specifically, Pandora Plus and Pandora Premium have [REDACTED] and [REDACTED] subscribers, respectively, out of a total of [REDACTED] Pandora listeners. The remaining [REDACTED] listeners access Pandora Free. 8/20/20 Tr. 3031–32 (Shapiro); Phillips WDT ¶¶ 5, 20–21. Accordingly, Professor Shapiro characterizes the number of noninteractive skips occurring on the subscription tiers is [REDACTED].

SoundExchange counters this point by noting that, although the impact of [REDACTED], Professor Shapiro nonetheless fails to measure this effect and reduce his skips adjustment accordingly. Conversely, the Services attack SoundExchange's criticism as being speculative and devoid of empirical support. The Judges find that, although there is no dispute that [REDACTED], SoundExchange does not bear the burden of quantifying, or at least estimating, the impact of the fact that listeners on the subscriber tiers would generate some of the reported skips. That is, because the adjustment is proffered by the Services, there is no apparent reason why SoundExchange should be required to assume the burden of proving the extent of the adjustment.

At a minimum, it is certainly reasonable, based on the record of the number of users and subscribers across Pandora tiers, as set forth above, that the percentage of skips would approximate the percent of Pandora customers who comprise the subscription tiers. That percent is [REDACTED]% ([REDACTED] ÷ [REDACTED]).[150] Applying this [REDACTED]% reduction in the [REDACTED]% the skips adjustment

[147] Although it might be possible to adjust the $[REDACTED] royalty rate to parse the effective competition and skips values therein, Professor Shapiro did not do so at the hearing, and, in fairness to SoundExchange, the Judges find in the exercise of their discretion that it would be unreasonable for the Services or the Judges, *sua sponte,* to attempt to make these adjustments, post-hearing, in this Determination. *See Johnson* v. *Copyright Board,* 969 F.3d 363, (2020) (parties must be provided adequate notice of issues to be considered and resolved at the hearing, to ''ensure[] that agencies provide a fair process in which each party is able 'to present its case or defense . . ., to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts' that bear on the agency's decision and choices.'') (internal citation omitted).

[148] Professor Shapiro's attempt to rely on increases in revenues to support his second interactivity adjustment to his ratio equivalency adjustment appears to be inconsistent with his criticism of Mr. Orszag's reliance on a revenue-based application of the ratio equivalency model. Additionally, there is nothing in the record sufficient to indicate how any estimated increase in subscriptions (and thus revenues) generated by the mid-tier Pandora Plus service would impact the value of [C], given the inadequacy (discussed above) of simply applying the difference in upstream effective per-play royalty rates.

[149] Because the Judges reject Pandora's proposed second interactivity adjustment on other grounds, they do not address SoundExchange's argument that, because the mid-tier rate [REDACTED], the mid-tier rate cannot be examined in isolation.

[150] The percentage of noninteractive skips attributable to subscribers might be *higher* than this percent, because subscribers have unlimited skips, but that percentage might also be *lower,* because subscribers have revealed a preference (by paying to subscribe) for utilizing on-demand features rather than noninteractive features. Thus, utilizing the relative percentages of subscribers is a reasonable middle ground for this small difference, and is certainly preferable to disregarding the skips adjustment in its entirety, when it is undisputed that such an adjustment is necessary.

proffered by Professor Shapiro reduces that skips adjustment to [REDACTED]% (*i.e.,* [REDACTED] × ([REDACTED] − [REDACTED]) = [REDACTED] (rounded to [REDACTED]%). Thus, Professor Shapiro's proposed royalty rate, incorporating his first interactivity adjustment (but rejecting the second), of $[REDACTED], needs to be reduced by [REDACTED]% to $[REDACTED] (*i.e.,* $[REDACTED] × (1 − [REDACTED]), which rounds to $[REDACTED] per play.

This $[REDACTED] per-play rate does not include an adjustment to generate a rate that offsets the Majors' complementary oligopoly power, in order to reflect a market that is effectively competitive. The Judges turn next to that adjustment.

(C) Professor Shapiro's Proposed Effective Competition Adjustment

Before considering Professor Shapiro's proposed ''effective competition'' adjustment, it is instructive to recall the Judges' separate detailed analysis [151] of the effective competition issue and the associated necessary adjustments. To summarize, the Judges offset the 12% effective competition adjustment by an appropriate portion of the [REDACTED] in the effective royalty rate (from [REDACTED]% to [REDACTED]%) that [REDACTED] [152] [REDACTED] for any analysis in which Spotify is the benchmark or ratio equivalency comparator. If the benchmark is the interactive market as a whole, then the Judges apply the 12% effective competition adjustment, minus ([REDACTED]% × the market revenue share attributable to [REDACTED] × the share of their royalties paid at or about the [REDACTED]%-of-revenue level).

But Professor Shapiro proposes a different effective competition adjustment for his subscription benchmark.[153] As his ''alternative market-power adjustment,'' Professor Shapiro compares the royalty rate paid by [REDACTED] for its [REDACTED]. He relies on this comparison because of what he understands to be an important difference between the [REDACTED]: Whereas most interactive subscription services have a repertoire of approximately [REDACTED] songs they make available to subscribers, [REDACTED] subscribers have access to [REDACTED] songs. Given this disparity, Professor Shapiro opines that for [REDACTED] listeners the full repertoires of each Major are not ''Must Haves,'' because customers do not expect to find all their favorite artists and recordings on [REDACTED] as they would with a standalone interactive subscription service. Shapiro WDT at 37–40.

Professor Shapiro then takes note that the per-performance royalty rate paid by [REDACTED] for its [REDACTED] service is significantly below the general effective rate for interactive services. Specifically, he relies on the fact that the effective rate for [REDACTED] is $[REDACTED] cents per play, compared with the $[REDACTED] per-play effective rate for other interactive services. Relying on this difference, Professor Shapiro computes the ratio of the two rates—$[REDACTED]/$[REDACTED], which yields his proposed adjustment factor of [REDACTED]1, implying an effective competition adjustment of [REDACTED]%.[154]

SoundExchange asserts that Professor Shapiro's subscription benchmark should not be reduced by an effective competition adjustment. It notes Professor Shapiro's characterization of [REDACTED]'s effective per-play rate of $[REDACTED] as an effectively competitive rate. SoundExchange finds this assertion particularly important because that rate is essentially identical to Spotify's effective per-play rate on its subscription service of $[REDACTED] per play.[155] *See* SX PFFCL ¶¶ 483–489 (and record citations therein). Moreover, SoundExchange emphasizes that Professor Shapiro himself concedes that the effective rate for Spotify's subscription service, in his opinion, is ''the upper bound for a competitive rate.'' 8/20/20 Tr. 3116–17 (Shapiro).

Separate and apart from the foregoing issue, SoundExchange asserts that the [REDACTED] royalty rate is an inappropriate input for computing an effective competition adjustment. Specifically, SoundExchange argues that [REDACTED]'s royalty rate is [REDACTED] because: (1) [REDACTED] offers listeners only a limited number of new releases,[156] (2) [REDACTED], and (3) [REDACTED]. Orszag WRT ¶ 112; Trial Ex. 5610 ¶¶ 6–7, 9 (WRT of Aaron Harrison).

In response, Pandora concedes that the use of [REDACTED] for this comparative analysis is not ''perfect,'' but asserts that benchmarking exercises are fraught with *inherent complexities,* and thus rarely meet that standard. Pandora also seeks to dismiss the defects in this aspect of its benchmarking exercise by noting that Mr. Orszag failed to identify the need for an effective competition adjustment. Pandora/Sirius XM PFFCL ¶ 219. These arguments are meritless. Although the Judges disagree with Mr. Orszag regarding the need for this adjustment, his opinion in no way serves to support Pandora's reliance on [REDACTED]'s rate to propose a [REDACTED]% effective competition adjustment, which must succeed or fail on its own merits. And the acknowledgement by Pandora that this benchmarking exercise is less than perfect simply begs the question of whether it is so imperfect as to be given no weight in the Judges' benchmarking analysis.

With regard to the substantive merits of Professor Shapiro's proposed adjustment, Pandora does not deny that he acknowledges that his adjustment could reasonably be [REDACTED], particularly the [REDACTED]. However, Pandora chastises Mr. Orszag for failing to quantify the effect of the limited catalog. The Judges find Pandora's response unavailing. Because it is *Professor Shapiro* who proffers [REDACTED] as a comparator for effective competition purposes, Pandora and he bear the burden of producing evidence that this limited service serves the purpose for which Professor Shapiro intends.

Pandora also asserts that [REDACTED]'s commercial presence—

[151] *See supra,* section III.

[152] SoundExchange asserts that [REDACTED]% of revenue after Spotify obtained that [REDACTED]. However, there is insufficient detail in the record relating to [REDACTED]'s negotiations with the Majors, the overall structure of its rates and which tiers of service pay which rates. (In fact, there is evidence that [REDACTED] continues to pay royalties at a rate of [REDACTED] percent-of-revenue. Peterson WRT, tbl.5). Thus, the Judges do not lump the Apple royalty rate together with the Spotify rate, but they do include [REDACTED]'s data in connection with Professor Shapiro's overall industry data.

[153] Professor Shapiro proffers an identical effective competition adjustment for his subscription benchmark rate and his ad-supported rate. Because he presents his ad-supported first in his WDT, he essentially incorporates by reference his ad-supported effective competition adjustment. The text immediately following this footnote, is based on Professor Shapiro's substantively identical effective competition adjustment to his ad supported benchmark rate.

[154] The [REDACTED]:1 factor implies a percentage difference in the two rates of [REDACTED]%. The rate differential is thus 1 − [REDACTED] = [REDACTED]. Thus, Professor Shapiro's proposed effective competition adjustment is [REDACTED]% (rounded).

[155] Spotify avers that, at most, a downward effective competition adjustment of approximately [REDACTED]% would be warranted for Professor Shapiro's benchmark, reflecting the difference between the $[REDACTED] ([REDACTED]) and $[REDACTED] ([REDACTED]) rates. SX PFFCL ¶ 487.

[156] SoundExchange notes that Professor Shapiro concedes it would be reasonable to reduce his [REDACTED]-based effective competition adjustment to reflect [REDACTED]'s possibly [REDACTED] have access. 8/20/20 Tr. 3120 (Shapiro).

despite its limited repertoire—confirms that the catalogs of all Majors are not ''Must Haves,'' which is why its effective per-play rate is [REDACTED] $[REDACTED]. 8/20/20 Tr. 3119 (Shapiro). The Judges disagree. [REDACTED]'s limited repertoire is more suggestive to the Judges of a significantly differentiated service compared to other interactive services and to noninteractive services. Because [REDACTED] is offered for [REDACTED], and does not accept advertising, it is relatively unique.[157] There is no sufficient evidence in the record indicating that a subscription or ad-supported music service (interactive or noninteractive) could survive commercially if it operated with [REDACTED]'s limited repertoire.

Additionally, the Services make no response to SoundExchange's contention that [REDACTED] receives a lower rate because it serves as a funnel, converting [REDACTED] listeners to [REDACTED] subscribers. The absence of a Services' response is especially relevant because, as discussed *infra,* Professor Shapiro agreed that the funneling/conversion capacities of another interactive service, Spotify, need to be taken into account when using Spotify's royalty rates (in the ad-supported market) as a benchmarking input.[158]

The Judges now turn from the question of whether the [REDACTED] royalty rate is substantively an appropriate benchmarking input, to SoundExchange's other argument—that if the $[REDACTED] per-play [REDACTED] rate is an effectively competitive rate, then so too is Spotify's effective $[REDACTED] per-play royalty rate. The Judges find that SoundExchange's assertion in this regard is of little practical importance as an opposition to Professor Shapiro's subscription benchmark model.

If the Judges were to treat Professor Shapiro's characterization of the [REDACTED] $[REDACTED] per-play rate as essentially an admission that the Spotify effective per-play rate of $[REDACTED] is also effectively competitive, the setting of a benchmark rate by the Judges would be little changed. Applying Professor Shapiro's proffered [REDACTED]% effective competition adjustment on his $[REDACTED] interactive benchmark generates an effectively competitive rate of $[REDACTED], (which would then be subject other potential adjustments). But the [REDACTED] rate of $[REDACTED] that Professor Shapiro opines to be ''effectively competitive'' is *virtually identical* (and it too would then be subject to the same potential additional adjustments). Thus, substituting the [REDACTED] effective royalty rate for Professor Shapiro's effective competition adjustment would be inconsequential.

(D) Professor Shapiro's Subscription Benchmark Rate as Adjusted by the Judges

In sum, the Judges find as follows with regard to Professor Shapiro's proposed subscription benchmark rate:

1. The effective interactive industrywide interactive benchmark rate of $[REDACTED] per play is reasonable.
2. The first interactivity adjustment of 2:1 is appropriate, properly reducing his interim calculation to $[REDACTED] per play (rounded).
3. The second (cumulative) interactivity adjustment is rejected.
4. The skips adjustment is reduced to [REDACTED]%, properly reducing the interim calculation to $[REDACTED] (rounded).
5. The [REDACTED]% effective competition adjustment proposed by Professor Shapiro is rejected.
6. The Judges apply the lower effective competition adjustment supported by their overall ''effective competition'' analysis:

a. − [REDACTED]%
b. [REDACTED] [159] × [REDACTED] [160]
c. = [REDACTED]%
d. $[REDACTED] × (1 − [REDACTED]) = $[REDACTED] × [REDACTED] = 0.0025 (rounded).

(E) Interactivity ''Adjustment'' to Mr. Orszag's Benchmark

Mr. Orszag avers that his benchmark model directly and implicitly accounts for the difference in interactivity between the benchmark and target markets, and that any further such adjustment would be unnecessary and improper. In particular, he states that it is his use of the effective percentage of revenue rate paid by interactive subscription services that allows his model to account for the impact of interactivity. More specifically, he testifies that, when he multiplies that benchmark percent-of-revenue rate by the lower revenues in the target market (relative to the benchmark market), the product equals a lower royalty. This lower royalty, he concludes, reflects the lower value consumers place on a service that lacks on-demand functionality. Orszag WDT ¶ 79. Alternately stated in terms of the ratio-equivalency model, the interactivity difference is implicitly modeled because the revenue figure in the target market—the right-hand numerator [C]—is substantially less than the revenue figure in the benchmark (interactive) market numerator [A]—given that the benchmark subscription service price is substantially higher than the subscription price in the benchmark market and the number of subscriptions in the benchmark market is substantially greater.

The Services do not make any specific challenge to Mr. Orszag's claim that his model implicitly includes an interactivity adjustment. To be sure, the Services vigorously challenge the appropriateness of his model, including its failure, in their opinion, to properly apply the ratio equivalency benchmarking model in *Web IV.*[161] But, assuming *arguendo* that Mr. Orszag's subscription benchmarking model is otherwise appropriate, the Services offer no new or specific criticism regarding its implicit interactivity adjustment, as explained by Mr. Orszag.[162]

(F) Skips Adjustment to Mr. Orszag's Benchmark

According to Mr. Orszag, his benchmarking model also directly and implicitly accounts for the skips differential from the benchmark market to the target market, despite the fact that his benchmark data is weighted very heavily toward Pandora, which, under its direct license agreements with the record companies, pays royalties for skips (unlike the benchmark services). This difference does not affect Mr. Orszag's proffered per-play royalty rate because in his model he divides the target market's total royalties due by the

[157] In fact, [REDACTED]'s availability to all [REDACTED] suggests it is offered as a sort of ''loss-leader,'' rather than as a stand-alone downstream source for direct monetization.

[158] The Judges agree with the Services that SoundExchange's claim that Amazon had relatively greater bargaining leverage (as the record companies' primary physical product distributor) is belied by the [REDACTED] $[REDACTED] per-play royalty rate for [REDACTED]. *See* Shapiro WDT at 42 tbl.10. But the other issues discussed above, are sufficient bases to doubt the usefulness of the [REDACTED] royalty rate as a benchmark.

[159] *See* Orszag WDT tbl.4.

[160] *See* Peterson WRT fig.5; *see also* 8/25/20 Tr. 3706 (Peterson) [REDACTED]; 8/11/20 Tr. 1209 (Orszag) (As between the [REDACTED]

[161] *See* discussion *supra,* section IV.B.1.e.

[162] The Services do criticize Mr. Orszag for not making a ''second'' interactivity adjustment to reflect the greater interactivity of the mid-tier services that constitute Mr. Orszag's target market, relative to the *non*interactivity of statutory services. However, as explained *supra,* section IV.B.1.e.v(A), in connection with Professor Shapiro's proposed further interactivity adjustment, the Judges find no sufficient evidence in the record or basis in the *Web IV* approach to support a finding that there is greater market value in these mid-tier services compared with statutory services.

number of target market plays—including skips—yielding a per-play rate that accounts for skips. That per-play rate accounts for skips because (1) the royalties generated by the skips are included in the numerator *and* (2) the number of skips are included in the denominator, in the same manner as full plays, thus canceling each other out and not changing the per play royalty calculation. 8/11/20 Tr. 1191–92, 1249–50 (Orszag).[163]

In his WRT, Professor Shapiro asserts that Mr. Orszag had improperly failed to make an explicit skips adjustment. Shapiro WRT at 33. At the hearing, however, Professor Shapiro acknowledges that Mr. Orszag's approach indeed *does not* require a separate skips adjustment. 8/20/20 Tr. 3025–26 (Shapiro).

The Judges agree that Mr. Orszag's ratio equivalency benchmarking model, to the extent it is otherwise useful and appropriate, does not require a skips adjustment.[164]

(G) Effective Competition Adjustment to Mr. Orszag's Benchmark

As explained in the separate section of this Determination analyzing the effective competition issue, SoundExchange maintains that the enhanced power of its benchmark interactive service, Spotify, has allowed it to exert countervailing power in its negotiations with the Majors that fully offsets their complementary oligopoly power. *See* SX PFFCL ¶¶ 259–493 (asserting that no competition adjustment is required because the benchmark agreements on which Mr. Orszag's analysis is based reflect effectively competitive rates). For this reason, Mr. Orszag makes no effective competition adjustment to his proposed subscription benchmark rate.

However, as the Judges stated *supra* in their analysis and findings regarding the effective competition adjustment, it is appropriate to adjust downward Mr. Orszag's Spotify-based ratio equivalency rate as follows:

(1) Apply the 12% downward adjustment;

(2) [REDACTED] that adjustment by [REDACTED] percentage points to reflect Spotify's [REDACTED]; and

(3) multiply the rate from step (2) by [REDACTED]%, the percent of revenue paid by Spotify at the [REDACTED]% level).[165]

(H) Mr. Orszag's Subscription Benchmark Rate as Adjusted by the Judges

The Judges do not make any adjustments to Mr. Orszag's proffered benchmark other than the foregoing effective competition adjustment. Based upon the analysis in the Judges' discussion of effective competition, *supra,* they calculate their effective competition adjustment to Mr. Orszag's $0.0033 benchmark per-play rate as follows:

1. The Judges adjust Mr. Orszag's proffered benchmark rate to reflect both the complementary oligopoly power of the Majors (12%) and, in partial mitigation, the extent to which Spotify paid the [REDACTED] percent-of-revenue royalty rate instead of the [REDACTED]% rate (reflecting Spotify's bargaining power).

2. The [REDACTED] of this royalty rate from [REDACTED]% to [REDACTED]% reflects a [REDACTED]% [REDACTED] royalties.

3. To determine the extent to which Spotify paid (approximately) the [REDACTED] percent-of-revenue rate, the Judges note that [REDACTED]% of its royalties were paid on that basis. Peterson WRT, fig.5.

4. [REDACTED]% × [REDACTED] = [REDACTED]% (rounded).

5. The complementary oligopoly adjustment is [REDACTED]% − [REDACTED]%, which equals [REDACTED]%.

6. Mr. Orszag's adjusted rate is calculated as $[REDACTED] × (1 − [REDACTED]), which equals $0.0032 (rounded).

f. The Judges' Synthesis of the Adjusted Rates of Professor Shapiro and Mr. Orszag

As explained *supra,* Professor Shapiro's benchmark approach has a weight of 88.5%, and Mr. Orszag's has a weight of 11.5%, in the Judges synthesized rate based on the benchmark/ratio equivalency approach. The synthesis of their two models, as adjusted by the Judges, is set forth below:

The Shapiro Subscription Benchmark Rate:
$0.0025 × 0.885 = $0.00221
+
The Orszag Subscription Benchmark Rate:
$0.0032 × 0.115 = $0.00037
=
$0.00258 rounded to $0.0026

Accordingly, the Judges find that the benchmark-derived rate for noninteractive subscription services is $0.0026 per play.

2. The Ad-Supported Benchmark Models [166]

a. SoundExchange's Ad-Supported Benchmark Model

On behalf of SoundExchange, Mr. Orszag uses a benchmarking analysis quite similar to his subscription benchmark model considered *supra.* First, although he is modeling the ad-supported market, his approach again looks to the *subscription* interactive market as the benchmark, using Spotify as the proxy. Next, he calculates an effective percent-of-revenue royalty paid by Spotify in the subscription interactive market, and then converts that benchmark percent-of-revenue rate into an ad-supported per-play rate by dividing royalties by the number of noninteractive plays. Orszag WDT ¶ 96.

Mr. Orszag acknowledges that in *Web IV* the Judges rejected this approach, *i.e.,* the use of *subscription* interactive services as a benchmark for *ad-supported* noninteractive services. *See Web IV,* 81 FR at 26344–46 (significant divergence in WTP between downstream subscription and ad-supported consumers negates a finding of substantial cross-substitution from subscribership to ''free to the listener'' use, thus rendering inapplicable

[163] For example, assume all plays (including skips) generate $240,000 in royalties (the numerator), and the total number of plays (including skips) totals 120,000,000 plays. The per-play royalty (including skips) is $0.0020 ($240,000 ÷ 120,000,000 plays = $0.0020). Now also assume 20,000,000 of these plays were skips. If in Mr. Orszag's model skips were explicitly eliminated, there would be only *100,000,000 plays in the denominator* (120,000,000 plays − 20,000,000 plays = 100,000,000 plays), and only *$200,000 in royalties in the numerator* ($240,000 − (20,000,000 plays $0.0020 in royalties) = $240,000 − $40,000 = $200,000. Now, with skips eliminated, Royalties ÷ Plays = $200,000 ÷ 100,000,000 = $0.0020—the same per-play royalty rate with or without skips.

[164] Mr. Orszag acknowledges though that the two services other than Pandora included in his model's target market (iHeart and Rhapsody) do not report or pay for skips, which would require a skips adjustment. However, according to Mr. Orszag, those two services constitute a *de minimis* portion of the total plays in his target market. *See* 8/11/20 Tr. 1230 (Orszag). The Services agree that: (1) Mr. Orszag's ratio equivalency approach is [REDACTED]'s revenue-per-play; (2) Pandora pays for skips; and (3) the net effect of (1) and (2) is to minimize the impact of Mr. Orszag's failure to include a skips adjustment for iHeart and Rhapsody. Nonetheless, the Services aver that the absence of a skips adjustment for the iHeart and Rhapsody plays has an ''unquantified effect'' on Mr. Orszag's benchmark subscription royalty rate. Services RPFFCL ¶ 240. Although a benchmark proponent should quantify or estimate a benchmark input that would be significant, here the Judges find that the Services have essentially acknowledged the correctness of Mr. Orszag's skips analysis, and that the ''unquantified effect'' would be of little consequence.

[165] Unlike their adjustments to Professor Shapiro's approach, the Judges do not reduce Spotify's impact by multiplying by Spotify's market share, because Mr. Orszag uses only Spotify data in his benchmark market analysis, whereas Professor Shapiro uses a weighted average of multiple interactive services in his benchmark market analysis.

[166] The Judges use the phrase ''ad-supported services'' to refer to nonsubscription services throughout this Determination.

Professor Rubinfeld's attempted extension of the ratio equivalency approach to the ad-supported calculation of ad-supported royalties). Notwithstanding this *Web IV* finding, Mr. Orszag opines that his particular model, and new market developments, combine to distinguish his approach from that rejected in *Web IV.*

First, in his WDT, Mr. Orszag asserts that the present record evidence demonstrates there is sufficiently greater substitution between the benchmark and target markets than was shown in *Web IV,* justifying his use of interactive services as a benchmark for ad-supported services. Orszag WDT ¶ 88. Moreover, Mr. Orszag takes issue with the Judges' finding in *Web IV* that the ad-supported listeners did not reveal a positive WTP. He asserts that, from an economic perspective, listeners reveal a positive WTP, in that they subject themselves to listening to advertising, which, he argues, is itself a form of payment in time rather than in money.

However, Mr. Orszag does not attempt to measure the dollar value of that time to these listeners. Rather, he notes that the noninteractive services earn revenue from the advertising revenue they receive for making advertising time available on those services, a portion of which the noninteractive services can pay as royalties to the record companies. Mr. Orszag avers that, if it were really true that listeners to ad-supported service have a zero willingness to pay, then ad-supported *services* themselves should also have zero willingness to pay, which plainly is not the case. Orszag WDT ¶ 90; 8/11/20 Tr. 1240–41 (Orszag). Mr. Orszag also points to record evidence, including Pandora documents, indicating that [REDACTED]. Trial Ex. 5056 at 26. Another Pandora document on which Mr. Orszag relies states that ''[REDACTED]'' Trial Ex. 5061 at 2; Orszag WDT ¶ 93.

Nonetheless, although Mr. Orszag acknowledges that the sound recording and streaming industry perceives ad-supported listeners as having a ''low'' WTP, Orszag WRT ¶ 75, SoundExchange points out that a Services' witness, T. Jay Fowler, Director of Product Management for Music Products at YouTube (a division of Google), speculates that this ''may be only a temporary or transitory phenomenon,'' because consumers need time to understand the value of streamed music and thus make the switch from an ad-supported to a subscription service. Trial Ex. 1100 ¶ 17 (WDT of T. Jay Fowler); SX PFFCL ¶ 164. In furtherance of this argument, Mr. Orszag also relies on evidence from Professor Willig's application of data from the Zauberman Survey, which Mr. Orszag characterizes as showing a high cross-elasticity of demand for noninteractive ad-supported listening and interactive ad-supported subscribership. That survey evidence, as applied by Professor Willig, indicates that 9.1% of respondents would switch from ad-supported noninteractive services to a new on-demand subscription, if their ad-supported noninteractive service was not available. Willig WDT ¶ 47, fig.6 (panel A).[167]

Based on the foregoing rationale, Mr. Orszag utilizes the same ''ratio equivalency'' model as he used for the subscription tier. SoundExchange summarizes his application of this approach to the ad-supported model as follows:

> [A] and [B] remain the total revenue earned by and total royalty paid by Spotify for its subscription interactive service. As before and for the same reasons provided in Mr. Orszag's benchmark analysis for noninteractive subscription services . . . the analysis conservatively uses the effective [percent of royalty] rates paid by Spotify as the basis for the proposed per-play rate for statutory ad-supported noninteractive services. . . . And as before, Mr. Orszag excluded family, student, military, employee, and trial and promotional products in calculating the effective rates because these products are unlikely to be relevant to an ad-supported service. . . . [C] is now the revenue earned by the [noninteractive] ad-supported service.

SX PFFCL ¶¶ 168–169 (and record citations therein).[168]

The effective percent-of-revenue rate in Mr. Orszag's benchmark market, [B]/[A], of course remains at [REDACTED]% (because he uses the same benchmark market). Mr. Orszag multiplies that [REDACTED]% effective rate by the noninteractive ad-supported gross revenue for Pandora and iHeart, and then divides by the corresponding number of plays in the target noninteractive ad-supported market. *Id.* ¶ 98.[169] His computations and results are set forth in the table below (excerpted from Orszag WDT tbl.9):

Table 9—Noninteractive Ad-Supported Benchmark, May 2018–April 2019 [RESTRICTED]

[REDACTED]

The resulting proposed royalty rate for noninteractive ad-supported services is $0.0025 per play, as presented in the right-hand column of the table above. *Id.* ¶ 99.[170]

b. The Services' Criticism of Mr. Orszag's Benchmark Ad-Supported Model in His WDT

As an initial matter, the Services criticize the fundamentals of Mr. Orszag's ratio equivalency model in this ad-supported context for the same reasons they criticize his use of this model formulation in his subscription market analysis. Again, they criticize what they construe as Mr. Orszag's improper re-characterization of the *Web IV* ratio equivalency approach because he: (1) Defines [A]and [C] as revenue inputs; (2) fails to identify a per-play rate [B] in the benchmark market; (3) applies the percent-of-revenue paid in the benchmark market to the target market; and (4) uses play counts in the target market instead of the benchmark market to generate per-play rates.

Additionally, the Services criticize Mr. Orszag's decision to input the percentage-of-revenue royalty rate applicable to *subscription* interactive services as an appropriate data point for calculating the *ad-supported* noninteractive royalty, given the clear rejection of that approach in *Web IV.* Further, the Services aver that Mr.

[167] The Hanssens Survey indicates, according to Professor Shapiro, that this diversion to new interactive subscriptions would be [REDACTED], measuring [REDACTED]%. Shapiro WDT at 21, tbl.2. This lower figure would not alter the weights assigned to the benchmarking and ratio-equivalency models. The Judges note, though, that despite finding the Zauberman Survey less reliable in other respects than the surveys by Professors Hanssens and Simonson (the latter replicating Professor Hanssens's survey work) only the Zauberman Survey asks respondents directly to identify the source of music to which they would divert if noninteractive subscription services were not available (The Hanssens and Simonson surveys ask more ambiguously what respondents would do if they noticed all relevant services had stopped streaming songs by some popular artists and some newly released music. Hanssens WDT ¶¶ 13, 21–22.)

[168] As with his subscription model, Mr. Orszag excluded family, student, military, employee, and trial and promotional products in calculating the effective rates, claiming that these products would not likely be relevant to an ad-supported service. Orszag WDT ¶ 97. And, as noted in the above quote, for the revenue of noninteractive services ([C] in his model) Mr. Orszag uses revenue earned by Pandora and iHeart. 8/11/20 Tr. 1248 (Orszag); Orszag WDT ¶ 98.

[169] Calculated from a different perspective, Pandora and iHeart's combined average revenue per play was $[REDACTED] [REDACTED] for the twelve-month period ending April 2019. This average revenue per play, when multiplied by the percentage-of-revenue royalty rate for interactive subscription services, results in the per-play royalty rates for noninteractive ad-supported services. *Id.* ¶ 98.

[170] With regard to potential adjustments to his proposed rate, Mr. Orszag opines first that, as with his subscription benchmark model, his ad-supported mode contains an implicit interactivity adjustment, because it relies on the lower revenue of the ad-supported noninteractive market as the value of [C] (compared to the higher revenue of the benchmark interactive subscription market. Next, Mr. Orszag finds no reason to make either a skips or an effective competition adjustment, for the same reasons discussed *supra* in connection with his subscription benchmark model.

Orszag's ad-supported modeling: (1) Fails to address the difference in the ways the two services generate revenue (advertising versus consumer subscription payments); (2) fails to demonstrate (or even calculate) comparable demand elasticities between the two categories of services as required by *Web IV;* (3) fails to demonstrate comparable WTP as the between the ad-supported and subscription services; (4) fails to demonstrate an opportunity cost even close to approximating the 1:1 opportunity cost (cross-elasticity) between the two categories of service; and (5) fails to apply Spotify's own ad-supported rates into the analysis. Services RPFFCL ¶ 158 (and record citations therein).

Among these criticisms, the Services highlight what they assert are the two *principal* problems in Mr. Orszag's model. First, they point to his decision to duplicate his subscription ''ratio equivalency'' model by simply substituting noninteractive ad revenue for subscription revenue. They note that the identity and motivations of the different classes of payors—advertisers who pay for listeners' attention, on the one hand, and subscribers who pay for uninterrupted access to music, on the other—renders misguided any attempt to apply the ratio equivalency model in this manner.

Further, the Services emphasize that Mr. Orszag fails to demonstrate how users' willingness to listen to ads can be converted into a dollar value. What the market evidence does reveal, the Services state, is directional in nature—that the amount such users would pay (if any) *must be less* than the subscription price of an on-demand service. *See* Leonard WRT ¶ 54 (noting that, by revealed preference, consumers have demonstrated that their WTP to avoid ads is less than that of subscribers to paid services); *see also* Peterson WRT ¶¶ 38, 40.

Relatedly, the Services maintain that Mr. Orszag does not provide a reason for his assumption—incorporated into his model—that the amount advertisers pay to transmit ads to noninteractive listeners is actually a proxy for the WTP for music of noninteractive listeners. *See* Peterson WRT ¶ 38 (advertiser WTP for listener attention may be completely unrelated to listeners' WTP for music, and therefore is not a basis to assert that ad-supported services, whose listeners are clearly price sensitive, have an elasticity of demand comparable to that of subscription services); *see also* 8/25/20 Tr. 3702–03 (Peterson) (same). In fact, the Services argue that advertising revenue generated by an ad-supported service is materially determined by that service's *own investment and skill* in building an advertising platform that will attract advertiser dollars. 8/20/20 Tr. 3248 (Shapiro). And, in particular, Pandora has invested significantly to create its advertising platform, allowing it to receive substantially higher advertising rates and more advertising revenue than other ''free-to-the listener'' noninteractive streaming services.

Specifically, the Services, and Pandora in particular, emphasize Pandora's unique ability to attract and monetize advertisers—a return on its investment of billions of dollars. They note that this revenue generation is unconnected to the level of functionality it offers. 8/20/20 Tr. 3218–20 (Shapiro) (testifying that Pandora's investment in ''systems [on] which . . . advertisers compete for . . . space'' increases the per-play revenue Pandora receives in a way that has ''nothing to do with the rights they have licensed, but, rather, with their own capabilities.''); Herring WDT (*Web IV*) ¶ 11 (''Pandora derives more than 80% of its revenue from the sale of advertising. . . .'').

Further in this regard, the Services maintain there is no evidence that advertiser payments are correlated with the particular level of *interactivity* offered by a service, a correlation, they assert, is implicitly assumed by Mr. Orszag's adoption of a ratio equivalence relationship between subscriber payments in the interactive space and advertisers' payments in the noninteractive space. *See* Services PFFCL ¶¶ 26–27 (and citations therein). As Dr. Leonard testifies, advertisers ''have no reason to prefer advertising on a service with greater interactivity. . . .'' Leonard WRT ¶ 54.[171]

Even if listeners' tolerance for advertisements could be construed as a form of ''payment'' for noninteractive listening, the Services maintain that this would still be insufficient to justify Mr. Orszag's adoption of a ratio equivalence between the two broad categories of services. *See* Shapiro WRT at 38–40 (*citing Web IV,* 81 FR at 26349); Peterson WRT ¶¶ 36–40 (citing *Web IV,* 81 FR at 26353). More specifically, the Services maintain that Mr. Orszag's model cannot address the Judges' point in *Web IV* that ''[t]he ratio equivalency approach assumes that listeners who willingly pay for a subscription to a service have a WTP *equal to* the WTP of those who use ad-supported (free-to-the-listener) services.'' *Web IV,* 81 FR at 26345. (emphasis added). Moreover, the Services point out that Mr. Orszag himself concedes that consumers of advertising-supported and subscription services have a different WTP. 8/12/20 Tr. 1548 (Orszag). This underscores the relevance of the Services' claim that Mr. Orszag did not provide, or even attempt to provide, the demonstration of comparable demand elasticities that the Judges previously required. *See Web IV,* 81 FR at 26349. And the Services point to Dr. Peterson's testimony, in which he notes that the low WTP of ad-supported listeners indicates that their demand is far more elastic than the demand of interactive subscribers. 8/25/20 Tr. 3702 (Peterson); Peterson WRT ¶ 37.

Turning to the particular issue of *cross-elasticity,* the Services note the Zauberman Survey, as applied by Professor Willig, reveals that about 90% of ad-supported noninteractive listeners are *unwilling* to pay for a subscription interactive service. Services RPFFCL ¶ 165. This point, the Services claim, underscores the importance of their criticism that neither Mr. Orszag nor the survey evidence demonstrates the existence of a sufficiently high cross-elasticity of demand between ad-supported noninteractive listening and subscription interactive (on demand) listening to support the application of Mr. Orszag's ratio equivalency. In this vein, the Services emphasize that Mr. Orszag does not deny that he has *not* demonstrated the 1:1 opportunity cost required by the *Web IV* ''ratio equivalency'' approach, *i.e.,* that, in this context, a dollar spent by an advertiser on an ad-supported noninteractive service would otherwise be spent on a subscription to an interactive service, or, alternatively, that if users discontinued listening to an ad-supported noninteractive service, the resulting reduction in advertising revenue would otherwise create a commensurate increase in subscription revenue for an interactive service. *See* 8/13/20 Tr. 1948 (Orszag).

The Services further claim that SoundExchange's reliance on Pandora's internal documents, Trial. Exs. 5056 and 5061, is misplaced. They point out that neither of these documents actually shows how many [REDACTED]. Services RPFFCL ¶ 163 (and record citations therein). Similarly, the Services maintain that SoundExchange has the relevant direction of the evidence wrongly reversed with regard to its analysis of Spotify's customer

[171] The irony of this criticism by the Services is not lost on the Judges. On the one hand, the Services argue that interactivity is irrelevant on the ad-supported tier, because the payors (the advertisers) are uninterested in the functionality of the system. Yet, as discussed *infra,* the Services propose that the Judges make *two interactivity adjustments* to the ad-supported rate.

behavior. That is, the fact that [REDACTED] % of Spotify's subscribers had originally used Spotify's ad-supported service provides no useful information regarding the appropriate metric: How many Spotify ad-supported users in fact have a WTP for a Spotify subscription. Indeed, the Services note, SoundExchange's argument in this regard is belied by Mr. Orszag, who acknowledges that only [REDACTED]% of Spotify's ad-supported listeners convert to Spotify's subscription tier within the first two years using Spotify's ad-supported service. Services RPFFCL ¶ 164 (citing Orszag WRT ¶ 75 n.167).

c. The Judges' Analysis and Findings Regarding Mr. Orszag's Ad-Supported Benchmark Model From His WDT

The Judges reject the ad-supported model Mr. Orszag presents in his WDT.[172] At an obvious level, his approach deviates from the Judges' finding in *Web IV,* in which they rejected the use of a ratio equivalency formula that utilized subscription inputs on the left-hand benchmark side of the model. Moreover, Mr. Orszag's *rationale* for his departure from *Web IV* is unavailing. There is simply no evidence to support his assertion that there is anything approaching a 1:1 substitutability (cross-elasticity) from interactive services to noninteractive services.

Perhaps in recognition of the fact that the 9.1% substitution figure he cites from the Zauberman Survey does not reflect significant cross-elasticity, Mr. Orszag adds in a footnote, that ''no particular level of cross-elasticity is necessary for one market to serve as an appropriate benchmark for another market.'' To support this point, he presents as an example, quoted in part *supra,* the hypothetical that the subscription price for a cable television service in Chicago may be ''an ideal benchmark'' to use in order to set an appropriate subscription price for a cable television service in Philadelphia, ''even though there is zero cross-elasticity for cable services between the two cities, because residents of Philadelphia cannot access the Chicago service and vice versa.'' Orszag WDT ¶ 95 n.132. But this example only underscores the narrow relevancy of a ratio equivalency approach and its implicit assumption of a substitutability of (or proximate to) 1:1, to constitute effective cross-substitutability.[173]

In this regard, Mr. Orszag's ''inter-city'' analogy reflects a subtle but important shift in his reasoning: He is dispensing with the *Web IV*/Professor Rubinfeld underpinning of the ratio equivalency model—high cross-substitutability (assumed or actual)—and asserting that his approach is consistent with the more traditional pure benchmarking approach, which relies on the *similarity—not the cross-elasticity or substitutability*—between sellers/licensors, buyers/licensees, and the rights being transferred between the benchmark and target products. *The Judges' discern from Mr. Orszag's distinction a confirmation of their rationale for relying substantially on Professor Shapiro's benchmarking approach, because the cross-elasticity/substitutability revealed by the record is relatively low, whether in the subscription market (as discussed supra) or in the ad-supported market (as discussed here).*[174]

The Judges also place no weight on Mr. Orszag's assertion that the willingness of ad-supported listeners to subject themselves to advertisements indicates a positive WTP. Although there is certainly disutility in listening to advertising that is annoying, uninformative or irrelevant, other advertising can be pleasant or amusing (or at least neutral), informative or relevant. Also, advertising interruptions allow a user to take advantage of the break to attend to other personal necessities. Moreover, ad-supported listeners are made aware of the presence of advertising, so they are already a self-selected cohort of consumers who have a tolerance for advertising. In any event, measurement of the cost of any disutility would be difficult, and Mr. Orszag certainly did not attempt to do so. Additionally, by choosing an ad-supported service, as Dr. Leonard notes, listeners have revealed a preference (given their budget constraints and utility preferences[175]) for that bundle of music + advertising over pure music priced at $4.99 per month or more. And of course, an immediate problem with Mr. Orszag's assertion is that the payments of advertising revenues reflect the WTP of *advertisers*—not the WTP of *listeners.* (Again, Mr. Orszag does not attempt to convert listener time into a direct monetary measure.)

Further, advertising, like music, is an ''experience'' good. One does not know that certain advertising will be useful or not until it is heard. And in this context, it is important to appreciate that technological advancements in targeted advertising make it much more likely that advertising will be more useful to listeners than the former more blunderbuss approach.[176]

[172] Alternatively, in his *WRT and hearing testimony,* in response to the models proffered by Professor Shapiro and Dr. Peterson, Mr. Orszag acknowledges that it is also reasonable to rely on Spotify's effective *ad-supported* percent-of-revenue paid as the benchmark rate, rather than the subscription percent-of-revenue it pays (as he proposes in the benchmark model) in his WDT. The Judges analyze Mr. Orszag's alternative approach *infra,* after considering the models proposed by Professor Shapiro and Dr. Peterson, that also use Spotify's ad-supported service as a benchmark.

[173] The Judges incorporate by reference here their citations to *Web IV* and *SDARS III, supra,* in their consideration of Mr. Orszag's subscription model, pertaining to the import of the absence of sufficient cross-elasticity. *See* discussion *supra,* section IV.B.1.e.ii.

[174] The Judges also agree with the Services that Mr. Orszag's failure to estimate the own-elasticities of demand for his benchmark and target services compromises his attempt to apply the *Web IV* benchmark approach. ''Own-elasticities'' of demand reflect the responsiveness of quantity demanded to increases or decreases in the price of a product—typically a negative (inverse) relationship, as represented in the downward-sloping demand curve. Cross-elasticity measures the responsiveness of demand for product A in response to a change in the price of product B—a positive relationship for substitute products. *See generally* Robert S. Pindyck & Daniel L. Rubinfeld, Microeconomics at 33–36 (8th ed. 2013). As the Judges have noted in both *SDARS III* and *Web IV,* a significant level of cross-elasticity (proven or reasonably presumed) is necessary for the ratio-equivalency model to be broadly applicable, or else, as here, its application is limited by the extent of cross-elasticity demonstrated between the benchmark and target markets. Own elasticities can also be relevant because they indicate the relative pricing power of each tier of service (a low elasticity (*i.e.,* high inelasticity) indicates relatively greater pricing power, and *vice versa,* pursuant to the Lerner Equation discussed in *Web IV*). If own-elasticities are roughly equal, then the services have a roughly equal concern over the impact on quantity (and thus revenue) of a change in retail prices, making the ratio equivalency model more appropriate, *ceteris paribus.* Further, high own-elasticity can be *suggestive* of significant cross-elasticity with regard to clearly substitutable products. A relatively high own-elasticity suggests that a given percentage increase in price will engender a larger percentage decrease in quantity, that is likely to result in substitution of a product sufficiently similar in price and characteristics, even in the absence a more specific measuring of cross-elasticity, such as through the use of consumer surveys.

[175] Economic jargon often obscures reality. ''Budget constraints'' refer to consumers' limited incomes; for example, poor people will not have extra cash to spend on music, even if they would prefer the ''utility'' of an ad-free service, because they cannot transfer spending from necessities to the luxury of a subscription to a music service.

[176] The Judges do not endorse in full Pandora's criticism that the record companies should not receive royalties based on advertising revenues generated by Pandora's arguably superior advertising platform. As SoundExchange notes, noninteractive services, including Pandora, also benefit from the superior identification, development and promotion of sound recordings and artists. Moreover, the advertising revenue is derived from the presence of listeners, who are attracted to Pandora in large measure because of the music produced by the record companies. Therefore, the advertisers' demand, and Pandora's investments in better monetization of that advertiser demand, are derived in part from the attributes of, and investments in, the underlying sound recordings. It is more accurate to state that Pandora's advertising revenues are *jointly produced* as a consequence of what economist call a ''joint production function,'' consisting of the quality of:

Continued

All of these advertising-related concerns were not addressed in the record, and their absence makes Mr. Orszag's speculation regarding listeners' revelation of a positive WTP unpersuasive.

In order to distill value from advertising revenues, the Judges agree with Dr. Leonard that Mr. Orszag would have been better served if he had analyzed the ad-supported tier as a ''multi-sided platform, where listeners, record companies and advertisers converge to create economic value for all participants. *See* Leonard WRT ¶ 54; 8/24/20 Tr. 3561 (Leonard) (describing advertising-supported services as ''two-sided platform[s]'' connecting users to advertisers and distinguishing them from subscription services for which there is no ''other side of the market that you need to be worried about''); *see generally* David S. Evans & Richard Schmalensee, Matchmakers: The New Economics of Multisided Platforms (2016); Ruth Towse, *Dealing with Digital: The Economic Organisation of Streamed Music,* 42 Media Culture & Society, no. 7–8, 1461 (2020).[177]

Additionally, the Judges find that the documents indicating that many Spotify subscribers originated as ad-supported listeners is uninformative. The Judges agree that the relevant measure is the extent to which ad-supported listeners convert to subscribers. Interestingly, that figure, [REDACTED]%, (as noted *supra*) is [REDACTED] to the 9.1% substitution figure from the Zauberman Survey (cited *supra*), which tends to confirm the low cross-elasticity between ad-supported and subscription tiers. Similarly, the internal Pandora documents on which SoundExchange relies do not [REDACTED], but rather purportedly estimate, [REDACTED].

In sum, the Judges find no sufficient basis to apply the benchmarking approach for the ad-supported noninteractive market that Mr. Orszag proffers in his WDT.[178]

d. Professor Shapiro's Ad-Supported Benchmark Model

Professor Shapiro's ad-supported benchmark comes from the *interactive* ad-supported market. According to Professor Shapiro, this is an appropriate and direct benchmark, consistent with *Web IV,* in which the Judges likewise used ad-supported benchmarks to develop the ad-supported statutory rate.[179]

To apply this benchmark, Professor Shapiro begins by calculating weighted average *effective* per-play royalty rates. Specifically, he begins by analyzing the effective per-play rates paid by Spotify and SoundCloud [180] to the Majors for performances on their *ad-supported* interactive tiers from May 2018 through April 2019—which he calculates as $[REDACTED] per play. Shapiro WDT at 33, 36 & tbl.8; 8/19/20 Tr. 2900 (Shapiro). As discussed *supra,* although he includes SoundCloud data, essentially, the $[REDACTED]. Shapiro WDT at 36 & tbl.8; 8/19/20 Tr. 2900 (Shapiro). Professor Shapiro further testifies that, to his knowledge, $[REDACTED] was the [REDACTED] at that time. 8/19/20 Tr. 2900 (Shapiro).

More particularly, Professor Shapiro divides: (1) The total royalty fees paid by Spotify and SoundCloud to each Major between May 2018 and April 2019; by (2) the play counts on their ad-supported interactive tiers during the same period. Shapiro WDT at 36 & tbl.8, 63 (Appx. D).

Professor Shapiro includes in his (pre-adjustment) $[REDACTED] per-play rate a previously omitted [REDACTED]. Shapiro WDT at 31 & Appx. D at 1. This [REDACTED] was needed because, pursuant to its contract with [REDACTED].[181]

In addition, Professor Shapiro includes in his (pre-adjustment) $[REDACTED] per-play proposed rate a value for [REDACTED]. Professor Shapiro calculates this further value at $[REDACTED] per play. Shapiro WDT at 33 n.47; Appx. D at 1–2 & n.4; *see also* Trial Ex. 4044 at 14, 43; Trial Ex. 5037 at 58–63 ([REDACTED]).

Before considering potential adjustments to his $[REDACTED] benchmark rate that may be required to account for differences between the benchmark and target markets, Professor Shapiro characterizes this $[REDACTED] per-play *interactive market* derived rate as exceeding an ''upper bound for the zone of reasonableness'' for ad-supported services. He reaches this opinion because he finds it would be ''unreasonable for [noninteractive services] to pay more per-performance for streams of sound recordings than the rate . . . for . . . interactive performances,'' which, because of its greater functionality, he characterizes as ''far more valuable'' than noninteractive performances). Shapiro WDT at 37.[182]

(i) The record companies' music; (ii) Pandora's curation of the music; and (iii) Pandora's advertising platform. *See* 8/20/20 Tr. 3248 (Shapiro) (''the revenue earned [by Pandora's ad-supported service] is a combination of the music . . . creating the experience, the person . . . listening more, and then how much money can be collected per-play will depend also in an important way on value brought by the service [including] [Pandora's skill at monetization.''). Additionally, the purpose of a rate setting process, whether by negotiating counterparties in an unregulated market or by the Judges, is to apply economic analysis to determine how the overall value of these inputs will be allocated as between licensors and licensees. Although each side of the licensing market can accurately claim that its investments are responsible for generating value, and that the other side is wrongly appropriating that value for itself, such self-serving claims do nothing to assist in the allocation of value and, hence, the setting of royalty rates. *See generally* Richard Watt, *Revenue Sharing as Compensation for Copyright Holders,* 8 Rev. Econ. Res. Copyright Issues 51, 56 & n.8 (2011) (economically a royalty rate derived from a percent-of-revenue approach is analogous to an *ad valorem* tax on the service).

[177] Dr. Evans and Professor Schmalensee define a ''multi-sided platform'' as:

A business that operates in a physical or virtual place (a platform) to help two or more different groups find each other and interact. The different groups are called 'sides.' For example, Facebook operates a virtual place where friends can send and receive messages, where advertisers can reach users, and where people can use apps and app developers can provide those apps.

Evans & Schmalensee, *supra,* at 210. Professor Towse notes the particular application of multi-sided platform economics to the analysis of ad-supported music services. *Towse,* 42 Media Culture & Society, at 1465 (''In the streaming market, the upstream price is negotiated by the [Digital Service Provider] for the rights to stream the music . . . for ad-based services, [it is] the price charged to the advertiser. *It is an obvious application of platform economics.*'') (emphasis added).

The Judges note that Mr. Orszag essentially endorses a platform-based approach in his WRT and hearing testimony, by acknowledging the appropriateness (in his model) of using revenue from the ad-supported service rather than subscription revenue. His testimony in that regard is discussed *infra.*

[178] The Judges' rejection of Mr. Orszag's ad-supported benchmark model moots any issues regarding his ad-supported benchmark adjustments.

[179] More particularly, in *Web IV,* the Judges relied on *noninteractive* ad-supported benchmarks: the Pandora/Merlin and iHeart/Warner agreements.

[180] It is undisputed that SoundCloud is not comparable to the target market services primarily because it has a high level of user-generated content and lacks access to the full catalogs of the record companies. 8/11/20 1408–09 (Orszag). Further, unlike other services, SoundCloud has always been mainly a platform where unsigned artists can post their music for downstream discovery. Harrison WDT ¶ 12; Trial Ex. 5289 at 7. The Services maintain that the issue regarding SoundCloud's suitability as a benchmark is ''much ado about nothing,'' because [REDACTED], Services RPFFCL ¶ 206, and Professor Shapiro notes that [REDACTED] 8/19/20 Tr. 2100 (Shapiro). Accordingly, the Judges do not rely on SoundCloud as an appropriate benchmark.

[181] However, Professor Shapiro declines to include a similar [REDACTED] payment by Spotify to Warner, asserting that the payment data he had been provided reflected a global true-up payment rather than a U.S. payment, without information to enable a break-out of the U.S. portion of the ''true-up.'' Shapiro WDT, app. D at 1 n.3; 8/19/20 Tr. 2911–12 (Shapiro). The Judges discuss the [REDACTED] issue *infra.*

[182] To be clear, this benchmarking approach is *not* the ratio equivalency method. Because Professor Shapiro is applying effective noninteractive rates as his benchmarks, his model does not require an assumption of a particular level of substitution (cross-elasticity) between the benchmark and target markets that would affect the per-play rate in the target market.

i. Professor Shapiro's Adjustments

Professor Shapiro proposes the same three adjustments to his benchmark rate for ad-supported webcasters as he did for his subscription benchmark rate: (1) An interactivity adjustment; (2) a skips adjustment; and (3) an effective competition adjustment. Shapiro WDT at 37–40. He supports the application of all three adjustments on the same general bases he advocates for making these adjustments to his subscription benchmark, as discussed *supra.*

(A) Professor Shapiro's Proposed Interactivity Adjustment

Professor Shapiro proposes to make the same two-step adjustment he applies to the subscription benchmark. He relies on the principle he applies in the subscription market, *viz.,* that ''the rights conferred to play music interactively . . . are much more valuable than the rights conferred for statutory services. . . .'' Shapiro WDT at 33–34. To make this adjustment—and even though Professor Shapiro eschews reliance on the ratio equivalency approach for this ad-supported benchmark—he proposes that his unadjusted $[REDACTED] benchmark be reduced by 50% *by applying the same 2:1 ''ratio equivalency'' ratio that the Judges have only applied in connection with subscription services.* Shapiro WDT at 38–39. To apply this ratio adjustment in the ad-supported context, Professor Shapiro relies on the relative retail prices charged by ten leading *subscription* interactive services, $9.99 per service, and three mid-tier services (offering limited interactivity), $4.99 per service.[183] This adjustment reduces Professor Shapiro's benchmark rate from $[REDACTED] to $[REDACTED]. Shapiro WDT at 38–39.

Professor Shapiro testifies that he found further support for his 2:1 interactivity adjustment and the concomitant rate reduction to $[REDACTED] by comparing: (1) The rate Pandora pays Warner for limited Premium Access on-demand intervals on Pandora Free: $[REDACTED]; with (2) the noninteractive rate Pandora pays Warner: $[REDACTED] for noninteractive plays on its noninteractive tier. Trial. Exs. 5126, 4031; Shapiro WRT at 34. Similarly, Professor Shapiro notes that Pandora's contract with Sony contains a per-play royalty rate of $[REDACTED] for noninteractive performances on its ad-supported noninteractive service, Trial. Exs. 5012 at 10; 5024 at 3, compared with a $[REDACTED] rate for *interactive* plays on that same ad-supported noninteractive tier. Shapiro WRT at 34 n.93.

As he asserts regarding his proposed subscription benchmark interactivity adjustment, Professor Shapiro claims the above 2:1 adjustment remains insufficient because it compares the retail subscription price from the benchmark market to mid-tier services with *limited* interactive features—not to statutory *non*interactive services. Shapiro WDT at 38. To complete the interactivity adjustment to account for this point, Professor Shapiro proposes (again, as with his subscription benchmark) to make an adjustment that reflects the percentage difference between: (1) The effective per-play mid-tier royalty rate for subscription services, $[REDACTED]; and (2) the statutory rate paid by subscription noninteractive services: $0.0023. Shapiro WDT at 30 & tbl.5, 38–39. This percentage difference is [REDACTED]%, based on a [REDACTED]:1 ratio of $[REDACTED]:$[REDACTED]. *Id.* Applying this [REDACTED]% adjustment on top of the 2:1 adjustment reduces Professor Shapiro's interim rate (before any other adjustments) from $[REDACTED] to $[REDACTED].

However, in an acknowledgement that Spotify's ad-supported mobile tier (a part of his benchmark service) is less than fully interactive, with functionality more like that of a mid-tier limited interactive service, Professor Shapiro testifies that it would be reasonable for the Judges to apply *only* his second interactivity adjustment—*i.e.,* the [REDACTED]:1 that he asserts adjusts for the difference between the value of (1) mid-tier services; and (2) statutorily-compliant functionality. 8/19/20 Tr. 2905. Applying only this second interactivity adjustment, Professor Shapiro lowers his $[REDACTED] per-play rate (described above) to $[REDACTED] (subject to the additional adjustments detailed below).

(B) Professor Shapiro's Proposed Skips Adjustment

Professor Shapiro next proposes to make a skips adjustment, which he asserts is required because noninteractive licensees are required by statute to pay for plays under thirty seconds, but the benchmark interactive services do not pay for such truncated plays. Shapiro WDT at 39. Applying the same analysis as in his subscription benchmark model, and noting that recent Pandora data shows less-than-thirty second performances account for about [REDACTED]% of total radio performances, he derives a [REDACTED]:1 ratio for his skips adjustment. Shapiro WDT at 39. This adjustment lowers Professor Shapiro's benchmark rate for ad-supported services from $[REDACTED] to $[REDACTED] (applying both of his interactivity adjustments), or from $[REDACTED] to $[REDACTED] (applying only his second interactivity adjustment).

(C) Professor Shapiro's Proposed Effective Competition Adjustment

Professor Shapiro proposes the same effective competition adjustment here, as he did for his subscription benchmark. That is, he calculates the difference between the effective per-performance rates paid to the Majors by [REDACTED] interactive service ($[REDACTED]) and the weighted average of the effective per-performance rates paid by ten other major on-demand streaming services ($[REDACTED]). Shapiro WDT at 39–40, 42 & tbl.10. This results in a [REDACTED]:1 adjustment factor. This adjustment lowers Professor Shapiro's benchmark rate for advertising supported webcasters from $[REDACTED] to $[REDACTED] (if both interactivity adjustments are applied) or from $[REDACTED] to $[REDACTED] (if only the second interactivity adjustment is made). 8/19/20 Tr. 2906–2907 (Shapiro).[184]

As discussed in detail *supra,*[185] the Judges found that the 12% effective competition adjustment derived in *Web IV*—based on the pro-competitive effects of steering—remains the best measure, *ceteris paribus,* for transforming rates inflated by the Majors' complementary oligopoly market power into effectively competitive rates. But, as also noted above, all other things were *not* equal (comparing the *Web IV* and *Web V* evidence) in the *subscription* benchmarking exercise, whereas here, the [REDACTED].[186]

e. SoundExchange's Criticisms of Professor Shapiro's Ad-Supported Benchmark Model

i. Professor Shapiro's Decision Not To Include the [REDACTED] Value

Professor Shapiro declines to apply a [REDACTED].[187] He explained in his

[183] The services on which Professor Shapiro relies are the same as those he relied on to make this adjustment in the subscription market (Pandora Plus, Slacker LiveXLive Plus, and Napster unRadio).

[184] The Judges consider Professor Shapiro's proposed effective competition adjustment in light of (1) their finding that the 12% steering adjustment remains appropriate; and (2) SoundExchange's criticism, discussed *infra.*

[185] *See supra,* section III.C

[186] *See supra,* section III.D

[187] A ''true-up'' in this context is an increase in total royalties paid at the end of the year. The

Continued

WDT that, although he applies a [REDACTED], he declines to apply a *Warner* ''true-up'' because it is his understanding that, although ''[REDACTED].'' Shapiro WDT at 63; Appx. D at 1 n.3 (emphasis added); *see also* 8/19/20 Tr. 2911–12 (Shapiro).[188]

However, Mr. Orszag, in his WRT, asserts that Professor Shapiro should have made the [REDACTED]. Moreover, Mr. Orszag identified the document upon which he relies as supportive of this testimony. Orszag WRT ¶ 80 n.178 (identifying the royalty statement document as ''SOUNDEX_W5_NATIVE_PROD_000751_RESTRICTED.xlsx.'' (henceforth the ''000751'' document)).[189] SoundExchange had produced the ''000751'' document to the Services in discovery, and Professor Shapiro specifically identified it as one of the documents he reviewed in preparing his written testimony. Shapiro WDT, Appx. C; *see also id.* app. D at 1 & n.1 (identifying the documents on which Professor Shapiro relies to calculate ad-supported royalty payments as SOUNDEX_W5_NATIVE_PROD_000001–001558, a sequence that includes ''000751,'' the document identified by Mr. Orszag).

Professor Shapiro had an opportunity at the hearing to contest Mr. Orszag's written rebuttal testimony in this regard, and, if he had contested that testimony, to explain why the aforementioned document was insufficient. Professor Shapiro did continue to claim at the hearing that [REDACTED]'' *but he did not address Mr. Orszag's assertion that the document the latter cited,* the ''00751'' document, in fact [REDACTED]. 8/19/20 Tr. 2911–12 (Shapiro) (Professor Shapiro asserting that he ''[REDACTED]).

The Judges find Professor Shapiro's failure to offer a substantive rebuttal relating to this document to be especially problematic because, as noted above, Professor Shapiro had already reviewed that document, had possession of it (or access to it) and presumably was familiar with its contents. Further, in its post-hearing proposed findings, the Services continue to ignore the ''07751'' document, asserting that ''Mr. Orszag did not calculate the value of the true-up himself or provide the data required to do so.'' Pandora/Sirius XM PFFCL ¶ 225. But, as noted above, Mr. Orszag did identify a document that he said contained the necessary data, and that specific testimony remained unchallenged.

It is also noteworthy that Google's expert economic witness, Dr. Peterson, having access to the same data, decided to apply the [REDACTED] *in toto.* 8/25/20 Tr. 3780 (Peterson) [REDACTED]''); *see also* 8/10/20 Tr. 1172–73 (Orszag) (''Dr. Peterson and I have similarly found the same result . . . .'').

Professor Shapiro's failure to challenge the sufficiency of the document identified by Mr. Orszag, combined with Dr. Peterson' application of a [REDACTED] convinces the Judges that Professor Shapiro's failure to apply a [REDACTED] was incorrect. Applying this [REDACTED] increases Professor Shapiro's ad-supported benchmark rate, before any adjustments, from $[REDACTED] to $[REDACTED] (rounded). Orszag WRT tbls.7 & 8.[190]

ii. Professor Shapiro's Failure To Account for the Funneling (Conversion) Value of Spotify's Ad-Supported Service

Mr. Orszag claims that a fundamental problem with Professor Shapiro's use of the Spotify ad-supported tier as a benchmark is that he fails to account for the fact that this benchmark also incorporates a successful and thus valuable feature: The ability to convert users to Spotify's more lucrative subscription tier. Orszag WRT ¶ 72.

SoundExchange notes that, at the hearing, Professor Shapiro acknowledges this point. First, as a general matter, he agreed that the more promotional a music service is of other revenue streams (net of substitution for other revenue streams, the lower the royalty rate the service should be able to negotiate. Then, specifically, Professor Shapiro admitted that, if [REDACTED], then [REDACTED] 8/19/20 Tr. 2967 (Shapiro).

Mr. Orszag further explains that the importance of funneling ad-supported users into paid subscriptions is thus a [REDACTED] component of the bargain between the record companies and Spotify. That value is manifested in the parties' negotiations by the record companies' [REDACTED]. Orszag WRT ¶ 73.

Another SoundExchange economic witness, Professor Tucker, places Spotify's funneling/conversion value in the broader contemporary economic context of ''freemium'' pricing models. More particularly, she notes the need for sellers to experiment constantly with different ways of ''nudging people to upgrade'' and reminding them of the potential benefits of the premium paid product, '' so as to overcome the risk that customers will become ''anchored to a zero price.'' 8/17/20 Tr. 2116 (Tucker). Professor Tucker opined that the record companies' [REDACTED] was a striking application of the commercial necessity to funnel and convert to a premium service. *Id.* at 2120–21. (Tucker).

The Services contend that SoundExchange has failed to demonstrate adequately the [REDACTED]. Also, they contend record company witnesses have indicated that, notwithstanding any discounts/penalties based on listener tenure, the record companies have [REDACTED] Services RPFFCL ¶¶ 179–183 (and record citations therein).

Notwithstanding these rejoinders, the Services propose that, if the Judges find Spotify's ad-supported tier rates to include [REDACTED], rather than reject the ad-supported rates as benchmarks, the Judges should adjust the Spotify ad-supported benchmark rate upwards in an attempt to isolate and remove the [REDACTED] in that rate tier. *See* 8/19/20 Tr. 2912 (Shapiro). In that regard, Professor Shapiro agreed that other potential evidence exists to calculate this adjustment: The express terms in [REDACTED] 8/19/20 Tr. 2912–13, 2914 (Shapiro) (agreeing with Judge Strickler's suggestion that the [REDACTED]); *see generally* Services PFFCL ¶ 146; Pandora/Sirius XM PFFCL ¶¶ 242–243 (and record citations therein).

The Judges find that, despite the various incentives and market power that may have led to the [REDACTED],[191] the [REDACTED], serve as a useful basis by which to isolate the [REDACTED]. Indeed, as discussed at length *infra,* the parties have adopted a basis by which to apply these [REDACTED].

Having considered SoundExchange's criticisms of Professor Shapiro's establishment of a benchmark, the

additional royalties are due because, although [REDACTED]'' *See* 9/3/20 Tr. 5668 (Harrison); Shapiro WDT at 31 n.47.

[188] The omission of this [REDACTED] is significant. When this royalty payment is included, Professor Shapiro's (unadjusted) benchmark rate increases from approximately $[REDACTED] to approximately $[REDACTED]. *Compare* Orszag WRT tbl.8 *with* 8/19/20 Tr. 2912 (Shapiro) (describing the impact of applying or not applying the [REDACTED]).

[189] This document was not proffered as evidence at the hearing and, accordingly, is not part of the hearing record.

[190] Mr. Orszag, like Professor Shapiro, includes in his calculation of the Spotify effective rate the value of marketing considerations (alternatively valued at the functionally equivalent rate $[REDACTED] per-play) in the agreements between Spotify and major record companies. *Compare* Shapiro WDT at 31 n.47 & app. D at 2 *with* Orszag WRT tbls. 7 & 8.

[191] Any potential impact from differences in market or bargaining power, such as from the licensors' complementary oligopoly market structure, Spotify's unique position as a pureplay service, interactivity differences or play counts, is addressed by the Judges elsewhere in this Determination, both generally and with specific regard to the experts' rate proposals.

Judges next proceed to a consideration of SoundExchange's criticisms of the potential adjustments proffered by Professor Shapiro.

iii. Criticism of Professor Shapiro's Interactivity Adjustment

Taking on Professor Shapiro's first interactivity adjustment, SoundExchange challenges the correctness of applying a supposed value for interactivity derived from the subscription market in the ad-supported market. More particularly, SoundExchange asserts, relying on Professor Shapiro's own testimony, that the added value, if any, of interactive functionality depends on its value *to consumers* in the downstream market. In a subscription market, SoundExchange avers the service's demand for interactive functionality is a derived demand, arising from its downstream customers' WTP for interactive functionality. SX RPFFCL (to Pandora/Sirius XM) ¶ 229 (citing 8/19/20 Tr. 2975–76 (Shapiro)).

In contrast to a subscription market, SoundExchange maintains, an ad-supported service's demand for interactive functionality would be irrelevant to the calculation of advertisers' WTP for advertisements, and the users' willingness to listen to them. *Id.* (citing 8/19/20 Tr. 2977–80 (Shapiro)). Thus, SoundExchange maintains that Professor Shapiro errs in using an interactivity adjustment derived from the subscription market to adjust his ad-supported rates. In further support of this argument, SoundExchange relies on the testimony of two of the Services' economists, testifying for the NAB and Google, respectively, in this proceeding. *Id.* (citing Leonard WRT ¶ 54 (''[T]he relationship between revenue generation and interactivity is substantially different for ad-supported than for subscription services.''); and 8/25/20 Tr. 3702–03 (Peterson) (''[I]t's really the willingness to pay of advertisers and the ability of the service to attract advertisers that is going to affect the revenue on the service. It's not listeners that are providing that revenue.'')).

Turning to Professor Shapiro's second interactivity adjustment based on mid-tier subscription services, SoundExchange offers the same criticism as it asserts immediately above because this adjustment is also derived from the subscription market. SX RPFFCL (to Pandora/Sirius XM) ¶ 230. SoundExchange also raises the criticism of this second interactivity adjustment it makes in connection with Professor Shapiro's subscription benchmark adjustments. That is, SoundExchange re-asserts that Professor Shapiro: (1) Entirely ignores consumer WTP to pay in the downstream market by relying on upstream royalty differentials; (2) cannot cite to evidence any positive WTP of consumers in the downstream market for the additional functionality that Pandora obtained for its mid-tier Pandora Plus service; (3) wrongly dismisses the fact that the subscription price for Pandora's prior noninteractive service was the same ($4.99) as its subsequent mid-tier Pandora Plus service; (4) merely speculates that the additional functionality of Pandora Plus may have increased consumer demand compared to demand for its prior noninteractive service; (5) ignores the fact that any increase in subscribership that may have occurred simply adds more plays and more revenue, without necessarily changing revenue per play; (6) fails to address the fact that [REDACTED] and (7) wrongly uses a statutory rate (the $0.0023 rate) as his base against which to compute the percentage value added by Pandora's mid-tier service. *See* SX PFFCL ¶¶ 143–156 (and record citations therein).

SoundExchange also takes issue with the implicit premise that Spotify's ad-supported service has the full functionality necessary to justify the interactivity adjustments Professor Shapiro proposes. It notes that (as Professor Shapiro himself acknowledges), although Spotify's ad-supported service is fully interactive when used on a desktop, its mobile service is not fully interactive, but rather provides a ''shuffle'' feature that lets listeners select an artist or playlist and hear a somewhat randomized stream of tracks by that artist or from that playlist. *See* 8/19/20 Tr. 2985 (Shapiro).[192] However, SoundExchange notes that Professor Shapiro does not reduce his proposed interactivity adjustment to reflect the lower functionality of the mobile service, 8/19/20 Tr. 2986 (Shapiro), even though he acknowledges that ''[REDACTED]'' and its [REDACTED] 8/19/20 Tr. 2986–87 (Shapiro).[193]

SoundExchange also takes issue with Professor Shapiro's reliance on the per-play rates of $[REDACTED] for Premium Access plays on Pandora's noninteractive service. It notes that, for example, Sony's contract with [REDACTED]'' Trial Ex. 5097 at 1. Accordingly, SoundExchange maintains that these per-play rates embody a promotional value, and thus do not reflect the stand-alone value of on-demand functionality on Pandora's ad-supported service.

iv. Criticism of Professor Shapiro's ''Skips'' Adjustment

SoundExchange questions the probative value of the data upon which Professor Shapiro relies for his [REDACTED]% skips adjustment on the same basis as it challenges his application of this data to his skips adjustment in the subscription market. To recap the criticism, SoundExchange notes that Professor Shapiro acknowledges that this data came from noninteractive plays available on all three tiers of Pandora's service—ad-supported, mid-tier and fully interactive. 8/20/20 Tr. 3028–29 (Shapiro). As a consequence, Mr. Orszag asserts, the [REDACTED]% ''skips'' rate is likely overstated because subscribers to Pandora's two interactive tiers have unlimited skips, making them more likely to skip when accessing noninteractive plays on those two tiers. Orszag WRT ¶ 120. SoundExchange notes that Professor Shapiro agrees but testifies that any such upward bias would have had a *de minimis* impact, so he did not measure the effect. 8/20/20 Tr. 3030–32 (Shapiro).

v. Criticisms of Professor Shapiro's Effective Competition Adjustment

SoundExchange asserts that no effective competition adjustment is warranted. Because Professor Shapiro proffers the same [REDACTED]% effective competition adjustment to the ad-supported rate as he does to the subscription rate, for the same reasons, SoundExchange sets forth the same substantive opposition. *See* SX PFFCL ¶¶ 487–489. Accordingly, the Judges' recitation of that argument *supra* is incorporated by reference here.[194]

SoundExchange also repeats its argument regarding the virtual equivalency of the $[REDACTED]

[192] Spotify's mobile shuffle service also allows up to 6 songs from an album within a 60 minute period, compared to the statutory sound recording performance complement which allows only 3 songs from an album within a 3 hour period. *See* Peterson WDT ¶ 45 n.33.

[193] It was for this reason that Professor Shapiro proposes the alternative interactivity adjustment approach, as discussed *supra,* whereby only the difference between the mid-tier royalty rate and the statutory rate (his ''second'' interactivity adjustment) would be applied. However, SoundExchange characterizes this approach as a ''tactical retreat'' without economic meaning, because Professor Shapiro offers no explanation for why an interactivity adjustment for a mid-tier subscription service–with the same functionality available on *both* desktop and mobile devices–is applicable to Spotify's ad-supported service (with functionality that differs depending on whether the music is delivered via a mobile or a desktop method). SX RPFFCL (to Pandora/Sirius XM) ¶ 233.

[194] *See supra,* section IV.B.1.e.v(C).

effective per-play rate for [REDACTED] and the $[REDACTED] effective per-play rate for Spotify. Again, SoundExchange notes that Professor Shapiro characterizes this [REDACTED] rate as effectively competitive, whereas he asserts that [REDACTED] reflects the Majors' complementary oligopoly power. *See* SX PFFCL ¶¶ 483–486 (and record citations therein).

f. The Judges' Analysis and Findings Regarding Professor Shapiro's Proposed Adjustments

i. Professor Shapiro's Proposed First and Second Interactivity Adjustments

The Judges reject Professor Shapiro's proposed interactivity adjustments to his proposed ad-supported rate. In reaching this finding, the Judges agree with SoundExchange that the concept of added economic value for interactivity is not a suitable basis to adjust downward a proposed benchmark rate. Advertisers, not listeners, pay the royalties. And there is insufficient evidence to establish that advertisers' payments to noninteractive ad-supported services are a function of the level of interactivity of that service.[195] Moreover, Professor Shapiro's attempt to apply the 2:1 interactivity adjustment derived from the subscription market is not only unsupported, it is ironic, because Professor Shapiro has rightfully chastised Mr. Orszag for applying subscription market data to divine an ad-supported rate, as discussed *supra.*

The Judges also decline to endorse Professor Shapiro's alternative proposal to apply only his second interactivity adjustment. As the Judges explained *supra* regarding Professor Shapiro's proffer of this [REDACTED]% adjustment in the subscription market, there is no sufficient evidentiary basis to use the *entirety* of the upstream royalty differences to generate downstream differences in interactivity value, nor is there sufficient evidence that *any* of the royalty difference ($[REDACTED]) reflected actual value differences, given the $4.99/month price for both Pandora's prior Pandora One statutory subscription service and its subsequent Pandora Plus mid-tier subscription service. Moreover, because this royalty differential relates to the subscription market, the Judges find it (like professor Shapiro's proffered first interactivity adjustment) to be uninformative with regard to the ad-supported market.

ii. Professor Shapiro's Proposed Skips Adjustment

SoundExchange does not add any other criticisms of Professor Shapiro's skips adjustment to its discussion of his ad-supported adjustment to his subscription skips adjustment. Accordingly, the Judges adopt (and incorporate by reference here) the same analysis and the same finding of a [REDACTED]% skips adjustment as they found for the subscription market.

iii. Professor Shapiro's Proposed Effective Competition Adjustment

Because Professor Shapiro's proffered ad-supported effective competition adjustment, and SoundExchange's criticism thereof, are identical to their positions regarding this potential adjustment in the subscription market, the Judges incorporate by reference here their rejection of that adjustment, and the reasons for that rejection.[196]

The Judges' rejection of Professor Shapiro's proposed effective competition adjustment does not mean that no such adjustment is warranted. Rather, the Judges apply the same analysis to the ad-supported sector as they have in the subscription context. However, the Judges' *application* of that approach here in the ad-supported sector differs from their analysis in the subscription sector. To recap, in the subscription sector, [REDACTED].[197] Thus, when applying the [REDACTED]% effective competition adjustment based on the price-competitive impact of steering, the Judges offset the percentage difference between the [REDACTED]% and [REDACTED]% rates—[REDACTED]%—to set an effective competition adjustment of [REDACTED]% (*i.e.,* [REDACTED]% – [REDACTED]%).

However, in the ad-supported sector, [REDACTED]. Indeed, the Majors [REDACTED]. Ultimately, the Majors and Spotify [REDACTED]. Trial Ex. 4040 (Universal/Spotify 2017Agreement); Trial Ex. 5038 (Warner/Spotify Agreement).

With regard to the headline per-play rates, the 2017 Universal-Spotify Agreement [REDACTED]. *Compare* Trial Ex. 2062, Fees Annex, p. 3 (2013 Agreement) *with* Trial Ex. 4040, Fees Annex, p.1 of 3; *see also* Harrison WDT ¶ 24 (noting [REDACTED]); Shapiro WRT at 19 n.60 ([REDACTED]. Similarly, [REDACTED]. *Compare* Trial Ex. 5020 ex. I (Rate Card) (2013 Agreement) *with* Trial Ex. 5038 app. 1 (Rate Card) (2017 Agreement).[198]

In the other tier of its 2017 Agreements with [REDACTED], Spotify [REDACTED]. Spotify has been paying royalties [REDACTED] 2017 Agreements because that [REDACTED]. 8/20/20 Tr. 3085–86 (Shapiro); 8/11/20 Tr. 1233 (Orszag). But, as Mr. Harrison of Universal acknowledged, [REDACTED]. 9/3/2020 Tr. 5710–11 (Harrison); SX PFFCL ¶ 291 (acknowledging the [REDACTED]). Further, there is no evidence to indicate that the effective per-play rate on the ad-supported tier [REDACTED] under Spotify's 2017 Agreements with the other two Majors, *i.e.,* Warner or Sony.

Mr. Harrison asserts that the reason Spotify's *[REDACTED]* was because Spotify was [REDACTED]. But the ability of a licensor to extract value from a licensee's [REDACTED] is precisely the sort of ''heads-I-win, tails-you-lose'' advantage that the Judges noted in *SDARS III* is part-and-parcel of a licensor's complementary oligopoly power. *SDARS III,* 83 FR at 65228. Accordingly, the 2017 Agreement between Universal and Spotify, with regard to the ad-supported rates (and unlike with regard to the subscription rates), is consistent with an undiminished exercise of complementary oligopoly power.[199]

Additionally, by obtaining [REDACTED] in the 2017 Agreements, Universal and Warner [REDACTED],

[195] To be sure, listeners to ad-supported services may well prefer interactive functionality to noninteractive functionality, because the former provides greater utility. The problem is that such a preference is not revealed in this multi-sided platform context because the listeners do not make purchasing decisions.

[196] *See supra,* section IV.B.1.e.v(C). The Judges add, though, that Professor Shapiro's ad-supported methodology appears to shed light on Pandora's decision (discussed *supra*) to propose an effective competition adjustment ([REDACTED]%) based on the difference between the interactive average royalty rate ($[REDACTED]) and the [REDACTED] royalty rate ($[REDACTED]), rather than the difference between the $[REDACTED] average rate and [REDACTED]s $[REDACTED] effective per-play rate. *Because Pandora uses the Spotify ad-supported rate as its benchmark, if it identified Spotify's effective per-play rate (based on a [REDACTED]) as effectively competitive, it could not then rely on that rate to generate a downward effective competition adjustment, as exposed by SoundExchange.* That would have significantly increased Pandora's proposed benchmark rate.

[197] Under the 2017 Agreements, [REDACTED]. Shapiro WDT at 40, tbl.10; *see also* Orszag WDT ¶ 153 & tbl.15 ([REDACTED]).

[198] The Sony/Spotify 2013 and 2017 Agreements [REDACTED]. *See* Trial Exs. 5074 (2013 Agreement) and 5011 (2017 Agreement); *see also* Orszag WDT, fig.6..

[199] The Judges discussed this phenomenon elsewhere in this Determination, regarding the Majors' obtaining a share of the value of Pandora's investment in the monetization of its advertising platform. In that context and in the present context, the extent to which the Majors can share in the increase in advertising revenue is a function of their complementary oligopoly power (as is every aspect of the rate-setting process). This *particular* aspect of the Majors' complementary oligopoly power is mitigated by the Judges' *general* inclusion of the [REDACTED]% effective competition adjustment, which is broadly intended to offset all aspects of the Majors' complementary oligopoly power (that is not otherwise offset by Spotify's countervailing power in the subscription benchmark market).

relative to their 2013 Agreements, [REDACTED]. Thus, *[REDACTED]* of the 2017 Agreements, these Majors had [REDACTED]—which, as noted above, [REDACTED], according to Mr. Harrison.

The Judges find these facts to belie any assertion that [REDACTED]. Thus, the effective competition adjustment on the ad-supported tier remains at [REDACTED]%, as it pertains to Professor Shapiro's benchmark rate.

g. Applying the Skips and Effective Competition Adjustments

Because the Judges do not apply any interactivity adjustment to Professor Shapiro's ad-supported benchmark rate, they adjust the $[REDACTED] per-play ad-supported rate by first applying the [REDACTED]% adjustment for skips, which reduces the rate to $[REDACTED]. The Judges then apply the effective competition adjustment of [REDACTED]. The resulting rate is $[REDACTED] ($[REDACTED]) rounded).

3. Supplementation by Mr. Orszag and Professor Shapiro to Their Original Ad-Supported Benchmarking Approaches

Both Mr. Orszag and Professor Shapiro supplement their ad-supported benchmarking models in manners that narrow the differences between their proposed rates. Each expert's supplemental position is examined seriatim below.

a. Professor Shapiro Acknowledges the Propriety of Adjusting His Proposed Spotify Ad-Supported Benchmark Rate Higher To Account for Spotify's Ability To Funnel Ad-Supported Users Into Its Higher Royalty-Bearing Subscription Tier

Professor Shapiro takes notice of SoundExchange's criticism that his ad-supported benchmark model fails to account for Spotify's added value as a funneling tool, converting ad-supported listeners into subscribers who pay a higher retail price and generate higher royalties. 8/19/20 Tr. 2912 (Shapiro) (''[[REDACTED]''); *see also* Orszag WRT ¶ 72. Further, for benchmarking purposes in this proceeding, Pandora assumes that [REDACTED]a value to the Majors that [REDACTED]. Pandora/Sirius XM PFFCL ¶ 241.[200]

Having adopted this assumption, Professor Shapiro testifies that the appropriate response is not to disregard Spotify's ad-supported tier rates. Rather, the correct approach is to address Spotify's ad-supported rate structure by [REDACTED]. 8/19/20 Tr. 2912 (Shapiro); Shapiro WRT at 42.

Taking note of the aforementioned Spotify agreements with Warner and Universal, Professor Shapiro focuses on the per-play royalty rates Spotify pays [REDACTED]): $[REDACTED].[201] Each of these rates, Professor Shapiro notes, represents a [REDACTED]% [REDACTED] the base per-play minimum specified in the agreements. Shapiro WRT at 43; Harrison WDT ¶ 67 (regarding the Universal agreement); Adadevoh WDT ¶ 21 (regarding the Warner Agreement).

According to Professor Shapiro, it would be appropriate to use the [REDACTED]users, as the basis for an upward adjustment to his benchmark rate, in order to [REDACTED]. In other words, [REDACTED]. 8/19/20 Tr. 2912–14 (Shapiro).

Professor Shapiro at first intended to adjust his benchmark rate higher to reflect the full [REDACTED]% [REDACTED]. However, Mr. Orszag pointed to a fact that indicated Professor Shapiro would actually *overstate* his benchmark if he applied [REDACTED]. Specifically, Mr. Orszag testified:

> You just can't take the rate and [REDACTED]. That would be inappropriate. One would want to weight by the number of subscribers who have been—have been [REDACTED] [REDACTED].

8/11/20 Tr. 1382 (Orszag). Mr. Orszag used this data to determine that, to adjust the proposed royalty rate derived by Professor Shapiro (and by Dr. Peterson), as well as the proposed royalty rates he derived—to eliminate the funneling/conversion value in the rate structure—required a [REDACTED] adjustment (a [REDACTED]) in their respective rates. 8/11/20 Tr. 1382, 1405–06 (Orszag); 8/25/20 Tr. 3816 (Orszag).[202]

Professor Shapiro analyzed this background worksheet and came to the same conclusion as Mr. Orszag, quantifying the smaller upward adjustment of [REDACTED]% to the proposed rate, rather than [REDACTED]%. *Compare* 8/25/20 Tr. 3816 (Orszag) (''Professor Shapiro in his testimony has introduced a new adjustment. He proposed a [REDACTED] × adjustment to the Spotify Free rate . . . that works to correct the [REDACTED] that are associated with the Spotify Free benchmark. And with that, *I am more comfortable with that benchmark.* '') *with* 8/19/20 Tr. 2913, 2921, 2970 (Shapiro) (''I have calculated, for the same calculation he did . . . that the proper adjustment would be a [REDACTED] adjustment factor. . . . [W]e did the same calculation and we both got to this same number.. . . And that ratio is also [REDACTED]. So we're doing the same thing.. . . I [had] said something like the [REDACTED], but Mr. Orszag corrected me and pointed out it should be [REDACTED].'').

Applying this [REDACTED] factor to the Judges' calculation (conducted *supra*) of Professor Shapiro's benchmark effective rate for ad-supported noninteractive services, $[REDACTED], results in a final effective rate of $[REDACTED] (*i.e.,* $[REDACTED] × [REDACTED]), or $0.0023 (rounded).

b. Mr. Orszag Acknowledges the Propriety of Using Spotify's Ad-Supported Service as a Benchmark for the Statutory Benchmark Service

Although SoundExchange and Mr. Orszag continue to advocate for the latter's *subscription benchmark-based rate* of $0.0025 as the statutory ad-supported rate,[203] Mr. Orszag subsequently testified that he had become ''comfortable'' as well with applying Spotify's *ad-supported rate* as the benchmark in his own ratio equivalency model. He came to this conclusion after discerning that ''[t]he percentage of revenue for the Spotify subscription tier is virtually the same as the percentage of revenue for the Spotify Free tier.'' 8/25/20 Tr. 3809 (Orszag).

More particularly, he notes that the effective percent-of-revenue rate paid by [REDACTED] (*i.e.,* as a percent of advertising revenue) is [REDACTED]%. Peterson WDT, ¶ 51. By comparison, the royalty rate on which Mr. Orszag relies in his WDT is based on a very similar [REDACTED]% subscription market effective rate paid by [REDACTED]. Orszag WDT, tbls.7, 9.

Mr. Orszag notes, though, that his percent of revenue calculation differs from the calculations of Dr. Peterson and Professor Shapiro. Dr. Peterson bases his royalty percentage on net revenue, which is lower than gross revenue. By contrast, Mr. Orszag makes

[200] Consistent with this assumption, the Judges have described *supra* the ad-supported rate structure in Spotify's agreements with Universal and Warner, respectively, that provide Spotify [REDACTED].

[201] There is no evidence of a comparable [REDACTED] rate in its agreement with Sony.

[202] Mr. Orszag calculated this [REDACTED] adjustment from a worksheet he utilized in this proceeding that had been produced by SoundExchange to the Services in discovery, Bates #W5 00492–00502). 8/11/20 Tr. 1408 (Orszag) (promising to identify the underlying worksheet the next hearing day); 8/12/20 Tr. 1486 (identification of the worksheet the next hearing day by David Handzo, Esq, counsel for SoundExchange, without objection).

[203] ''I continue to believe that license agreements for subscription on-demand services can be useful benchmarks for statutory ad-supported services.'' Orszag WRT ¶ 75.

his percent-of-revenue calculation off Spotify's gross revenues. The revenue figure (whether gross or net) is the denominator in the calculation of effective percent-of-revenue royalties. (The royalties paid comprise the numerator.). Thus, Dr. Peterson's [REDACTED]% figure, Mr. Orszag acknowledges, must be restated using gross revenues, to make an apples-to-apples comparison with Mr. Orszag's benchmarking approach. Mr. Orszag performs this restatement and re-calculates Spotify's effective percent-of-revenue royalty payments, on a gross revenue basis, as [REDACTED]%. Orszag WRT ¶ 71 n.155. Mr. Orszag also notes that the effective percent-of-revenue rate (apparently on gross revenues) determined through Professor Shapiro's data is similar, at [REDACTED]% (after correcting for (1) Professor Shapiro's acknowledged double-counting in connection with the [REDACTED]) and (2) his decision not to provide [REDACTED].). Orszag WRT ¶ 71 nn.155–156.

Mr. Orszag explains that, when establishing percent-of revenue rates using net advertising revenues, his own ratio equivalency approach (*not* the benchmarking approach of either Dr. Peterson or Professor Shapiro) per-play rates decrease by [REDACTED]%, from $[REDACTED] to $[REDACTED] (a $[REDACTED] reduction). *Id.*[204] Specifically, when Mr. Orszag applies Dr. Peterson's [REDACTED]% of revenue figure, Mr. Orszag calculates a per-play royalty of $[REDACTED] ($[REDACTED] rounded). Similarly, when Mr. Orszag applies Professor Shapiro's [REDACTED]% rate, Mr. Orszag calculates an effective per-play rate of $[REDACTED] (which also rounds to $[REDACTED]). Orszag WRT ¶ 71 n.156.

In his WRT, Mr. Orszag continues to cast doubt, though, on Spotify's ad-supported rate as a useful benchmark. He emphasizes that Spotify's ad-supported tier is ''wholly different'' from, *inter alia,* statutory noninteractive ad-supported services because of the former's separate attribute as a [REDACTED] funneling tool, inducing ad-supported listeners to convert to subscribership and its concomitant higher royalty payments. Orszag WRT ¶¶ 72–75. However, as noted *supra,* when the [REDACTED] adjustment was made to control for the separate value of funneling/conversion,[205] Mr. Orszag became, if not a full-fledged convert, ''more comfortable'' with the ''Spotify Free benchmark.'' 8/25/20 Tr. 3816 (Orszag).[206]

When Mr. Orszag applies the [REDACTED] adjustment to reflect the number of Spotify listeners [REDACTED], his proposed rate—derived from his ratio equivalency model but using Spotify's ad-supported data—increases from $[REDACTED] to $[REDACTED] *See* 8/11/20 Tr. 1406 (Orszag).

The final step in this analysis would be to apply an appropriate adjustment for effective competition. For the reasons discussed, *supra,* regarding the effective competition adjustment necessary for Professor Shapiro's ad-supported benchmark rate, the Judges apply the same 12% effective competition adjustment.

Applying the 12% effective competition adjustment to Mr. Orszag's $[REDACTED] rate reduces his ad-supported rate, to $[REDACTED] ($0.0024 rounded).

As in the subscription market analysis, the Judges need to weight the relative impacts of: (1) The benchmark approach of Professor Shapiro (joined in the ad-supported analysis by the identical rate identified by the Judges from Dr. Peterson's analysis) and (2) Mr. Orszag's (*de facto*) ratio equivalency approach. The Judges use the same approach here as they did *supra* for the subscription rate. That is, they look to the Zauberman Survey,[207] as applied by Professor Willig, for SoundExchange's' estimate of the diversion ratio from ad-supported *noninteractive* listeners to a new ad-supported *interactive* service, which is [REDACTED]%.[208]

Thus, Mr. Orszag's $0.0024 rate has a weight of [REDACTED]% in the calculation of the overall benchmark rate in the ad-supported market. Professor Shapiro's $0.0023 rate has a weight of [REDACTED]% (*i.e.,* 1 − [REDACTED]). The resulting rate is $0.0023 (rounded).[209]

4. Dr. Peterson's Ad-Supported Benchmark Model

a. Dr. Peterson's Interactive Benchmark

Dr. Peterson, testifying on behalf of Google, derived his ad-supported benchmark analysis from the *interactive* ad-supported market. According to Dr. Peterson, this is an appropriate benchmark, consistent with *Web IV,* in which the Judges used ad-supported benchmarks to develop the ad-supported statutory rate. 8/25/20 Tr. 3631 (Peterson); Peterson WDT ¶¶ 10, 12. Google and Dr. Peterson posit that Spotify's ad-supported service is the closest benchmark available for statutory ad-supported services. Google LLC's Amended Proposed Findings of Fact and Conclusion of Law ¶ 24 (Google PFFCL); 8/25/20 Tr. 3633–34 (Peterson). Google further suggests that the Judges have indicated a preference toward benchmark analysis and that prior determinations have tended to eschew non-benchmark-based approaches. Google PFFCL ¶ 13–18; *Web IV,* 81 FR at 26320, 26327; *Distribution of Cable Royalty Funds,* Final Allocation Determination, 84 FR 3352, 3602 (Feb. 12, 2019) (*2010–13 Cable Allocation Determination*).

To apply his benchmark, Dr. Peterson began by calculating effective per-play royalty rates, derived from the royalties paid by Spotify to Warner, UMG, Sony, Merlin and Ingrooves on a percent-of-revenue [REDACTED], in which the other [REDACTED]. Peterson WDT ¶¶ 10, 48–51; 8/25/20 Tr. 3634 (Peterson) (explaining that he divided the total royalties paid or to be paid by the reported royalty-bearing plays for

[204] To be clear, Mr. Orszag is here plugging in calculations of percent-of-revenue rates in the benchmark market by using Dr. Peterson's and Professor Shapiro's own percent-of-revenue calculations in order to generate a percent-of-revenue rate in the benchmark market that Mr. Orszag, *using his ratio equivalency model,* then applies to the target market; Mr. Orszag is *not* applying his percent-of-revenue calculations, as derived from these other two experts, in *their benchmarking models. See* Services PFFCL ¶¶ 48–56 (and record citations therein).

[205] Mr. Orszag also contends that the [REDACTED] rate is still too low because: (1) Some Spotify ad-supported listeners ultimately convert to the subscription tier [REDACTED]; and (2) Spotify's contract with the Majors require it to [REDACTED]. Orszag WRT ¶¶ 73, 75 n.167. However, the Services convincingly note that: (1) [REDACTED]; and (2) there is no evidence that [REDACTED], resulting in a loss of revenue. Services RPFFCL ¶¶ 195, 204; *see also* 8/19/20 Tr. 2971 (Shapiro) (noting that an adjustment based on additional revenue arising from an [REDACTED].'').

[206] The Services nonetheless do not agree with the methodology utilized by Mr. Orszag, as it does not reflect the need to make any appropriate adjustments. *Id.;* Pandora/Sirius XM PFFCL ¶ 244 n.33. However, the Judges examine the relative merits of the Services' proposed adjustments separately, in their analysis of each expert's model. The salient point here though is that Professor Shapiro's approach (and Dr. Peterson's approach) yield effective per-play royalty rates on the ad-supported tiers that are quite proximate, prior to the consideration of particular adjustments.

[207] As the Judges noted regarding their use of the Zauberman Survey in their subscription rate calculation, although they find the Zauberman Survey less reliable in other respects than other surveys in the record, only the Zauberman Survey asks respondents directly the necessary diversion question, here, to identify the source of music to which they would divert if noninteractive ad-supported services were not available, not if they were merely downgraded.

[208] Professor Willig estimated the number of monthly plays on Pandora to be [REDACTED]. Willig WDT ¶ 45. The diversion of monthly plays to interactive ad-supported services (*i.e.,* to a service such as Spotify's) is [REDACTED], according to Professor Willig's application of the Zauberman Survey. Willig WDT, fig.6 (panel A). [REDACTED]=[REDACTED]% (rounded).

[209] [REDACTED].

each label); Peterson WDT ¶¶ 13, 48.[210] Dr. Peterson used the payments due under the [REDACTED]. 8/25/20 Tr. 3636–3637 (Peterson) ([REDACTED]). Under the Spotify licenses, Dr. Peterson found that the effective per-play rates [REDACTED]. Peterson WDT ¶¶ 10, 48–51.

On behalf of SoundExchange, Mr. Orszag, as noted *supra,* proposed that an upward adjustment was necessary to address the funneling/conversion value [REDACTED], namely a [REDACTED] adjustment (a [REDACTED]% increase) in the respective rates. 8/11/20 Tr. 1382, 1405–06 (Orszag); 8/25/20 Tr. 3816 (Orszag).[211] Dr. Peterson set forth that any adjustment to Spotify ad-supported rates to account for value attributable to funneling or conversion of users from ad-supported to paid subscription tiers that may occur should not look toward funneling occurring from the Spotify ad-supported tier to the Spotify subscription tier, but instead should seek to assess the difference in the upselling capabilities of the Spotify ad-supported benchmark compared to statutory services. Dr. Peterson noted that Mr. Orszag did not attempt such an analysis, despite evidence that statutory services are funneling consumers into subscription offerings. Therefore, he suggested, the Judges should reject Mr. Orszag's incomplete attempt to support a [REDACTED]× upward adjustment without comparing the upsell potential of Spotify against statutory services such as Google, Pandora, and iHeart. Peterson WDT ¶¶ 60–61.

Dr. Peterson further countered Mr. Orszag's suggested adjustment by offering that the premise for applying an upsell adjustment is unfounded. He argued that the evidence does not support the notion that [REDACTED] that accounts for the conversion of users to subscription tiers. Instead, he contended that the labels [REDACTED]. Google notes testimony from executives at Warner Music and UMG regarding both [REDACTED]. Dr. Peterson suggested that Mr. Orszag's analysis was erroneous because he arrived upon a ratio using headline per-play rates ([REDACTED]) to form a proposed adjustment to apply to Dr. Peterson's analysis, which is based on effective rates [REDACTED]. Peterson WDT ¶¶ 62–65.

Relatedly, in the hearing Dr. Peterson offered an alternative adjustment to account for funneling or conversion from ad-supported to paid subscription, whereby the starting point for his analysis (to which his proposed adjustments would be applied) would be the [REDACTED] for ad-supported customers who used the ad-supported service [REDACTED], as opposed to the payments due under the [REDACTED]. He reasoned this starting point may be appropriate if the Judges feel they need additional adjustment for funneling value, because any funneling value, [REDACTED], would have been exhausted or otherwise be *de minimis.* And, he offered, that was the amount [REDACTED] was willing to accept under the agreement. 8/26/20 Tr. 3955, 3960, 3961–63 (Peterson).

b. Dr. Peterson's Adjustments

Dr. Peterson and Google proposed four adjustments to the benchmark rates for ad-supported webcasters: (1) An interactivity adjustment, (2) a skips adjustment, (3) an effective competition adjustment, and (4) a marketing adjustment. Peterson WDT ¶¶ 15.[212]

i. Dr. Peterson's Proposed Interactivity Adjustment

Dr. Peterson proposed a downward interactivity adjustment because the benchmark agreements he used are from an interactive market, whereas the target, statutory market is for non-interactive. 8/25/20 Tr. 3632, 3638 (Peterson). His testimony noted that interactive services receive a greater grant of rights (including the ability to let listeners hear on-demand whatever songs they want whenever they wish) and that licensors expect higher rates from interactive licenses than non-interactive licenses. Peterson WDT ¶ 52; 8/25/20 Tr. 3648 (Peterson).

Dr. Peterson proposed a downward interactivity adjustment of [REDACTED]%. 8/25/20 Tr. 3632 (Peterson); Peterson WDT ¶¶ 15(a), 55. His proposal came from his comparison of [REDACTED] [REDACTED] service to the statutory rate. 8/25/20 Tr. 3642 (Peterson); Peterson WDT ¶¶ 53–55. Peterson explained that [REDACTED] service, while meeting most of the statutory criteria, is not eligible for the statutory license because it [REDACTED], and that [REDACTED]. 8/25/20 Tr. 3641–43 (Peterson); Peterson WDT ¶¶ 53, 54. Dr. Peterson offered that the incremental amount [REDACTED] agreed to pay above the statutory rate is a useful measure of how a willing buyer and willing seller value the additional interactive functionality. Peterson WDT ¶ 54; *see also* 8/25/20 Tr. 3649, 3678–79 (Peterson). He set forth that the [REDACTED]% difference represents an incremental premium [REDACTED] paid for non-statutory functionality and that the difference is not meaningfully influenced by the statutory rate, but rather, that the comparison with the statutory rate allows for calculation of the delta between the respective rates. 8/25/20 Tr. 3632; 3646 (Peterson).

ii. Dr. Peterson's Proposed Skips Adjustment

Dr. Peterson also proposed to make a skips adjustment, which he asserts is required because the noninteractive licensees are required by statute to pay for plays under thirty seconds, but the benchmark interactive services do not pay for such brief plays. Peterson WDT ¶ 67. Dr. Peterson set out that the effective per-play rate he calculated (total royalties paid/reported streams) has a denominator (streams 30 seconds or longer) that excludes plays for which a statutory service would pay, thus leading to a higher per-play rate for interactive services. Peterson WDT ¶ 67. Based on information from Spotify on the number of total plays and plays of less than 30 seconds on its ad-supported interactive service, Dr. Peterson calculated that a downward adjustment of [REDACTED]%, applied to Spotify's effective per-play rate results in what Spotify would have paid on a dollar-per-stream basis. *See* 8/25/20 Tr. 3680–81 (Peterson); Peterson WDT ¶¶ 15(c), 68. He proposed an alternative skips adjustment by calculating the adjustment to the statutory rate that would be required for statutory payments to remain unchanged if

[210] Dr. Peterson also analyzed SoundCloud Limited's (SoundCloud) licenses with UMG and Warner for the SoundCloud ad-supported tier to corroborate his findings based on the five Spotify licenses. The SoundCloud licenses were offered as confirmatory benchmarks rather than primary benchmarks because the SoundCloud ad-supported tier includes comparatively less than a full catalog of content and significant user-generated content. Peterson WDT ¶ 11. As previously indicated, the Judges find that SoundCloud is not comparable to the target market services primarily because it has a high level of user-generated content and lacks access to the full catalogs of the record companies. 8/11/20 1408–09 (Orszag). Further, unlike other services, SoundCloud has always been mainly a platform where unsigned artists can post their music for downstream discovery. Harrison WDT ¶ 12; Trial Ex. 5289 at 7.

[211] Pandora and Sirius XM's expert witness Professor Shapiro also accepted a similar [REDACTED] upward adjustment. *See, e.g.,* 8/19/20 Tr. 2913, 2921, 2970 (Shapiro) (''I have calculated, for the same calculation he did . . . that the proper adjustment would be a [REDACTED] adjustment factor. . . . [W]e did the same calculation and we both got to this same number. . . . And that ratio is also [REDACTED]. So we're doing the same thing. . . . I [had] said something like the [REDACTED], but Mr. Orszag corrected me and pointed out it should be [REDACTED].'').

[212] Dr. Peterson's testimony also suggested that the decrease in length of the average hit song indicates that per-play rates should decrease. Peterson WDT ¶¶ 78–79 (suggesting that a hit-driven station would have to play more songs per hour such that any decrease in the statutory rate is likely to be offset, at least partially, by an increase in the number of royalty-bearing plays). Google did not argue for such an adjustment but instead suggested the issue as a reason to view its rate proposal as a modest one. Google PFFCL ¶ 79.

statutory services were to pay only on performances of 30 seconds or longer. He offered that relevant information provided from Pandora showed that on its ad-supported radio service [REDACTED]% of total performances are less than 30 seconds, thus leading him to arrive at an alternative [REDACTED]% reduction in the benchmark rate to account for skips. *Id.*

iii. Dr. Peterson's Proposed Effective Competition Adjustment

As with other participants and experts, Google and Dr. Peterson propose that a competition adjustment is necessary because labels have complementary oligopoly power in the benchmark market for licensing of music services, which means those rates do not reflect effective competition, but rather they result in royalty rates set at supracompetitive levels even higher than a single monopolist would charge. 8/25/20 Tr. 3652–53 (Peterson); *see also* Peterson WDT ¶¶ 19, 21–22, 34–35. Dr. Peterson offered that the consumer expectation that all interactive services will have the full catalog of each significant record label means that the labels' catalogs do not substitute for one another and are instead ''must haves'' for interactive services, which thus creates a licensing market where the major labels have complementary oligopoly power. 8/25/20 Tr. 3653 (Peterson); Peterson WDT ¶¶ 33, 57.

Dr. Peterson also set out that statutory streaming services have a greater ability to steer listeners' experience than interactive services, using techniques such as designing playlists to meet listeners' tastes that omit recordings from certain labels or reducing the number of plays for a given label's recordings if the license rate is too high. Dr. Peterson opines that this ability to steer is a marker of effective competition. Peterson WDT ¶ 58–59. He sought to replicate such effective competition through his competition adjustment, which reflects a statutory licensee's ability to avoid high license rates by substituting or steering away from high royalties. Peterson WDT ¶¶ 65–66; *see also* 8/25/20 Tr. 3662 (Peterson). Dr. Peterson offered an analysis that chiefly used a Pandora-Merlin agreement that was in effect at the time of *Web IV,* which required Pandora to increase (*i.e.,* steer toward) Merlin spins by at least 12.5% and allowed Pandora to effectively engage in significant steering without negative reaction, to arrive at a proposed lower bound for his downward competition adjustment of 11.1% − 12.5/(100+12.5) = 11.1%. Peterson WDT ¶¶ 62, 65. Dr. Peterson also looked to an agreement between iHeart and Warner, in effect at the time of *Web IV,* with a different [REDACTED] structure which required iHeart to pay royalties to Warner [REDACTED] at the time the deal was struck, which Dr. Peterson found indicative of an intention to steer of more than 50%. Peterson WDT ¶ 63. In his analysis, he set out that evidence of the ability to steer ranges from [REDACTED]% in the case of the Pandora/Merlin agreement to more than 50% in the case of iHeart/Warner. Dr. Peterson also looked at Pandora's steering experiments, cited in the *Web IV* determination, finding some consumer resistance to steering at a rate of 30%, thus arriving at a proposed upper bound for the downward competition adjustment of [REDACTED]% [REDACTED]. Peterson WDT ¶¶ 62, 65.

Dr. Peterson asserted that his competition adjustment is conservative because it is calculated based only on a reasonable ability to steer, which does not fully address or compensate for complementary oligopoly power. 8/25/20 Tr. 3662–63, 3664–65 (Peterson). He added that other market data supports that even higher levels of steering are possible in the target noninteractive market, again noting evidence that Pandora engaged in steering toward Merlin by [REDACTED]% (instead of [REDACTED]%), without negative feedback. Peterson WDT ¶ 62.

iv. Dr. Peterson's Proposed Marketing Adjustment

Dr. Peterson offered that a marketing adjustment to the Spotify benchmark licenses may not be appropriate. While he recognized that the agreements [REDACTED], he concluded that the value of [REDACTED] may be zero. The provisions, he indicated, [REDACTED]. Peterson WDT ¶ 69. Dr. Peterson offered that the marketing value stated in the Spotify benchmark licenses likely does not reflect [REDACTED]. Peterson WDT ¶¶ 69–70. Dr. Peterson calculated a potential valuation by allocating the total advertising value across active countries and dividing the value of advertising attributable to the United States by the number of performances. Dr. Peterson determined this additional unadjusted value at $[REDACTED] per play. To address any uncertainty of the actual value of such negotiated advertising in the current record, Dr. Peterson calculated the adjusted Spotify benchmark range with and without the advertising adjustment. Peterson WDT ¶¶ 71, 75. Google argues that no advertising adjustment is justified, given the acknowledged uncertainties in assigning specific valuation and admitted inability to value such benefits on a dollar-for-dollar basis with the value stated in the agreements. Google PFFCL ¶¶ 66–69.

v. Dr. Peterson's Application of His Proposed Adjustments

The range of Dr. Peterson's proposed adjustments are reflected below, in Dr. Peterson's Figure 2. Peterson WDT ¶ 74.

The top section of each panel shows the unadjusted benchmark rates and the adjusted rates based on three adjustments (Interactivity, Competition and Skips adjustments). In order to determine the benchmark rate reflecting these adjustments the unadjusted rate is multiplied by one minus the adjustment for each rate. Thus, the adjusted rates are equal to:

$$\text{Adjusted Rate} = (1 - \text{Interactivity Adj}) \times (1 - \text{Competition Adj}) \times (1 - \text{Skips Adj}) \times \text{Unadjusted Rate}.$$

Peterson WDT ¶ 74.

The top panel of Figure 2 uses the [REDACTED]% Skips adjustments and the bottom panel uses the [REDACTED]% skip rate. The adjustment range of [REDACTED]% to [REDACTED]% using the Pandora free tier skips data is arrived at by applying, to the Unadjusted Rate, Dr. Peterson's proposed interactivity adjustment of [REDACTED]%, Skips adjustment of [REDACTED]% (Pandora free tier), and competition adjustment of [REDACTED]%. The adjustment range of [REDACTED]% to [REDACTED]% using the Spotify free tier skips data is arrived at by applying Dr. Peterson's proposed interactivity adjustment of [REDACTED]%, skips adjustment of [REDACTED]% (Spotify free tier), and competition adjustment of [REDACTED]%. The range of adjusted rates before accounting for the potential value of marketing support is $[REDACTED] to $[REDACTED] per play. Dr. Peterson offered the midpoint of this range as being a reasonable estimate of a rate, when treating advertising allowances as having no value. That midpoint is equal to $[REDACTED] per play. Peterson WDT ¶ 74; Figure 2.

Both the top and bottom panels of Figure 2 show the calculation of the adjusted value of advertising in the benchmark agreements. The top row of the middle section reflects the unadjusted value of advertising per play in the United States. The value is calculated by allocating the total advertising value across active countries and dividing the value of advertising attributable to the United States by the number of performances. The adjusted advertising ranges are calculated in the

same way as the adjusted rates indicated above, where the adjusted rate = (1 − Interactivity Adj) × (1 − Competition Adj) × (1 − Skips Adj) × Unadjusted Rate. The range of adjusted benchmark rates including the stated value of advertising allowances is $[REDACTED] to $[REDACTED] per play. Dr. Peterson offered the midpoint of this range as being a reasonable estimate of a rate, when advertising allowances are included. The midpoint is equal to $[REDACTED] per play. Peterson WDT ¶¶ 75–76.

Figure 2—The Adjusted Benchmarks [RESTRICTED]

[REDACTED]

c. SoundExchange's Criticisms of Dr. Peterson's Ad-Supported Benchmark Model

SoundExchange acknowledges that the Judges have found benchmark-based approaches useful in the past. However, SoundExchange disputes that the Judges have expressed a preference of benchmarking over other approaches, such as modeling. Instead, it offers that the Judges have assessed each type of analysis on the merits, as established by the record in each case. SoundExchange's Corrected Replies to Google's Amended Proposed Findings of Fact and Conclusions of Law ¶¶ 14–17 (SX RPFFCL (to Google)).

SoundExchange also initially disputed that the benchmarks proposed by Google are appropriate. SoundExchange argues that Dr. Peterson improperly used Spotify's ad-supported rates as a benchmark, suggesting that subscription interactive services are a better starting point than ad-supported interactive services. SoundExchange also urged that Spotify's ad-supported service should not be used as a benchmark without an upward adjustment to account for its [REDACTED] ability to promote sales of subscriptions. SX RPFFCL (to Google) ¶¶ 22–26. However, in the hearing Mr. Orszag testified that he had become ''comfortable'' with applying Spotify's *ad-supported rate* as the benchmark in his own ratio equivalency model. He came to this conclusion after discerning that [REDACTED].'' 8/25/20 Tr. 3809 (Orszag). When a [REDACTED] adjustment was made to control for the separate value of funneling/conversion, Mr. Orszag became, if not a full-fledged convert, ''more comfortable'' with the ''Spotify Free benchmark.'' 8/25/20 Tr. 3816 (Orszag).

i. SoundExchange's Criticisms of Dr. Peterson's Proposed Interactivity Adjustment

SoundExchange faults Dr. Peterson's interactivity adjustment because, in its view, the adjustment is not based sufficiently on the incremental value placed on the interactive functionality by consumers in the downstream market. It notes that in past cases the Judges have accepted interactivity adjustments based on downstream market value, evidenced by consumers' willingness to pay for the functionality. It offers that there is little evidence from Google that consumers actually value the additional functionality that [REDACTED] obtained under its direct licenses and that, in fact, the additional functionality on [REDACTED]'s ad-supported service was minimal. SX PFFCL ¶ 228–231; *Web IV,* 81 FR at 26345, 26348; *see also Web II,* 72 FR at 24902 (accepting SoundExchange's interactivity adjustment, based on average consumer subscription price and the average per-subscriber royalty rate for on-demand services). SoundExchange adds that Dr. Peterson was unable to indicate whether increased functionality generated more revenue per play on the ad-supported tier. SX PFFCL ¶ 232; 8/11/20 Tr. 1401 (Orszag). It adds that, per [REDACTED] (Trial Ex. 5321), [REDACTED]. SX PFFCL ¶ 232. SoundExchange suggests that the true motivation for [REDACTED] to license the increased functionality was to offer customers a sample of the full interactive function as a way to promote and upsell its subscription interactive service. SX PFFCL ¶¶ 235–236; 8/31/20 Tr. 4646 (Phillips).

SoundExchange asserts that Dr. Peterson's interactivity adjustment—being based on a comparison of [REDACTED]'s effective per-play rate for its ad-supported [REDACTED] service to the statutory rate—is based in part on the statutory rate, which violates requirements that benchmark rates be free from the influence of regulation. Sound Exchange raises further issues with regard to the relationship between the negotiated and statutory rates, with Mr. Orszag testifying that if the statutory rate that Dr. Peterson relied on in his adjustment is too low (as SoundExchange argues it is) then Dr. Peterson's interactivity adjustment will be too large. SX PFFCL ¶¶ 237–239; Orszag WRT ¶ 95.

ii. SoundExchange's Criticisms of Dr. Peterson's ''Skips'' Adjustment

SoundExchange questions the probative value of the data upon which Dr. Peterson relies for his [REDACTED]% skips adjustment on the same basis as it challenges his application of this data to Professor Shapiro skips adjustment. SoundExchange notes that Dr. Peterson's data came from noninteractive plays available on all three tiers of Pandora's service, ad-supported, mid-tier, and fully interactive. 8/20/20 Tr. 3028–29 (Shapiro). As a consequence, Mr. Orszag asserts, the [REDACTED]% ''skips'' rate is likely overstated, because subscribers to Pandora's two interactive tiers have unlimited skips, making them more likely to skip when accessing noninteractive plays on those two tiers. Orszag WRT ¶ 120. SoundExchange notes that Professor Shapiro agrees with the concern in principle but testified that any such upward bias [REDACTED], so he did not measure the effect. 8/20/20 Tr. 3030–32 (Shapiro).

SoundExchange also takes issue with Dr. Peterson's alternative skips adjustment and its reliance on the Spotify ad-supported service's skip rate [REDACTED]%), alleging Dr. Peterson's analysis is faulty for only considering the benchmark market's skip rate and ignoring the target market's skip rate. It argues that Spotify pays for its ad-supported service on a percentage of revenue basis and, therefore, whether Spotify's skip rate is [REDACTED]% has no impact on what Spotify pays the record companies on the percentage of revenue basis. It notes Mr. Orszag's view that the benchmark market's skip rate may only be used if there is a basis to assume that the benchmark market and the target market have the same skip rate and that there is no evidentiary basis for such a conclusion. SX PFFCL ¶¶ 244–247.

iii. SoundExchange's Criticisms of Dr. Peterson's Effective Competition Adjustment

SoundExchange criticizes Dr. Peterson's analysis asserting that it relied on stale evidence, from the time of *Web IV,* namely a 2014 agreement between Merlin and Pandora, a 2013 agreement between iHeart and WMG, and a 2014 litigation experiment conducted by Pandora. SoundExchange argues that the market for subscription interactive services has changed since *Web IV,* and that the increased competition would require a downward shift of the competition adjustment used in *Web IV.* It adds that the application of the evidence from *Web IV* would need to account for the differing market evidence used in that proceeding, involving many services and not just the

service with the [REDACTED]. SX PFFCL ¶¶ 490–493.

iv. SoundExchange's Reaction to Dr. Peterson's Proposed Marketing Adjustment

SoundExchange reiterates that value is derived by the record companies in the relevant agreements through provisions for the streaming services to provide marketing support in the form of uncompensated advertisements to the record labels. SX PFFCL ¶¶ 490–493. It points out that Dr. Peterson calculated proposed adjustments based on advertising benefits and that Google should not be able to walk away from the adjustments. SX RPFFCL (to Google) ¶ 69.

d. The Judges' Analysis and Findings Regarding Dr. Peterson's Ad-Supported Benchmark Model

As an initial matter, the Judges clarify that they do not strictly adhere to any preference toward any particular method of analysis, benchmark or otherwise, but instead assess all reasoned analyses on their merits and on the record of each case.

Taking into account the entirety of the record, the Judges determine that it is appropriate to utilize the proposed benchmarks from the interactive ad-supported market, provided that an appropriate conversion adjustment is applied.[213] The Judges apply the aforementioned [REDACTED] adjustment to the rates for [REDACTED]). Where negotiated provisions place a value on funneling in the benchmark agreements, the Judges find an adjustment is appropriate. While Dr. Peterson started his analysis with the higher-end per-play rate under the [REDACTED] for customers who [REDACTED], the Judges note that this is not necessarily the [REDACTED]. The Judges find that Mr. Orszag's proposal is a superior mode to account for the value of funneling. However, as there is insufficient evidence and analysis of analogous funneling value in the [REDACTED], the Judges make no such adjustment to those benchmark rates.

Applying this [REDACTED] factor to Dr. Peterson's calculated per-play rates for [REDACTED], results in a final effective rate of $[REDACTED] (*i.e.,* $[REDACTED] × [REDACTED]) or $[REDACTED] (rounded) [REDACTED]; and $[REDACTED] (*i.e.,* $[REDACTED] × [REDACTED]) or $[REDACTED] (rounded) for [REDACTED]. The starting point benchmark per-play rates calculated by Dr. Peterson for [REDACTED] remain.

i. The Judges' Analysis and Findings Regarding Dr. Peterson's Proposed Adjustments

(A) The Judges' Analysis and Findings Regarding Dr. Peterson's Proposed Interactivity Adjustments

Based on the entirety of the record, the Judges decline to apply Dr. Peterson's—proposed interactivity adjustments. The Judges agree with SoundExchange that the record does not clearly demonstrate added economic value for interactivity as a suitable basis to adjust the proposed benchmark rates downward. Advertisers, not listeners, pay the royalties. And there is insufficient evidence to establish that advertisers make payments to noninteractive ad-supported services based upon the level of interactivity of that service.

While we do not foreclose the possibility of a record that may allow measuring interactivity value by looking toward how the service and the labels (as opposed to downstream users) value that interactivity in an ad-supported context, on this record the Judges will not apply an interactivity analysis which fails to appropriately consider oligopoly power in a direct deal such as the proposed [REDACTED] benchmark. The Judges' decline to apply the proposed interactivity adjustment in part because the record, [REDACTED], indicates that major labels exert oligopoly power in similar direct deals. When Judge Strickler asked Dr. Peterson whether any of the proposed [REDACTED]% adjustment for interactivity constitutes a complementary oligopoly premium, he conceded that he could not preclude that oligopoly power could be a cause of the higher rate. 8/25/20 Tr. 3645 (Peterson). Absent accurate consideration of oligopoly power, which is persuasively established elsewhere, we find it inappropriate to apply the proposed interactivity adjustment.

(B) The Judges' Analysis and Findings Regarding Dr. Peterson's Proposed Skips Adjustment

As indicated previously, the Judges are in agreement with SoundExchange's criticisms of both Professor Shapiro's and Dr. Peterson's skips adjustment for ad-supported services. Additionally the Judges agree that the reliance on the Spotify ad-supported service's skip rate ([REDACTED]%) as a basis for adjustment is in error. The Judges agree that there is insufficient basis to conclude that the benchmark market and the target market have the same skip rate, and that absent reliable evidence to that effect a direct adjustment as proposed would be incorrect. Accordingly, and based on the entire record, the Judges adopt (and incorporate by reference here) the same analysis and the same finding of a [REDACTED]% skips adjustment as they found for the subscription market.

(C) The Judges' Analysis and Findings Regarding Dr. Peterson's Proposed Competition Adjustment

Taking into account the entirety of the record, the Judges are persuaded of the necessity to apply an effective competition adjustment. For the reasons discussed with regard to the effective competition adjustment to Professor Shapiro's ad-supported benchmark, the Judges apply a 12% effective competition adjustment to Dr. Peterson's ad-supported rate. The Judges' Analysis and Findings regarding Dr. Peterson's Proposed Marketing Adjustment.

Based on the entirety of the record, the Judges find that it is appropriate to apply the marketing adjustment, as offered by Dr. Peterson. While we note that Google and Dr. Peterson offer rationales that an adjustment may not be appropriate, Dr. Peterson also found a basis to place a value on this factor. Additionally, while Dr. Peterson offers calculations performed with and without the marketing adjustment, his ultimate analytical step, finding a midpoint within the range of rates he calculated, was done based on calculations that included the marketing adjustment. Finally, we are in agreement with SoundExchange that Google has not offered a sufficient basis to distance itself or the Judges from applying a factor offered by Google's own expert analysis.

ii. Dr. Peterson's Benchmark Rate as Adjusted by the Judges

In sum, the Judges find as follows with regard to Dr. Peterson's proposed ad-supported benchmark rate:

1. The effective ad-supported benchmark per-play rates of $[REDACTED] for [REDACTED], $[REDACTED] for [REDACTED], $[REDACTED] for [REDACTED], $[REDACTED] for [REDACTED], and $[REDACTED] for [REDACTED] are in the range of a reasonable starting point.

2. Applying the [REDACTED] factor to account for funneling/conversion to Dr. Peterson's calculated per-play rates for [REDACTED], results in a final effective rate of $[REDACTED] (*i.e.,* $[REDACTED] × [REDACTED]) or $[REDACTED] (rounded) for

[213] The Judges find insufficient basis to find that any shift in song length is not adequately accounted for in the benchmark markets.

[REDACTED]; and $[REDACTED] (*i.e.,* $[REDACTED] × [REDACTED]) or $[REDACTED] (rounded) for [REDACTED] The starting point benchmark per-play rates calculated by Dr. Peterson's for [REDACTED] remain respectively as $[REDACTED], $[REDACTED], and $[REDACTED].

3. The interactivity adjustment is rejected.

4. The skips adjustment is reduced to [REDACTED]%, properly reducing the interim calculation to $[REDACTED] (rounded) for [REDACTED], $[REDACTED] (rounded) for [REDACTED], $[REDACTED] (rounded) for [REDACTED], $[REDACTED] (rounded) for [REDACTED], and $[REDACTED] (rounded) for [REDACTED].

5. The 24% effective competition adjustment proposed by Dr. Peterson is rejected.

6. The Judges apply the 12% effective competition adjustment. This effective competition adjustment properly reduces the interim calculation to $[REDACTED] (rounded) for [REDACTED], $[REDACTED] (rounded) for [REDACTED], $[REDACTED] (rounded) for [REDACTED], $[REDACTED] (rounded) for [REDACTED], and $[REDACTED] (rounded) for [REDACTED].

7. Applying the Marketing adjustments set forth by Dr. Peterson, increasing the per-play rates as follows of $[REDACTED] [$[REDACTED] + $[REDACTED]] for [REDACTED], $[REDACTED] [$[REDACTED] + $[REDACTED]] for [REDACTED], $[REDACTED] [$[REDACTED] + $[REDACTED]] for [REDACTED], $[REDACTED] [$[REDACTED] + $[REDACTED]] for [REDACTED], and $[REDACTED] [$[REDACTED] + $[REDACTED]] for [REDACTED].

8. The range of adjusted rates is $0.00197 and $0.00228 per play, and the midpoint of $0.002125, when rounded (or, more precisely, rounded further) is *$0.0021,* which is a reasonable estimate of the rate applying the Judges' modifications to Dr. Peterson's model.

5. Separate Rate for Nonportable Services

a. Google's Proposal

Google seeks a separate rate for certain nonportable uses, citing the statutory directive that the Judges ''shall distinguish among the different types of services then in operation.'' 17 U.S.C. 114(f)(1)(B). Google argues that the rise of nonportable smart speaker devices, and streaming services tailored to those devices, has created such a different type of service. Google PFFCL ¶¶ 91–92. It offers that separate rates for nonportable uses have been adopted by the Board in other regulations and that the Judges should set a separate rate for nonportable, nonsubscription services that is 50% of whatever headline rate the Judges set for portable nonsubscription services. Google PFFCL ¶¶ 93–94. Specifically, Google seeks a per-performance rate for the new type of service that it refers to as ''Nonsubscription Nonportable Webcasting Services'' which Google proposes to define as ''a service offered by a Licensee that makes an Eligible Transmission available solely over a nonportable device, such as a smart speaker, a smart home appliance, or a personal computer.'' Google Proposed Rates and Terms at 3.

Google offers proposed benchmark licenses between major labels ([REDACTED]) with Google as evidence in support of its proposal, which include [REDACTED]. Google PFFCL ¶ 102. It [REDACTED]. Google PFFCL ¶ 103. Google asserts that the [REDACTED] reflect an understanding that consumers are willing to pay an incremental amount for the ability to take music with them on phones and portable devices. Google PFFCL ¶ 104. Google also points toward lower rate structures for certain nonportable services in the context of the mechanical compulsory license under 17 U.S.C. 115. Google PFFCL ¶ 105.

b. SoundExchange's Criticism of Google's Proposal for a Separate Rate for Nonportable Services

SoundExchange asserts that Google has not established that streaming services that are available only on nonportable devices are a different type of service warranting a different rate, and that there is no evidence that a willing buyer and willing seller would agree to lower rates for such a service. SX RPFFCL (to Google) ¶ 94. It contends that Google confuses nonportable devices with nonportable services in its attempts to highlight ''Nonsubscription Nonportable Webcasting Services'' as an allegedly different type of service. SoundExchange argues that the dichotomy that Google proposes is undermined by the fact that portable services can also be consumed on nonportable devices. SX RPFFCL (to Google) ¶ 96. SoundExchange challenges the notion that any growing popularity of smart speakers supports the notion that streaming services that can only be operated on a smart speaker are growing in popularity or exist as a different type of service. SX RPFFCL (to Google) ¶ 97. It argues that Google ''bears the burden of demonstrating not only that'' nonportable services ''differ[] from other forms of commercial webcasting, but also that [they differ] in ways that would cause willing buyers and willing sellers to agree to a lower royalty rate in the hypothetical market.'' SX RPFFCL (to Google) ¶ 100 (citing *Web IV,* 81 FR at 26320 (applying that principle to simulcasters)).

SoundExchange contends that the proposed benchmark agreements do not match up with Google's rate proposal. It notes that the [REDACTED]. Through Mr. Orszag, SoundExchange posits that [REDACTED] and does not support the notion that the rate should be half of the per-performance rate for a service available on a broader range of devices. SX RPFFCL (to Google) ¶ 94; Orszag WRT ¶¶ 139–140.

SoundExchange further addresses concerns that the proposed benchmarks do not provide useful information about the *per-performance* rate for a service tier accessible on *multiple* nonportable devices to which a willing buyer and a willing seller would agree. SX RPFFCL (to Google) ¶ 101. It notes that even if the offered [REDACTED] were relevant, it would be inappropriate to attribute all of the difference in [REDACTED] to nonportability because the rates are also driven by the fact that they are for single-device services, which excluded classes of devices that would be eligible under Google's proposed rates and terms, *e.g.,* a personal computer. SoundExchange suggests these distinctions discount the notion that [REDACTED]. SX RPFFCL (to Google) ¶¶ 102–104, 110. SoundExchange also challenges the notion that the cited rates for certain nonportable mechanical licensing royalties are not appropriate support for Google's proposal because they address different rights to different works with different sellers. SX RPFFCL (to Google) ¶¶ 104–106.

c. The Judges' Analysis and Findings Regarding Google's Proposal for a Separate Rate for Nonportable Services

Based on the entirety of the record the Judges are not persuaded that Google has established the basis for a separate rate for Nonsubscription Nonportable Webcasting Services. While the Judges have concerns about the extent to which the [REDACTED] and the appropriate use of mechanical rates within the context of the section 115 compulsory regime as persuasive evidence for the purpose of sustaining a separate rate, those are relatively minor concerns. The Judges find the case for a separate rate is most profoundly undermined because the requested rates would extend far beyond the bounds of the proposed benchmark agreements.

The benchmark agreements are tied to [REDACTED] and to very specific device characteristics,[214] whereas the requested rate (and defined bounds) are not tied or specifically limited to the same specific types of devices, nor are they limited to [REDACTED]. This makes them poor benchmarks and makes for a poor case for the existence of the requested distinct different type of service. Furthermore, Google did not adequately acknowledge or offer appropriate adjustments to account for the fairly profound distinctions between its request and the limitations represented in its proposed benchmarks. While the Judges may amend a request to comport with the offered evidence, on this record we find an inadequate basis to do so. Additionally, in a case such as this where the request diverts so profoundly from the offered benchmark evidence, prudence compels the Judges not to engage in such refining of the requested rates or terms.

C. Evaluation of Game Theoretic Modelling Evidence

1. Professor Willig's Shapley Value Model

Professor Willig describes his Shapley Value Model as a ''multi-party bargaining approach.'' Willig WDT ¶ 9. He explains that his Shapley Value Model is a form of economic game theory that assumes a ''cooperative'' relationship among the bargaining parties, *id.* ¶ 12, providing a ''generalized solution to the problem of how to apportion among the members of a multi-party bargaining group the surplus created by their productive cooperation with each other.'' *Id.* ¶ 14.[215]

Professor Willig's Shapley Value Model indicates a royalty rate for *ad-supported* noninteractive services of $0.0028 per play in 2021, and, for *subscription* noninteractive services, a per-play royalty rate of $0.0030 in 2021. Willig WDT ¶ 55. He derives these 2021 royalty rates from the average royalty rates over the entire five-year (2021–2025) rate period generated by his Shapley modeling, which are $0.0030 and $0.0031 for the ad-supported and subscription services, respectively.[216]

According to Professor Willig, the Shapley Value Model has properties that make it well suited for establishing royalties in this proceeding. He explains that this modeling, when combined with relevant data, identifies the following values and properties:

1. The ''fallback value'' which any party (record company or streaming service in the present case) could create on its own without an agreement among one or more of the other parties. Willig WDT ¶ 13.

2. The extra value—the Shapley ''surplus''—that the parties collectively could generate in ''notional''[217] agreements with the other parties, above their fallback values. *Id.*

3. The ordering of ''every possible combination of unilateral, bilateral and multilateral deals that may be struck by the different parties.'' *Id.* ¶ 14.[218]

4. The portions of the surplus—the ''incremental contribution''—that each party adds to the total amount of value created, is ''assessed as increments to every possible combination of unilateral, bilateral, and multilateral deals that may be struck by the different parties . . . .'' *Id.*

5. Each party's ''incremental contribution'' is then averaged across all such combinations.'' *Id.*

Each party's average incremental contribution is its Shapley Value. *Id.* ¶ 16 (''The Shapley Value accorded to a party rests on the value that it brings to the group's cooperation, taking into account all the subsets of the group to which it can join.'').

To further explain the Shapley Value concept, Professor Willig provides the following example:[219]

The concept of a Shapley Value is best understood by reference to a simple analogy. Imagine that parties A, B, and C are negotiating a deal in person. Party C can be the first, the second, or the third to arrive in the room. The value it brings to the bargaining table may be contingent on the order in which it arrives. For example, if Party C is last to the negotiation it may have more bargaining power as a result of its ability to hold up or frustrate consummation of a deal to which Parties A and B are otherwise amenable. When C is first to the negotiation, it has no bargaining power over the others. Shapley analysis takes into account all such possible differences in Party C's bargaining power that are contingent on its order of arrival to the negotiation. It does so by taking the average of each ''incremental value'' created by Party C in each possible sequence of arrivals. As such, Party C's Shapley Value will only be high relative to the other parties' Shapley Values if, on average, it brings a relatively high incremental value to all possible orderings and sub-orderings of Parties A, B, and C.

Id. ¶ 15.

The value of a sub-set—*i.e.,* a Shapley coalition—prior to joinder by other parties to the notional negotiation, is denominated as its ''Characteristic Function.'' The calculation of its Characteristic Function is ''necessary to assess and delineate the value that can result from the cooperation of any subset of the overall cooperating group.'' *Id.* ¶ 17. The value of each coalition's Characteristic Function is based on the fundamental economic principle that a coalition of willing sellers (like any individual seller) ''is assumed to act in the manner that maximizes the collective surplus of the coalition.''. Willig WDT app. C at C–4 (¶ 6 therein); *see also id.* app. F at F–4 (¶ 7 therein) (same). After specifying these coalitions and calculating the maximum values of their characteristic functions, the modeler can derive Shapley Values for each party to the notional Shapley ''negotiation.'' *Id.* ¶ 33.

Professor Willig contends that Shapley Value modeling is related to the royalties that are to be determined in the present proceeding, with the record companies and the noninteractive streaming services constituting the ''arriving'' participants. The record companies must: (1) Recover their opportunity costs,[220] identified as their fallback values in Professor Willig's model; and (2) receive their Shapley Values, *i.e.,* their average share of the surplus they contribute across all arrivals. Thus, unless royalty payouts are *high* enough to at least allow the

[214] [REDACTED], Trial Ex. 5090 at 37 ([REDACTED] [REDACTED]); [REDACTED], Trial Ex. 1006 at 50 [REDACTED]); [REDACTED], Trial Ex. 1010 at 65–66 ([REDACTED]).

[215] A ''cooperative'' game assumes that the participants' ''joint action agreements are enforceable,'' and are distinguished from ''non-cooperative games,'' ''in which such enforcement is not possible, and individual participants must be allowed to act in their own interests.'' Avinash Dixit et al., Games of Strategy 26 (3d ed. 2009).

[216] More particularly, Professor Willig derives his proposed 2021 rates from his five-year average by discounting back from the mid-point of the rate period to the start of the period, using the Federal Reserve Open Market Committee's inflation forecast. *Id.*

[217] The Judges use ''notional'' to identify the negotiations assumed in Shapley Value modeling, and to distinguish those ersatz negotiations from the ''hypothetical'' negotiations the Judges must construct to establish the statutory royalty rates. More precisely, the ''notional'' Shapley Value negotiations generate ''notional'' royalty rates that may: (1) Constitute a ''hypothetical'' rate that would constitute an effectively competitive rate; (2) fail to reflect a ''hypothetical'' effectively competitive rate; or (3) serve as a building block that, with adjustments or offsets, is an input into a ''hypothetical'' effectively competitive rate.

[218] As Professor Willig explains: ''In Shapley Value analysis there are always N! (*i.e.,* N factorial) different arrival orderings, where N is the number of negotiating parties. For example, with three negotiating parties, there are 3! (*i.e.,* $3 \times 2 \times 1$) = 6 different arrival orderings. *Id.* ¶ 20 n.13.

[219] In this proceeding, the economic experts appropriately proffer potentially illuminating examples (as in the accompanying text) in an attempt to state clearly the principles and methods underlying their work. The Judges find their use of such examples to be consistent with the evidentiary principles set forth in 37 CFR 351.10(e).

[220] ''The opportunity cost'' of anything of value is what you must give up to get it,'' and thus ''is inseparably bound up with choice.'' John Quiggin, Economics in Two Lessons: Why Markets Work So Well, and Why They Can Fail So Badly 15 (2019).

record companies to receive their fallback values (*i.e.,* their opportunity costs) plus their Shapley Values, they would not license their repertoires to the noninteractive services. In similar fashion, the noninteractive services will receive their average share across all arrival orderings, corresponding to their Shapley Values (also calculated across all arrivals, of Shapley-derived Surplus). *See* Willig WDT ¶ 24 (describing this application of Shapley Value modeling).

According to Professor Willig, in this proceeding, a record company's ''opportunity costs'' include any marginally higher royalties it might have earned by licensing to other distribution methods (such as, *e.g.,* interactive services), rather than licensing its sound recordings to noninteractive services.[221] Thus, he claims that Shapley Value modeling is ''an appropriate approach for assessing rates that would be negotiated in the hypothetical marketplace for noninteractive webcasting [because it] fit[s]within the requirements of the relevant legal statute.'' *Id.*

a. The Specifications in Professor Willig's Shapley Value Model

A necessary initial step for an economist constructing a Shapley Value model is the delineation and enumeration of the parties to the notional negotiations, *i.e.,* the types and the number of sellers and buyers (licensors and licensees in this proceeding). *Id.* ¶ 25. According to Professor Willig, this process should ''strike[] a balance between offering a granular and realistic description of the hypothetical market [while] maintaining enough simplicity around the number of entities being modeled such that the model can be readily solved and necessary data inputs can be estimated.'' *Id.* ¶ 26.

In the notional negotiations of his Shapley modeling, Professor Willig assumes a market with four upstream record companies and two downstream noninteractive webcasting distributors. Willig WDT ¶ 25. Three of these four record companies represent each of the major record companies (Sony, Warner and Universal) (collectively the Majors), and the fourth represents a ''combination'' of all independent record companies (Indies). *Id.* Thus, these four entities comprise the entirety of the record company licensors in his market model. The two noninteractive services represent, respectively, a combination of all ad-supported noninteractive distributors, and a combination of all subscription noninteractive distributors, thus comprising the entirety of the noninteractive licensees. *Id.* According to Professor Willig, these assumptions strike the required balance between granular realism and model tractability. *Id.*

Professor Willig claims that the assumptions he makes regarding these specifications are necessary and prudent because they allow the model to generate the following economic information:

1. The effects of the ''potentially different negotiating positions'' of the Majors vis-à-vis the Indies.

2. The difference, if any, in royalty rates, between ad-supported noninteractive services, on the one hand, and subscription noninteractive services, on the other.

3. The effects of ''competition between the collective ad-supported noninteractive distributor and the collective subscription noninteractive distributor.''

Willig WDT ¶ 26. Professor Willig adds that his model will generate royalty rates that are *lower* than would exist in the actual market because the model's ''grouping'' of services ''simplifies away rivalry among the various extant ad-supported noninteractive distributors and among the various extant subscription noninteractive distributors, [which] eliminate[es] consideration of competition within these groups of distributors,'' artificially *elevating* ''their respective market power. *Id.*[222]

Next, Professor Willig calculates the value of the ''characteristic functions'' created by each possible cooperative grouping (''coalition'') of these six parties to the notional negotiation (*i.e.,* the four record companies and two noninteractive distributors). To make these ''characteristic function'' calculations, he first determines the value that each party or set of parties contributes upon arriving to the coalition. *Id.* ¶ 27.

Starting with the record companies, Professor Willig defines the value each brings to these coalitions as ''a function of both the costs it incurs and the revenue it could generate by licensing its sound recordings to distributors other than interactive services.'' *Id.* ¶ 28. Professor Willig characterizes this value as a record company's ''fallback value''—*i.e.,* a value it would retain in the absence of agreements with the noninteractive distributors. *Id.*[223]

According to Professor Willig, in order to determine this fallback value the model must ''evaluat[e] what would happen if each noninteractive [service] did not have access to that record company's music.'' *Id.* ¶ 29. In that regard, he testifies that the model must explain—assuming the absence of noninteractive services from the market—''how much of each noninteractive [service's] audience would divert to other music listening options (including to the other noninteractive distributor).'' *Id.*[224]

Because of the importance to his Shapley Value Model of the value of this diversion, Professor Willig begins the model-building aspect of his testimony by describing the type of data necessary to calculate the diversionary impact of noninteractive services. Specifically, he explains that his model requires the following inputs:

1. The size of the audience of each noninteractive distributor;

2. The diversion parameters that represent the proportion of these audiences that would divert to each alternative mode of distribution; and

3. The respective share of noninteractive plays for each record company specified in the model. *Id.*

Professor Willig explains that the value the noninteractive services bring to the notional Shapley negotiation is based on the profits they can generate, *i.e.,* from the revenues they receive from subscribers and advertisers, less

[221] Note that his application of the opportunity cost concept does not include the value of additional royalties that a record company would have earned *by licensing* its sound recordings to noninteractive services—such as royalties earned because some listeners to terrestrial radio, (which does not pay sound recording royalties) might have converted to noninteractive listening (as indicated by the surveys presented in this case, discussed *infra,* section IV.A). These negative opportunity costs (opportunity benefits) would need to be offset against the opportunity costs described by Professor Willig in the accompanying text, to determine *the net value of all opportunities foregone. See* Paul J. Ferraro and Laura O. Taylor, *Do Economists Recognize an Opportunity Cost When They See One? A Dismal Performance from the Dismal Science,* 4 J. Econ. Analysis & Pol'y 1, 7 (2005) (''An avoided benefit is a cost, and an avoided cost is a benefit. Thus, the opportunity cost . . . is . . . the *net benefit forgone.*'') (emphasis added).

[222] This specification may not be a simplification so much as an approximation of reality. As noted *infra,* Professor Willig finds that in the noninteractive market Pandora has a market share of more than [REDACTED]% in the ad supported and subscription sectors, respectively, making the ''one noninteractive service'' specification fairly realistic.

[223] Professor Willig acknowledged that the ''fallback value'' in his model doesn't specify whether that fallback value is generated from markets that are perfectly competitive, monopolistically competitive, oligopolistic or monopolistic. 8/5/20 Tr. 378–79 (Willig).

[224] As noted *supra,* his model does not net out the positive royalties record companies would earn by listeners who would listen to a noninteractive service rather than to terrestrial radio (or, any other non-royalty bearing substitute, such as listening to existing music sources or listening to less music, for that matter).

''various costs''—including the copyright royalties noninteractive services pay to music publishers for musical works. *Id.* ¶ 30. These costs of course do not include the sound recording royalties, as these are the ''unknowns'' for which the Shapley Value model is intended to solve. *See id.* ¶ 30.

Professor Willig's Shapley Value Model treats licenses from all three Majors as essential to the viability of a noninteractive service, in each Shapley subset of negotiating parties. As Professor Willig notes, incorporating this ''must have'' input into the Shapley Value model means that ''without access to the sound recordings of all three of the major record companies, a noninteractive distributor does not operate and contributes zero profits to the rest of the subset of the bargaining parties.'' Willig WDT ¶ 31.[225]

To support his treatment of each Major as a ''Must Have,'' Professor Willig relies on an abundance of record facts and prior statements by the Judges, as enumerated below.

First, Professor Willig notes that, in *Web IV,* the Judges stated that ''[t]here appears to be a consensus that *the repertoire of each of the three Majors is a 'must have' in order for a noninteractive service to be viable.*'' *Web IV,* 81 FR at 26373 (emphasis added). This statement by the Judges was supported by testimony in *Web IV.* In that proceeding, Professor Michael Katz, the NAB's economic expert witness, and Professor Shapiro, testifying for Pandora, both declined to conclude that the Majors were not ''Must Haves'' for noninteractive services. *Web IV,* 81 FR at 26364. Additionally, in *Web IV* the Judges found that the ''Must Have'' status of noninteractive services was demonstrated by Pandora's own data showing the high percentage of total plays on Pandora that were comprised of the most popular songs (hits), *i.e.,* from the top 5%, 10%, and 20% of ''weekly spins,'' a percentage greater than the total percent of overall plays of Majors' recordings on Pandora. As the Judges stated, ''[t]hese 'top spin' figures are indicative of the 'must have' aspect of the Majors' repertoire,'' and explain ''why steering away from [the Majors'] repertoires cannot be pursued beyond a certain level, and why [Professor] Shapiro candidly declined to reject the idea that the Majors' repertoires were 'must haves' even though noninteractive services could steer away from them to an extent.'' *Id.* at 26373 n.155.

In this proceeding, SoundExchange notes that an even earlier proceeding took note of the importance to a noninteractive service of accessing all the ''hits.'' SX PFFCL ¶ 595 (citing *SDARS II,* 78 FR at 23064 (quoting a Sirius XM witness who testified that ''Sirius XM is very hits driven, and they want to have the most successful service they can, so they're going to use what's popular.'')). Further, SoundExchange identifies the body of evidence in the present record that belies a view that a noninteractive streaming service could simply eliminate a Major's entire repertoire:

> Numerous documents produced by Pandora explain that [REDACTED]. Tr. Ex. 5153 at 35–56; *see* 8/5/20 Tr. 467:17–468:5 (Willig); 8/10/20 Tr. 960:3–961:1 (Willig); *see, e.g.,* Ex. 5156 at 17 [REDACTED] Ex. 5157 at 22 [REDACTED]); Ex. 5154 at 18 ([REDACTED]); Ex. 5155 at 31 ([REDACTED]''); Ex. 5158 at 13 [REDACTED]).

SX PFFCL ¶ 596.[226]

The only new evidence that the Services proffer that would potentially support their claim that noninteractive services can move beyond steering and forego the entire repertoire of a Major are the results from Pandora' Label Suppression Experiments. However, as explained in the Judges' consideration of Professor Shapiro's game theoretic modeling they find that evidence to be deficient and accord it no weight.

For the foregoing reasons, the Judges find Professor Willig's decision to treat each of the three Majors as a ''Must Have'' to be reasonable and proper.

Having specified the ''characteristic functions'' in his model, Professor Willig derives the algebraic expression of the Shapley Values for each party in the negotiation styled by the Shapley Value methodology. *Id.* ¶ 33 & app. C. Applying the ''characteristic function'' concepts he delineated earlier, Professor Willig notes that his algebraic analysis identifies ''[t]he difference between the characteristic function for a subset of the parties *without* the [noninteractive service] and the characteristic function for that subset *with* the [noninteractive service] added . . . .'' *Id.* at 33. Applying this mathematical difference, Professor Willig states that his model allows for the implementation of the applicable ''Shapley Value algorithm.'' *Id.* app. C at C–5 (¶ 9 therein). This algorithm allows Professor Willig to evaluate ''every possible arrival ordering'' and determine the negotiating parties' ''incremental value.'' *Id.*

He then utilizes his model to determine the ''incremental value'' contributed by each ''arriving'' negotiating party identified in his model, relative to the value created by the parties that preceded the ''arriving'' party. Professor Willig then averages the sum of these incremental contributions for each negotiating party across all 720 arrival orderings.[227] *Id.* Each party's average incremental contribution constitutes its individual Shapley Value.

Professor Willig next explains how his model makes the link between Shapley Values and the royalties to be paid to the record companies:

> [O]nce Shapley Values are derived, the corresponding royalties from the two noninteractive distributors to the record companies can be computed. These are the payments that result in each party's bottom line equaling its Shapley Value.
>
> For each [noninteractive service], the total royalty payments it makes to the record companies must equal the difference between its profits from its market operations and its Shapley Value.
>
> For each record company, the total royalty payments it receives must equal the difference between its Shapley Value and the total compensation it receives from its other sources of distribution, less its costs of operation.

Id. ¶ 34; *see also id.* app. C, p. C–6 (¶ 10 therein).

b. The Empirical Inputs in Professor Willig's Shapley Value Model

Having specified his Shapley Value Model, Professor Willig then identifies the following necessary categories of data inputs:

1. Royalty rates that record companies earn from other forms of music distribution;
2. noninteractive distributors' audience sizes;
3. diversion ratios reflecting the amount of a noninteractive distributor's audience that would switch to other forms of music distribution and generate royalties if that noninteractive distributor were unavailable;
4. record company play shares; and
5. noninteractive distributors' fixed costs and marginal profit rates.

Willig WDT ¶ 35. He then explains how he selected the data for each of these

[225] By contrast, Professor Willig's model does not assume that the repertoires of the specified aggregate of Indies are ''must have'' inputs for a noninteractive service. Rather, his model assumes that a noninteractive service without access to all of the Indies' sound recordings would not suffer a complete loss of profits attributable to the Indies, but would instead would see a decline in profits commensurate with listeners' preferences for content carried by [I]ndies.'' *Id.*

[226] SoundExchange also relies on evidence regarding the ''Must Have'' status of the Majors' individual repertoires to *interactive* services. The Judges do not find that evidence germane to the question of whether the Majors are ''Must Haves'' for *noninteractive* services.

[227] Given the presence of six ''players'' in his model, there are 6! (*i.e.,* 720) arrival orderings.

five input categories, as described below.

i. Royalties From Other Forms of Distribution

Professor Willig uses ''currently observable'' sound recording rates as proxies for the sound recording royalty rates that will prevail during the rate period, 2021–2025. *Id.* ¶ 36. The *first* alternative category of distribution he considers is comprised of *subscription* on-demand streaming music and video services. Professor Willig obtains the royalty payment data detail for eight such services [228] from the royalty statements of the three Majors and Merlin Network (Merlin), a digital rights agency for independent record labels. *Id.* ¶ 37.[229] This royalty data reflected payment over the 12-month period ending March 2019, the most recent four-quarter period for which data was available to Professor Willig. *Id.* The average monthly royalties paid by these eight services, weighted by each service's subscriber count, was approximately $[REDACTED] per subscriber. *See id.* app. D at ex. D.1.

The *second* alternative rate/service category Professor Willig considers is comprised of *ad-supported* on-demand streaming music and video services. He obtained the royalty payment data detail for three such services—Spotify, YouTube (free version) and Vevo. *Id.* ¶ 38. The royalty data was produced by the same four entities that provided the royalty data for subscription on-demand services, and covered the same four-quarter time period. The average amount of royalties these three services paid over this period, weighted by each service's total plays, was approximately $[REDACTED] per play. *See id.* app. D at ex. D.2.

The *third* alternative rate/service category Professor Willig considers is Sirius XM *satellite radio transmission.* He obtained data on effective royalty rates, over the same 12-month period identified above, from: (i) Statements of Account provided by Sirius XM to SoundExchange showing the dollar value of royalties paid for satellite radio performances; and (ii) Sirius XM's SEC Forms 10–K and 10–Q filings setting forth its subscriber counts. *Id.* ¶ 39 & n.21 (and exhibits referenced therein). Professor Willig uses these data to compute average monthly subscriber counts, and then divides that count into average monthly royalties. *Id.* This division results in Sirius XM monthly royalties per subscriber of $[REDACTED].[230]

The *fourth* alternative royalty-bearing category Professor Willig considers is generated not by royalty payments from intermediaries, but rather by consumer payments to *purchase* digital downloads and physical music (*i.e.,* CDs and vinyl records). *Id.* ¶ 40. He relies on 2018 wholesale and retail sales data from the Recording Industry Association of America (RIAA) and from a 2018 Annual Music Study by an industry research firm, MusicWatch, prepared for the RIAA. These data provide information on the average dollar amount spent by purchasers of sound recordings in these formats. *Id.* Professor Willig also relies on additional 2018 RIAA data on the percent of the retail prices of digital downloads, CDs and vinyl records, respectively, that is paid as royalties on sales in these three categories. *Id.* ¶ 40 app. D at ex. D.3. He then multiplies each retail revenue amount by the applicable royalty percentage, to generate the following calculation of ''average monthly royalties per purchaser'':

$[REDACTED] for digital download purchasers
$[REDACTED] for CD purchasers
$[REDACTED] for vinyl record purchasers

Professor Willig then calculates an average royalty per purchaser of $[REDACTED], weighted by retail revenue percentages across these three sales formats. *Id.* app. D at ex. D.3.

The *fifth* (and final) alternative category of distribution Professor Willig considers is comprised of *AM/FM broadcasts* (to be clear, these are broadcasts via terrestrial radio rather than ''simulcasts'' over the internet) and a miscellaneous category for all other forms of music. *Id.* at 41.

The royalty rates calculated by Professor Willig for the foregoing categories are set forth in the figure below:

Figure 4—Royalty Rates for Outside Distributors (RESTRICTED)

[REDACTED]

Willig WDT fig.4.

Professor Willig testifies that in his Shapley Value Model, for the outside distributors identified in the above table, ''[e]ach of their respective royalty rates are taken as they actually are or are expected to be.'' Willig WDT ¶ 28. Accordingly, ''the options of listening to broadcast AM/FM radio or not listening to music . . . are modeled realistically as not producing any royalties for the record companies.'' *Id.; see also* 8/5/20 Tr. 406 (Willig) (''I took those elements of opportunity costs from the market data as they are.''); *id.* at 378–79, 488–89 (Willig). SoundExchange notes that Professor Willig's treatment of ''outside distributors,'' including those that do not generate any royalties, such as AM/FM radio, is ''[c]onsistent with the ''fork in the road'' approach taken by Professor Willig and adopted in *SDARS III.*'' SX PFFCL ¶ 625 (citing *SDARS III,* 83 FR at 65328).

ii. Noninteractive Distributors' Audience Sizes

In order to estimate the extent of diversion to alternative distribution methods and thus the value of the record companies' opportunity cost in licensing to noninteractive services (in the hypothetical market), Professor Willig also needs to estimate audience sizes for the noninteractive distributors. He identifies ''total numbers of plays per month'' as an appropriate measure to use in order to gauge audience size. Willig WDT ¶ 43.

To make this calculation, Professor Willig relies on Pandora's publicly reported financial projections to estimate its audience size, *see id.* ex. D.6, and he relies on SoundExchange's royalty statements and other data to estimate Pandora's *play share* of the noninteractive markets. These data indicate that Pandora which has approximately [REDACTED]% of the *play share* of the *ad-supported* noninteractive market and an [REDACTED]% play share of the *subscription* noninteractive market. *See id.,* app. D at ex. D.4. Professor Willig uses this *play share percentage* data as a proxy, to estimate Pandora's *audience share percentage* of the noninteractive ad-supported and subscription markets. He further assumes that Pandora will have the same shares of these markets throughout the 2021–2025 rate period as it did over the recent 12-month period ending March 2019. Willig WDT ¶ 43.

Using these Pandora's market shares, Professor Willig grosses up the Pandora audience size to reflect the total size of the noninteractive audience in these markets. By this method, he estimates that the *ad-supported* noninteractive

[228] The eight services are: [REDACTED]. Willig WDT app. D, ex. D.1.

[229] Merlin is a non-profit association for independent labels with more than 800 members representing tens of thousands of labels from 63 countries, including the United States. Orszag WDT ¶ 25.

[230] Professor Willig asserts that the royalty rates he calculated for Sirius XM are ''artificially'' low, because they do not account for: (i) Royalties paid through licenses directly negotiated between Sirius XM and certain record companies; or (ii) royalties that—only since the October 2018 enactment of the *Music Modernization Act*—SiriusXM must pay for its performance of sound recordings fixed prior to February 15, 1972. *See id.* n.22 (and accompanying text). However, because Professor Willig does not provide a basis for the Judges to make an actual or estimated adjustment based on this assertion, the Judges make no such adjustment.

market has an audience of [REDACTED], and that the *subscription* noninteractive market has an audience of [REDACTED]. *Id.* ¶ 44 & Fig. 5.

To adapt his audience size analysis to his opportunity cost analysis, Professor Willig converts the play count data into play-per user and play-per subscriber metrics.[231] Using Pandora's public financial projections, *see id.* app. D, ex. D.6, he divides the projected average monthly play counts for Pandora's two tiers (respectively, for the ad-supported and subscription tiers) by the projected number of active users (for the ad-supported tier) and by the projected number of subscribers (for the subscription tier). By this exercise, Professor Willig estimates that ''users of Pandora's ad-supported service are projected to listen to approximately [REDACTED] plays per month and subscribers to Pandora's subscription noninteractive service (*i.e.,* Pandora Plus) are projected to listen to approximately [REDACTED] plays per month over the 2021–2025 period.'' *Id.* ¶ 45.

iii. Estimating Opportunity Costs With Diversion Ratios

Professor Willig utilizes the dollar value of the previously discussed alternative distribution methods—''if a noninteractive distributor were no longer available in the marketplace''—to estimate the ''opportunity cost that record companies experience by licensing to noninteractive distributors instead of only licensing to all the outside forms of music distribution'' *Id.* ¶¶ 46, 47. More particularly, he multiplies these dollar values by the diversion ratios indicated by the survey work undertaken by another SoundExchange expert, Professor Gal Zauberman (the Zauberman Survey).[232] Professor Willig's opportunity cost estimates for each alternative method of distribution are set forth in the figure below:

Figure 6: Diversion Ratios and Opportunity Cost (RESTRICTED)

			If Ad-Supported Noninteractive Were Unavailable	If Subscription Noninteractive Were Unavailable
Panel A Diversion to:	Subscription On Demand	(% of respondents buying new subscriptions)	[redacted]	[redacted]
	SiriusXM	(% of respondents buying new subscriptions)		
	Ad-supported On Demand	(# of add'l plays per month per respondent)		
	CDs/Vinyl/Digital Downloads	(% of respondents becoming new purchasers)		
	Ad-supported Noninteractive	(# of add'l plays per month per respondent)		
	Subscription Noninteractive	(# of add'l plays per month per respondent)		
Panel B Royalty from:	Subscription On Demand	($ per subscriber per month)		
	SiriusXM	($ per subscriber per month)		
	Ad-supported On Demand	($ per play)		
	CDs/Vinyl/Digital Downloads	($ per subscriber per month)		
Panel C Opportunity Cost of Record Companies:	Subscription On Demand	($ per noninteractive user per month)		
	SiriusXM	($ per noninteractive user per month)		
	Ad-supported On Demand	($ per noninteractive user per month)		
	CDs/Vinyl/Digital Downloads	($ per noninteractive user per month)		
	Outside Distributor Subtotal	**($ per noninteractive user per month)**		
	Outside Distributor Subtotal	**($ per play on noninteractive service)**		

Willig WDT ¶ 47 & fig. 6.[233]

iv. Record Company Play Shares in the Noninteractive Market

Because Professor Willig constructed his Shapley Value Model to identify the separate values attributable to each of the Majors and to his aggregation of Indies, he must identify their separate ''play shares'' in the noninteractive markets. To estimate these ''play shares,'' he relies on ''the royalty statements that music streaming and video services provide to record companies when operating under directly negotiated license agreements.'' *Id.* ¶ 48. More particularly, he analyzes the most recent monthly royalty statements available for the 12-month period ending March 2019, from: (i) *Nonstatutory* streaming music and video services (with varying degrees of interactivity); (ii) statutory noninteractive services; and (iii) Pandora's and iHeart's noninteractive play counts ([REDACTED]).[234]

Professor Willig explains that these royalty statements set forth the total plays on each service in any given month, itemized by the record company that owned each copyrighted sound recording. He also states that he has no reason to believe these shares would be

[231] Professor Willig converts this data into a per-user metric in order to apply it in conjunction with the per-user information derived from the survey results upon which he relies in the development of his opportunity cost estimates.

[232] *See* Zauberman WDT. Professor Zauberman's survey testimony is discussed elsewhere in this Determination.

[233] Professor Willig provides a detailed explanation of how he incorporated Professor Zauberman's survey results as inputs in his calculation of diversion ratios needed to estimate record company opportunity costs.

[234] Even more granularly, Professor Willig evaluates all tiers of service (with varying degrees of interactivity) on the following services: Apple Music, Amazon Music Unlimited, Amazon Prime, Google Play, iHeart (both interactive and noninteractive tiers), Pandora (both interactive and noninteractive tiers), Napster, Spotify, Vevo, and YouTube. He notes that play share data from two other distribution methods—satellite via SiriusXM and physical retail and digital downloads—were ''not available'' to him. However, he testifies that he has ''no reason to think the content of any of the record companies is played with more or less frequency on these distribution methods, when compared to the distribution methods (interactive and noninteractive streaming) for which I did have data.'' Thus, he asserted that he had ''no reason to believe this additional data would materially change'' his play share estimates. Willig WDT ¶ 48 n.26.

substantially different over the 2021–2025 rate period, compared to the data he had applied. *Id.*

From this data, Professor Willig calculates the relative proportions of plays of sound recordings whose copyrights are owned by, respectively, Sony, Warner, and Universal, as well as from his grouping of Indies. More specifically, he computes each Major's play share, and then computes the Indies' play share as equal to 100% minus the sum of the Majors' shares. *Id.* at ¶ 48 & app. D at ex. D.5.

Professor Willig summarized these play shares in the following figure:

Figure 7: Estimated Play Shares (RESTRICTED)

[REDACTED]

v. Noninteractive Services' Fixed Costs and Marginal Profit Rates

As noted *supra,* Professor Willig's Shapley Value Model also requires data quantifying: (i) Each record company's ''fallback value''; and (ii) the surplus value brought by each of the negotiating parties to the notional Shapley market negotiations. With specific regard to the noninteractive services, Professor Willig states that the value they bring to the notional Shapley negotiations depends on their ability to generate profits, which subtract out from revenues variable costs, including the royalties noninteractive services pay for musical works (but not the sound recording royalties, which, to repeat, are the *outputs* of the Shapley Value Model). Willig WDT ¶ 49. To make this calculation, Professor Willig compiles categorical data relating to ''fixed costs, variable or marginal costs and the associated marginal profit rates of noninteractive distributors . . . .'' *Id.*

c. Professor Willig's Chosen Source of Financial Data

i. Financial Statements vs. Financial Projections

Professor Willig relies on the ''Pandora Merger Proxy,'' dated December 20, 2018, and filed with the Securities and Exchange Commission (SEC), Trial Ex. 5045, that described the proposed merger (subsequently consummated) between Pandora and Sirius XM. *Id.* & app. D, ex. D.6 (p.3 therein). Professor Willig utilizes Pandora data exclusively to represent the noninteractive services because: (i) Pandora was the only noninteractive service for which he could find ''forward-looking estimates'' of the data that he required; and (ii) Pandora is the largest noninteractive distributor in the market, accounting (as noted *supra*) for more than [REDACTED]% of total plays in the noninteractive market. *Id.* & app. D at ex. D.4.

Perhaps in (correct) anticipation of the Services' rebuttal, Professor Willig explains in detail why he decides to rely on the ''Pandora Merger Proxy''—which included predictions (what he characterized as ''forward-looking estimates'') of Pandora's future financial performance, and which Pandora sent to its shareholders in connection with the then-proposed (and subsequently consummated) acquisition of Pandora by Sirius XM. More particularly, he explains why he favored these projections, rather than *older* data in Pandora's most recent financial statements contained in its 2017 Form 10–K (annual report) filed with the Securities & Exchange Commission (SEC), Trial Ex. 5043, or data *even more current than the proxy statement data* in Pandora's financial statements for the first half of 2019. Trial Ex. 5054. *See* Willig WDT, app. D (¶ 2 therein).

Professor Willig acknowledges Pandora's ''recent history of operating losses'' (before and after Sirius XM's proposed acquisition of Pandora). However, he opines that such operating losses do not ''accurately reflect expectations about the incremental value'' that Pandora could bring to the notional Shapley Value negotiation concerning royalty rates for the 2021–2025 period. Willig WDT app. D (¶ 2 therein). Rather, he states, it is more appropriate to rely on: (i) Financial projections that undergird ''the approximately $3.5 billion purchase price paid by Sirius XM'' to acquire Pandora; and (ii) Pandora's substantial market capitalization of approximately $2.4 billion immediately prior to the announcement of the Sirius XM acquisition . . . .'' *Id.* According to Professor Willig, these are *market*-based values, and therefore the data on which they were based—utilized by Pandora's investment bankers as an input into their merger fairness opinions—are more probative of Pandora's likely financial performance over the forthcoming 2021–2025 rate period. Willig WDT app. D (¶¶ 2–3 therein).

Although Professor Willig states a preference for projections as opposed to the most recent historical financial information, he also chose to ignore different financial projections created for Pandora by Sirius XM *after* it had acquired Pandora. He acknowledges that these newer financial projections ''[REDACTED].'' Regardless, as a basis for rejecting these projections, Professor Willig states: ''I ''understand'' Pandora . . . produced [these] additional projections . . . for these proceedings . . . .[,]''—*but he does not attribute his understanding to any source. Id.* ¶ 3 n.4.[235]

ii. Professor Willig's Reliance on Merger ''Scenario 2'' Data

The Proxy Statement on which Professor Willig elects to rely contains two different sets of projections, denoted as ''scenarios,'' regarding Pandora's predicted financial future. ''Scenario 1a'' projected a relatively lower value for Pandora, whereas ''Scenario 2'' projected a relatively higher value. Professor Willig elected to utilize the higher-value Scenario 2 projections, ignoring the lower-value Scenario 1a projections. He made this decision because he understood that Pandora's investment bankers relied on the Scenario 2 projections to produce their valuation of Pandora in connection with the Sirius XM acquisition, and those projections were ''in-line with the $3.5 billion market price paid by Sirius XM to acquire [Pandora].'' Willig WDT app. D, ¶ 3 & n.5.[236] He notes that, by contrast, the Scenario 1a projections implied valuations substantially below this $3.5 billion market price.'' *Id.*

Using the higher-valued Scenario 2 projections, Professor Willig estimates Pandora's annual fixed costs at $397 million for its Pandora Free ad-supported service, and annual fixed costs of $85 million for its Pandora Plus subscription service. He then converts these annual figures into monthly fixed costs. To convert these monthly *Pandora* fixed cost estimates into noninteractive service *industrywide* data, he grosses them up by dividing by Pandora's market share (as he did when grossing up the audience size). Through this method, Professor Willig estimates monthly fixed costs of $40.4 million for ad-supported noninteractive services, and $8.9 million for subscription noninteractive services. Willig WDT app. D, ¶ 4 & n.6.

Having identified and segregated the fixed costs, Professor Willig then utilizes the Scenario 2 data for his estimate of Pandora's variable costs.[237]

[235] As discussed elsewhere in this Determination, Pandora vigorously denies the unattributed assertion that it created these newer projections, labeled ''Long Run Scenarios'' by Sirius XM, for the purpose of these proceedings.

[236] Professor Shapiro concedes that the Scenario 2 data needs to be taken ''seriously'' and are ''a big deal,'' because they were included in the ''merger proxy documents . . . used as part of the acquisition.'' 8/19/20 Tr. 2732–33 (Shapiro).

[237] As noted *supra,* these variable costs are necessary inputs in the Shapley Value model because these are costs that must be subtracted from revenue in order to estimate the ''surplus'' that can be the shared by the participants in the notional Shapley arrival orderings.

In this regard, Professor Willig also relies on other information, including a September 24, 2018 report by an investment banking firm (JMP Securities, engaged to analyze Sirius XM's acquisition of Pandora), that projected ''content acquisition costs'' for Pandora's three service tiers (Pandora Free, Pandora Plus and Pandora Premium). Willig WDT app. D at ex. D.6 (nn.8, 11 and 14 therein).

Generally, Professor Willig allocates Pandora's multi-tier variable costs on a per-tier basis proportionate to each tier's share of projected total (all-tier) revenue, through 2025, except where he identifies specific per tier costs. Specifically, these other identifiable variable costs include: (i) ''Cost of Goods Sold'' (including musical works royalties (performance right and mechanical rights royalties)); (ii) ''Operating Expenses''; (iii) ''Product Development Expenses''; (iv) ''Sales and Marketing''; (v) ''General and Administrative Expenses'' and ''Stock Based Compensation.'' Willig WDT app. D, ex. D.6 (at 3 therein).

Professor Willig also makes the following revenue-related assumptions regarding Pandora: [238]

(i) Revenue growth per subscriber annually from 2021–2025;

(ii) monthly revenue per subscriber for Pandora Plus in 2020;

(iii) annual revenue growth per subscriber for years 2021 to 2025;

(iv) monthly revenue per subscriber for Pandora Plus in 2020; and

(v) continued existence of the 2018 ad-supported and subscription noninteractive per-play royalty rates from 2021–2025 equal to the current statutory rates plus an annual 2% inflation rate.

Id. He bases his calculations of these five types of revenue information on ''the assumptions accompanying the Proxy Scenario 2 projections and recent history which indicate that Pandora Premium is expected to grow faster than Pandora Plus.'' *Id.*[239]

Based on the data upon which he relies, and the assumptions he makes in connection with that data, Professor Willig estimates an ad-supported marginal profit rate of $0.0042 per play, and a subscription marginal profit rate of $0.0048 per play. Willig WDT app. D, ex. D.6 (at 2 therein).[240]

iii. Professor Willig's Caveat Regarding the Foregoing Cost and Profit Data

Although Professor Willig elects to rely in his corrected written direct testimony on the Scenario 2 data, he recognizes that the data sets he then possessed when drafting that direct testimony did not contain granular cost and revenue information regarding Pandora. Accordingly, the assumptions he was compelled to make, as itemized *supra,* were necessarily tentative in nature. Specifically, Professor Willig acknowledged:

> [C]ertain key inputs to the Pandora projections were not disclosed in Pandora's proxy statements (*e.g.,* projected ad-supported user and subscriber counts, projected plays, and a breakdown of subscription revenue into its underlying Pandora Plus and Pandora Premium component parts). Accordingly, certain allocation assumptions were required to estimate key parameters from Pandora's projected financial information. Estimates derived from these projections may require amendment following the completion of discovery.
>
> * * * * *
>
> The Pandora projections on which these estimates are based do not disclose certain key inputs that were used to create the projections. For instance, the projections do not include a breakdown of subscription revenue into the portions related to its Pandora Plus noninteractive and Pandora Premium on-demand services, respectively, and therefore require an allocation assumption to exclude Pandora Premium revenue and costs from the analysis. Moreover, the projections do not include the projected subscriber counts, active user counts, and play counts underlying the projections, requiring these figures to be derived so that profit rates can be computed. Accordingly, the assumptions required to estimate key parameters for use in my Shapley Value model may need to be updated following the completion of discovery.

Willig WDT ¶ 50 n.30, app. D at D–3. Professor Willig did not amend his direct testimony to update these ''key parameters.''

In *Pandora's* rebuttal testimony, it criticizes Professor Willig's assumptions, and demonstrates that the more granular data provided an accurate description of Pandora's economic condition that served as the basis for the Scenario 2 projections on which Professor Willig elected to rely. *See* Trial Ex. 4109 (WRT of Jason Ryan) (Ryan WRT); Shapiro WRT (applying Mr. Ryan's economic data).

Later, in his written *rebuttal* testimony, Professor Willig utilizes the more granular economic data underlying the Scenario 2 projections to amend his direct testimony by substituting that data for the assumptions he had made in his direct testimony. Specifically, he testified as follows regarding the ''updates'' he made in his rebuttal testimony (at Appendix L):

> These revised profit rate estimates adopt certain of Professor Shapiro's cost allocation assumptions, his definition of variable costs, and make use of further details relating to the projections publicly disclosed in Pandora's merger proxy . . . (including subscriber counts, Pandora Plus revenues, advertising hours, and operating expense synergies).

Willig WRT ¶ 75 n.138.

Further, Professor Willig essentially adopted the analysis undertaken by Pandora's Vice President of Financial Planning and Analysis, Jason Ryan, regarding the allocation of advertising revenues; projected growth of subscription revenue; classification of certain sales and marketing expenses; classification of product development costs; and projected number of users, subscribers and plays. *See* 8/5/20 Tr. 525 (Willig) (''[W]hen you check the numbers that [Mr. Ryan] says are right against the numbers I use in my rebuttal report, they are exactly the same.''); *see also* Willig WRT app. L at 1, 3–4 & nn.2–4, 11 55–58 & 72–74; 8/5/20 Tr. 361–62, 520–25, 527–528 (Willig); SX PFFCL ¶¶ 669–674 (noting that Professor Willig's testimony, mooted many of the issues raised by Mr. Ryan and Professor Shapiro). Accordingly, the Judges adopt Mr. Ryan's analysis of the more granular cost and revenue data necessary to generate Pandora's profit margins on its subscription and ad-supported services. Additionally, the Judges find that Mr. Ryan, as a financial executive at Pandora, is a more competent witness to make the necessary categorizations and allocations of revenue and costs than Professor Willig.[241]

[238] Revenue data is necessary in the Shapley Value Model because revenue minus variable costs yields the surplus that can be allocated among the negotiating parties according to their respective Shapley Values.

[239] Professor Willig also assumes that the number of ad-supported users for years 2021–2024 should be ''calculated based on a liner [sic] user growth trend between the 2018 actual and 2025 projected figure. *Id.*

[240] For the avoidance of confusion, the Judges point out that these figures are *not Professor Willig's proposed royalty rates,* but rather his estimated marginal profit rates. His calculation of royalty rates is discussed *infra.*

[241] Thus, the Judges do not rely on Professor Willig's assertion that the more granular revenue and cost information did require him to materially change his royalty rate calculations. *Id.* More particularly, Pandora asserts that Professor Willig's analysis is still erroneous in two respects because he: (1) Misallocates product development costs across the ad-supported and Pandora Plus services by applying revenue proportions; and (2) fails to deduct non-music revenue from his calculation of Pandora's margin. Services PFFCL ¶¶ 277–286 (and record citations therein). These disputes do not require extended analysis. Suffice it to say, with regard to the first issue, the Judges repeat their finding that Professor Willig's attempt—for the first time in rebuttal testimony—to justify his allocation

d. Professor Willig's Calculation of the Record Companies' Opportunity Costs

As noted *supra,* Professor Willig assumes that each of the three Majors in his Shapley Value Model provides a ''Must Have'' repertoire for a noninteractive service. Willig WDT app. C at C–1 (¶ 1 therein). Therefore, his modeling assumes that ''only when all three [Majors] are present in a coalition can the [noninteractive service] begin making profits.'' *Id.* at C–3 (¶ 5 therein). This means that ''in any other case''—including when a noninteractive service obtains licenses from only one or two Majors—Professor Willig's Shapley Value Model assumes that the noninteractive service ''cannot operate.'' *Id.* at C–5 (¶ 8 therein).

Professor Willig acknowledges that the assumed ''Must Have'' status of each Major generates ''complementary oligopoly power'' in the market. However, he understands that the Judges' determination in a prior proceeding, *Phonorecords III,* ''credited a Shapley Value analysis as one way of addressing concerns about complementary oligopoly power [because] the analysis performed in the proceeding eliminated this 'walk away' power by valuing all possible orderings of the players' arrivals.'' Willig WDT ¶ 14 (quoting *Phonorecords III,* 84 FR at 1933 n.69).[242]

e. The Noninteractive Services' Shapley Values Derived by Professor Willig

By inserting the data inputs, discussed above,[243] into the Shapley Value formulas,[244] Professor Willig derives Shapley Values and corresponding royalty rates for ad-supported and subscription noninteractive services, respectively. *Id.* at 51 & fig.9. These results are set forth below:

Figure 9: Estimated Shapley Values and Royalty Rates for Noninteractive Distributors[31] (amounts are monthly except per play rates) (RESTRICTED)

	Ad-Supported Noninteractive	Subscription Noninteractive
Projected Profits (before royalties)		
$ millions		
$/Play		
$/Subscriber		
Total Opportunity Cost		
$ millions		
$/Play		
$/Subscriber		
Shapley Value		
$ millions		
$/Play		
$/Subscriber		
Royalties		
$ millions		
$/Play	0.00297	0.00312
$/Subscriber	N/M	2.04

[redacted]

Because the royalty rates derived by Professor Willig are based in part on the diversion ratio results obtained from the Zauberman Survey, *i.e.,* a survey of a sample from the larger population, the royalty rates are statistically inexact.

of product development costs across Pandora's services, is less credible than the analyses made by Mr. Ryan, who is a *fact witness* with direct knowledge of these details regarding Pandora's product development costs. *However,* with regard to the second numbered issue above, Professor Willig explained persuasively that Pandora's criticism of his treatment of non-music revenue did not impact the royalty rate he calculated, because he made his profit calculations on a per-play basis that was unaffected by the treatment of non-music revenue, in that ''non-music revenue and non-music listening travel together in roughly equal proportion,'' with each representing approximately [REDACTED]% of revenue and listening.'' SX RPFFCL (to Services) ¶ 284 (and record citations therein). Moreover, because the amount of listening and revenue at issue in this allocation is only [REDACTED]% of each metric, the allocation of this revenue would have only a *de minimis* impact on the royalty rate ultimately estimated by Professor Willig's Shapley Value Model.

[242] The Judges again discuss the issue of whether the repertoire of each Major is a ''Must Have'' *infra,* in connection with Pandora's assertion that its Label Suppression Experiments (LSEs) demonstrate that no one Major's repertoire is a ''Must Have.''

[243] *See also* Willig WDT app. D.

[244] *See* Willig WDT app. C.

Accordingly, Professor Willig calculates a confidence interval for his results, utilizing a ''bootstrap procedure'' [245] that produces a 95 percent confidence interval. This confidence interval establishes ranges for the royalties from $0.00290 to $0.00299 for the ad-supported noninteractive royalty rate and of $0.00299 to $0.00316 for the subscription noninteractive royalty rate. Willig WDT ¶ 51 & app. E.

Professor Willig emphasizes and explains several features of his results. First, he points out that ''the resulting Shapley Value for the ad-supported noninteractive [service] is near zero.'' *Id.* ¶ 51. The reason for this near-zero Shapley Value, he opines, is that ''the record companies' opportunity costs are high relative to the total projected profits of [the ad-supported noninteractive services].'' *Id.* Stating this point in commercial terms, Professor Willig explains that it reflects the alleged fact that ''the vast majority of those profits are necessary to compensate the record companies for the ad-supported noninteractive distributors' cannibalization of listeners that would otherwise consume music via other compensatory forms of music distribution.'' *Id.*[246]

f. The Royalty Rates Derived From Professor Willig's Shapley Value Model

Based on the foregoing analysis, and as stated at the outset of this description of Professor Willig's modeling, he opines that his Shapley Value Model generates a royalty rate for ad-supported noninteractive services of $0.0028 per play for 2021 and for subscription noninteractive services of $0.0030 per play for 2021.[247]

g. The Services' Criticisms of Professor Willig's Shapley Value Model Approach and the Judges' Analysis and Findings

i. Is Professor Willig's Shapley Value modeling appropriate for setting noninteractive rates?

(A) Professor Willig's Shapley Value Model is Inconsistent With the Shapley Modeling in *Phonorecords III* and Thus Fails to Generate Effectively Competitive Rates

Professor Willig's Shapley Value Model—like all Shapley modeling—incorporates all potential ''arrival orderings.'' Therefore, unlike in the actual market, the modeling does not include any scenario in which a Major record company can leverage a threat to ''Walk-Away'' from negotiations into a royalty rate that includes the effect of its complementary oligopoly status. As noted *supra,* Professor Willig—relying on *Phonorecords III*—thus opines that a Shapley Value analysis is ''one way of addressing concerns about complementary oligopoly power . . . .'' Willig WDT ¶ 14. Therefore, in his opinion his Shapley Value Model is ''an appropriate approach for assessing rates that would be negotiated in the hypothetical marketplace for noninteractive webcasting.'' *Id.* ¶ 24.

However, notwithstanding the fact that Shapley modeling includes all possible ''arrival orderings,'' expert economic witnesses for Pandora and Google, respectively, argue that Professor Willig's Shapley Value Model nonetheless incorporates complementary oligopoly power. *See* Shapiro WRT at 52, 57 (Jan. 10, 2020); Peterson WRT ¶¶ 82, 85, 100 n.103 (Jan. 10, 2020). As a second criticism, Professor Shapiro further asserts that Professor Willig misapplies the Shapley Value analysis in *Phonorecords III.* Shapiro WRT at 57.

Dr. Peterson summarizes his first criticism and that of Professor Shapiro regarding the purported presence of a complementary oligopoly effect in Professor Willig's Shapley Value Model:

> Professor Willig explicitly assumes that the major record labels are essential to a noninteractive streaming service. This implies that a single label can shut down the service, which allows the label to guarantee itself a high value or monetary payoff when acting alone.
>
> * * * * *
>
> [Because] Professor Willig's Shapley Value model explicitly models the major record labels as being essential . . . each [Major] can individually extract the value that a monopolist would extract from the streaming service or distributor. In the Shapley Value model, this set up allows the essential labels to extract the monopoly value of their recordings from the streaming service . . . .

Peterson WRT ¶ 87.

There is no dispute that in Professor Willig's Shapley Value Model—when the last arriving party is assumed to be a ''Must Have'' Major—that this last arriving Major will generate the *entire* value generated by noninteractive streaming. *That monopoly value is repeated for each of the three Majors when it is the last to arrive in a Shapley ordering.* Thus, when the modeling assumes the presence of complementary oligopolists—as does Professor Willig's modeling—it preserves a substantial measure of the Majors' ''Must Have'' power and translates it into higher shares of the Shapley surplus and, ultimately, higher royalty rates.

The validity of this criticism is made obvious by the following simple example, which reveals the different Shapley Values that arise even though all arrival orderings are present in a Shapley model: [248]

Assume the total Shapley Surplus = 12

Assume 2 Majors (''1'' & ''2'') with ''Must Have'' repertoires (*i.e.,* complementary oligopolists)

Assume 1 Noninteractive Service, ''S''

[245] The Judges have previously described the ''bootstrap'' procedure in the survey context as ''a sampling of the survey respondents [that is] itself randomly selected and thereby create[s] a confidence interval around each of the reported survey results''—in this case the entirety of the Zauberman Survey. *SDARS III,* 83 FR at 65232 n.90. There is no challenge by any of SoundExchange's adverse parties to this process.

[246] Professor Willig also finds support for these high opportunity costs and royalties in: (i) Pandora documents that he understands [REDACTED]; and (ii) testimony from record company witnesses that [REDACTED]. *See* Willig WDT ¶ ¶ 52–54.

[247] Professor Willig also uses a different set of survey results as a check on his Shapley Values and royalty rates. Specifically, he utilizes data from market research conducted by Edison Research—known as the ''Share of Ear'' study—that analyzes the share of time Americans spend listening to all different forms of music distribution. He concludes that this alternative data set confirms the royalty rates he derived from the Zauberman Survey results. Willig WDT ¶¶ 56–60 & ex.F. The Judges analyze this alternative approach in their discussion of the Services' criticisms of Professor Willig's Shapley Value modeling, *infra* section IV.C.1.g.

Additionally, Professor Willig tested the sensitivity of his Shapley Value model using a Nash-in-Nash (N–I–N) bargaining framework, another approach for modeling a multi-party negotiation. Willig WDT ¶¶ 61–67); 8/6/20 Tr. 738–39 (Willig). Under that framework, each potential negotiating record company/noninteractive service pair reaches a ''Nash'' bargain in which the record company receives its fallback value and each counterparty receives one half of the surplus created by the deal. Willig WDT ¶ 62. In these Nash-in-Nash (N–I–N) negotiations, the parties assume that all other pairs of parties have reached (or will reach) an equilibrium agreement. *Id.* A solution is reached when there is no negotiating pair with an incentive to change its agreement. *See id.* ¶¶ 65–66 & fig.11, app. G. His N–I–N model produces royalty rates similar to those obtained from Professor Willig's Shapley Value model—royalty rates for 2021 of $0.0030 per play for ad-supported noninteractive services and $0.0030 per play for subscription noninteractive services. Willig WRT ¶ 82 n.147; 8/6/20 Tr. 739 (Willig).

[248] The following examples assume only one service, in order for the example to be tractable and simply to demonstrate that, *ceteris paribus,* changing the number of licensor record companies alone will change the relative Shapley Values and resulting royalties. *Cf. Phonorecords III,* 84 FR at 1950 n.119 (discussing the practical value of attempting to model effective competition by limiting the number of ''arrival orderings'' via a reduction in the number of licensees rather than an increase in the number of licensors). The Judges are not suggesting that an appropriate Shapley Value Model would necessarily contain only a single service, unless supported by the marketplace facts.

Arrival orderings	Contribution by S	Contribution by #1	Contribution by #2
1, 2, S	12	0	0
2, 1, S	12	0	0
S, 1, 2	0	0	12
1, S, 2	0	0	12
S, 2, 1	0	12	0
2, S, 1	0	12	0

Shapley Value for S = 4 (24/6); Shapley Value for #1= 4 (24/6); Shapley Value for #2 = 4 (24/6)

So, in a Shapley Value model *with complementary oligopoly,* Service S pays 8/12 of surplus (67%) toward royalties to Record Companies #1 and #2.

But, compare below the royalty payment by the service *if there was no complementary oligopoly structure,* and instead one record company (#1) owned all the copyrights for sound recordings:

Arrival orderings	Contribution by S	Contribution by #1
1, S	12	0
S, 1	0	12

Shapley Value for S = 6 (12/2); Shapley Value for #1 = 6 (12/2)

So, in the Shapley Model *with monopoly instead of complementary oligopoly,* Service S pays only 6/12 of surplus (50%) toward royalties to Record Companies #1 and #2, substantially less than if a complementary oligopoly exists.

Alternatively, the Judges note that, if the market structure contains two *substitute* oligopolies that compete with each other (rather than *complementary* oligopolies) and each is able to satisfy 50% of market demand, the Shapley modeling would look as follows:

Arrival orderings	Contribution by S	Contribution by #1	Contribution by #2
1, 2, S	12	0	0
2, 1, S	12	0	0
S, 1, 2	0	6	6
1, S, 2	6	0	6
S, 2, 1	0	6	6
2, S, 1	6	6	0

Shapley Value for S = 6 (36/6); Shapley Value for #1 = 3 (18/6); Shapley Value for #2 = 3 (18/6)

So, in the Shapley Model *with substitute competing oligopolies instead of complementary oligopoly,* Service S pays only 6/12 of surplus (50%) toward royalties to Record Companies #1 and #2, again substantially less than if a complementary oligopoly exists.[249]

In sum, these examples demonstrate how Shapley Value modeling is sensitive to the number of participants, the number of orderings, substitutability and perfect complementarity of the services, *even though in each case all arrival orderings are generated by the Shapley modeling.*

With regard to the second criticism, Professor Shapiro claims:

> [T]he Shapley Value models used in *Phonorecords III* explicitly avoided complementary oligopoly power among separate copyright holders for each set of rights by removing the oligopoly. Professor Willig does *not* follow that approach to removing complementary oligopoly power among the major record companies in his Shapley Value model. As a result, for the very reasons given by the Judges in *Phonorecords III,* Professor Willig's model gives additional returns to the major record companies by endowing them with complementary oligopoly power.

Shapiro WRT at 57.

In this regard, in *Phonorecords III,* the Judges analyzed two Shapley Value models and one ''Shapley-inspired'' model in the same context of perfect complements/complementary oligopoly. Ultimately, the Judges combined elements of all three approaches, but, importantly here, they credited the Shapley Value model of Professor Leslie Marx for the purpose of calculating the total amount of royalties. In determining that total, Professor Marx first equalized the number of licensees in order to reduce the complementary oligopoly effect that is embodied in a Shapley Value approach, even though the use of Shapley ''arrival orderings'' eliminates the complementary oligopolists' ''walk-away'' (hold-out'') power. In this manner, she intentionally altered the number of arrival orderings in which one of the complementary oligopolists provided the entirety of the additional value. *Phonorecords III,* 84 FR at 1948–50 (''Professor Marx . . . offset the concentrated market power that the rightsholders possess, *separate and apart from any holdout power,* which the Shapley ordering algorithm would address . . . *address[ing] an issue—market power—that the Shapley Analysis does not address.*'').[250]

[249] The purpose of these examples is to demonstrate the significant limitations of a Shapley Value Model that simply takes as a given the complementary oligopoly structure of the market being modeled. Monopolies or oligopolies may well exist because of their ''efficiencies and economies of scale and/or their superior operations.'' *Web IV,* 81 FR at 26368. Whether any such entity utilizes such power in a manner that generates rates that are inconsistent with the workings of an effectively competitive market is a separate issue not addressed in the application of the Shapley Value Model in this proceeding. *See Web IV,* 81 FR at 26335 (distinguishing between '''[c]omplementary oligopoly' power exercised by the Majors designed to thwart price competition and thus inconsistent with an 'effectively competitive market,' [and] the Majors' non-complementary oligopolistic structure not proven to be the consequence of anticompetitive acts or the cause of anticompetitive results.''). The narrow point here is that the *complementary* oligopolistic market structure is not well-modeled via the Shapley approach, without an adjustment to offset the complementarity of the ''Must Have'' repertoires, as was done by Professor Marx in *Phonorecords III* and adopted by the majority in *Phonorecords III* in its application of the Shapley approach.

[250] In this regard, it should be noted that the *Phonorecords III* dissent was in accord with the Majority. The dissenting opinion pointed to expert testimony and evidence making clear that there is a distinction between: (1) The ''abuse of market power'' that arises when a ''Must Have'' licensor holds-out (or threatens to hold out) during negotiations, in order to earn economic rents arising from the fragmentation of ownership of ''Must Have'' inputs; and (2) the presence of existing market power disparities that may otherwise be implicit in Shapley Value modeling. The former ''abuse'' of market power is indeed ameliorated by

Continued

Professor Willig's Shapley Value Model specifications deviate in another important manner from those in the Shapley modeling in *Phonorecords III.* In that case, all the economists' Shapley modeling *aggregated the record companies as a single entity,* eliminating their complementary oligopoly power. Moreover, one of the economists who utilized Shapley Value modeling in that case, Professor Leslie Marx, utilized two different market structure models—her ''baseline'' model in which these two perfectly complementary (''Must Have'') rights (for sound recordings and musical works) were assumed to be owned by a single collective, and her ''alternative'' model in which these complementary rights were assumed owned by two separate entities. She used these two models (like the Judges use their examples above) as a pedagogical demonstration of how the fragmentation of ownership of complementary rights leads to higher and more inefficient royalty rates, *even in Shapely modeling that includes (by definition) all possible arrival orderings.*[251] *See Phonorecords III,* 83 FR at 2022 (dissenting opinion) (Professor Marx ''made this adjustment to offset the concentrated market power that the rights holders possess . . . *that the Shapley value approach does not address.*''). By contrast, Professor Willig here models each Major as a separate ''Must Have,'' which *incorporates the complementary oligopolists' pricing power, notwithstanding the inclusion of all arrival orderings.*

Professor Willig did not address this aspect of *Phonorecords III,* either in his WDT or WRT. At the hearing, the Judges asked Professor Willig if he had read the *Phonorecords III Determination* before he wrote those written testimonies, and he responded: ''Portions of it, yes [but] I must confess, not the whole thing.'' 8/25/20 Tr. 3863 (Willig). (In both of his written testimonies, though, he identified the *Phonorecords III Determination* as a document upon which he relied, without noting that he did not read it in its entirety. Willig WDT, app. B at B–2; Willig WRT, app. I. at I–1.).[252]

The Judges then asked Professor Willig if he had read the portions regarding ''the distinction between holdout power and market power . . . that was . . . actually adopted by way of adjustments by the majority . . . in *Phonorecords III,* [or] discuss that *Phonorecords III* issue in either of your written testimonies?'' 8/25/20 Tr. 3864 (Willig). Professor Willig's response made it clear that he had not addressed that specific issue. Rather, he provided a discursive answer in which he repeated that his Shapley Value Model ''has *at least* a prominent virtue *on this very subject that you are mentioning* of eliminating any special hold out power, or market power *that derives from the ability to be a holdout* . . . .'' 8/25/20 Tr. 3864–65 (Willig) (emphasis added). But the usefulness of the Shapley Value approach in eliminating ''hold out power'' was *not* ''the very subject'' of the Judges' question. Rather, their inquiry was whether Professor Willig had addressed the issue in *Phonorecords III* as to whether the ''arrival orderings'' themselves embedded the complementary oligopoly power of the Majors.

Continuing his response to the Judges' inquiry, Professor Willig further stated that it is necessary to ''to distinguish between the holdout power and the value that a party to the negotiations brings to the enterprise. And if one of the parties is a must-have, because it's so important, well, it shouldn't be denied the value that it brings . . . you don't want to strip away the value because that's part of the marketplace and part of the incentives to the parties to do what they need to do to provide that value.'' 8/25/20 Tr. 3865 (Willig).

But, this too does not resolve the issue of whether the arrival orderings in his Shapley Value model embed complementary oligopoly power into his Shapley Values and thus, ultimately, inflate the royalty rates. Moreover, his answer essentially states that a ''must have'' licensor should retain the value of that status, even though it is an artifact of the fragmented ownership of the ''must have'' nature of their repertoires, leading to a consequence where the Shapley Value modeling would provide the Majors with the value of this artifact, beyond the considerable value of their repertoires. *See Web IV,* 81 FR at 26368 (noting that eliminating the ''must have'' power of complementary oligopoly does not ''diminish the firm-specific monopoly value of each Major's repertoire taken as a whole.''). Moreover, the perfect complementarity generates market consequences that are even worse than monopoly. *See Web IV,* 81 FR at 26342 (relying on the ''logic first identified by Antoine Cournot in 1838, *firms offering complementary products tend to set higher prices than would even a monopoly seller* . . . .'') (emphasis added); *see also id.* at 26368 & n.142); 8/18/20 Tr. 2642–43 (Shapiro); 8/25/20 Tr. 3655–56 (Peterson).[253]

Accordingly, the Judges agree with Professor Shapiro's criticism of Professor Willig's approach for failing to ''remov[e] complementary oligopoly power among the major record companies in his Shapley Value model,'' and ''for the very reasons . . . in *Phonorecords III,* giv[ing] additional returns to the major record companies by endowing them with complementary oligopoly power.'' Shapiro WRT at 57.[254]

ii. Did Professor Willig correctly reject the 2019 ''Long Range Scenario'' (LRS) for Pandora prepared by Sirius XM?

Pandora also criticizes Professor Willig's decision to ignore the data contained in Sirius XM's LRS, Trial Ex. 4010, in his calculation of Pandora's profit margins over the 2021–2025 rate period. Although Professor Willig

the Shapley Value approach, whereas a complementary oligopoly effect inconsistent with effective competition can only be mitigated in Shapley Value modeling if the modeler adjusts for that market power disparity. *See Phonorecords III,* 84 FR 2023 & n.342 (dissenting opinion) (applying consistent testimony from, and evidence regarding, four economic expert witnesses, Professors Watt, Marx, Katz and Gans).

[251] That is, Professor Marx demonstrated precisely what the Judges have shown in the example in the text, *supra.*

[252] Professor Willig was also unable to recall, and did not address, an article on which the Judges expressly relied in *Web IV* for the proposition that ''even economists quite unwilling to assume that a given monopoly or oligopoly structure is inefficient and anticompetitive bristle at the idea that supranormal pricing arising from a complementary oligopoly is reflective of a well-functioning competitive market. *Web IV,* 81 FR at 26368 (citing Francesco Parisi & Ben DePoorter, *The Market for Intellectual Property: The Case of Complementary Oligopoly, in* The Economics of Copyrights: Developments in Research and Analysis (W. Gordon and R. Watt eds. 2003).

[253] Professor Willig did address the type of adjustment made by Professor Marx to her Shapley Value model in *Phonorecords III,* in response to a general question from the Judges. He testified as follows:

I think it would matter if somehow the majors were collapsed into a single major. That would affect the results, but in a way that would deviate from the features of the marketplace that are realistic and important.

8/5/20 Tr. 323 (Willig). However, the Judges find that changing the structure of the licensor-side of the market to eliminate complementary oligopoly effects is necessary. Although the Judges do not dispute Professor Willig's characterization of that complementary oligopoly power as ''realistic'' or ''important'' in an *actual* market for the licensing of noninteractive services, they find, as they did in *Web IV,* that a rate formula incorporating complementary oligopoly power is antithetical to an effectively competitive rate.

[254] To be clear, the Judges do not disagree with Professor Willig as to the ''Must Have'' status of each Major as a ''Must Have.'' Rather, as noted in the Judges' prior discussion in this Determination regarding ''effective competition,'' they continue to find that an appropriate downward adjustment must be made to royalty rates that reflect the effects of a complementary oligopoly market structure. The Judges consider *infra* whether the record provides a basis for making the necessary effective competition adjustment to Professor Willig's Shapley Value Model.

contends (with no attribution) that this LRS was prepared solely for this proceeding, Pandora's Vice President of Financial Planning and Analysis, Jason Ryan, describes the LRS as a document ''generated by Sirius XM *in the ordinary course of business,*'' and is intended, *inter alia,* to ''guide management in the preparation of its operating budget and business plan for the next year.'' Ryan WRT ¶ 36 (emphasis added). According to Mr. Ryan, the budgets created through Sirius XM's LRS process ''are also a tool that the Board of Directors of Sirius XM uses throughout the year to gauge the health of the business and at the end of the year when assessing performance-based compensation of executive officers and employees.'' *Id.* More particularly, Mr. Ryan explains that the LRS process proceeds in the following manner:

> The [REDACTED] flow from our reasonable efforts to plan and predict the trajectory (contraction or growth) of the business.

Id. ¶ 38.

Mr. Ryan's testimony is uncontroverted on this point. Further, there is no record evidence to support Professor Willig's ''understanding'' that Sirius XM's purpose in creating this particular LRS was to use it as evidence in this proceeding. *See* Willig WDT app. D ¶ 3 n.4. There is also no evidence to suggest that Sirius XM manipulated the financial information in this June 2019 LRS in order to affect the financial analyses undertaken in this proceeding.[255]

Nonetheless, as noted *supra,* Professor Willig independently justifies his reliance on the Scenario 2 merger financial data on the fact that ''Pandora's investment bankers prepared discounted cash flow valuation analyses using these Scenario 2 projections, which produced valuations in-line with the $3.5 billion market price paid by Sirius XM to acquire the company.'' *Id.* Accordingly, the Judges must examine *on its own merits* the Scenario 2 data upon which Professor Willig relies to compute Pandora's profit margins.

Professor Shapiro takes issue with Professor Willig's claim that the price paid to Pandora shareholders by Sirius XM is supported by the Scenario 2 financial projections, noting that the acquisition price was determined ''in part by synergies not included in Scenario 2 which considers Pandora as a standalone company.'' Consequently, Professor Shapiro asserts that the ''discounted cash flow'' set forth in the Scenario 2 materials does not generate the acquisition price paid by Sirius XM. Shapiro WRT at 72–73.

The Judges find that Professor Shapiro's criticism neither compromises the probative value of the Scenario 2 data nor Professor Willig's reliance on it to support his Shapley Value Model. Although the ''discounted cash flow'' contained in the Scenario 2 materials, standing alone, may not generate the actual acquisition price paid by Sirius XM, Professor Shapiro does not dispute that such information was relied upon by the investment bankers in their development of an appropriate price—one that ultimately was accepted by Pandora shareholders. That purchase price is not disconnected from projections based on Pandora's economic condition as of the date of the acquisition.[256]

Moreover, the price that willing sellers (here, Pandora shareholders) agree to pay to a willing buyer (here, Sirius XM), reflects a price established in *a* market—the market for corporate control. *See* Henry G. Manne, *Mergers and the Market for Corporate Control,* 73 J. Pol. Econ. 110, 112 (1965) (''[C]ontrol of corporations may constitute a valuable asset'' and is purchased and sold in ''an active market for corporate control. . . .''). The fact that the purchase price incorporates not only Pandora's capitalized discounted cash flow, but also the synergistic value assigned to Pandora by the investment banks and Sirius XM, upon the consummation of the merger, does not negate the evidentiary usefulness of the financial data underlying that acquisition price. A company's shares, like any assets, are appropriately valued at their highest and best use. Given that the acquisition of Pandora by Sirius XM indeed occurred, it is reasonable to conclude that Pandora's highest and best use, in terms of market value, was as a division of Sirius XM.

Accordingly, the Judges find that Professor Willig's reliance on Scenario 2 data was reasonable.[257]

iii. Professor Shapiro's Calculation of Scenario 2 ''Marginal Profit'' After Applying the Foregoing Criticisms

Professor Shapiro combines the foregoing criticisms based on Professor Willig's Shapley Value Model data inputs into a recalculation of marginal profits that is otherwise consistent with Professor Willig's Scenario 2 approach. The recalculation with regard to the *subscription service* is set forth in Figure 6 of Shapiro WRT at 47, and the recalculation with regard to the ad-supported service is set forth in Figure 7 of Shapiro WRT at 48. Each figure is reproduced below:

Figure 6: Pandora Projected Margins: Pandora Plus Subscription Service [RESTRICTED]

[REDACTED]

Figure 6 shows that substituting Professor Shapiro's changes for Professor Willig's original estimated data inputs results in a significantly lower per-performance margin at Pandora Plus, the subscription service. Shapiro WRT at 47. (As noted *supra,* Professor Willig also made most of these adjustments in his WRT.) Specifically, whereas Professor Willig calculated a per-performance margin of $0.0048, Professor Shapiro re-calculated a per-performance margin of $[REDACTED].[258]

Figure 7: Pandora Projected Margins: Advertising-Supported Service [RESTRICTED]

[REDACTED]

Figure 7 shows that substituting Professor Shapiro's changes for Professor Willig's original estimated data inputs results in a significantly lower per-performance margin at Pandora Plus, the subscription service. Shapiro WRT at 46–47. (As noted *supra,* Professor Willig also made most of these adjustments in his WRT.) Specifically, whereas Professor Willig calculated a per-performance margin of $0.0042, Professor Shapiro re-calculated a per-

[255] When asked by the Judges why he included this language in his WDT, Professor Willig testified:

> I'm *not sure* that that's what I had in mind with those words. Rather, that it had been produced recently relative to the timing of the submission by me, and it was produced for these proceedings, and I didn't mean, *as I recall, unless there's something that I'm forgetting,* which is always possible, that the LRS data were actually created just for these proceedings as opposed to produced for these hearings. . . . *I may have had some evidence of the specialization of the purpose, but I don't recall that now.* But what I surely meant was, at least, that the production was for these hearings. And I'm well aware that LRS is something that Sirius had been preparing for its own purposes going back years . . . . So *I don't remember whether it was really produced specifically for these purposes* . . . .

8/5/20 Tr. 366–67 (Willig) (emphasis added). The Judges find this response equivocal at best, and incomprehensible at worst.

[256] Professor Shapiro does not assert that the inclusion of synergistic value necessarily disqualifies financial projections as useful inputs into a Shapley model in this proceeding. In fact, he points out that the alternative and subsequent financial projection in the LRS, on which he relies, *explicitly* includes ''anticipated synergies'' in its financial projections. Shapiro WRT at 73.

[257] And as explained *infra,* the Judges' adoption of certain of Professor Shapiro's itemized critiques of Professor Willig's data applications essentially equates the rates generated by Professor Willig's reliance on the Scenario 2 data and Professor Shapiro's reliance on LRS data.

[258] The impact of these adjustments on the royalty estimates generated by Professor Willig's Shapley Value Model, together with the impact of the adjustments to Professor Willig's opportunity cost calculations, is set forth *infra.*

performance margin of $[REDACTED].[259]

The Judges adopt these adjustments to Professor Willig's profit margin calculations in his Shapley Value Model.[260]

iv. Alleged Errors in Professor Willig's Scenario 2 Opportunity Cost Calculations

Professor Shapiro alleges that Professor Willig made several errors in his calculation of opportunity costs that resulted in an overestimation of the opportunity costs incurred by record companies in his Shapley Value Model.[261] More particularly, Professor Shapiro addresses Professor Willig's calculation of these opportunity costs through the latter's application of the ''diversion rate'' [262] estimations in the survey undertaken by Professor Gal Zauberman (Zauberman Survey) to estimate the extent to which listeners to noninteractive services reported they would divert their listening to alternative forms of music listening if noninteractive services were no longer available.

Professor Shapiro calculates a lower estimated opportunity cost than calculated by Professor Willig through the latter's application of the Zauberman Survey. Specifically, Professor Shapiro alleges that Professor Willig made errors that inflated the opportunity costs attributable to purchases of CDs, vinyl records (vinyl) and digital downloads that the survey data indicated would occur if noninteractive services were unavailable.

(A) Royalties per Purchaser of CDs, Vinyl & Digital Downloads

First, Professor Shapiro alleges that Professor Willig erroneously calculates the ''CD/Vinyl/Digital Download Royalties per Purchaser'' presented in Exhibit D.3 of the Willig WDT. Professor Willig first separately calculates these monthly per-purchaser royalties for each of the three product subcategories—CDs ($[REDACTED] monthly per purchaser), Vinyl ($[REDACTED] monthly per purchaser) and Digital Downloads ($[REDACTED] monthly per purchaser). Willig WDT, app. D, ex. D.3 (Row ''I'' therein). The Zauberman Survey reported the diversion to all three of these purchases as a single diversion. But to calculate opportunity costs accurately, Professor Willig needs to unbundle the monthly per purchaser royalties for each of these three products *separately.* Accordingly, in order to generate his estimated opportunity cost calculation from the bundled categorization in the Zauberman Survey, Professor Willig attempts to calculate the ''Weighted Average'' of these three royalty figures. *Id.* (Row ''I,'' Column 4 therein). He calculates his opportunity cost total for this category—a monthly per purchase royalty of $[REDACTED]—by weighting each of these three categories *by their share of retail revenue, inter se. Id.* (Row ''G'' & n.4 therein).

According to Professor Shapiro, *weighting by share of retail revenue is incorrect.* The correct weighting, he asserts, is by the *number of units purchased per buyer* of each of the three formats. Shapiro WRT, app. D at 81. To demonstrate that weighting by units purchased is the appropriate method, Professor Shapiro presents a step-by-step example:

1. Assume 10 individuals buy CDs and 10 individuals buy Digital Downloads
2. Assume each CD buyer spends an average of $3 per month for CDs
3. Assume each Digital Download buyer spends $9 per month for Digital Downloads
4. So, total retail revenues are $30 per month for CDs ($3 × 10 people)
5. And, total retail revenues are $90 per month for Digital Downloads ($9 × 10 people)
6. Assume net royalties paid are 50% of retail revenue for each unit of either product
7. So, CD monthly royalties equal $15 (50% of $30)
8. And, Digital Download royalties equal $45 (50% of $90)
9. Total royalties are therefore $60 ($15 + $45)
10. Because there are 20 assumed buyers (10 for each product) average monthly royalties per buyer = $3 ($60 ÷ 3)
11. But under Professor Willig's approach, the answer is NOT $3.
12. Professor Willig instead weights the monthly royalties by the *share of retail revenue* attributable to each product, CDs or Digital Downloads.
13. For CDs, this represents 25% of total retail revenue ($3 × 10 people = $30 = 25% of $120)
14. For Digital Downloads, this represents the remaining 75% of total retail revenue ($9 × 10 people = $90 = 75% of $120)
15. The 25% of total retail revenue attributable to CDs is one-third of the 75% of *total retail revenue* attributable to Digital Downloads
16. So, weighting monthly royalty via retail revenue would be done via the following ratio:

    $30 CD revenue × ($1.50 royalty per buyer) + ($90 Digital Download revenue × $4.50 royalty per buyer) ÷ 30 + 90 = ($45 + $405) ÷ ($120) = $450 ÷ $120 = $3.75
17. *$3.75 is 25% greater than $3.00.*

Shapiro WRT at 81–82.

Professor Willig acknowledges that Professor Shapiro's approach is the correct way to calculate opportunity

[259] The impact of these adjustments on the royalty estimates generated by Professor Willig's Shapley Value Model, together with the impact of the adjustments to Professor Willig's opportunity cost calculations, is set forth *infra.* The Judges also note that Figures 6 & 7 show that Professor Shapiro's adjustments and corrections to the original profit margins in Professor Willig's Shapley Value Model result in Scenario 2 profit margins that are essentially identical to the profit margins estimated by Professor Shapiro in the ''alternate forecasts'' based on the LRS and Merger Proxy Scenario 1A. Shapiro WRT, Figs. 6 & 7 (last two columns). Accordingly, there is no necessity to consider those alternatives as necessary to establish different royalty rates in this proceeding.

[260] The Judges explain in text accompanying note 241, *supra,* that they rely on Mr. Ryan's categorizations and allocations of revenues and costs because of his competency with regard to these issues, given his role as a financial executive, and because of the Judges' perception of his credibility as a witness. By contrast, SoundExchange did not proffer an accounting or financial expert to testify regarding these categorization and allocation issues, leaving these issues to an economist, Professor Willig. Although Professor Willig is without question an esteemed economist, the Judges find that he is not nearly as competent as Mr. Ryan to give testimony regarding Pandora's financial and accounting issues. *See also* 8/5/20 Tr. 306–08 (Willig) (Professor Willig was qualified as an expert in this case in ''microeconomics, industrial organization, the use of statistics in economics, and the use of survey research and economics,'' and was previously qualified in other matters also as an expert in the economics of antitrust and intellectual property issues.). Finally, the Judges note that Professor Willig himself, in his role as an expert economic witness, explained that the differences in Pandora's marginal profits did not drive his Shapley Value Model results, because the opportunity costs of the record companies were so great as to dominate the royalty payout due to them pursuant to his modeling. *Id.* at 555 (''the opportunity costs almost exhaust[] the pre-royalty distributor profits [because][a]fter the distributor pays out to the labels their opportunity costs, there is not very much left . . . to split among the parties.'').

[261] To be clear, the opportunity cost issues addressed in this section of the Determination do not involve Professor Shapiro's broader economic argument regarding the asserted ''Must Have'' status of each Major, and the impact of that status on the calculation of opportunity costs.

[262] A ''diversion rate'' as used in the Zauberman Survey and as applied by Professor Willig is the percentage of surveyed listeners to a noninteractive service who would switch (divert) to another form of listening to music if the noninteractive service was not available. Professor Willig multiplies each percentage diversion rate by the royalty generated per-subscriber (or per-user, for the ad-supported service) by that other form of listening. The sum of those products equal Professor Willig's opportunity cost estimate. Willig WDT ¶ 47 & fig.6. As discussed *supra,* that opportunity cost estimate constitutes an economic cost that record companies must recover (*i.e.,* as a fallback value). The usefulness of the Zauberman Survey to calculate such switching, in the face of the Services' criticism, is separately discussed, elsewhere in this Determination.

costs for these physical royalties. 8/5/20 Tr. 504 (Willig) (''Professor Shapiro pointed out that maybe I wasn't perfectly logical in where I applied my weights, and I think there was some merit to that point that Professor Shapiro made, so I went back and I changed that. . . .'').[263]

The Judges find Professor Shapiro's re-calculation of these royalty weights—agreed to by Professor Willig—to be appropriate. The purpose of this opportunity cost analysis is to estimate *the number of units* of each subcategory of product (CDs, Vinyl and Digital Downloads) that would be purchased by each listener to a noninteractive service if that service was no longer available, and then multiply the number of units attributable to each subcategory by the royalty attributable to each item purchased. This exercise does not implicate retail prices. Accordingly, Professor Willig's use of retail prices as weights introduces an irrelevant factor.

Applying the foregoing principles, the weighted average opportunity cost for these three products is $[REDACTED], rather than the $[REDACTED] in the Willig WDT, app. D, D.3 (Row ''I,'' column 4 therein). *See* Shapiro WRT, app. D at 82 (Figure D.1: Correction to Exhibit D.3 in the Willig WDT, Revised Exhibit D.3 (Row J therein).

(B) Alleged Overestimation of Incremental Expenditures on CDs/Vinyl/Digital Downloads

Professor Shapiro's next criticism with regard to Professor Willig's opportunity cost analysis is that it ''overestimates the incremental expenditures that listeners would make on CDs, Vinyl, and Digital Downloads if statutory webcasting were no longer available.'' Shapiro WRT at 83. More specifically, Professor Shapiro asserts that Professor Willig makes two errors in this computation: First, he avers that Professor Willig allegedly *overestimates* the amount of money individuals would spend on CDs, Vinyl and Digital Downloads, an alleged error that causes Professor Willig to *inflate the opportunity cost input* into the Shapley Value Model. Second, according to Professor Shapiro, Professor Willig allegedly *underestimates* the number of individuals who would switch from a noninteractive service and to CDs, Vinyl and Digital Downloads, an alleged error *by which Professor Willig actually incorrectly reduces the opportunity cost input* in the Shapley Value Model. *Id.*

With regard to the allegation of overestimating the amount of spending on these three products, Professor Shapiro understands that Professor Willig assumes that people who switch some of their listening from noninteractive to CDs, Vinyl and Digital Downloads will then incrementally ''spend as much as the average consumer who purchases those media types.'' *Id.*[264] As Professor Shapiro notes, this assumption carries with it the implicit assumption that these switching consumers *did not buy any of these three products* when they were listening to a noninteractive service, but then bought *the same amount of these music formats as an average user* subsequent to the hypothetical elimination of noninteractive services. *Id.* In fact, Professor Willig acknowledges that he treats these substitutions in the same all-or-nothing manner as the binary choice of whether to subscribe to an interactive streaming service if noninteractive services were unavailable. *See* Willig WDT, app. E, ¶ 13 (''I estimate incremental royalties from diversion to [CDs, Vinyl and Digital Downloads] in the same way as for [subscriptions to] Paid-[On Demand] and [Sirius XM].'').

Professor Shapiro opines that the proper approach is to treat the purchase of each of these three products in a manner analogous to the use of an ad-supported service, where the listener makes marginal listening decisions on a per performance basis. In support of his argument, Professor Shapiro enlists a useful supporter—*Professor Willig himself*—who, in *SDARS III,* converted royalties from incremental purchases of these three products on a per performance basis. Shapiro WRT at 83 n.205 (citing Professor Willig's *SDARS III* Written Direct Testimony at B–5 to B–6). In further reliance on Professor Willig's own analysis (in the present proceeding), Professor Shapiro points out that a document on which Professor Willig relied, Trial Ex. 5039, showed that on-demand listeners spend less per month on these three products than the average purchaser, generating only $[REDACTED] in monthly royalties, substantially less than the $[REDACTED] weighted average per month calculated by Professor Willig or the $[REDACTED] recalculated weighted monthly average computed by Professor Shapiro. Professor Shapiro opines that it is unreasonable to conclude (as did Professor Willig), that noninteractive listeners—with their revealed lower Willingness-to-Pay for a streaming service—would spend multiple times more money than on demand listeners on CDs, Vinyl and Digital Downloads. Shapiro WRT at 83 n.206.

Professor Shapiro further relies on SoundExchange's own survey expert to support his critique of Professor Willig's estimation of opportunity cost emanating from the shift by some listeners to purchases of these three products. That survey expert, Professor Zauberman, reports that such diverted *ad-supported* listeners would allocate only 14.1% of their diverted time to these three products, and such diverted *subscribing* listeners would allocate even less of their diverted time, 9.9%, to these three products. Shapiro WRT at 84 n.207. According to Professor Shapiro, it is untenable for Professor Willig to assume that listeners and subscribers who divert such small fractions of their diverted time to these three products would also purchase these products in the same quantities (generating the same royalties) as all consumers who purchase these three products. Shapiro WRT at 84.

Instead, Professor Shapiro claims that it is more reasonable to assume that people who switch from noninteractive services to these three products ''would generate incremental royalties consistent with the proportion of time they divert. . . .'' *Id.* Once more, he enlists Professor Willig in support of his position, noting that, in *SDARS III,* Professor Willig's opportunity cost calculation applied the same assumption—estimating incremental

[263] Professor Willig attempted to add new testimony at the hearing regarding what he asserted was an unrelated but offsetting error made by Professor Shapiro in his calculations of these particular opportunity costs that, combined with Professor Willig's admitted error, generated a higher opportunity cost of $[REDACTED] for this category. However, Pandora's counsel interposed a prompt objection, arguing that this proffered testimony would constitute ''new analysis . . . that's out of bounds.'' SoundExchange's counsel did not respond when Pandora's counsel asserted this objection, and, after a scheduled 15 minute mid-afternoon recess, SoundExchange's counsel proceeded to question Professor Willig on other matters. The Judges then, *sua sponte,* afforded SoundExchange's counsel an opportunity to respond to the objection by Pandora's counsel that had prevented Professor Willig from testifying on this topic before the recess, so that the Judges could decide whether to sustain or overrule the objection raised by Pandora's counsel. However, SoundExchange's counsel declined to address the objection, claiming (incorrectly) that the testimony that was the subject of the objection ''is already in the record.'' 8/5/20 Tr. 504–05; 514–15 (colloquy). Thus, no such testimony regarding an alleged offset as to Professor Shapiro's physical opportunity cost correction (accepted by Professor Willig) is in the record. (In SX PFFCL ¶¶ 635–636, SoundExchange attempts to rely on *counsel's own analysis* of the record to substitute for the missing testimony by Professor Willig on this subject. That is plainly unacceptable.).

[264] As explained above, according to Professor Willig, the weighted average per consumer is $[REDACTED] per month. However, as corrected by Professor Shapiro and credited by the Judges, the properly weighted average monthly spending for these products in the Scenario 2 analysis is $[REDACTED] per month.

royalties from CDs and downloads as proportional to incremental listening to these products. *Id.*

Professor Shapiro attempts to apply this ''proportionate diversion'' assumption by applying data from the ''Share of the Ear'' survey to his spending calculations. First, he incorporates in this analysis his calculation of the weighted average spending of consumers—$[REDACTED] per month—on all three products. Second, Professor Shapiro calculates the incremental share of time that people would devote to these three products after switching from noninteractive services. Here, he relies on the ''Share of the Ear'' survey, which reports that Pandora subscribers allocate about [REDACTED]% of their music listening time to streaming music services, of which [REDACTED]% is spent listening to Pandora. Thus, Pandora subscribers spend [REDACTED]% ([REDACTED]% x [REDACTED]%) of their music listening time on Pandora. And, as noted above, according to the Zauberman Survey, listeners to ad-supported noninteractive services will divert an average of 14.1% of their time to these three products, and noninteractive subscribers will divert an average of 9.9% of their time to these three products.

Putting these data points together, Professor Shapiro explains that ''[t]he product of the share of time allocated to Pandora and the diversion rate to these three products [yields] the *incremental* time allocated to these [three products] in the absence of webcasting. *Id.* at 85. So, he calculates that users of the ad-supported service will allocate an incremental [REDACTED]% (*i.e.,* [REDACTED]% x [REDACTED]%) of their listening time to these three products and, in the same manner, subscribers will allocate [REDACTED]% (*i.e.,* [REDACTED]% x [REDACTED]%) of their listening time to these three products. *Id.*

The final step in Professor Shapiro's analysis is his comparison of this incremental listening time to the average time listening to these three products. To take this step, Professor Shapiro applies additional data from the ''Share of the Ear Survey.'' That survey reports that the average music consumer spends [REDACTED]% of his or her listening hours listening to ''Owned Music,'' which is another way of referring to CDs, Vinyl and Digital Downloads. As Professor Shapiro notes, this implies that, for listeners switching away from the ad supported noninteractive services, incremental spending increases for these three products by approximately [REDACTED]% (*i.e.,* [REDACTED]%/[REDACTED]%), and, for listeners switching away from subscriptions to noninteractive services, the increase is about [REDACTED]% (*i.e.,* [REDACTED]%/[REDACTED]%). Shapiro WRT app. D at 84–85.[265]

Professor Shapiro acknowledges that he is using data on switches in listening time (from noninteractive services to these three products) in order to estimate changes in the total monthly amount spent on those three products. *Id.* at 85. However, he considers increases in listening to be a reasonable proxy for increased purchases, rather than a confounding conflation of two data sets. *Id.* The Judges agree, and find his use of this change in listening to be a reasonable window into the likely changes in purchases. People who would increase their listening to music via these three products would need to purchase such products,[266] and it would be highly irrational for people to purchase these new products but not ''consume'' them, in order to substitute for their lost listening to noninteractive services.

Applying the foregoing changes, Professor Shapiro makes the following revisions to Professor Willig's calculation of per person monthly incremental royalties for people who switched from noninteractive services to these three products:

For switching from ad-supported noninteractive services, Professor Shapiro calculates incremental royalties of $[REDACTED] (*i.e.,* $[REDACTED] × [REDACTED]% × ([REDACTED]%/[REDACTED]%), less than Professor Willig's calculation of $[REDACTED]; and

For switching from subscription noninteractive services, Professor Shapiro calculates incremental royalties of $[REDACTED] (*i.e.,* $[REDACTED] × [REDACTED]% × ([REDACTED]%/[REDACTED]%), less than Professor Willig's calculation of $[REDACTED].

Id. at 85–86.

The Judges find Professor Shapiro's foregoing corrections to be reasonable and appropriate.

Professor Shapiro's next opportunity cost adjustment, relating to these three products pertains to what he alleges is Professor Willig's failure to address incremental purchases by ''consumers who *already* listen to [owned] CDs, Vinyl, and Digital Downloads . . . .'' *Id.* at 86. As noted *supra,* this correction is contrary to Pandora's interest because it *increases* the opportunity cost associated with diversions to these three products, and, *ceteris paribus,* increases the royalties paid by Pandora under Professor Willig's Shapley Value Model.

Professor Shapiro notes that the Zauberman Survey finds that 69% of listeners to an ad-supported noninteractive service and 67% of listeners to a subscription noninteractive service would divert *some* of their time to these three products in the absence of such noninteractive services. However, Professor Willig does not estimate any opportunity cost associated with these listeners.[267] This result suggests that these individuals would divert some time to buying and listening to new purchase of these three products, thereby creating an additional opportunity cost that would generate incremental royalties to the record companies under Professor Willig's Shapley Value Model. Shapiro WRT, app. D at 86.

According to Professor Shapiro, the correct opportunity cost associated with these purchases can be estimated as the product of: (1) These listener shares ([REDACTED]% for ad-supported listeners and [REDACTED]% for

[265] Professor Shapiro acknowledges that the data in the ''Share of Ear'' survey is sufficient only to render his estimates informed approximations, because that survey [REDACTED]. However, Professor Shapiro believes this latter point makes his approximation more favorable to SoundExchange, because he posits that Pandora Premium subscribers listen to more songs than Pandora Plus subscribers (apparently because their willingness to pay a higher subscription price reveals their relatively greater preference to listen to songs). Thus, because the switching subscriber group in the survey includes such increased listening, their switching decisions would be greater than the switching behavior of Pandora Plus subscribers alone, *raising* the reported diversion ratio for these three products, raising the calculated opportunity cost and, accordingly, increasing the proposed royalty rate for subscription services derived by Professor Willig's Shapley Value Model. *Id.* at 85 n.210. The Judges acknowledge these limitations in the Share of Ear survey, but they agree with Professor Shapiro that these issues are insufficient to reject his criticisms based on that survey's data.

[266] People who would choose instead to substitute (in whole or part) listening to their *already-owned* CDs, Vinyl and Digital Downloads would not necessarily purchase new quantities of these three products, but because that potential behavior is ignored in Professor Shapiro's analysis here, the opportunity cost is skewed higher by his decision to ignore such consumer behavior in this context. (However, Professor Shapiro does attempt to adjust for the additional purchases by switchers who also switch by listening to their existing collections of these three products, as discussed below.)

[267] Professor Willig classifies respondents in the Zauberman survey as ''new'' buyers of these three products *only* if they indicate both that they have not listened to CDs, Vinyl, and Digital Downloads in the previous 30 days *and* that they would listen to these media in case the webcaster went away. Under this definition, Professor Willig finds that [REDACTED]% of the listeners to the advertising-supported webcasters and [REDACTED]% of listeners to the subscription-based webcasters qualify as new buyers of CDs, Vinyl, and Digital Downloads. *See* Willig WDT, Fig.6.

subscribers, multiplied by (2) the incremental monthly royalties per buyer of these three products, which Professor Shapiro (as discussed above) calculated as $[REDACTED] for ad-supported switching and $[REDACTED] for subscription switching.

Professor Shapiro therefore adjusts the opportunity cost associated with switching to these three products to $[REDACTED] (*i.e.,* $[REDACTED] × [REDACTED]%) for switching ad-supported users and to $[REDACTED] (*i.e.,* $[REDACTED] × [REDACTED]%) for switching subscribers. Shapiro WRT, app. D at 86; *see also id.*at Fig. 8.

The Judges find Professor Shapiro's adjustments in connection with the three products (CDs, Vinyl and Digital Downloads) to be reasonable and appropriate bases to increase the opportunity cost arising from diversions to these products.

(C) The Treatment of Non-Music and AM/FM Diversion in Professor Willig's Opportunity Cost Analysis

Google's economic expert witness, Dr. Peterson, finds fault with Professor Willig's application of the results of the Zauberman Survey, by which he assumes that all the plays diverted from noninteractive services would be recaptured through listeners' accessing of royalty-bearing plays. Specifically, Dr. Peterson testifies as follows:

> [Professor] Willig's model assumes that the entire ad-supported non-interactive statutory streaming business can be shut down, and the music industry won't lose a single performance. So that's inconsistent with how economists think of choice, and it's inconsistent with commonsense. If there are people whose favorite way to listen to music is through a Pandora-like service, we would certainly expect them to expand their listening hours as well and find opportunities to use that service when they would not listen to another service.
>
> And . . . the evidence for this is . . . in the Zauberman surveys, where if you take the service away, some people say they will spend some of their day doing something other than listening to music. So it is incorrect to assume that all of the performances are preserved if you shut down the service.

8/25/20 Tr. 3734–35 (Peterson). This point ties in directly to the calculation of opportunity cost. As Dr. Peterson further notes, because the Zauberman Survey asks respondents how they would replace time spent listening to noninteractive services, those who would substitute non-royalty bearing activities would, necessarily, if noninteractive services were available, substitute away from the non-royalty bearing activities and listen to royalty-bearing noninteractive services. 8/25/20 Tr. 3735 (Peterson) (''[T]he consequence . . . of course, is that if you join the [noninteractive] service, [the label] gain[s] . . . performances and *the opportunity cost of the performances on the services is reduced as a result [and] this leads to an overstatement of opportunity costs.*'') (emphasis added).

During cross-examination, Dr. Peterson made this point in greater detail in a manner that is well-worth quoting in full:

> Q. And do you recall that one of the [Zauberman Survey] switching options was do something other than listen to music?
>
> A. That is an option in the Zauberman Survey that I think is not properly reflected in Dr. Willig's model.
>
> Q. Well, just looking at the survey, since the survey does contemplate people doing something other than listening to music, if a . . . free non-interactive service was taken away, some people would go back to doing things other than istening to music, right?
>
> A. That's correct.
>
> Q. And doesn't that account for the idea that free non-interactive services could expand listening overall?
>
> A. That free non-interactive services would expand listening overall?
>
> Q. Right.
>
> A. Oh, *that's exactly my point.* So . . . Dr. Willig's model says if there are a million plays on the service, and the must-have labels shut it down, a million plays are diverted and a million plays are collected in the aggregate by the labels . . . . That's the assumption that's built into his model. And I'm asserting, I think *what you just said,* which is that *that's not a very good assumption because some people would say, well, I loved Pandora but since I can't have Pandora . . . I'm going to read a book.* And so there would be *fewer* performances overall. And so *that aspect of Dr. Zauberman's survey is not at all reflected in the mathematics of Dr. Willig's model.* And that's—that's a problem.
>
> Q. But looking at the survey, it does allow for the possibility that the—that the service could expand listening or not expand listening? *That option is there in the survey, right?*
>
> A. But not in his model. I mean, it—and it actually doesn't really play into his opportunity cost either, which is very important here. So I disagree wholeheartedly with what you're saying.

8/25/20 Tr. 3799–3800 (Peterson) (emphasis added).

The Judges agree with Dr. Peterson. The Shapley Value Model constructed by Professor Willig overstates the opportunity costs because it does not consider the ''opportunity benefits'' [268] generated by listeners to noninteractive services who would otherwise divert to a non-royalty bearing activity, such as reading a book, as Dr. Peterson notes. But this defect in Professor Willig's opportunity cost calculation goes further, extending to any non-royalty bearing activity undertaken by a diverted listener, including listening to AM/FM (terrestrial radio).

As noted *supra,* AM/FM (terrestrial) radio stations do not pay royalties for their performances of sound recordings (because the Copyright Act does not confer a general public performance right on sound recording copyright owners). However, if noninteractive services attract listeners who would otherwise divert to terrestrial radio (as survey data in evidence indicate), there is a ''negative opportunity cost'' (*i.e.,* an ''opportunity benefit'') foregone by the record companies if they were to refuse to license noninteractive services. For example, at current statutory rates, the foregone ''opportunity benefit'' would be $0.0018 per play listened to by terrestrial listeners who would have otherwise accessed music via an ad-supported noninteractive service if it existed, and $0.0023 per play listened to by terrestrial listeners who would have otherwise accessed music via a subscription noninteractive service if it existed.

These ''opportunity benefits'' foregone are likely *not de minimis,* as the surveys in evidence in this proceeding indicate a significant amount of diversion to these alternatives by respondents who completed the survey. *See, e.g.,* Zauberman Survey ¶¶ 24–27 (85% of ad-supported noninteractive listeners would spend 27% of their diverted time listening to AM/FM radio over-the-air, and 79% of noninteractive subscribers would spend 18% of their diverted tine listening to AM/FM radio in this royalty-free manner—if their form of noninteractive services were unavailable). *See also id.* (48% of ad-supported noninteractive listeners would spend 16% of their diverted time doing something other than listening to music and, for subscribers to noninteractive services, 50% would spend 10% of their diverted time in these non-royalty-bearing activities). As noted *supra,* the ''opportunity benefit'' of these lost listeners is $0.0018 and $0.0023 for the plays diverted during such time periods from the ad-supported and subscriber noninteractive services, respectively.

SoundExchange notes though that Professor Willig engaged in a similar treatment of AM/FM listening, with his so-called ''fork in the road approach,'' that the Judges adopted in *SDARS III,* leaving interactive royalties unadjusted downward (thus not adjusting

[268] *See Ferraro and Taylor, supra,* at 7 (''An avoided benefit is a cost, and an avoided cost is a benefit. Thus, the opportunity cost . . . is . . . the *net benefit forgone.*'') (emphasis added).

downward to correct for their complementary oligopoly power and not adjusting *upward* to reflect the absence of sound recording royalties for AM/FM plays). But, the NAB points out, although Professor Willig's ''fork in the road'' testimony in *SDARS III* went unchallenged on cross-examination and in Sirius XM's proposed findings, *see SDARS III,* 83 FR at 65238, the Services are challenging the point here. Thus, the NAB asserts that the appropriateness of that approach is properly at issue in this proceeding.

The Judges agree with the NAB in this regard. All rate proceedings are conducted *de novo,* and any factual determinations made in a prior proceeding therefore certainly can be considered anew now.

The Judges find that Professor Willig's ''fork in the road'' approach does not adequately address the opportunity cost issue raised by Dr. Peterson. It is insufficient and off-point to treat lost listeners who divert to any non-royalty bearing alternatives as simply irrelevant to the complementary oligopoly premium attached to interactive opportunity costs. In fact, as Dr. Peterson makes clear, such non-royalty bearing alternatives—because they substitute for royalty-bearing noninteractive plays—generate what can be called ''opportunity benefits.''

In addition to the ''opportunity benefit'' point addressed above, the NAB makes a separate *legal* criticism of Professor Willig's ''fork in the road'' approach. Specifically, the NAB argues:

> [T]o the extent including supracompetitive royalty inputs in an opportunity cost analysis yields supracompetitive outputs, those outputs are inconsistent with the established *legal* standard requiring the rates set here to reflect effective competition. *Web IV,* [81 FR 26316] at 26332. Further, as a *legal* matter, there is a fundamental difference between complementary oligopoly rates for sound recording rights in interactive services and the lack of royalties for terrestrial radio play. The latter is a function of a Congressional judgment enshrined in federal copyright law. *See* 17 U.S.C. 106(6); *id.* sec. 114(a). The existence of complementary oligopoly power, in contrast, has never been blessed by Congress. To the contrary, this body has always regarded the majors' complementary oligopoly power as a feature of the market that must be corrected in establishing rates here. There is no sense in which it would be legally appropriate for the Judges to similarly ''correct'' lack of royalties resulting from the lack of a legally recognized public performance right for terrestrial radio play of sound recordings.

NAB PFFCL ¶ 136 n.34. In response, SoundExchange argues as follows:

> For the first time at *any* point in this proceeding, NAB offers a lengthy argument against the ''fork in the road'' analysis offered by Professor Willig and endorsed by the Judges in *SDARS III. See* [83 FR 65210] at 65238. This is completely inappropriate argumentation that, despite being offered as a ''finding of fact,'' is tellingly bereft of even a single supportive citation to the record in this case. *See* NAB PFFCL p.1 n.1. Notably, both Dr. Leonard and Professor Shapiro made explicit at trial that they were *not* challenging this concept.

SoundExchange's Corrected Replies to NAB's Proposed Findings of Fact and Conclusions of Law ¶ 136 (footnote) (SX RPFFCL (to NAB)).

SoundExchange's reply is unavailing. The NAB's argument is not in the form of a proposed ''finding of fact.'' Rather, it quite clearly is in the nature of a proposed ''conclusion of law.'' [269] Further, SoundExchange has not substantively replied to the NAB's argument.[270]

Moreover, the Judges conclude that the legal substance of the NAB's argument is persuasive. The absence of a public performance right for sound recordings on terrestrial radio—and hence the absence of any attached royalty obligation—was a statutory decision by Congress. The Judges identify no legal authority by which they may use that Congressional decision as an offset against the effect of complementary oligopoly power on the rate setting process. Moreover, because there is no royalty paid by terrestrial broadcasters for playing sound recordings, there is no basis for the Judges to simply *assume* either the existence or extent of a positive royalty, if such a public performance right actually existed. Indeed, regardless of the economic merits, the issue of whether such a public performance right and an associated royalty obligation should be created remains a matter of dispute in the legislative arena. *Compare https://www.soundexchange.com/advocacy/closing-the-amfm-radio-royalty-loophole/* (asserting that ''the reality is that AM/FM radio—terrestrial broadcast radio—uses music to draw an audience that in turn allows broadcasters to bring in $14.5 billion/year of revenue from advertising. While paying nothing for their primary product!'') *with https://www.nab.org/documents/newsroom/pressrelease.asp?id=4130* (asserting the allegedly ''tremendous benefits of free, promotional airplay for musicians and labels.'').

Finally, the Services also make a further *factual* challenge regarding Professor Willig's ''fork in the road approach.'' While not directly challenging that approach as a device for offsetting complementary oligopoly effects from the zero terrestrial royalty payments, Dr. Leonard, the NAB's economic expert witness, asserts that this ''fork in the road'' approach does not address the complementary oligopoly impact of the ''Must Have'' nature of the Majors, which makes a noninteractive service's ''no license'' negotiating strategy untenable. 8/24/20 Tr. 3411–13 (Leonard).

The Judges find Dr. Leonard's point to be helpful. Elsewhere in this determination, the Judges make essentially the same point regarding the imbedding of a complementary oligopoly effect in the ''arrival orderings'' in Professor Willig's Shapley Value Model. Dr. Leonard's testimony in this regard is helpful because it makes clear that the ''fork in the road'' approach simply does not address this separate inclusion of a complementary oligopoly effect on the rates derived from Professor Willig's Shapley Value Model.

v. The Adjusted Opportunity Costs in Professor Willig's Shapley Value Model, Incorporating the Foregoing Changes in the Opportunity Cost Attributable to Music Purchases

Based on the foregoing adjustments accepted by the Judges, Professor Willig's opportunity cost calculation must be adjusted, as set forth in the figure below:

Figure 8: Correcting Professor Willig's Opportunity Cost Calculations [RESTRICTED]

[REDACTED]

Shapiro WRT at 50, Fig.8.

As the above table shows, Professor Shapiro's adjustments reduce the opportunity cost for ad-supported services from $[REDACTED] (Professor Willig's estimate) to $[REDACTED] (Professor Shapiro's adjusted estimate).

[269] The NAB did not label ¶ 136 n.34 of its PFFCL as a conclusion of law. See NAB PFFCL at 1 n.1. However, the parties' *labeling* of separate portions of their post-hearing filings as proposed ''findings of fact'' or ''conclusions of law'' does not prevent the Judges from independently considering whether a particular proposal is either factual or legal, based upon the *substance* of the proposal. Indeed, because these submissions are merely *proposals,* neither the substance nor labeling of the submissions by the parties is binding on the Judges. Here, the NAB specifically argues that it would not be ''*legally appropriate*'' for the Judges to offset the complementary oligopoly effect based on the lack of a ''*legally* recognized public performance right for terrestrial radio play of sound recordings.'' NAB PFFCL ¶ 136 n.34 (emphasis added). Clearly, as a matter of substance, this assertion is a proposed legal conclusion.

[270] SoundExchange neither responded substantively to this legal argument in its post-hearing Reply to the NAB, nor during closing arguments that followed the submission of the Proposed Findings of Fact and Conclusions of Law. *See* 11/19/20 Tr. 6062 *et seq.* (closing arguments).

For subscription services, these adjustments would reduce Professor Willig's opportunity cost estimate from $[REDACTED] to Professor Shapiro's adjusted estimate of $[REDACTED]. *Id.; see also* Willig WDT ¶ 47, Fig. 6.[271]

However, according to Professor Shapiro, the ''Share of Ear'' analysis by Professor Willig erroneously inflates these opportunity costs, by overestimating the diversion rates to new subscriptions and new owned media purchases. Shapiro WRT, app. D at 86. Accordingly, Professor Shapiro rebuts this alternative approach by explaining the alleged limitations in Professor Willig's methodology and presenting an adjusted version that Professor Shapiro claims is a superior application of the ''Share of Ear'' data.

vi. The Impact of All of Professor Shapiro's Data Input and Opportunity Cost Adjustments to Professor Willig's Calculation of Statutory Royalties in the Scenario 2 Approach

Applying all of Professor Shapiro's data and opportunity cost adjustments to Professor Willig's Scenario 2 approach, the Judges find that the royalty rates proposed by Professor Willig must be significantly reduced. Specifically, these royalty rate differences are as follows:[272]

	Ad supported	Subscription
Willig parameters	$0.00297	$0.00312
Shapiro Adjusted Inputs	$[REDACTED]	$[REDACTED]

See Willig WDT ¶ 51, Fig.9; Shapiro WRT, Fig.15 at 64.[273]

Additionally, because these adjusted rates are average rates over the 2021–2025 rate period, like Professor Willig's proposed rates, they need to be discounted back to 2021 to establish rates for that first year of the rate period. Professor Willig deflated these rates by a factor of 0.96117, applying the U.S. Federal Open Market Committee's inflation rate forecast for 2021 of two percent. Willig WDT ¶ 55 & n.43. (The Services have not objected to Professor Willig's application of this inflation-adjustment process.). Applying Professor Willig's adjustment factor of 0.96117, the Judges' calculate 2021 royalty rates, based on their adoption of Professor Shapiro's input-adjusted version of Professor Willig's Shapley Value Model parameters, to be $[REDACTED] for ad-supported services and $[REDACTED] for subscription services.[274]

vii. The Impact of Shapley ''Arrival Orderings'' Given the Judges' Finding That They Do Not Reflect ''Effective Competition''

The Judges must incorporate their prior finding that Professor Willig's Shapley Value Model incorporates complementary oligopoly power in the number of arrival orderings. There is no record evidence that suggests how Shapley Values and resulting royalties would be computed if the arrival orderings were changed to ameliorate the market power generated by the number of arrival orderings created by the fragmentation of copyright ownership of ''Must Have'' repertoires across three Majors.

The Judges note that Professor Willig's Shapley Value Model does not explicitly address the potential impact of steering by a noninteractive service, *i.e.,* one that promises to play more sound recordings from a record company that agrees to a lower royalty or threatens to play fewer sound recordings from a record company that declines to agree to a lower royalty.[275] *Accord* 8/18/20 Tr. 2638 (Shapiro) (''The primary focus of competition certainly . . . in Professor Willig's model . . . is not steering'').

Professor Willig maintains that his Shapley Value Model implicitly incorporates the value of steering because the characteristic function embodies ''the extreme form of steering,'' that is, ''a black-out, non-license situation,'' which, as explained *supra,* would result in the commercial demise of the noninteractive service because each Major is a ''Must-Have.'' 8/10/20 Tr. 1070–72 (Willig).

The Judges find Professor Willig's treatment of a Major *blackout* to be a difference in kind rather than one of degree when compared with steering. An essential aspect of steering is that it serves to partially *disaggregate a record company's repertoire* by allowing the noninteractive service to modify its song selection to marginally lower its royalty costs, while increasing the royalty revenue paid to the record company increasing plays via steering and decreasing royalty revenue to the record company ''steered against'' by the service. *See Web IV,* 81 FR at 26367. As also explained therein, the noninteractive service would not go out of business as it would if it lacked a license from a Major, but rather would see an improvement to its bottom line. *Id.* Clearly, therefore, marginal steering is different in kind. The characteristic function, on whose features Professor Willig relies, does not contemplate this steering-based disaggregation.[276]

Thus, because the royalty rates derived from Professor Willig's Shapley Value Model reflect complementary oligopoly power (even as adjusted *supra*), they must be discounted to reflect effective competition. However, the Judges find nothing in the record to estimate the value of an effective competition adjustment to Professor Willig's Shapley Model-derived royalty rates (as adjusted herein).[277]

[271] In an attempt to find data consistent with his opportunity cost derived from the Zauberman Survey and other surveys in this proceeding, Professor Willig considered listening information generated by the Edison Research ''Share of Ear'' survey. Willig WDT ¶¶ 56–60 & app. F. However, on cross-examination, Professor Willig admitted that ''it's *absolutely* my view that the [S]hare of the [E]ar study is not nearly as well founded for this purpose . . . . [I]n many ways it's really not really comparably informative for the issue at hand . . . .'' 8/10/20 Tr. 1100 (Willig); *see also* Leonard WRT ¶¶ 23–29 (explaining that ''royalty calculations based on the 'Share of Ear' survey are flawed'' because, *inter alia,* they ''ignore[ ] that some users already have subscriptions and already own CD/Vinyl/Digital Downloads [so that] [p]lays diverted to these options would not represent an opportunity cost to SoundExchange.''). When both the proponent of survey evidence and the adversary decline to endorse its usefulness, the Judges will not consider that evidence as confirmation of other surveys, and the Judges place no weight on data generated by the Share of the Ear survey.

[272] Professor Shapiro does not propose that the Judges utilize the foregoing royalty rates he calculates as the statutory royalty rates. *See* Shapiro WRT at 60.

[273] As noted *supra,* note 247, Professor Willig also utilizes a N–I–N Model as a sensitivity check to his Shapley Value results. The Services assert, correctly, that the opportunity cost, profit margin and ''Must Have'' inputs Professor Willig utilizes in his N–I–N Model are identical to the inputs he utilizes in his Shapley Value Model. Services RPFFCL ¶ 693 (incorporating by reference the Services' critiques of Professor Willig's Shapley Value Model). Similarly, the Judges' consideration of the inputs in Professor Willig's Shapley Value, *supra,* are equally applicable to his N–I–N Model, and reduce his proposed royalty rates to the same extent.

[274] For the ad-supported rate, $[REDACTED] × [REDACTED] = $[REDACTED] (rounded to $[REDACTED]). For the subscription rate, $[REDACTED] × [REDACTED] = $[REDACTED] (rounded to $[REDACTED]).

[275] As explained in *Web IV,* such promises and threats can result in the absence of actual steering, as all record companies agree to reduce their rates in order to avoid being ''steered against.'' *Web IV,* 81 FR at 26366.

[276] The record does not reflect whether any Shapley Value Model even *could* address the impact of steering, but it is clear that Professor Willig's modeling does not. As explained in *Web IV, supra,* the function of steering is a *redistribution* of value to adjust for complementary oligopoly power, whereas the characteristic function establishes the *maximum value of the coalition.*

[277] More particularly, the Judges do not find that the effective competition adjustments applied to the benchmark and ratio-equivalency rates discussed elsewhere in this Determination, particularly those based on steering, can be logically applied to Professor Willig's Shapley Value-derived rate. *See* 8/6/20 Tr. 777–79, 8/10/20 Tr. 1077–78 (Willig) (acknowledging he did not conduct an analysis

Continued

Accordingly, the evidentiary record only allows the Judges to state with regard to the royalty rates they have determined—by adjusting Professor Willig's Shapley Model-derived rates—that those 2021 rates, $[REDACTED] for ad-supported services and $[REDACTED] for subscription services, exceed an effectively competitive rate by an indeterminate amount. As such, these rates serve only as *limited guideposts,*[278] indicating that *effectively competitive* rates generated via a Shapley Value Model would be less than these levels.[279]

2. Professor Shapiro's Nash-in-Nash Model

On behalf of Pandora, Professor Shapiro proffers two game theoretic bargaining theories to support proposed benchmark rates. In his direct testimony, he presents his ''Nash-in-Nash'' (N–I–N) model, and in his rebuttal testimony, as a critique of Professor Willig's Shapley Value Model, Professor Shapiro advances his ''Myerson Value'' model.

Professor Shapiro explains that the licensing of performances of sound recordings needs to be analyzed with a ''bargaining model [that] account[s] for the *multiple* bilateral negotiations that would take place'' between noninteractive services and record companies. 8/18/20 Tr. 2654–55 (Shapiro). The dynamic in such a market, he explains, is that ''although each record label would negotiate separately with each webcaster (assuming no coordination), the outcome of negotiations between one label-webcaster pair would be expected to affect the outcomes between other pairs.'' *Id.;* Shapiro WDT at 27.[280]

The game theoretic approach that best addresses this simultaneous competition and bargaining context and is the ''dominant way'' of modeling such a market, according to Professor Shapiro, is the N–I–N model, a ''non-cooperative'' game theory model which utilizes ''a consistent solution to simultaneous [bi-lateral] negotiations between multiple pairs of actors.'' 8/18/20 Tr. 2655 (Shapiro).[281] Using his N–I–N model, Professor Shapiro generates an ad-supported royalty rate of $[REDACTED] per play, and $[REDACTED] per play for subscription services. Shapiro WDT at 28 tbl.4, 32 tbl.7.

Professor Shapiro applies his N–I–N bargaining model for both ad-supported and subscription webcasting. For both forms of webcasting, his N–I–N model includes eight record companies with the largest shares of listening on Pandora[282] plus two ''catch-all'' categories of independent record companies. Shapiro WDT at 27–28 & tbl.4; *id.* at 75–76; 8/19/20 Tr. 2742, 2747 (Shapiro).

In Professor Shapiro's N–I–N modeling ''*the first step*'' in identifying royalty rates ''is to examine the opportunity cost to an individual record company of licensing its repertoire to a statutory webcaster.'' Shapiro WDT at 4 (emphasis added). He defines record company opportunity costs in the same general manner as Professor Willig—the royalties foregone by a record company if it licenses its repertoire to a noninteractive service rather than to another type of service or offers its repertoire for sale as a physical or digital product.[283] However, in performing his opportunity cost analysis, Professor Shapiro relies on a fundamental difference in the hypothetical unregulated noninteractive market. Specifically, he testifies:

> [S]ome degree of competition among record companies would also arise if a webcasting service can obtain significant bargaining leverage by threatening to drop a given record company from its service entirely if the royalty rate offered by that record company is unreasonably high.
>
> * * * * *
>
> Importantly, my analysis here relies on new evidence that no individual record company is even close to being ''must-have'' for Pandora's advertising-supported webcasting service.

Shapiro WDT at 11–12.

Accordingly, Professor Shapiro's entire N–I–N Model relies upon ''new evidence'' that he asserts demonstrates that no single record company in fact is a ''Must Have'' for a noninteractive service. Because further application of his N–I–N Model turns on the sufficiency of this new evidence, the Judges to turn now to an examination of that evidence.

a. Pandora' ''Label Suppression Experiments''

To determine whether each of the Majors is a ''Must Have'' for noninteractive services, Professor Shapiro asked Pandora to conduct several ''Label Suppression Experiments'' (LSEs) pursuant to general instructions he provided to Pandora. Shapiro WDT app. E. The LSEs were conducted and supervised by an in-house Pandora economist employed as a ''Distinguished Scientist,'' Dr. David Reiley. Trial Ex. 4091 ¶¶ 1–4, 6, 11–13 (WDT of David Reiley) (Reiley WDT). Dr. Reiley constructed LSEs to answer the question: ''What effect, if any, there would be on users' listening if Pandora stopped playing the entire catalog of a particular record company on Pandora's ad-supported service?'' Reiley WDT ¶¶ 11, 13.

In an attempt to answer this question, Dr. Reiley and his colleagues ran five experimental treatments among listeners

based on steering because steering–based competition among the Majors would be inconsistent with the maximization of the ''characteristic function,'' *i.e.,* the maximization of the surplus the bargaining parties can obtain within his Shapley Value Model); *see also* 8/26/20 Tr. 3921 (Shapiro) (''none of our models have steering . . . .'').

[278] When ''the Judges are confronted with evidence that, standing alone, is not itself wholly sufficient, they may rely on that evidence ''to *guide* the determination,'' *i.e.,* by using it as a ''*guide post*'' when considering the application of more compelling evidence. *SDARS II,* 78 FR at 23063, 23066 (emphasis added).

[279] As discussed *supra,* Professor Willig's estimated rates are also too high because they do not reflect the ''opportunity benefit'' of listeners who would substitute noninteractive listening for non-royalty bearing activities, including listening to AM/FM radio. And, given the legal infirmity of the ''fork in the road'' approach, also discussed *supra,* his proposed rates are further improperly inflated.

[280] In a two-player negotiation, the solution to the model is based on assumptions by each party regarding the negotiating strategy of the counterparty. In the N–I–N model, this concept is expanded to account for the expected outcomes in multiple two-player bargaining. Allan Collard-Wexler *et al.,* ''*Nash-in-Nash*'' *Bargaining: A Microfoundation for Applied Work,* 127 J. Pol. Econ. 163, 165–166 (2019).

[281] For the difference between such a ''non-cooperative'' model and a ''cooperative'' model such as Professor Willig's Shapley Value Model, *see supra* note 215. Professor Shapiro opines that a ''non-cooperative'' model better describes the bilateral negotiations hypothesized by the willing buyer/willing seller standard than the ''cooperative'' model invoked by Professor Willig, which is better suited for examining the behavior of ''coalitions'' of participants. *Id.* 2817–18 (Shapiro).

[282] The eight record companies are [REDACTED].

[283] Professor Shapiro describes opportunity cost in the present context as follows:

> The opportunity cost approach recognizes that, when a record company licenses its repertoire to a music service, some customers will devote additional listening time to that music service rather than listening to music in other ways. Because of the decreased listening to sound recordings through other media, the record company in question will lose some of the royalties it would otherwise have earned on performances or sales of recordings through these other media, to the extent the record company would have received incremental royalties from that listening.

Shapiro WDT at 3. In Professor Shapiro's N–I–N model, a record company's opportunity cost for licensing a webcaster is the product of four factors: (1) The total number of performances on the given webcaster's service (referred to as ''*N*'' in his model); (2) the percentage of those performances that would be lost to other forms of listening in the absence of a license from the record company (referred to as ''*L*'' in his model); (3) the average per-performance royalty the record company would earn from other forms of listening (referred to as ''*R*''); and (4) the record company's share of performances on the webcaster and the alternative services (referred to as ''*S*''). Shapiro WDT at 17; 8/18/20 Tr. 2663–65 (Shapiro).

of Pandora's ad-supported tier.[284] One group in each experiment received the ''treatment'' (described below) and the other group in each experiment was the ''control'' group, which did not received the ''treatment.''

Each treatment intentionally suppressed music from a different record company—not totally—but as completely as possible. Two of the treatments separately suppressed music from [REDACTED], and three separately suppressed music from [REDACTED]. *Id.* ¶ 12; 9/1/20 Tr. 4899 (Reiley).

Dr. Reiley then compared the listening behavior of users in the five treatment groups to the behavior of the control group, which did not receive any suppression treatment. Reiley WDT ¶ 19. He ran these LSEs over a roughly three-month period, from June 4 to August 31, 2019, and again for another approximately three-month period concluding December 4, 2019. Reiley WDT ¶ 16; Trial Ex. 4108 ¶¶ 4 (WRT of David Reiley) (Reiley WRT).

In analyzing the results, Dr. Reiley focused primarily on a particular metric: The average hours listened per registered Pandora ad-supported user, noting that ''average hours per listener was a standard metric for in-house experiments at Pandora. Reiley WDT ¶ 19. According to Dr. Reiley, the LSEs demonstrated that ''for the initial three-month experimental period, a near-total suppression of spins of any single record company [REDACTED].'' *Id.* ¶¶ 21–24; 9/1/20 Tr. 4906–07. (Reiley). He depicted the results of his three-month run of these LSEs in the following figure:

[RESTRICTED]

[REDACTED]

Reiley WDT, Fig. 2.[285]

As noted *supra,* Dr. Reiley also extended these LSEs for an additional three months. He reported his cumulative six month totals, which, he testified, confirmed his conclusion regarding the three months of experiments, *viz.,* that [REDACTED]. Reiley WRT ¶¶ 12–16 & Fig.1.[286]

b. SoundExchange's Criticism of Pandora's LSEs, Pandora's Responses, and the Judges' Findings and Analysis

i. The LSEs Are Unreliable and Uninformative

According to SoundExchange, the LSEs are not a reliable source of evidence, and thus cannot be utilized as an economic analysis to calculate Professor Shapiro's input ''*L*'' in the opportunity cost calculation necessary for his N–I–N- modeling. Willig WRT ¶¶ 22–27; 8/5/20 Tr. 351–53, 570–72, 574 (Willig). Even at this high conclusory level, Pandora offers less than a full-throated defense of the LSEs, asserting not that the LSEs are objectively sufficient and persuasive evidence, but that, comparatively, they are ''the best, most reliable evidence of the effects of a record label blackout on listening on Pandora's ad-supported radio tier.'' Services RPFFCL ¶ 852 (citing 9/1/20 Tr. 4927–28 (Reiley).

The first criticism levelled by SoundExchange is that the design of the LSEs impeded detection by respondents who were exposed to a label blackout (the treatment group) of the existence of the blackout. More particularly, a SoundExchange economic expert witness, Professor Catherine Tucker, criticized the LSEs for making the LSEs' participants, ''blind'' to the experiments' nature (*see* Reiley WDT ¶ 7), in that they were not made aware that they had lost access to the repertoire of the suppressed record company. Trial Ex. 5605 ¶ 18 (CWRT of Catherine Tucker) (Tucker WRT); 8/17/20 Tr. 2280–81 (Tucker).

Pandora responds by pointing to Dr. Reiley's testimony, in which he invokes the principal scientific reason for making the study ''blind'' to participants. Specifically, he identifies what is known in experimental work as the ''Hawthorne effect,'' by which participants in an experiment modify their behavior simply because they become aware of the experiment. 9/1/20 Tr. 4927–28 (Reiley). Moreover, Pandora argues that it would have no reason to notify ad-supported users of the existence of a *real-world* label black-out, and that any communication Pandora could have attempted to convey to the ''treatment groups'' would not even ''come close to replicating the sort of real-world *third-party* communications'' disclosing the blackout (discussed below) that Professor Tucker claims (wrongly in Pandora's opinion) would occur. Services RPFFCL ¶ 858.

The Judges find significant merit in SoundExchange's criticism. The failure of the LSEs to provide notice to participants in the ''treatment groups'' that they had lost access to the repertoire of a given record company is an important omission. Its importance is based on the fact that the value of a webcasting service lies not only in the sound recordings a listener hears, but the listeners' understanding of the repertoire to which the service has access and derivatively, which the listener can expect to be included in the sound recordings he or she may hear. To be sure, such access likely has more value to an interactive (on demand) service than to a noninteractive service, but that comparison is hardly dispositive. And the assertion by Pandora that *it* could hardly have provided the same type of notice and disclosure that third parties would have disseminated (discussed in more detail below), while likely correct, only underscores the incompleteness and lack of necessary ''real world'' elements in the experiments. That is, the fact that the necessary disclosures of information could not possibly have been included in the experiment—*by Pandora's own admission*—indicates to the Judges that the error lies in the fundaments of the LSEs, and that Pandora's unavoidable omission of such notices is hardly an argument supportive of the use of the LSEs in this proceeding.[287]

[284] To be included in either the LSE treatment or control groups, users must have listened to Pandora's ad-supported radio product during the experimental period, and were not included if they did not satisfy that criterion. *See* 9/1/20 Tr. 4902–03 (Reiley).

[285] The figures are probabilistic, because they were derived from a *survey* of Pandora ad-supported listeners, rather than from the entire population of such listeners. Dr. Reiley testified that the LSE survey size was sufficient to produce, for the listening hour reported effects, 95% confidence intervals that would be no wider than +/-5% for [REDACTED], and no wider than +/-0.5% for [REDACTED]. Reiley WDT ¶ 18. Accordingly, in the results displayed in Figure 2 in the accompanying text, the point estimates are shown by the dots, and horizontal lines indicating the width of the 95% confidence intervals.

[286] In a pre-hearing Motion, the Judges disallowed Pandora from using the cumulative results of the six month survey, because Dr. Reiley's testimony regarding the final three months of the survey should have been included in his direct testimony, or in timely filed amended direct testimony, rather than in his written *rebuttal* testimony. However, the Judges admitted Dr. Reiley's rebuttal testimony for the narrower purpose of attempting to rebut SoundExchange's position that the Judges should deem all three Majors to be ''Must Haves'' for noninteractive services. To be clear, the Judges do not consider the cumulative (six months) data for any *affirmative* purpose.

[287] The absence of disclosure to the treatment group of the loss of access to the repertoire of a record company is inconsistent with if not antithetical to, the idea of modeling the hypothetical market in a manner consistent with ''effective competition.'' As Professor Shapiro concedes, if a Major is blacked-out on Pandora, listeners have lost what economists describe as ''access value.'' 8/19/20 Tr. 2709 (Shapiro). But without disclosure of that lost value, the diminished access is not known to listeners (unless they learn of the lost access from some other source, as posited by SoundExchange). This informational deficiency is important. One of the necessary conditions for a market to be effective is the absence of asymmetric information. *See* Clifford Winston, Government Failure versus Market Failure at 27 (2006) (''efficiency . . . requires that buyers and sellers be fully informed . . . . If consumers are uninformed or misinformed about the quality of a product, they may derive less utility from it than they expected.''); Karl-Gustaf Lofgren et al., *Markets with Asymmetric Information: The Contributions of*

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The Judges also reject Dr. Reiley's reliance on the general principle that participants in an experiment should not be made aware of the nature of the experiment. Rather, the Judges concur with Professor Tucker, who testifies that this principle is inapplicable where, as here, ''we're interested in actually measuring what happens when people receive and know about receiving a degraded service.'' 8/17/20 Tr. 2281 (Tucker).

Several SoundExchange witnesses testify that services in competition with Pandora (if it was the service blacking-out a label) would have strong economic incentives to disseminate and exploit this information by: (1) Publicizing Pandora's shrunken repertoire; (2) emphasizing their own more complete repertoires; (3) targeting existing Pandora users via advertising campaigns; (4) offering promotional prices in conjunction with an emphasis on the new gap in repertoires, to encourage switching away from Pandora; and (5) expanding their own offerings or changing their prices in response to the change offering environment. Tucker WRT ¶¶ 48–49; Willig WRT ¶¶ 23–24; Zauberman WRT ¶¶ 23–25, 30–32; Simonson WRT ¶¶ 21–27, 30; 8/5/20 Tr. 570–74 (Willig). Moreover, SoundExchange notes that even Professor Shapiro concedes that Pandora's competitors would engage in such messaging if Pandora blacked-out a Major. 8/19/20 Tr. 2704–06 (Shapiro). Further, Professor Shapiro also concedes that ''there would very likely be external sources of information about this that users would receive.'' In an attempt to address this likely reality, he simply used the high statistical point estimate [REDACTED] as a proxy for the lost listening, even though he [REDACTED]'' 8/19/20 Tr. 2703 (Shapiro) (emphasis added). In fact, Professor Shapiro broadly acknowledges it is ''true'' that ''the experiments [are] imperfect in various respects . . . .'' *Id.* at 2710.

Despite its expert making these concessions regarding its own experiments, Pandora criticizes *SoundExchange* for not offering evidence beyond its witnesses' testimony regarding the likely industry responses to a Major's blackout. The Judges find this criticism is meritless and only underscores the inherent deficiencies in the LSEs. Pandora's argument is essentially that, although its model does not specify necessary elements of reality, the adverse party, SoundExchange, bore the burden of producing evidence of how that reality would affect noninteractive services in the real world.

Quite the contrary, Pandora, as the proponent of the LSE evidence, bears the burden of producing sufficient evidence to demonstrate the necessary realism of its experimental modeling.[288] Economic experiments are models,[289] and all economic models need to be analyzed through a ''realism filter.'' Dani Rodrik, Economics Rules at 27 (2015) (noting that the ''critical assumptions'' of an economic model must be evaluated through a ''realism filter'' to determine whether more realistic assumptions ''would produce a substantive difference in the conclusion produced by the model''). Pandora's LSEs do not pass through such a ''realism filter.''

SoundExchange further asserts that the disclosure of the black-out would not be made only by Pandora's competitors. It notes that, in the real-world, beyond the confines of the experimental world, consumers would learn about a Major's blackout on a noninteractive service from a number of additional sources, specifically, by artists and managers whose sound recordings and musical works would be unavailable and by the record company that had been subject to the blackout. SoundExchange asserts that these persons and entities would have the economic incentive to disseminate information regarding the blackout, and how their sound recordings could otherwise be accessed. 8/5/20 Tr. 352–53, 570–71 (Willig); 8/17/20 Tr. 2285 (Tucker). Other witness testimony explained that additional information channels—social media platforms, news media and personal networks of friends and family—would also be able to inform listeners to a noninteractive service that the repertoire of songs to which they have access had been reduced. Tucker WRT ¶¶ 19–27; Willig WRT ¶ 24; Zauberman WRT ¶¶ 25–33; Simonson WRT ¶¶ 21–30.

In response, Pandora again chastises SoundExchange for offering only speculation regarding the anticipated response by noninteractive listeners upon learning of the blacking out of a Major record company from economically motivated industry competitors and stakeholders. Pandora further criticizes SoundExchange's witnesses for relying on anecdotes pertaining to the reactions of listeners to on demand services upon learning that they had lost access to identifiable music from a particular Major. As noted above, the Judges agree with Pandora that the reactions by noninteractive listeners could be less intense, given that they have no expectation of hearing a particular song. But again, the market for noninteractive music also involves the promotion of access to a large repertoire of music that can be accessed by the curators (algorithmic or human) of that repository. A shrinking of that repertoire clearly would constitute important relevant information for a listener in choosing to remain with, or begin listening to, a noninteractive service. And once again, the burden of producing evidence regarding the importance, *vel non,* of such information is properly borne by Pandora, as the proponent of the experimental evidence, so that its model is sufficiently realistic and useful when proffered to set statutory rates with real world impact. Finally, as noted *supra*

George Akerlof, Michael Spence and Joseph Stiglitz, 104 Scandinavian J. Econ., no. 2, 195, 205 (2002) (Joseph Stiglitz, winner of the Nobel Prize for his work on the economics of information, and ''probably the most cited researcher within the information economics literature . . . has time and again pointed out that economic models may be quite misleading if they disregard informational asymmetries [and] that many markets take on a different guise in the perspective of asymmetric information . . . .''); Diane Coyle, Markets, State, and People 73, 303 (2020) (''The absence or presence of information asymmetries can make all the difference to how a market functions . . . . The assessment of efficiency . . . should account for . . . likely behavioral responses.''). But the LSEs tacitly assume a market infected by such informational asymmetry regarding the offerings of a noninteractive service, and in so doing create an experimental market infused not with effective competition, but rather with *market failure. See* Joseph E. Stiglitz & Jay K. Rosengard, Economics of the Public Sector 93 (4th ed. 2015) (identifying ''imperfect information'' as one of ''six basic market failures''); Anne Steineman, Microeconomics for Public Decisions 147 (3d. ed. 2018) (''Market failures can also occur because of imperfect information. Efficiency requires *that all relevant information be available to consumers* . . . .'') (emphasis added). The irony of this point is not lost on the Judges: Professor Shapiro endorses as evidence of a hypothetical effectively competitive market an experiment (the LSEs) that generate the absence of a condition—adequate information—whose presence is necessary to avoid market failure.

[288] Pandora also casts doubt on whether any ''third party has any reliable method for reaching the vast majority of Pandora users.'' Services RPFFCL ¶ 860. Although this, too, is speculation, it is noteworthy in that Pandora is specifically making the general asymmetric information point the Judges made *supra*—arguing in essence that it has superior information that prevents third parties from providing customers of information regarding the service they are accessing. This argument hardly supports a finding that the LSEs reflect a real world market that would be *effectively competitive.*

[289] *See* Uskali Mäki, *Models are Experiments, Experiments are Models,* 12 J. Econ. Methodology 303, 306 (2005) (''experimental systems . . . are artificially designed and constructed substitute systems, controlled mini-worlds that are directly examined in order to indirectly generate information about the . . . world outside the laboratory—such as economic systems and behavior . . . . *[S]uch experimental systems are . . . material models of aspects of the rest of the world.*'') (emphasis added).

regarding the response by Pandora's competitors, Pandora's assertion that its experiment could not model third-party dissemination of true information and listener reaction thereto is actually a self-criticism by Pandora of the usefulness of its experiment, rather than an appropriate critique of the SoundExchange witnesses whose testimony revealed the insufficiency of the experiment's design. That is, if the LSEs could not possibly have been designed to demonstrate real-world effects, that evidence is lacking in probative value, and Pandora cannot escape that finding by attempting to lay off on its adversary a burden of producing contrary evidence.[290]

Another defect in the LSEs alleged by SoundExchange is that Pandora did not prevent listeners in the treatment group from listening to songs via Pandora's ''Premium Access'' feature, which allows ad-supported users to access on-demand functionality for a limited time in exchange for viewing additional video advertisements. Reiley WDT ¶ 15; Phillips WDT ¶¶ 25–26. Pandora entices ad-supported users with repeated prompts and an offer to access bespoke songs if an ad-supported user ''opt[s] into a Premium Access Session.'' 8/31/30 Tr. 4645–46, 4632–33 (Phillips).

According to SoundExchange, Pandora's decision not to suppress content when listeners in a treatment group were using ''Premium Access'' had the effect of masking the label blackouts, logically leading listeners in the treatment groups to believe that the repertoire of the blacked-out label was still available to them. Reiley WDT ¶ 15; Phillips WDT ¶¶ 25–26; Tucker WRT ¶ 38; 8/17/20 Tr. 2319–20 (Tucker); 8/31/30 Tr. 4645–46 (Phillips). Moreover, SoundExchange maintains that this disguise effect existed regardless of whether ad-supported listeners ultimately opted into Premium Access sessions, because the offer suggested the accessibility of all repertoires, including those of the blacked-out record company. Tucker WRT ¶¶ 37–38.

Pandora acknowledges that the non-suppression of the blacked-out record company's repertoire on ''Premium Access'' was not an error or oversight, but rather intentional. Services RPFFCL ¶¶ 870, 872. It also concedes that listeners in the treatment groups heard a ''small number'' of tracks from the otherwise blacked-out record company. SX PFFCL ¶ 874. Pandora further asserts that SoundExchange has proffered no evidence that such Premium Access was intended to, or in fact did, ''disguise'' the absence of a blacked-out repertoire, because such limited access would not be confused with access on Pandora's noninteractive service. Services RPFFCL ¶ 873. In sum, Pandora, while acknowledging that the LSEs therefore did not generate ''perfect suppression,'' notes that [REDACTED]% of the blacked-out record companies' recordings were in fact suppressed. Services RPFFCL ¶ 875 (and citations therein).

The Judges find SoundExchange's criticism of the LSEs in this regard well-taken. If listeners heard otherwise blacked-out songs after accessing Pandora's ad-supported service, there is no persuasive evidence that they would recall, going forward, whether that the songs or artists they heard—which included recordings that they selected—had been accessed via the noninteractive curation process or via the Premium Access feature on that otherwise noninteractive service. Rather, Pandora asks the Judges simply to assume that listeners would be so attentive as to parse and recall the specific Pandora services through which they heard certain recordings. There is simply no reason to make such a counterintuitive assumption. Further, because a noninteractive service offers a listener the potential to hear music from a large repertoire, when a listener hears a sound recording from a particular favored artist, the listener has no reason to conclude that such recordings are in fact unavailable via the noninteractive service. That is, it seems at least equally reasonable to assume that a listener would expect to be able to access songs it hears on a service, regardless of the precise tier on which the service provided the song to the listener—at least without some further sufficient evidence to the contrary. Once again, Pandora bears the burden of producing sufficient evidence in this regard, and no such evidence is in the record.

Additionally, Pandora's own experience in conducting experiments should have put it on notice that the periodic playing of songs that are otherwise suppressed is sufficient to disguise the suppression. In its steering experiments relied upon by the Judges in *Web IV,* Pandora explained that by decreasing the frequency of the plays of songs from high-royalty record companies, *without completely eliminating plays of those songs,* Pandora could reduce its royalty costs without degrading the listener's perception of the repertoire of the service. Here too, the playing of otherwise blacked-out record company songs accessed via the noninteractive service, in the Premium Access promotional space, potentially allowed the listener to assume no such degradation. And importantly, Pandora does not provide any reason why it did not turn off the Premium Access feature for listeners selected for the LSEs, which would have mooted this concern.[291]

SoundExchange notes that in light of the foregoing deficiencies in the LSEs, even Dr. Reiley and Professor Shapiro make a consequential admission: They simply do not know how ad-supported listeners would have reacted if they were made aware of the label blackouts. *See* 9/1/20 Tr. 4928 (Reiley) (''[I]f we imagine that listeners were informed of [the missing content], then I don't know what impact that would have on listening.''); Shapiro WDT at 21 (''LSEs ''do not fully capture what would happen in the real world in the event of a blackout resulting from one of [the] record companies withholding its repertoire from Pandora . . . . [L]isteners were presumably not aware of the blackout, and they might react more strongly if they were aware.'').

SoundExchange further notes that, although Pandora's goal was to achieve 100% label suppression in the treatment group (aside from allowing Premium Access to plays of suppressed labels), it failed even in that endeavor, for several reasons. First, SoundExchange identifies what it describes as a ''technical error,'' whereby the suppression was turned off for a period of time over several days—June 13–16 and 26—during the treatment period because of various software and system upgrades. Reiley WDT ¶ 31; Reiley 9/1/20 Tr. 4956–58 (Reiley). For Pandora's 89-day experiment, this five-day period represents approximately 6% of the entire experimental period during which the suppression was partially interrupted. The Judges find that this technical error in the experiment, standing alone, would not invalidate the LSEs, but in combination with the other defects, serves to eliminate further any

[290] Pandora also emphasizes that [REDACTED]. However, the record reflects no basis for the Judges to apply the circumstances surrounding the launching of a new form of music distribution to the overall noninteractive market. Similarly, the Judges give little weight to SoundExchange's reliance on the specific example of [REDACTED]. *See* SX PFFCL ¶ 862; Services RPFFCL ¶ 862.

[291] Turning off the Premium Access feature apparently would have represented a degrading of the ad-supported service that listeners might notice, interfered with Pandora's attempt to market its premium product to these ad-supported listeners and perhaps even violated its agreements with its licensors (Pandora does not say). But Pandora's desire to maintain the Premium Access feature for the treatment groups underscores its inability (or unwillingness) to construct a sufficiently probative experiment given the nature of the ad-supported service.

weight the Judges could place on the LSEs.

Next, SoundExchange points out that Pandora continued to provide a number of ''miscellaneous provider tracks'' [292] to the treatment group, including recordings from the suppressed labels, again causing the suppression level to be reduced. Reiley WDT ¶ 28; Reiley WRT ¶¶ 21–23; 8/17/20 Tr. 2321–2322 (Tucker). More particularly, Professor Tucker testified that approximately [REDACTED]% of users in the major label treatment groups were exposed to at least one ''miscellaneous provider'' track during the LSEs. *See* Tucker WRT app. 1 (Rows 13–14); 8/17/20 Tr. 2322 (Tucker).

[REDACTED] Dr. Reiley's understanding that few spins of these ''miscellaneous provider tracks'' constituted plays from the suppressed labels. Reiley WDT ¶ 30; Reiley WRT ¶ 23 (noting that his team tested a sample of miscellaneous provider tracks and determined that only 10–15% of them (*i.e.,* 10–15% of 6% of total plays) were from the suppressed label); 9/1/20 Tr. 4921–24 (Reiley) (''Most of [the miscellaneous provider tracks] are going to be tracks that belong to other owners, since [REDACTED]).

With regard to Professor Tucker's testimony, Pandora notes that she conceded that the fact that approximately [REDACTED]% of users heard a miscellaneous provider track during the experimental period does not mean that they heard a *suppressed label track. See* 8/18/20 Tr. 2403 (Tucker). Also, Pandora points out that the [REDACTED]% figure reported here by SoundExchange ([REDACTED]% to be precise) includes miscellaneous provider tracks played *during Premium Access sessions. See* Tucker WRT app. 1 at lines 13–14. As explained *supra,* Premium Access sessions had been intentionally excluded from the LSEs.

With regard to the number of potential miscellaneous provider tracks to which a listener in the treatment group may have been exposed, the Judges agree that it is likely that such exposure was relatively low. However, even this likely small effect, when combined with the other deficiencies in the LSEs, renders the experimental results less than conclusive. Moreover, the fact that many of these miscellaneous provider tracks may have been provided within the Premium Access feature does not mitigate the imperfection. As stated *supra,* Pandora has not offered a sufficient explanation as to why ad-supported listeners would accurately parse the difference between songs played as ad-supported or as Premium Access songs accessed via the ad-supported service, in order to be cognizant of the loss of certain songs on the ad-supported tier alone. Further, because these ''miscellaneous provider tracks'' are apparently relatively popular,[293] they may have an outsized influence on a listener's satisfaction with the ad-supported service compared to less popular songs, and thus a relatively greater impact on the accuracy of the experiment.

Another issue raised by SoundExchange is the LSEs' handling of ad-supported users who upgraded to Pandora Plus or Pandora Premium subscription tiers during the experiment and thus did not receive the suppression treatment during the entire experimental period. Despite these upgradings, Pandora continued to analyze these upgraded listeners as part of the treatment group. *See* Reiley WDT ¶ 32 (''[A]lthough listeners who upgraded to Plus or Premium no longer received treatment after subscribing, I have not excluded those listeners or their listening metrics from the analysis . . . . .''); *see also* Reiley WRT ¶ 19. More particularly, the experimental data showed that [REDACTED]% of ad-supported users in the [REDACTED] treatment group and [REDACTED]% in the [REDACTED] treatment group upgraded to a subscription tier during the LSEs. Tucker WRT app. 1; Reiley WDT ¶ 32. Professor Tucker explained that this upgrading has the potential of masking the shift by ad-supported users in the ad-supported service. 8/17/20 Tr. 2318 (Tucker).

Pandora does not dispute the accuracy of the data as presented by Professor Tucker. Rather, Dr. Reiley states that he did not exclude these listeners in part ''because they did receive at least partial treatment *prior* to the upgrade . . . .'' Reiley WRT ¶ 19. Although that is not inherently unreasonable, there is also merit in Professor Tucker's assertion. The upgrading individuals may have abandoned the ad-supported service (via their upgrading) *because* of the label suppression, which would have justified either the elimination of those upgraders from the experiment, or perhaps counting them as having abandoned the ad-supported service *because* of the suppression.[294]

Next, SoundExchange avers that the LSEs cannot estimate how consumers would react over a time period longer than the LSEs, such as the five-year rate-setting period. *See* Tucker WRT¶ 77 (''Consumer learning can lead to substantial difference in the measured effect of a treatment over time''); 8/17/20 Tr. 2323–25 (Tucker) (''[C]ertainly the substance of these critiques does not change when you look at a longer time period.).

In response, Pandora relies on the testimony of Professor Shapiro and Dr. Reiley, in which they extrapolate to the LSEs longer-term effects *from other experiments* that had measured the longer-term impact of ad-loads on listening and the impact of steering, respectively. Reiley WDT ¶ 36; Reiley WRT ¶ 27. More particularly, Dr. Reiley and Professor Shapiro found that, by this extrapolation, the three-month LSEs should be adjusted by a factor of three, increasing the negative impact associated with a label blackout (and finding that the adjustment factor should equal two for the six-months of data). Shapiro WDT at 21, 24–25, tbl.3; 8/19/20 Tr. 2701 (Shapiro).

SoundExchange challenges as *ad hoc* Pandora's reliance on these unrelated experiments. It argues that neither Dr. Reiley nor Professor Shapiro provides ''legitimate support for why this relationship, which was obtained from a different experiment involving a different treatment and a different experimental design, is applicable here.'' Tucker WRT ¶ 93; 8/5/20 Tr. 583–84 (Willig). Going more deeply, Professor Willig opined that ''there is really no particular reason to believe, from a logical basis or an economic basis, that the three times or the two times is an accurate correction.'' 8/5/20 Tr. 583 (Willig). Multiple SoundExchange witnesses further explained that these other two experiments are simply too unlike the LSEs to provide useful information. Tucker WRT ¶¶ 76–83; Zauberman WRT ¶¶ 40–45, 53–56; Simonson WRT ¶¶ 41–45; Willig WRT ¶ 26.

Going even further, Professor Willig distinguished the ad-load experiment from the LSEs:

> [A]d load is a different sort of a degradation of the service from the point of view of the listeners than a narrowing of the repertoire of the music that's played, and the

[292] ''Miscellaneous provider tracks'' are recordings that have not yet been identified as covered by Pandora's current direct license agreements but are nonetheless played by Pandora ''because of the long history of user data associated with those tracks'' (*i.e.,* they are popular tracks). Reiley WDT ¶ 28.

[293] *See supra* note 292.

[294] Professor Reiley responded to this criticism, but his testimony in that regard is unclear. However, he did report on the minimal level of exposure these participants received of the suppressed labels after they had upgraded. Reiley WRT ¶ 19.

ability of a listener to discern that the ad load has increased is going to be relatively obvious. And whether or not that's the case for the missing music is somewhat less certain . . . . And so the applicability of the information from the ad loads study to the LSEs is really questionable. It is really rather speculative.

8/5/20 Tr. 584 (Willig). Finally, with regard to the ad load experiment comparison, SoundExchange notes that Dr. Reiley acknowledged the absence of any record evidence to support what is essentially nothing more than his assumption of a correlation between the effects of ad load and label suppression. 9/1/20 Tr. 4970 (Reiley).

Regarding the other purportedly comparative experiment—the steering experiments conducted by Pandora's Dr. Stephan McBride—SoundExchange's witnesses identified an important dissimilarity with the LSEs: The McBride steering experiments measured the effects of steering only up to a 30% level. *See* 9/1/20 Tr. 4925, 4990 (Reiley). Nonetheless, Dr. Reiley simply assumed that he could extrapolate from the results of a steering experiment in order to generate long-term effects from a [REDACTED]% suppression of a label. *Id.* at 4925 (Reiley).

Finally, SoundExchange again relies on the testimony of Professor Reiley himself to demonstrate the arbitrariness of his decision to multiply the three-month results by three, and the six-month results by two. Specifically, Dr. Reiley acknowledged that ''it's impossible to know exactly what would happen without running the experiment for a . . . much longer period of time,'' and that his comparison to the ad-load experiment was a ''best guess at what we think the long-run effects are likely to be.'' 9/1/20 Tr. 4910–11 (Reiley).

In rebuttal to these criticisms, Pandora relies first on Dr. Reiley's testimony that he had the benefit of having been involved in Pandora's ad-load experiments, but he acknowledged that Pandora had engaged in few other long-term experiments. Reiley WDT ¶¶ 27–28; 9/1/20 Tr. 4915–16 (Reiley). Based on that experience, he observed a decline in listening hours over approximately the first year of the ad-load experiments that was linear in nature, which he testified *could* render reasonable and justifiable Professor Shapiro's decision to double the effects of the six-month LSE experiment. Reiley WDT ¶ 28; 8/19/20 Tr. 2701 (Shapiro).

Pandora nonetheless concedes that its ad-load experiment was not perfectly correlated with the LSEs with regard to long-term effects. Attempting to turn the tables on SoundExchange, Pandora and Dr. Reiley chastise SoundExchange (yet again) for not presenting any contrary evidence. 9/1/20 Tr. 4907–09 (Reiley).

In similar fashion, Pandora relies on Dr. Reiley's conclusion that the LSEs were also consistent with longer-run extrapolations of Dr. McBride's steering experiments. However, Dr. Reiley acknowledges the wider confidence intervals in the LSEs' results compared to the steering experiments. 9/1/20 Tr. 4925, 4990 (Reiley). And, as with the alleged correlation between the LSEs and the ad-load experiments, Pandora points to the absence of any contrary evidence from SoundExchange to refute this alleged correlation. Services RPFFCL ¶ 961.

The Judges agree with SoundExchange that Pandora has failed to show the long term effects of a sustained blackout of a Major or other label by Pandora. There is insufficient evidence to support a finding that the results of two unrelated experiments—testing the impact of changing ad-loads and the steering of plays—can be mapped onto the LSEs. The fact that these other experiments may be the only available potential comparators does not mean that they are useful, or even that they are the best comparators.[295]

SoundExchange also focuses on an aberrational statistical output from the LSEs. The three-month results showed a [REDACTED]—*i.e.,* this aspect of the LSEs found that listening [REDACTED]. Reiley WDT ¶ 22. Similarly, after six months, the [REDACTED] treatment group showed [REDACTED]. Reiley WRT ¶¶ 12–14 & Fig. 1. Considering these results, Professor Willig found it implausible that ''users would listen to Pandora *more* if it lost access to [REDACTED].'' Willig WRT ¶¶ 28–29.

According to Dr. Reiley, these results are not statistically significant from a zero effect, and therefore should not be considered anomalous. Reiley WDT ¶ 22 & Fig. 2. Nonetheless, Professor Shapiro discarded the [REDACTED] data, replacing it with the three-month [REDACTED] loss rate, which he noted generated an even greater opportunity cost result. 8/19/20 Tr. 2699 (Shapiro); Shapiro WDT at 22, 27; tbl.4 at 26.

Professor Willig explained why, in his opinion, Professor Shapiro's substitution of [REDACTED] for [REDACTED] data is inappropriate:

> [I]t is completely illogical to reject the results of an LSE applied to one [REDACTED], while simultaneously claiming the results from the same experiment applied to a [REDACTED] are not only reliable, but can be extrapolated to the record company for which the experiment was deemed to be unreliable. None of the LSEs produce results that are statistically different from zero, and as such, Professor Shapiro's approach amounts to drawing on the random ''noise'' from one LSE and asserting that such noise constitutes a better estimate of blackout effects than the random noise from his other LSEs. This is completely inappropriate and cannot form the basis for reliable results.

Willig WRT ¶ 28.

The Judges agree with Professor Willig's criticism. Although it was ''conservative'' for Professor Shapiro to plug in the [REDACTED] data for the [REDACTED]data, that act of purported ''fairness'' does not make the LSEs reliable. Indeed, because the LSEs also did not include a treatment group blacking-out [REDACTED]'s repertoire (for reasons that Pandora did not explain), Pandora is left with the data generated from the [REDACTED] results to serve as a proxy for the [REDACTED], when the experiment was designed to include [REDACTED]. Although there can be circumstances when information gleaned from only one Major is sufficient, an expert witness cannot simply discard data sources that he believed, *ex ante,* to be necessary, but which, *ex post,* cast doubt on the usefulness of the experiment, in order to paper-over anomalous results.[296]

In fact, SoundExchange takes Professor Shapiro to task for making other adjustments to the LSE results that it claims are equally *ad hoc* in nature. First, it criticizes Professor Shapiro for attempting to mitigate the real world fall-out (through third-party disclosure of the blackout, discussed *supra*) that would likely ensue upon a blackout of a Major by Pandora by simply relying on the upper end of the 95% confidence interval from the LSEs. Professor Willig notes that the upper end of these confidence intervals would be as tainted by the experiments' inability to measure the impact of these real world effects as

[295] Indeed, given Dr. Reiley's acknowledgement that Pandora has engaged in few longer-term experiments, and did not identify any other such experiments, it is equally true that the ad-load and steering experiments may be the ''worst'' comparators available. In any event, the concept of ''better' or ''worse'' comparators is meaningless—the experiments are simply inapposite and cannot support Pandora's attempt to establish credible long-term effects arising from the LSEs.

[296] Thus, the Judges disagree with Pandora that Professor Shapiro's discarding of the [REDACTED] data—leaving the LSEs with lost listening data from but one Major ([REDACTED]—is similar to the Judge's reliance of industry data from fewer than all three Majors. *See* Services RPFFCL ¶ 953. Here, Dr. Reiley and Professor Shapiro constructed an experimental world and established its parameters. When those parameters produced an anomalous result, they discarded it, thereby revising their own experiment. That treatment by a party of data in conflict with the position it advocates resembles a cherry-picking of data, and is quite distinguishable from the Judge's reliance on real world data from less than all industry participants as probative of the workings of a market.

the point estimates that Professor Shapiro decided to ignore. Alternately stated, the confidence intervals, like the point estimates, are simply unrelated to the real world dissemination of information regarding the blackouts, and thus cannot be invoked as a proxy for the effect of such real world events. *See* 8/5/20 Tr. 581 (Willig); *see also* 8/17/20 Tr. 2335 (Tucker) (finding this adjustment to be ''incredibly ad hoc and unreliable'' and ''anything but conservative''); Tucker WRT ¶ 92 (finding these adjustments ''untethered to any valid procedure to produce reliable field experiment estimates''). Moreover, SoundExchange asserts that Professor Shapiro did not present a logical, mathematical or statistical justification for this adjustment. Rather, he instead multiplied the effect of the treatment four times over, a multiple that he testified—in decidedly imprecise language—''[REDACTED]'' 8/19/20 Tr. 2704–27 (Shapiro).

In response, Pandora claims that Professor Shapiro never claimed there was a correlation between the impact of the non-disclosure of the label suppression and the parameters of the confidence interval. Services RPFFCL ¶ 955. But to the Judges, that response merely underscores SoundExchange's broader criticism—*no aspect of the data arising from the LSEs addresses this non-disclosure problem.*

Accordingly, the Judges are in agreement with the criticism levelled by SoundExchange. The mere fact that Professor Shapiro moved in the direction of greater listening loss by relying on the results at the upper end of the 95% confidence interval is undeniably uncorrelated with the real-world effects of third-party disclosure of the existence of the blackout of a label. As the record testimony and evidence discussed above demonstrates, Pandora proffered no evidence to counter the argument that such a blackout would likely lead to the cratering of Pandora's listener base, making even Professor Shapiro's quadruple adjustment meaningless.[297]

ii. Conclusion Regarding the LSEs and the Implication for Professor Shapiro's N–I–N Model

For all of the foregoing reasons, the Judges cannot rely on the LSEs to support Professor Shapiro's calculation of his input ''*L*'' in his N–I–N model), *i.e.,* the percentage of those performances that would be lost to other forms of listening in the absence of a license from the record company. The failure (or inability) of the LSEs to address the effects of third-party motivated disclosure over the longer-term of the existence of the blackouts on Pandora's listenership, is alone a fatal defect in the LSEs. The other defects catalogued above constitute a further metaphorical ''death by a thousand cuts,'' further supporting the Judges' decision to put no weight on the results of the LSEs. The Judges are in agreement with Professor Willig's testimony that, after considering the foregoing issues, Professor Shapiro's parameter ''L'' is flawed because it is based on unreliable data from the LSEs. Willig WRT ¶¶ 22–27); 8/5/20 Tr. 351–53, 570–74 (Willig) (LSEs are ''absolutely not'' a reliable source of evidence for use in economic analysis).

Because a useful input ''*L*'' is a *sine qua non* of Professor Shapiro's opportunity cost calculation within his N–I–N Model, the Judges' decision to reject the calculation of that value (which was intended to show that any one Major is not a ''Must Have'') renders Professor Shapiro's N–I–N Model unusable.[298]

3. Professor Shapiro's Myerson Value Model

In his rebuttal testimony, Professor Shapiro utilizes what he described as a ''Meyerson Value'' modeling, developed by the economist Roger Myerson, which Professor Shapiro claims is a superior to Professor Willig's ''Shapley Value'' approach as a form of analysis in this proceeding. More particularly, Professor Shapiro testifies that Myerson Value modeling is similar in nature to the Shapley Value, and in fact can generate values equal to those produced by Shapley Value modeling in certain circumstances. Here, however, Professor Shapiro maintains that the two values depart from one another. The reason for the different outcomes is that the Myerson Value is applicable when there are ''contract externalities,'' a complication that is not addressed in Shapley Value modeling. Shapiro WRT at 32. By ''contract externalities,'' Professor Shapiro is referring to a situation where, in the present context, any one notional licensing agreement reached by a Major record company with a noninteractive service would affect the agreements reached by that noninteractive service with the other two Majors. Shapiro WRT at 59.

Professor Shapiro opines that these ''contract externalities'' would occur *if* the repertoire of each Major was not a ''Must Have'' for a noninteractive service.[299] In this regard, he acknowledges that, for his Myerson Value approach to be relevant (as with his N–I–N model) the Judges would need to find that the Majors are *not* ''Must Have'' licensors for noninteractive services. *See* 8/19/20 Tr. 2755–56 (Shapiro) (acknowledging that the differences between the Shapley Value modeling results and the Myerson Value modeling results would be relatively small if the Majors are indeed ''Must Haves'' for noninteractive services). Applying this model, Professor Shapiro generates an ad-supported rate of $0.00146 per play, and a subscription rate of $0.00155 per play. Shapiro WRT at 63.

The dispositive defect in Professor Shapiro's Myerson Value modeling is that it too requires the application of the results from the LSEs to demonstrate that no one Major is a ''Must Have,'' and that bi-lateral negotiations within the model would account for this situation. But, as noted above in the Judges' discussion of Professor Shapiro's N–I–N model, an approach that is dependent upon a finding that the Majors are not ''Must Haves'' for a noninteractive service is in conflict with the Judges' finding that such a ''Must Have'' condition exists. Accordingly, the Judges decline to apply Professor Shapiro's Myerson Value modeling and results.

D. Evaluation of NAB Proposal for a Separate Rate for Commercial Simulcasters

The NAB participated in this proceeding on behalf of commercial radio stations that simulcast their over-the-air broadcasts on the internet. In this proceeding, the Judges focus on the internet transmissions of these broadcasters.

The NAB argues that commercial simulcasting (simulcasting) is distinct from other forms of commercial statutory webcasting. Given the

[297] And, as noted elsewhere in this Determination, for the same reasons, the Judges find that the likely real-world disclosures—from multiple interested sources—of an *interactive* service's blacking-out of a Major would cause a rapid collapse of the interactive service as well ([REDACTED]).

[298] Accordingly, the relative merits and criticisms of the other aspects of Professor Shapiro's N–I–N Model are moot.

[299] *See* Shapiro WRT at 63–64. The external effect is that Major ''A'' must consider the possibility that agreements between Major ''B'' and/or ''C,'' on the one hand, and the noninteractive service, on the other, could result in Major ''A's'' inability to enter into a license agreement with that noninteractive service unless Major ''A'' reduced its royalty demand in order to avoid being the ''odd man out.'' But, each Major would be in the same position during negotiations, so each Major has the incentive to avoid this ''contract externality'' by proposing a lower rate than it would in the absence of this bargaining uncertainty.

purported differences, the NAB advocates for a separate (lower) rate for simulcasters than for other eligible nonsubscription transmissions by webcasters. The NAB maintains that simulcasting constitutes a distinct submarket in which buyers and sellers would be willing to agree to lower royalty rates than their counterparts in the commercial webcasting market. It proposes a statutory rate of $0.0008 per play for simulcasts and $0.0016 for other eligible nonsubscription transmissions. NAB PFFCL ¶ 10. The NAB's proposal defines a simulcast transmission as ''a public performance of a sound recording by means of the simultaneous or near-simultaneous retransmission, as part of an eligible nonsubscription transmission, of the same sound recording included in a 'broadcast transmission,' as the term is defined in 17 U.S.C. 114.'' NAB Proposed Rates and Terms at 8.

The NAB broadly contrasts simulcasting with custom radio services, which, it asserts, are standalone products, untethered to a corresponding radio broadcast. Leonard WDT ¶ 33. It indicates that custom radio provides a personalized experience that reflects a specific user's preferences. Leonard WDT ¶ 33; 8/18/20 Tr. 2430–31 (Tucker); *see also* 8/13/20 Tr. 1819 (Orszag). The NAB adds that such services also permit more interactivity than simulcasts, such as seeding stations, skipping to another song, and thumbing up or down, all of which curate the listening experience. 8/24/20 Tr. 3427 (Leonard); Leonard WDT ¶ 49; Leonard WRT ¶¶ 41–47.

Dr. Leonard, whom the NAB engaged to analyze the appropriate statutory royalty for public performance rights for sound recordings for webcasting under the Section 114 license and to evaluate the NAB's proposal regarding that statutory royalty, set out three types of webcasting services subject to the Section 114 license: Simulcast, Custom Radio, and internet Radio. Leonard WRT ¶¶ 32–35. His stated criteria for simulcasts tracks closely to the proposed regulatory definition offered by the NAB. Dr. Leonard characterized custom radio as a service that ''streams music to listeners over the internet without any simultaneous terrestrial broadcast. Unlike simulcasts, custom radio is a 'one to one' stream, with a particular listener receiving an individualized stream reflecting his or her expressed preferences, subject to the limitations on 'interactivity' imposed by the Section 114 license, as interpreted by U.S. courts.'' Leonard WRT ¶ 33.

He characterized internet radio as ''a 'native digital' service [that] does not involve the retransmission of a terrestrial broadcast.'' Leonard WRT ¶ 34. He went on to state that internet radio is more similar to custom radio than to simulcast and that, while internet radio stations do not vary the music played based on an individual listener's preferences, such services nonetheless often feature greater user functionality than simulcast, such as allowing listeners to pause and skip songs. He also maintained that internet radio services do not feature much non-music or localized content, nor are they subject to FCC regulation or public interest requirements. He also asserted that internet radio services are not a significant part of the streaming market and noted that his report does not treat internet radio services as distinct from custom radio services. Leonard WRT ¶ 35.

As the proponent of a rate structure that treats simulcasters as a separate class of webcasters, the NAB bears the burden of demonstrating not only that simulcasting differs from other forms of commercial webcasting, but also that it differs in ways that would cause willing buyers and willing sellers to agree to a lower royalty rate in the hypothetical market. *Web IV,* 81 FR at 26320. As discussed below, based on the record in the current proceeding, the Judges find that the NAB has not satisfied that burden. Therefore, the Judges do not adopt a different rate structure for simulcasters than that which applies to other commercial webcasters.

1. History

No prior rate determination has treated simulcasters differently from other webcasters. In *Web I,* the Librarian, at the recommendation of the Register, rejected a CARP report that set a separate rate for retransmission of radio broadcasts by a third-party distributor and adopted a single rate for commercial webcasters. 67 FR at 45252.[300]

In *Web II,* the Judges rejected broadcasters' arguments that rates for simulcasting should be different from (and lower than) royalty rates for other commercial webcasters. 72 FR 24084, 24095 (May 1, 2007), *aff'd in relevant part sub nom. Intercollegiate Broad. Sys.* v. *Copyright Royalty Bd.,* 571 F.3d 69 (D.C. Cir. 2009) (*Web II*).

The NAB reached a WSA settlement with SoundExchange prior to the conclusion of *Web III* covering the remainder of the *Web II* rate period and all of the *Web III* rate period. At the request of the NAB and SoundExchange, the Judges adopted the settlement as statutory rates and terms binding all simulcasting broadcasters. *See* 75 FR 16377 (April 1, 2010). Consequently, simulcasters did not participate in the *Web III* proceeding, in which the Judges determined rates for ''all other commercial webcasters.'' Although the Judges did not determine separate rates for simulcasters in *Web III,* because the Judges adopted the NAB settlement, simulcasting broadcasters paid different rates than webcasters that operated under the rates determined by the Judges.

In *Web IV,* the Judges also rejected broadcasters' arguments that rates for simulcasting should be different from (and lower than) royalty rates for other commercial webcasters. 81 FR at 26323.

2. Proposed Benchmark Agreements

In the current proceeding, the NAB offered proposed benchmark agreements in support of its rate proposal, supplemented by an alternative economic analysis. The NAB offered different types of voluntary agreements in support of its proposal: Direct license agreements between sound recording rights owners and webcaster iHeart and license agreements for musical compositions between performing rights organizations and webcasters Pandora and iHeart.

a. The iHeart/Indie Agreements

The NAB sets forth as proposed benchmarks a set of 16 renewed direct license agreements between iHeart and independent (''indie'') record labels that include rights for simulcasting and other webcasting. Exs. 2013–2026, 2081–2082 (the iHeart/Indie Agreements). The NAB's economist, Dr. Leonard, accurately indicated that the terms and conditions of iHeart's direct deals with indies are generally consistent across all of these agreements. Leonard WDT ¶ 63. The NAB argues that these agreements provide insight into how willing buyers and willing sellers license simulcast and custom radio streams on different terms. 8/24/20 Tr. 3355 (Leonard); Leonard WDT ¶ 65; Trial Ex. 2154 ¶ 14 (WDT of James Russell Williams III (''Tres Williams'')) (Williams WDT).

The NAB maintains that the iHeart/Indie Agreements are the only willing buyer/willing seller agreements offered by any participant that are between statutory services and sound recording companies for the same rights at issue under the section 114/112 licenses. 8/24/20 Tr. 3375–76 (Leonard); *see also id.* at 3355; Leonard WDT ¶ 65. Dr.

[300] The Librarian also rejected arguments that broadcasters who stream their own radio broadcasts should be treated differently from third parties who stream the same broadcasts. *Id.* at 45254.

Leonard focused his analysis on the renewal agreements because he concluded that these agreements indicate that the effective per-play rates under those agreements were acceptable to both parties and that the iHeart-Indie benchmarks are the best evidence of a willing buyer/willing seller transaction at the effective per-play rates that predated the renewal. Leonard WRT ¶ 50; Leonard WDT ¶ 65; 8/24/20 Tr. 3357–58.

The NAB argues that the iHeart/Indie Agreements reflect licensors' views of the relative promotional and substitutional considerations associated with licensing iHeart's simulcast and custom radio services and generate average rates below the statutory rate. Leonard WDT ¶ 71, 75. In the NAB's view, the indie labels' willingness to accept below-statutory rates was motivated by steering, including both the ability to garner more plays of the indies' catalogs and special relationships with top programmers at iHeart. 8/31/20 Tr. 4538–39; 4542–43 (Williams).

SoundExchange asserts that the iHeart/Indie Agreements are not a reliable or appropriate benchmark. It points out Dr. Leonard's acknowledgement that the iHeart/Indie Agreements account for only [REDACTED]%, [REDACTED]%, and [REDACTED]% of iHeart's total simulcast, custom radio, and webcast performances, respectively. Leonard WDT ¶ 72 & app. A4. SoundExchange maintains that the scope of these licenses makes them insufficiently representative to serve as persuasive benchmarks, citing the Judges' decision, in *SDARS III,* not to use as a benchmark a far larger number of direct licenses with indie record labels, 500 direct licenses representing 6.4% of the tracks on Sirius XM playlists because they were not representative of the market. *SDARS III,* 83 FR at 65249.

SoundExchange also criticizes the persuasiveness of the iHeart/Indie Agreements because the agreements [REDACTED] 8/24/20 Tr. 3492 (Leonard). SoundExchange adds that all but two of the agreements [REDACTED]. Orszag WRT ¶ 59. SoundExchange also maintains that under the iHeart/Indie Agreements, iHeart had little incentive to steer plays toward the contracting indie labels' content. It cites to Dr. Leonard's acknowledgment that broadcasters' choice of content is driven not by simulcasting but by terrestrial radio choices and the considerations there. 8/24/10 Tr. 3503 (Leonard).[301] SoundExchange adds that [REDACTED]. SX PFFCL ¶¶ 1181–1182; Orszag WRT ¶ 59.

SoundExchange asserts that the iHeart/Indie Agreements do not fully account for the economic value of simulcasting to the parties. It maintains that the indie labels that entered into the iHeart/Indie Agreements received several other benefits not available under the statutory license in exchange for accepting a lower royalty rate. Orszag WRT ¶ 62. It asserts that these motivating factors serve as key differentiators between direct license agreements and the statutory environment and that taking royalty rates from direct licenses at face value would distort the estimate of overall market rates. Orszag WRT ¶ 68.

SoundExchange indicates that the labels entering into the iHeart/Indie Agreements were motivated by [REDACTED]. Orszag WRT ¶¶ 65. The agreements include payments that are characterized [REDACTED]. *See, e.g.,* Trial Ex. 2013 ¶¶ 1(j), 1(g)(g), and 4(a)(i) The U.S. copyright law confers no exclusive right of public performance by means of terrestrial radio transmissions for sound recording copyright owners. Mr. Orszag [REDACTED] Orszag WRT ¶¶ 66. Mr. Orszag argued that a label whose catalog performs better on terrestrial radio than it does on simulcasting or custom webcasting might expect [REDACTED]. *Id.* He added that several indie labels generally [REDACTED], or [REDACTED]. Orszag WRT ¶¶ 66 n.139. Mr. Orszag also indicated that in addition to the financial benefits, this [REDACTED] served as an [REDACTED]. *Id.* ¶ 65; 8/31/20 Tr. 4606–07 (Williams) (acknowledging that ''[REDACTED]'').

SoundExchange also argues that the labels entering into the iHeart/Indie Agreements direct license were motivated by royalties for pre-1972 catalog, something the labels were not otherwise entitled to prior to the passage of the Music Modernization Act in 2018. Orszag WRT ¶¶ 67.

SoundExchange notes that the iHeart/Indie Agreements enabled indie labels to both avoid deduction of SoundExchange's administrative fee and capture the full amount of royalties owed by iHeart, without any mandatory share of royalties under the iHeart/Indie Agreements going directly through SoundExchange to featured or non-featured performing artists, as would have been the case under the statutory license. 8/13/20 Tr. 1852–53 (Orszag); Orszag WRT ¶ 63. The NAB elicited testimony from Mr. Orszag indicating that he was aware of only one of the indie labels that agreed to the iHeart/Indie Agreements, [REDACTED], which primarily focuses on budget classical music, that [REDACTED]. 8/13/20 Tr. 1853 (Orszag). Mr. Orszag indicated that one of the indie labels that agreed to the iHeart/Indie Agreements, [REDACTED], may still employ splits with certain artists, equal to or proximate to the 50/50 split due to performing artists under the statutory license. However, he did not represent that he knew know all of [REDACTED]'s deals with its artists, or the share of royalties that artists may be due. 8/13/20 Tr. 1855–57 (Orszag).[302]

b. The PRO Agreements

The NAB offers agreements licensing public performance rights in musical works to webcasters as a providing evidence to reinforce the conclusion that simulcast should receive a lower royalty rate than custom radio. Leonard WDT ¶ 83, 89. The NAB argues that agreements between performance rights organizations and webcasters indicate that simulcast and custom radio exist as distinct products subject to different rates in voluntary agreements. 8/24/20 Tr. 3389–91 (Leonard); Leonard WDT ¶ 81.

Dr. Leonard referenced a 2017 ASCAP Radio Station License Agreement with iHeart. He represented that the license includes coverage for simulcasts and certain non-simulcast webcasts but excludes coverage for custom radio webcasts that offers music programming customized for any specific user or enables a user to provide feedback to customize the music programming made available to such specific user. Leonard WDT ¶¶ 85–86. Dr. Leonard maintained that this ASCAP license is informative because: The radio stations licensees offering simulcast services are the same licensees at issue in this proceeding; the license covers analogous rights, for performance of musical compositions as compared to performance of sound recordings; the license covers simulcast and non-simulcast (non-custom) internet radio, [REDACTED]; the agreement is a transaction negotiated under the competitive protections of the ASCAP antitrust consent decree; and it functions as an industrywide agreement.

[301] 17 U.S.C. 114(g)(2) requires that SoundExchange distribute 50% of collected license fees to the copyright owner of a sound recording, 45% to recording artist or artists featured on such sound recording, and the remaining 5% to independent administrator that represents non featured musicians and vocalists who have performed on sound recordings.

[302] The iHeart/Indie Agreements include substantially similar language indicating that the relevant label ''[REDACTED].''

All but one of the iHeart/Indie Agreements, the [REDACTED] Agreement, Trial Ex. 2027, went on to clarify that ''[REDACTED]'' *See, e.g.,* [REDACTED] Agreement, Trial Ex. 2013 ¶ 4b.

Leonard WDT ¶ 87. Dr. Leonard testified [REDACTED], so he compared the ASCAP license's percentage of revenue rate for simulcasts with an effective Pandora royalty, which he calculated as a percentage of revenue. Leonard WDT ¶ 88; 8/24/20 Tr. 3390 (Leonard). His analysis indicated that the ratio of the ASCAP royalty rate as a percentage of revenue for simulcast to the ASCAP royalty rate as a percentage of revenue for Pandora ranges from 38% to 48%. Leonard WDT ¶ 88.

Dr. Leonard represented that BMI has offered to the Radio Music License Committee [303] a percentage of revenue royalty rate for terrestrial broadcasts simulcast and certain limited non-simulcast non-custom streaming. He maintained this is an indication that BMI treats simulcasting as equivalent to radio stations' terrestrial broadcasts. Leonard WDT ¶ 89. He also acknowledges that the RMLC did not request and BMI did not offer a rate for custom radio. Leonard WDT ¶ 90. Dr. Leonard also indicated that a group of radio stations represented by the RMLC entered into licenses with the PRO SESAC covering the period from January 1, 2016 to December 31, 2018 that provided a percentage of revenue royalty rate for terrestrial broadcasts and simulcast. Leonard WDT ¶ 91.

The NAB also argues that litigation with ASCAP and BMI over the royalty rates it was required to pay to those PROs for its custom radio product indicates that custom radio services are not similarly situated to radio stations' product, and that the two services are not ''similarly situated'' under the ASCAP consent decree but are ''different types of services.'' SX PFFCL ¶¶ 90–91; *see In re Pandora Media, Inc.,* 6 F. Supp. at 320; *BMI* v. *Pandora Media, Inc.,* 140 F. Supp. 3d 267, 270 (S.D.N.Y. 2015).

SoundExchange counters the NAB's arguments regarding the PRO agreements by asserting that it is not informative that custom webcasting is generally licensed separately and at a higher rate because licensees pay the PROs on a percentage of revenue basis. 8/24/20 Tr. 3534–35 (Leonard). SoundExchange notes that Dr. Leonard acknowledges that radio broadcasters typically play less music per hour than custom webcasters, and the percentage-of-revenue rates paid to the PROs by simulcasters would reasonably be lower than the rates paid to the PROs by custom webcasters. *See, e.g.,* Leonard WDT ¶ 39 & app. C2–C18; *see also* 8/24/20 Tr. 3535–36 (Leonard); Orszag WRT ¶ 48. SoundExchange maintains that the different intensities of music use explain the different effective percentage of revenue rates in PRO agreements for simulcast and custom radio. Orszag WRT ¶¶ 50–51.

SoundExchange adds that the NAB did not actually submit into the record any operative agreement between any PRO and any webcaster that covers *custom radio* and that NAB's claimed evidence about what custom radio pays is from unseen agreements between Pandora and two PROs is inadequate. SX PFFCL ¶¶ 1096–97; 8/24/20 Tr. 3541, 3542 (Leonard). SoundExchange argues that Dr. Leonard does not know what the agreements may actually say and he cannot say whether the rates for custom webcasting reflect potential tradeoffs on other terms. SX PFFCL ¶¶ 1097–99. SoundExchange adds that Dr. Leonard admitted that he did not know if there were such tradeoffs or how they were negotiated because he had not actually seen the agreements. 8/24/20 Tr. 3542, 3551 (Leonard).

SoundExchange then argues that the definitions regarding ''similarly situated'' licensees in the ASCAP and BMI consent decrees include factors that are distinct from the provisions of 17 U.S.C. 114(f)(1)(B). SoundExchange maintains that the differences between the consent decrees and the statute explain why PROs treat custom radio differently from broadcast and simulcast. It notes that the ASCAP consent decree expressly identifies, ''the nature and frequency of musical performances'' as a factor to identify whether services are similarly situated, and states that similarly situated services ''use music in similar ways and with similar frequency.'' SX RPFFCL (to NAB) ¶ 102, citing *United States* v. *ASCAP,* No. 41–1395 (WCC), 2001 WL 1589999, at *3 (S.D.N.Y. June 11, 2001).

3. Conclusions Regarding Benchmark Evidence for Simulcasting as Distinct From Other Forms of Statutory Webcasting

a. iHeart/Indie Agreements

Based on the entirety of the record, the Judges do not accept the iHeart/Indie Agreements as sufficiently probative of the relevant market to accept them as meaningful or persuasive benchmarks, or therefore as adequately persuasive to establish a separate rate for simulcasting. Importantly, these direct licenses cover only a small portion of the sound recordings performed by iHeart, and an even smaller portion of the entire market for simulcast, custom radio, and internet radio performances. The Judges also find that the record is insufficiently informative as to the effect of steering on the agreed upon royalty rates because none of them contain [REDACTED]. In addition, because U.S. copyright law confers no exclusive right of public performance by means of terrestrial radio transmissions for sound recording copyright owners, or prior to passage of the MMA a right to royalties for pre-1972 sound recordings, the Judges have misgivings regarding the extent to which the royalties under the agreements accurately reflect the myriad of motivations, and value received, for labels to enter into them. In sum, the characterization of part of the compensation in these agreements [REDACTED] is suspect, as it is not economically rational for a licensee to pay a royalty for an activity for which no license is required. The NAB has not sustained its burden to provide an adequate basis in evidence or economic theory that would permit the Judges to allocate this compensation accurately.[304]

The Judges find that SoundExchange offered compelling indications that the indie labels that entered into the iHeart/Indie Agreements were motivated by non-monetary benefits that undermine the application of the agreements as reliable benchmarks. The Judges find that the NAB did not adequately counter or account for these concerns.

SoundExchange also raised legitimate concerns that several indie labels generally [REDACTED], or [REDACTED], on the [REDACTED] of the direct licenses across multiple monthly royalty statements, thus skewing the motivations of the Indie labels, especially in the context of payments for unrecognized rights under U.S. copyright law. The NAB did not present the Judges with adequate evidence to address or account for these legitimate concerns.

The Judges observe, and find concern with the fact that while the NAB's proposal seeks to contrast simulcasting with all other statutory webcasting, the NAB chose to more consistently draw a contrast between simulcasting and custom radio services, by treating internet radio, without adequate justification, as indistinct from custom radio. The Judges find that this conflating of internet radio and custom

[303] The Radio Music License Committee represents the interests of the commercial radio industry on music licensing matters.

[304] While Dr. Leonard's analysis of the iHeart/Indie Agreements offered adjustments that considered allocating various levels of revenue [REDACTED]. The Judges would need further evidence to determine whether and the extent to which, as an economic matter, [REDACTED] should be treated as compensation for simulcasting, in contrast to custom webcasting.

radio services was not adequately supported by the record evidence, and that therefore the proper comparison between simulcasting and all other statutory commercial webcasting was insufficiently established.[305]

b. PRO Agreements

Based on the entirety of the record, the Judges find that evidence regarding agreements between performance rights organizations and webcasters is insufficiently persuasive to establish that simulcast and custom radio exist as distinct products subject to different rates in voluntary agreements. As an initial matter, the Judges note that PRO negotiations and agreements cover different rights, and involve different parties from those at issue in this proceeding. It is also relevant that the rights at issue are often subject to detailed on-going government oversight via consent decrees. The Judges are in agreement with SoundExchange that the definitions regarding ''similarly situated'' licensees in the ASCAP and BMI consent decrees include factors that are distinct from the provisions of 17 U.S.C. 114(f)(1)(B).

In addition, the Judges find it troubling that the NAB did not actually submit into the record any operative agreement between any PRO and any webcaster that covers custom radio. The Judges find the NAB's claimed evidence about what custom radio pays, purportedly derived from unseen agreements between Pandora and two PROs, to be inadequate and unreliable. SoundExchange correctly points out that neither the NAB nor the Judges can know what the agreements actually say, and whether the agreements may reflect tradeoffs on other terms.

4. Qualitative Arguments Regarding a Separate Rate for Simulcasters

In addition to its proposed benchmarks, the NAB offers several qualitative arguments why willing buyers and sellers would agree to lower simulcasting rates. For the reasons set forth below, and based on the entirety of the record, the Judges are not persuaded that the offered qualitative arguments sufficiently establish that willing buyers and sellers would agree to separate, lower simulcasting rates.

a. Degree of Interactivity

The NAB argues that simulcasters should pay a lower royalty because simulcast transmissions are among the least interactive form of webcasting. NAB PFFCL ¶¶ 147–153. It asserts that in establishing a digital performance right for sound recordings and the statutory license at issue, Congress recognized that ''interactive services are most likely to have a significant impact on traditional record sales'' while noninteractive services were more promotional and less substitutional. NAB PFFCL ¶ 148 (citing H.R. Rep. No. 104–274, at 14). The NAB suggests that this legislative history indicates Congress's recognition that a service's interactivity is a good proxy for its ability to substitute or interfere with other streams of revenue. Leonard WDT ¶ 49. It points to the Copyright Office's recognition that ''it may be appropriate [for the Judges] to distinguish between custom and noncustom radio, as the substitutional effect of personalized radio on potentially competing interactive streaming services may be greater than that of services offering a completely noncustomized experience.'' NAB PFFCL ¶ 149 (citing *Copyright and the Music Marketplace, supra* at 178). The NAB also offers the testimony of Aaron Harrison, Senior Vice President, Business and Legal Affairs of UMG Recordings, who agreed that typically ''[REDACTED]'' 9/3/20 Tr. 5691 (Harrison).

As a record company executive, Mr. Harrison's testimony provides some evidence that record companies [REDACTED] because those services are less likely to displace sales of sound recordings. However, the value of his statements for determining whether a differential rate is justified for simulcasters is limited. First, Mr. Harrison was not addressing specific negotiations or transactions. Second, the series of questions Mr. Harrison was responding to were focused on additional functionality of directly licensed *interactive* services. 9/3/20 Tr. 5690–92 (Harrison). Mr. Harrison clarified this in his testimony stating his understanding that UMG has only licensed ''[REDACTED].'' 9/3/20 Tr. 5691 (Harrison).

While the NAB posits that simulcasting is less interactive than custom webcasting, it has not established that simulcasting, *as a rule,* is materially less interactive than the full scope of noninteractive webcasting, all of which would be subject to the general commercial webcasting rates. The statutory license is available to services that offer a continuum of features, including various levels of interactivity, which are offered in a manner consistent with the license. While the Judges recognize, as have others, that a variety of factors *may* support a separate rate, on the record before them, the Judges find insufficient basis for parsing the interactivity across statutory services as proposed, or to set a customized rate structure among categories of commercial webcasters based on statutorily permissible levels of interactivity.

b. Promotional Effect

The record includes numerous statements concerning the specific promotional value to copyright owners of terrestrial radio plays for stimulating revenue for sound recordings, thus leading to a licensee's willingness to accept lower rates for such plays. *See, e.g.,* 9/3/20 Tr. 5734 (Harrison); Trial Ex. 2153 at 7–19 (WDT of Tom Poleman) (Poleman WDT); 9/9/20 Tr. 5944 (Sherwood); Leonard WRT ¶¶ 97–101. The record also indicates that characteristics that enhance promotional value include tight playlists with limited recordings and repeated plays of recordings on those playlists. Additionally, the record includes some indication that labels may not distinguish the between terrestrial radio versus simulcasting in terms of promotional benefit. Poleman WDT ¶¶ 7; 8/27/20 Tr. 4418–19.

The bulk of the evidence is persuasive that labels perceive a distinct promotional value in over the air radio play of their recordings, including participation in certain promotional programs and opportunities to enhance their ability to leverage promotional plays on terrestrial radio, with some necessary tie-in to simulcast plays. However, the record provides little persuasive indication that labels similarly, affirmatively, seek plays over simulcasts for purposes of promotion. The indications that labels may not distinguish the between terrestrial radio versus simulcasting in terms of promotional benefit is reasonably indicative that labels simply do not consider the promotional value of simulcasts (which reaches a relatively small number of listeners) in their pursuit of the promotional value of terrestrial radio plays. The NAB fails to analyze adequately the degree to which labels assign promotional value, or take actions motivated by promotional value

[305] The Judges also observe, but do not necessarily rely upon, the apparent ability of the [REDACTED]. While there was an indication that some labels and artists agreements, in particular a notably successful recording artist group, may employ artist share splits equal to or proximate to the 50% share due to performing artists under the statutory license, the Judges have sparse indication regarding the range or frequency of actual artists' shares that may be equal to or proximate to the statutory 50/50 split. The Judges also note that the [REDACTED] Agreements [REDACTED]. *See e.g.,* [REDACTED] Agreement, Ex 2013, ¶ 4b. This is in contrast to at least one other agreement in evidence covering webcasting uses eligible for the 114 statutory license, the 2016 Pandora/UMG agreement, which indicates an obligation for UMG to ''[REDACTED],'' Ex 5013, SOUNDEX_W5_000010111.

of simulcasts in relation to the promotional value labels seek via terrestrial plays.

c. The Value of Non-Music Content as a Differentiator

The NAB points to simulcasts' differentiated use of music versus non-music content, compared to custom radio, which is geared more toward music content. NAB PFFCL ¶¶ 165–167. It sets forth that terrestrial radio and simulcasters play relatively few songs compared to custom radio services. NAB PFFCL ¶ 167; Leonard WDT ¶ 47; 8/24/20 Tr. 3427:3–8 (Leonard) (''[terrestrial broadcasters and simulcasters] use forms of non-music content to compete in the marketplace . . . in contrast, a custom radio station is basically 100 percent music.''). It adds that terrestrial radio and simulcasters play relatively small catalogs of songs compared to custom radio services and that as a result any particular sound recording is not significantly important for the transmitted programming. NAB PFFCL ¶ 167; 9/3/20 Tr. 5734 (Harrison); Leonard WDT ¶ 45. The NAB also offers that radio stations receive the most ad revenue during parts of the day where they play the least music, as an indication that terrestrial radio and simulcasters value non-music content less. 8/24/20 Tr. 3429–31 (Leonard). It also suggests that audience surveys and proposed benchmark agreements (addressed above) indicate that listeners place a relatively high value on non-music content. The NAB maintains that taken together this ''evidence suggests music content has less value per minute, and therefore less value per-play, on simulcast than on custom radio.'' NAB PFFCL ¶ 172.

Like the NAB's proposed analysis of promotional value, its arguments regarding differentiated use of music versus non-music content by terrestrial radio and simulcasters compared to custom radio are insufficient. Both analyses fail adequately to address the relative motivations behind programming choices as they may apply to terrestrial radio versus simulcasting, and extent to which each transmission method plays a role in programming choices. Additionally, the bulk of the evidence and analysis regarding differentiated use of music versus non-music content involves comparison of simulcasts and *custom radio,* the latter of which is merely a subset of other eligible nonsubscription transmissions. This type of evidentiary comparison does not match with the proposal to differentiate rates between simulcast and *all other* eligible nonsubscription transmissions. While the NAB posits that simulcasts are able to differentiate by use of non-music content and that simulcasters play relatively few songs compared to custom radio, it has not adequately established that simulcasting, *as a rule,* is materially less music intensive than the full scope of noninteractive webcasting, all of which would be subject to the general commercial webcasting rates.

d. Competition With Other Commercial Webcasters

SoundExchange argues that simulcasters and other commercial webcasters compete for listeners and revenue in the same submarket and therefore should be subject to the same rate. It cites to numerous statements in government filings submitted by broadcasters and the NAB in support of this position. *See, e.g.* NAB 2018 comments filed with the FCC (Trial Ex. 5472) (acknowledging radio broadcasters have myriad competitors for streaming audiences); Cumulus Media, Inc. December 31, 2019 SEC filing Form 10–K (Trial Ex. 3042) at 8 (discussing competition with various digital platforms and services, including streaming music and other entertainment services for both listeners and advertisers). Additionally, SoundExchange points to internal NAB and iHeart documents indicating that broadcasters view digital music services as competitors. *See, e.g.* NAB Board Meeting Minutes from January 29, 2018 (Trial Ex. 5196) at 3 (discussing ''[REDACTED]''). SoundExchange also offers evidence that certain webcasters affirmatively seek to compete with simulcasters as well as terrestrial radio, including [REDACTED]. Trial Ex. 5056 at 73. The Judges find these indications of mutual competition between simulcasters and other commercial webcasters to be a compelling indication that simulcasters and other commercial webcasters operate in the same, not separate submarkets.

5. Survey Evidence Regarding Separate Rate for Simulcasters

a. The Hauser Survey

The NAB engaged Professor John Hauser to determine the degree to which listening to simulcasts substitutes for various alternative activities, the importance of different types of content to simulcast listeners, and how much consumers listen to simulcasts. *See* Trial Ex. 2151 ¶¶ 6–7, app. E (WDT of John Hauser) (Hauser WDT); 8/27/20 Tr. 4333–35 (Hauser). Professor Hauser's survey results are expressed as a series of ''diversion ratios'' reflecting the percentage of respondents that, in the absence of simulcasts, would consume content from the potential alternative activities presented in the survey. Hauser WDT app. R.

Professor Hauser indicated that his survey employed standard scientific methods to maximize reliability. The method included Screening Questions to ensure an appropriate target audience and attention checks to verify that respondents read the survey questions carefully. He also used a double-blind methodology and included question and response options unrelated to the study's objective and used filters and randomization of response options (when appropriate) to avoid certain biases. Hauser WDT ¶¶ 14, 22–24, 39.

After screening for the appropriate target sample audience, 536 respondents moved to the main survey. Of that group of qualified respondents, 532 completed the survey. Professor Hauser testified that this sample size was adequate to enable him to provide statistically significant results. Hauser WDT ¶ 76.

In an introduction to the survey, the respondents were instructed that ''There are various ways in which you can listen to content, some of which are defined below. Please read these definitions carefully, and keep them in mind when responding to questions in this survey.'' The descriptions of the listening options were:

Live AM/FM radio broadcasts through a radio: Live AM/FM radio is broadcast locally, thus allowing listeners to listen to local stations that may offer news, sports, weather, talk, and/or music through an AM/FM radio that is portable, in the home, or built into a car. Stations may broadcast programming created locally (*e.g.,* morning shows with local traffic and weather), or nationally. Radio stations may be not-for-profit (*e.g.,* NPR, college radio stations) or commercially supported by ad sales (commercial radio).

Live AM/FM radio broadcasts over the internet: Live AM/FM radio broadcasts over the internet allow listeners to listen to the same content through their computers or other internet-capable devices that is simultaneously transmitted to AM/FM radios. Live AM/FM radio broadcasts over the internet may be accessed by going to the website or app of a radio station, or to the website or app for a platform such as iHeartRadio or TuneIn.

Satellite radio (SiriusXM): Satellite radio is broadcast nationwide via satellite, thus allowing listeners to listen to the same stations anywhere in the country through a receiver that is portable, in the home, or built into a car. Satellite radio is available by subscription and offers commercial-free music as well as sports, news, talk, and other programming. Satellite radio may offer different stations that are not available on live AM/FM radio broadcasts through a radio or over the internet.

On-demand music streaming services: On-demand music streaming services allow

listeners to choose the specific song, artist, or playlist they wish to hear, in addition to playlists provided by the service. These services may be available for free with ads, or through a paid subscription without ads. On-demand music streaming services include Apple Music, ad-supported Spotify, Spotify Premium, Google Play Music, and others.

Not-on-demand music streaming services: Not-on-demand music streaming services do not allow listeners to choose the specific song or artist they wish to hear, but instead provide a pre-programmed list of songs based on listener preferences. The specific planned selection and order of songs remain unknown to the listener (*i.e.,* no prepublished playlist). These services may be available for free with ads, or through a paid subscription without ads. Not-on-demand music streaming services include adsupported Pandora, Pandora Plus, and others.

Hauser WDT app. D–6–7. At various points in the survey, respondents were informed may click a link to review these definitions. *See, e.g.* Hauser WDT app. D–11.

The first question in the main survey, Q1, asked respondents to approximate the total number of hours they spent listening to live AM/FM broadcasts from commercial radio stations over the internet over the prior three days. Hauser WDT ¶ 93.

On average, respondents estimated that they spent 5.3 hours listening to internet simulcasts of terrestrial commercial radio during the past three days (approximately 1 hour per day). The median respondent estimated spending four hours listening to internet simulcasts of terrestrial commercial radio during the past three days—approximately 1.5 hours per day. A total of 91.6 percent of the respondents spent less than twelve hours over three days (*i.e.,* four hours per day) and 96.7 percent spent less than eighteen hours over three days (*i.e.,* six hours per day). Three respondents spent more than ten hours per day and no respondents spent more than forty-eight hours over the three-day period. The average estimated number of hours spent listening to internet simulcasts of terrestrial commercial radio by day of week ranged from 1.7 to 1.8 hours. Hauser WDT ¶¶ 94–95.

The next question, Q2, asked respondents about the types of content to which they listened on internet simulcasts of terrestrial commercial radio. Respondents were prompted to select all of the offered types of content to which they listened on internet simulcasts of terrestrial commercial radio in the last three days. Hauser WDT ¶ 96. The offered types of content were as follows:

—Music (all genres, *e.g.,* pop country rock children's music religious music)
—Sports (*e.g.,* game broadcasts commentary)
—News weather and traffic
—Religion (nonmusic content, *e.g.,* preaching education)
—Talk (*e.g.,* live DJ commentary politics personal finance
—Comedy (*e.g.,* sketch comedy stand up)
—Kids and family nonmusic content (*e.g.,* educational programs)
—Other content. Please specify [TEXT BOX DO NOT ALLOW BLANKANCHOR GO TO Q4 IF ONLY OTHER IS SELECTED ANCHOR]
—Don't know/Unsure [EXCLUSIVE ANCHOR] [IF ''DON'T KNOW/UNSURE'' IS SELECTED GO TO Q4 OTHERWISE GO TO Q3]

Hauser WDT app. D–10.

On average, respondents indicated that they listened to 2.6 types of content on internet simulcasts of terrestrial commercial radio in the last three days. The breakdown was as follows: 413 respondents (82.4 percent) selected music; 277 respondents (55.3 percent) selected news weather and traffic; 248 respondents (49.5 percent) selected talk; 182 respondents (36.3 percent) selected sports; 89 respondents (17.8 percent) selected comedy; 34 respondents (6.8 percent) selected religion; 32 respondents (6.4 percent) selected kids and family; and 2 respondents (0.4 percent) selected other content types. Hauser WDT ¶ 97.

Appendix O, displays a table of the results.

If respondents indicated that they listened to one or more types of content in the past three days, they were next asked, in Q3, to indicate the level of importance each type of content had for them, choosing between ''not important,'' ''somewhat important,'' and ''very important'' for each type of content. Hauser WDT ¶ 99.

A total of 256 (51.1 percent) indicated music was very important, 185 (36.9 percent) indicated news, weather and traffic was very important, 123 (24.6 percent) indicated talk content was very important, 99 (19.8 percent) indicated sports content was very important, 45 (9.0 percent) indicated comedy was very important, 22 (4.4 percent) indicated religious content was very important, and 18 (3.6 percent) indicated that kids and family content was very important. Hauser WDT ¶ 100.

Appendix P, displays a table of the results.

The respondents were then asked, in Q4, about options they would consider in place of internet simulcasts as follows:

Now suppose that live AM/FM radio broadcasts from commercial radio stations over the internet were not available for the next five years. Assume that everything else would be available for the next five years as it is now. Which of the following if anything would you consider doing in place of listening to such broadcasts over the internet during the next five years? The prices below are examples and do not include promotional discounts taxes or fees. If you are unable to say whether you would do or would not do a particular activity please indicate this by choosing the 'Don't know Unsure' option. It is important that you do not guess.

Hauser WDT ¶¶ 101–104, app. E, Q4

Then, in Q5, respondents were asked, out of the selected consideration set, which option they *would choose,* as follows:

Continue to suppose that live AM/FM radio broadcasts from commercial radio stations over the internet were not available for the next five years. Assume that everything else would be available for the next five years as it is now. Now think about the most recent time you listened to live AM/FM radio broadcasts from commercial radio stations over the internet. Please consider situations similar to that time and the content you listened to at that time. Which one of the following would you do in place of listening to such broadcasts over the internet in similar situations during the next five years. The prices below are examples and do not include promotional discounts taxes or fees. If you are unable to say which particular activity you would do please indicate this by choosing the 'Don't know/Unsure' option. It is important that you do not guess.

Hauser WDT ¶¶ 101–105, app. E, Q5.

Professor Hauser indicated that the consider-then-choose question formulation served two functions. First, the question serves a filter. Respondents cannot select a medium if they would not at least consider it. By using such a filter, the survey avoids asking respondents to guess about which medium they would choose. Second, Professor Hauser represented that there is strong scientific evidence that consumers use a two-stage consider-then-choose decision process when they make a consumption decision, and that this format is more realistic and provides a better representation of the decision processes that consumers use. Hauser WDT ¶¶ 102.

The options in Q4 and Q5 were as follows: [306]

(A) On-demand music streaming services in place of live AM/FM radio broadcasts from commercial radio stations over the internet

[306] The question presentation included informing respondents that they may click a link to review the definitions for ''Live AM/FM radio broadcasts through a radio'' ''Live AM/FM radio broadcasts over the internet'' ''Satellite radio (SiriusXM)'' ''On-demand music streaming services'' ''Not-on-demand music streaming services''. *See, e.g.* Hauser WDT app. D–11.

[1] I would listen to on-demand music streaming service(s) through the paid subscription(s) I already have (*e.g.,* Apple Music, Spotify Premium, Google Play Music).

[2] I would purchase new paid subscription(s) to on-demand music streaming service(s) that I don't currently subscribe to (*e.g.,* an individual subscription to Apple Music, Spotify Premium, or Google Play Music at $9.99 per month or $119.88 per year).

[3] I would listen to on-demand music streaming service(s) that have ads and that I do not need to pay for (*e.g.,* ad-supported Spotify).

[4] I would listen to music on video site(s) that have ads and that I do not need to pay for (*e.g.,* ad-supported YouTube).

(B) Not-on-demand music streaming services in place of live AM/FM radio broadcasts from commercial radio stations over the internet

[5] I would listen to not-on-demand music streaming service(s) through the paid subscription(s) I already have (*e.g.,* Pandora Plus).

[6] I would purchase new paid subscription(s) to not-on-demand music streaming service(s) that I don't currently subscribe to (*e.g.,* an individual subscription to Pandora Plus at $4.99 per month or $59.88 per year).

[7] I would listen to not-on-demand music streaming service(s) that have ads and that I do not need to pay for (*e.g.,* ad-supported Pandora).

(C) Satellite radio (Sirius XM) in place of live AM/FM radio broadcasts from commercial radio stations over the internet

[8] I would listen to satellite radio through the paid subscription I already have (Sirius XM).

[9] I would purchase a new paid subscription to satellite radio that I don't currently subscribe to (*e.g.,* a Sirius XM subscription at $10.99 per month or $131.88 per year for ad-free music, $15.99 per month or $191.88 per year for ad-free music, news, traffic, weather, and other content).

(D) Other ways of listening to live AM/FM radio broadcasts in place of such broadcasts from commercial radio stations over the internet

[10] I would listen to live AM/FM radio broadcasts from commercial radio stations through a radio.

[11] I would listen to live AM/FM radio broadcasts from not-for-profit radio stations (*e.g.,* NPR, college radio stations) through a radio.

[12] I would listen to live AM/FM radio broadcasts from not-for-profit radio stations (*e.g.,* NPR, college radio stations) over the internet.

(E) Owned or purchased audio in place of live AM/FM radio broadcasts from commercial radio stations over the internet

[13] I would listen to digital music files or CDs that I already purchased.

[14] I would purchase and listen to digital music files or CDs that I don't currently own.

[15] I would listen to music obtained through peer-to-peer file sharing or free download sites.

[16] I would listen to non-music digital content that I already purchased or downloaded (*e.g.,* podcasts, audiobooks).

[17] I would purchase or download and listen to non-music digital content that I don't currently own (*e.g.,* podcasts, audiobooks).

(F) Television and video options in place of live AM/FM radio broadcasts from commercial radio stations over the internet

[18] I would watch video content that I already purchased, subscribe to, or have access to (*e.g.,* movies, cable television, Hulu, Netflix).

[19] I would purchase or subscribe to video content that I don't currently own or subscribe to (*e.g.,* movies, cable television, a Hulu subscription at $5.99 per month or $71.88 per year, a Netflix subscription at $8.99 per month or $107.88 per year).

[20] I would listen to music channels through my existing cable or satellite television subscription (*e.g.,* Music Choice).

(G) Print options in place of live AM/FM radio broadcasts from commercial radio stations over the internet

[21] I would read print or online content that I already purchased, subscribe to, or have access to (*e.g.,* books, newspapers, magazines).

[22] I would purchase or subscribe to print or online content that I don't currently own or subscribe to (*e.g.,* books, newspapers, magazines).

Others

[23] Other [PIPE IN RESPONSE TEXT FROM Q4]

[24] Don't know/Unsure

Hauser WDT app. D–15–17

Appendix Q, displays a table of the results to Q4 regarding *consider* options, and is reproduced below.

BILLING CODE 1410–72–P

Activities to Which Respondents Would Switch If Internet Simulcasts of Terrestrial Commercial Radio Were Unavailable for Five Years

Q4

Response Options[1]	Would consider	Would not consider	Don't know/Unsure
A) On-demand music streaming services in place of live AM/FM radio broadcasts from commercial radio stations over the Internet			
1. I would listen to on-demand music streaming service(s) through the paid subscription(s) I already have (e.g., Apple Music, Spotify Premium, Google Play Music).	295 (58.9%)	141 (28.1%)	65 (13.0%)
2. I would purchase new paid subscription(s) to on-demand music streaming service(s) that I don't currently subscribe to (e.g., an individual subscription to Apple Music, Spotify Premium, or Google Play Music at $9.99 per month or $119.88 per year).	150 (29.9%)	256 (51.1%)	95 (19.0%)
3. I would listen to on-demand music streaming service(s) that have ads and that I do not need to pay for (e.g., ad-supported Spotify).	386 (77.0%)	72 (14.4%)	43 (8.6%)
4. I would listen to music on video site(s) that have ads and that I do not need to pay for (e.g., ad-supported YouTube).	381 (76.0%)	78 (15.6%)	42 (8.4%)
B) Not-on-demand music streaming services in place of live AM/FM radio broadcasts from commercial radio stations over the Internet			
5. I would listen to not-on-demand music streaming service(s) through the paid subscription(s) I already have (e.g., Pandora Plus).	229 (45.7%)	199 (39.7%)	73 (14.6%)
6. I would purchase new paid subscription(s) to not-on-demand music streaming service(s) that I don't currently subscribe to (e.g., an individual subscription to Pandora Plus at $4.99 per month or $59.88 per year).	148 (29.5%)	275 (54.9%)	78 (15.6%)
7. I would listen to not-on-demand music streaming service(s) that have ads and that I do not need to pay for (e.g., ad-supported Pandora).	350 (69.9%)	106 (21.2%)	45 (9.0%)
C) Satellite radio (SiriusXM) in place of live AM/FM radio broadcasts from commercial radio stations over the Internet			
8. I would listen to satellite radio through the paid subscription I already have (SiriusXM).	210 (41.9%)	221 (44.1%)	70 (14.0%)
9. I would purchase a new paid subscription to satellite radio that I don't currently subscribe to (e.g., a SiriusXM subscription at $10.99 per month or $131.88 per year for ad-free music, $15.99 per month or $191.88 per year for ad-free music, news, traffic, weather, and other content).	114 (22.8%)	297 (59.3%)	90 (18.0%)
D) Other ways of listening to live AM/FM radio broadcasts in place of such broadcasts from commercial radio stations over the Internet			
10. I would listen to live AM/FM radio broadcasts from commercial radio stations through a radio.	454 (90.6%)	26 (5.2%)	21 (4.2%)
11. I would listen to live AM/FM radio broadcasts from not-for-profit radio stations (e.g., NPR, college radio stations) through a radio.	359 (71.7%)	82 (16.4%)	60 (12.0%)
12. I would listen to live AM/FM radio broadcasts from not-for-profit radio stations (e.g., NPR, college radio stations) over the Internet.	362 (72.3%)	85 (17.0%)	54 (10.8%)

Activities to Which Respondents Would Switch If Internet Simulcasts of Terrestrial Commercial Radio Were Unavailable for Five Years

Q4

Response Options[1]	Would consider	Would not consider	Don't know/Unsure
E) Owned or purchased audio in place of live AM/FM radio broadcasts from commercial radio stations over the Internet			
13. I would listen to digital music files or CDs that I already purchased.	397 (79.2%)	77 (15.4%)	27 (5.4%)
14. I would purchase and listen to digital music files or CDs that I don't currently own.	260 (51.9%)	167 (33.3%)	74 (14.8%)
15. I would listen to music obtained through peer-to-peer file sharing or free download sites.	190 (37.9%)	217 (43.3%)	94 (18.8%)
16. I would listen to non-music digital content that I already purchased or downloaded (e.g., podcasts, audiobooks).	299 (59.7%)	145 (28.9%)	57 (11.4%)
17. I would purchase or download and listen to non-music digital content that I don't currently own (e.g., podcasts, audiobooks).	240 (47.9%)	181 (36.1%)	80 (16.0%)
F) Television and video options in place of live AM/FM radio broadcasts from commercial radio stations over the Internet			
18. I would watch video content that I already purchased, subscribe to, or have access to (e.g., movies, cable television, Hulu, Netflix).	420 (83.8%)	61 (12.2%)	20 (4.0%)
19. I would purchase or subscribe to video content that I don't currently own or subscribe to (e.g., movies, cable television, a Hulu subscription at $5.99 per month or $71.88 per year, a Netflix subscription at $8.99 per month or $107.88 per year).	223 (44.5%)	211 (42.1%)	67 (13.4%)
20. I would listen to music channels through my existing cable or satellite television subscription (e.g., Music Choice).	315 (62.9%)	119 (23.8%)	67 (13.4%)
G) Print options in place of live AM/FM radio broadcasts from commercial radio stations over the Internet			
21. I would read print or online content that I already purchased, subscribe to, or have access to (e.g., books, newspapers, magazines).	312 (62.3%)	127 (25.3%)	62 (12.4%)
22. I would purchase or subscribe to print or online content that I don't currently own or subscribe to (e.g., books, newspapers, magazines).	213 (42.5%)	205 (40.9%)	83 (16.6%)
23. Other[2]	34 (100.0%)	–	–
Average Number of Selections per Respondent	**12.6**	**6.7**	**2.7**

Source: Simulcast Switching Survey (N=501)

Note:
[1] Q4: "Now suppose that live AM/FM radio broadcasts from commercial radio stations over the Internet were not available for the next five years. Assume that everything else would be available for the next five years as it is now. Which of the following, if anything, would you consider doing in place of listening to such broadcasts over the Internet during the next five years? The prices below are examples and do not include promotional discounts, taxes, or fees."
[2] The open-ended responses to Q4 include 15 respondents who indicated that there was nothing else they would consider by writing "nothing," "none," "all of my options were covered above," or something similar.

Hauser WDT app. Q.

Appendix R, displays a table of the results to Q5 regarding which option they *would choose,* and is reproduced below.

Activities to Which Respondents Would Switch If Internet Simulcasts of Terrestrial Commercial Radio Were Unavailable for Five Years

Q5

Response Options[1]	Count	Percentage	95% Confidence Interval[2]
A) On-demand music streaming services in place of live AM/FM radio broadcasts from commercial radio stations over the Internet	**92**	**18.4%**	**[15.0%, 21.8%]**
1. I would listen to on-demand music streaming service(s) through the paid subscription(s) I already have (e.g., Apple Music, Spotify Premium, Google Play Music).	37	7.4%	[5.1%, 9.7%]
2. I would purchase new paid subscription(s) to on-demand music streaming service(s) that I don't currently subscribe to (e.g., an individual subscription to Apple Music, Spotify Premium, or Google Play Music at $9.99 per month or $119.88 per year).	7	1.4%	[0.4%, 2.4%]
3. I would listen to on-demand music streaming service(s) that have ads and that I do not need to pay for (e.g., ad-supported Spotify).	25	5.0%	[3.1%, 6.9%]
4. I would listen to music on video site(s) that have ads and that I do not need to pay for (e.g., ad-supported YouTube).	23	4.6%	[2.8%, 6.4%]
B) Not-on-demand music streaming services in place of live AM/FM radio broadcasts from commercial radio stations over the Internet	**56**	**11.2%**	**[8.4%, 13.9%]**
5. I would listen to not-on-demand music streaming service(s) through the paid subscription(s) I already have (e.g., Pandora Plus).	8	1.6%	[0.5%, 2.7%]
6. I would purchase new paid subscription(s) to not-on-demand music streaming service(s) that I don't currently subscribe to (e.g., an individual subscription to Pandora Plus at $4.99 per month or $59.88 per year).	14	2.8%	[1.3%, 4.2%]
7. I would listen to not-on-demand music streaming service(s) that have ads and that I do not need to pay for (e.g., ad-supported Pandora).	34	6.8%	[4.6%, 9.0%]
C) Satellite radio (SiriusXM) in place of live AM/FM radio broadcasts from commercial radio stations over the Internet	**42**	**8.4%**	**[5.9%, 10.8%]**
8. I would listen to satellite radio through the paid subscription I already have (SiriusXM).	26	5.2%	[3.2%, 7.1%]
9. I would purchase a new paid subscription to satellite radio that I don't currently subscribe to (e.g., a SiriusXM subscription at $10.99 per month or $131.88 per year for ad-free music, $15.99 per month or $191.88 per year for ad-free music, news, traffic, weather, and other content).	16	3.2%	[1.6%, 4.7%]
D) Other ways of listening to live AM/FM radio broadcasts in place of such broadcasts from commercial radio stations over the Internet	**161**	**32.1%**	**[28.0%, 36.2%]**
10. I would listen to live AM/FM radio broadcasts from commercial radio stations through a radio.	127	25.3%	[21.5%, 29.2%]
11. I would listen to live AM/FM radio broadcasts from not-for-profit radio stations (e.g., NPR, college radio stations) through a radio.	18	3.6%	[2.0%, 5.2%]
12. I would listen to live AM/FM radio broadcasts from not-for-profit radio stations (e.g., NPR, college radio stations) over the Internet.	16	3.2%	[1.6%, 4.7%]

Activities to Which Respondents Would Switch If Internet Simulcasts of Terrestrial Commercial Radio Were Unavailable for Five Years

Q5

Response Options[1]	Count	Percentage	95% Confidence Interval[2]
E) Owned or purchased audio in place of live AM/FM radio broadcasts from commercial radio stations over the Internet	**56**	**11.2%**	**[8.4%, 13.9%]**
13. I would listen to digital music files or CDs that I already purchased.	30	6.0%	[3.9%, 8.1%]
14. I would purchase and listen to digital music files or CDs that I don't currently own.	9	1.8%	[0.6%, 3.0%]
15. I would listen to music obtained through peer-to-peer file sharing or free download sites.	3	0.6%	(0.0%, 1.3%]
16. I would listen to non-music digital content that I already purchased or downloaded (e.g., podcasts, audiobooks).	8	1.6%	[0.5%, 2.7%]
17. I would purchase or download and listen to non-music digital content that I don't currently own (e.g., podcasts, audiobooks).	6	1.2%	[0.2%, 2.2%]
F) Television and video options in place of live AM/FM radio broadcasts from commercial radio stations over the Internet	**59**	**11.8%**	**[8.9%, 14.6%]**
18. I would watch video content that I already purchased, subscribe to, or have access to (e.g., movies, cable television, Hulu, Netflix).	37	7.4%	[5.1%, 9.7%]
19. I would purchase or subscribe to video content that I don't currently own or subscribe to (e.g., movies, cable television, a Hulu subscription at $5.99 per month or $71.88 per year, a Netflix subscription at $8.99 per month or $107.88 per year).	12	2.4%	[1.1%, 3.7%]
20. I would listen to music channels through my existing cable or satellite television subscription (e.g., Music Choice).	10	2.0%	[0.8%, 3.2%]
G) Print options in place of live AM/FM radio broadcasts from commercial radio stations over the Internet	**15**	**3.0%**	**[1.5%, 4.5%]**
21. I would read print or online content that I already purchased, subscribe to, or have access to (e.g., books, newspapers, magazines).	10	2.0%	[0.8%, 3.2%]
22. I would purchase or subscribe to print or online content that I don't currently own or subscribe to (e.g., books, newspapers, magazines).	5	1.0%	[0.1%, 1.9%]

Activities to Which Respondents Would Switch If Internet Simulcasts of Terrestrial Commercial Radio Were Unavailable for Five Years

Q5

Response Options[1]	Count	Percentage	95% Confidence Interval[2]
H) Others	**17**	**3.4%**	**[1.8%, 5.0%]**
23. Other[3]	3	0.6%	(0.0%, 1.3%]
24. Don't know / Unsure	14	2.8%	[1.3%, 4.2%]
I) Blank responses[4]	**3**	**0.6%**	**(0.0%, 1.3%]**

Source: Simulcast Switching Survey (N=501)

Note:
[1] Q5: "Continue to suppose that live AM/FM radio broadcasts from commercial radio stations over the Internet were not available for the next five years. Assume that everything else would be available for the next five years as it is now. Now think about the most recent time you listened to live AM/FM radio broadcasts from commercial radio stations over the Internet. Please consider situations similar to that time and the content you listened to at that time. Which one of the following would you do in place of listening to such broadcasts over the Internet in similar situations during the next five years? The prices below are examples and do not include promotional discounts, taxes, or fees."
[2] The lower bound of the confidence interval is set to zero when the 95% symmetric confidence interval would otherwise include values smaller than zero.
[3] Three respondents selected their self-entered responses from Q4 in Q5. Those responses were: "nothing," "listening to amazon music," and "Listening to radio with ads."
[4] Three respondents did not select "Would consider" for any options in Q4, thus were not directed to Q5.

Hauser WDT app. R.

Professor Hauser developed a table to summarize the alternatives that were selected by more than 3.0 percent of survey respondents, which is reproduced below.

Table 3: Activities to Which More Than Three Percent of Respondents Would Switch If Internet Simulcasts of Terrestrial Commercial Radio Were Unavailable for Five Years

Response Options	Count	Percentage	95% Confidence Interval
I would listen to live AM/FM radio broadcasts from commercial radio stations through a radio.	127	25.3%	[21.5%, 29.2%]
I would listen to on-demand music streaming service(s) through the paid subscription(s) I already have (e.g., Apple Music, Spotify Premium, Google Play Music).	37	7.4%	[5.1%, 9.7%]
I would watch video content that I already purchased, subscribe to, or have access to (e.g., movies, cable television, Hulu, Netflix).	37	7.4%	[5.1%, 9.7%]
I would listen to not-on-demand music streaming service(s) that have ads and that I do not need to pay for (e.g., ad-supported Pandora).	34	6.8%	[4.6%, 9.0%]
I would listen to digital music files or CDs that I already purchased.	30	6.0%	[3.9%, 8.1%]
I would listen to satellite radio through the paid subscription I already have (SiriusXM).	26	5.2%	[3.2%, 7.1%]
I would listen to on-demand music streaming service(s) that have ads and that I do not need to pay for (e.g., ad-supported Spotify).	25	5.0%	[3.1%, 6.9%]
I would listen to music on video site(s) that have ads and that I do not need to pay for (e.g., ad-supported YouTube).	23	4.6%	[2.8%, 6.4%]
I would listen to live AM/FM radio broadcasts from not-for-profit radio stations (e.g., NPR, college radio stations) through a radio.	18	3.6%	[2.0%, 5.2%]
I would purchase a new paid subscription to satellite radio that I don't currently subscribe to (e.g., a SiriusXM subscription at $10.99 per month or $131.88 per year for ad-free music, $15.99 per month or $191.88 per year for ad-free music, news, traffic, weather, and other content).	16	3.2%	[1.6%, 4.7%]
I would listen to live AM/FM radio broadcasts from not-for-profit radio stations (e.g., NPR, college radio stations) over the Internet.	16	3.2%	[1.6%, 4.7%]

Source: Simulcast Switching Survey (N=501), Appendix R.

Hauser WDT ¶¶ 108, table 3.

As reflected in the table, ''I would listen to live AM/FM radio broadcasts from commercial radio stations through a radio'' was selected by 127 respondents (25.3 percent), and was the most commonly selected alternative. Other commonly-selected alternatives included ''I would listen to on-demand music streaming service(s) through the paid subscription(s) I already have (*e.g.,* Apple Music, Spotify Premium, Google Play Music),'' which was selected by 37 respondents (7.4 percent), and ''I would watch video content that I already purchased, subscribe to, or have access to (*e.g.,* movies, cable television, Hulu, Netflix),'' which was selected by 37 respondents (7.4 percent). Fourteen respondents (2.8 percent) selected ''don't know/unsure'' in response to this question. Hauser WDT ¶¶ 109.

Professor Hauser weighted the results of Q5 by the total number of hours each respondent reported listening to internet simulcasts of terrestrial commercial radio in Q1 in to evaluate whether the alternatives respondents consider as substitutes for internet simulcasts of terrestrial radio varied based on the total amount of time respondents spend listening to such simulcasts. He explained that if a respondent listened to only one hour of such simulcasts over the prior three days, his or her response to Q5 would count as one, while if a respondent listened to four hours of such simulcasts over the prior three days, his or her response to Q5 would count as four. Hauser WDT ¶¶ 110.

Appendix S, displays a table of the weighted results to Q5, and is reproduced below.

Activities to Which Respondents Would Switch If Internet Simulcasts of Terrestrial Commercial Radio Were Unavailable for Five Years

Weighted by Hours Listened

Q5

Response Options[1]	Percentage Weighted by Hours Listened[2][3]	95% Confidence Interval[4]
A) On-demand music streaming services in place of live AM/FM radio broadcasts from commercial radio stations over the Internet	**17.2%**	**[13.8%, 20.5%]**
1. I would listen to on-demand music streaming service(s) through the paid subscription(s) I already have (e.g., Apple Music, Spotify Premium, Google Play Music).	7.5%	[5.2%, 9.9%]
2. I would purchase new paid subscription(s) to on-demand music streaming service(s) that I don't currently subscribe to (e.g., an individual subscription to Apple Music, Spotify Premium, or Google Play Music at $9.99 per month or $119.88 per year).	1.6%	[0.5%, 2.7%]
3. I would listen to on-demand music streaming service(s) that have ads and that I do not need to pay for (e.g., ad-supported Spotify).	4.7%	[2.8%, 6.6%]
4. I would listen to music on video site(s) that have ads and that I do not need to pay for (e.g., ad-supported YouTube).	3.3%	[1.7%, 4.9%]
B) Not-on-demand music streaming services in place of live AM/FM radio broadcasts from commercial radio stations over the Internet	**14.0%**	**[11.0%, 17.1%]**
5. I would listen to not-on-demand music streaming service(s) through the paid subscription(s) I already have (e.g., Pandora Plus).	2.8%	[1.3%, 4.2%]
6. I would purchase new paid subscription(s) to not-on-demand music streaming service(s) that I don't currently subscribe to (e.g., an individual subscription to Pandora Plus at $4.99 per month or $59.88 per year).	2.7%	[1.2%, 4.1%]
7. I would listen to not-on-demand music streaming service(s) that have ads and that I do not need to pay for (e.g., ad-supported Pandora).	8.6%	[6.1%, 11.1%]
C) Satellite radio (SiriusXM) in place of live AM/FM radio broadcasts from commercial radio stations over the Internet	**6.8%**	**[4.5%, 9.0%]**
8. I would listen to satellite radio through the paid subscription I already have (SiriusXM).	4.3%	[2.5%, 6.1%]
9. I would purchase a new paid subscription to satellite radio that I don't currently subscribe to (e.g., a SiriusXM subscription at $10.99 per month or $131.88 per year for ad-free music, $15.99 per month or $191.88 per year for ad-free music, news, traffic, weather, and other content).	2.4%	[1.1%, 3.8%]
D) Other ways of listening to live AM/FM radio broadcasts in place of such broadcasts from commercial radio stations over the Internet	**31.2%**	**[27.1%, 35.3%]**
10. I would listen to live AM/FM radio broadcasts from commercial radio stations through a radio.	24.8%	[21.0%, 28.7%]
11. I would listen to live AM/FM radio broadcasts from not-for-profit radio stations (e.g., NPR, college radio stations) through a radio.	2.9%	[1.4%, 4.5%]
12. I would listen to live AM/FM radio broadcasts from not-for-profit radio stations (e.g., NPR, college radio stations) over the Internet.	3.4%	[1.8%, 5.0%]

Activities to Which Respondents Would Switch If Internet Simulcasts of Terrestrial Commercial Radio Were Unavailable for Five Years
Weighted by Hours Listened
Q5

Response Options[1]	Percentage Weighted by Hours Listened[2][3]	95% Confidence Interval[4]
E) Owned or purchased audio in place of live AM/FM radio broadcasts from commercial radio stations over the Internet	**11.3%**	**[8.5%, 14.1%]**
13. I would listen to digital music files or CDs that I already purchased.	6.2%	[4.1%, 8.4%]
14. I would purchase and listen to digital music files or CDs that I don't currently own.	1.7%	[0.5%, 2.8%]
15. I would listen to music obtained through peer-to-peer file sharing or free download sites.	0.5%	(0.0%, 1.1%]
16. I would listen to non-music digital content that I already purchased or downloaded (e.g., podcasts, audiobooks).	1.3%	[0.3%, 2.3%]
17. I would purchase or download and listen to non-music digital content that I don't currently own (e.g., podcasts, audiobooks).	1.6%	[0.5%, 2.7%]
F) Television and video options in place of live AM/FM radio broadcasts from commercial radio stations over the Internet	**11.3%**	**[8.5%, 14.1%]**
18. I would watch video content that I already purchased, subscribe to, or have access to (e.g., movies, cable television, Hulu, Netflix).	8.0%	[5.6%, 10.4%]
19. I would purchase or subscribe to video content that I don't currently own or subscribe to (e.g., movies, cable television, a Hulu subscription at $5.99 per month or $71.88 per year, a Netflix subscription at $8.99 per month or $107.88 per year).	1.8%	[0.6%, 3.0%]
20. I would listen to music channels through my existing cable or satellite television subscription (e.g., Music Choice).	1.6%	[0.5%, 2.7%]
G) Print options in place of live AM/FM radio broadcasts from commercial radio stations over the Internet	**3.0%**	**[1.5%, 4.5%]**
21. I would read print or online content that I already purchased, subscribe to, or have access to (e.g., books, newspapers, magazines).	1.4%	[0.4%, 2.5%]
22. I would purchase or subscribe to print or online content that I don't currently own or subscribe to (e.g., books, newspapers, magazines).	1.6%	[0.5%, 2.7%]

Activities to Which Respondents Would Switch If Internet Simulcasts of Terrestrial Commercial Radio Were Unavailable for Five Years
Weighted by Hours Listened
Q5

Response Options[1]	Percentage Weighted by Hours Listened[2][3]	95% Confidence Interval[4]
H) Others	**4.8%**	**[2.9%, 6.7%]**
23. Other	0.8%	(0.0%, 1.6%]
24. Don't know / Unsure	4.0%	[2.3%, 5.7%]
I) Blank responses[5]	**0.5%**	**(0.0%, 1.1%]**

Source: Simulcast Switching Survey (N=490)

Note:
[1] Q5: "Continue to suppose that live AM/FM radio broadcasts from commercial radio stations over the Internet were not available for the next five years. Assume that everything else would be available for the next five years as it is now. Now think about the most recent time you listened to live AM/FM radio broadcasts from commercial radio stations over the Internet. Please consider situations similar to that time and the content you listened to at that time. Which one of the following would you do in place of listening to such broadcasts over the Internet in similar situations during the next five years? The prices below are examples and do not include promotional discounts, taxes, or fees."
[2] This tabulation excludes respondents who answered "don't know/unsure" in Q1a. Q1a: "Thinking about the last three days, approximately how many total hours did you spend listening to live AM/FM radio broadcasts from commercial radio stations over the Internet?"
[3] The percentage of respondents making each selection from Q5 is weighted by hours listened reported in Q1a.
[4] The lower bound of the confidence interval is set to zero when the 95% symmetric confidence interval would otherwise include values smaller than zero.
[5] Three respondents did not select "Would consider" for any options in Q4, thus were not directed to Q5.

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Hauser WDT app. S.

b. Criticisms of the Hauser Survey

SoundExchange offers several critiques of the Hauser surveys, including those noted below. SX PFFCL ¶¶ 1208–1269.

i. Hypothetical Scenario

SoundExchange notes that Professor Hauser's hypothetical scenario requires respondents to predict what they would do if ''live AM/FM radio broadcasts from commercial radio stations over the internet were not available for the next five years.'' Hauser WDT, app. D at D–11. It maintains that the hypothetical, which does not mention music content, may cause respondents to answer the replacement questions in terms of how they would replace non-music content, rather than how they would replace music content. Zauberman WRT ¶ 64. SoundExchange also argues that the long, five year, period toward which respondents are directed to forecast their behavior can be cognitively taxing and confusing for individuals. Zauberman WDT ¶ 62; *see also* Simonson WRT ¶¶ 111–112. SoundExchange notes expert testimony from Professor Zauberman who maintained that the ambiguity of Professor Hauser's hypothetical does not adequately follow best practice, which dictates that hypotheticals be posed in a way that ensures the maximum relatability so that respondents are not confused about the scenario they are asked to consider. Zauberman WRT ¶ 65, *See, e.g.,* Floyd Jackson Fowler, Jr., *How Unclear Terms Affect Survey Data,* 56 Pub. Opinion Q. 218–231 (1992); *see also,* Norbert Schwartz & Daphna Oyserman, *Asking Questions About Behavior: Cognition, Communication, and Questionnaire Construction,* 22 Am. J. Evaluation, no.2, 127–160 (2001).

ii. Response Options

SoundExchange argues that Professor Hauser did not customize his list of Q4 replacement options to match respondents' individual circumstances. Instead, SoundExchange notes, all respondents received the same list of replacement options, regardless of whether or not all of these options were applicable to them. Professor Zauberman noted that eight of the 22 specific options that Professor Hauser poses for all respondents to consider in Q4 refer to services or content that they are told they already own, have access to, or have purchased, regardless of whether that is true or not. Professor Zauberman asserted that providing such response options to respondents, which do not apply to them, is confusing. Zauberman WRT ¶ 66–67. Professor Zauberman added that providing respondents with options regardless of the service/content they already own, have access to, or have purchased is poor survey design. Zauberman WRT ¶ 66–67, *See, e.g. Questionnaire Design,* Pew Res. Center, https://www.pewresearch.org/methods/u-s-survey-research/questionnaire-design/ (last visited Jan. 8, 2020); *see also,* Don A. Dillman et al., *The Fundamentals of Writing Questions, in internet, Phone, Mail, and Mixed-Mode Surveys: The Tailored Design Method* 94, 114–116 (4th ed. 2014).

Professor Zauberman explained the potentially troubling impact of this question design by considering how a respondent who does not already subscribe to a paid on-demand streaming service may react to option 1, in Q4 (''I would listen to on-demand music streaming service(s) through the paid subscription(s) I already have''), given the choices: ''Would consider'' ''Would not consider'' and ''Don't know/Unsure?''. Professor Zauberman opined that, in such a scenario, none of the available options makes sense. He maintained that the only logical answer regarding a service that the respondent does not already have would be ''N/A'' or ''I do not have such a subscription'' and these choices were not present in the survey. Instead, he suggested that respondents may be forced to answer as if they have the service. Zauberman WRT ¶ 68.

Professor Zauberman identified another alleged flaw in that Professor Hauser's response options are designed in a way that confuses respondents. He argued that the Hauser survey presented respondents with too many response options, and cited scholarship indicating that such choice options may causes cognitive overload and thus unreliable responses. Zauberman WRT ¶ 68; *see, e.g.,* Sheena S. Iyengar & Mark R. Lepper, *When Choice is Demotivating: Can One Desire Too Much of a Good Thing?,* 79 J. Personality & Soc. Psychol., no.6, 995–1006 (2000); Elena Reutskaja et al., *Choice Overload Reduces Neural Signatures of Choice Set Value in Dorsal Striatum and Anterior Cingulate Cortex,* 2 Nature Hum. Behav., 925–935 (2018).

Professor Zauberman explained that Q4 presented respondents with a list of 22 specific response options, plus an open response ''Other.'' And, in Q5, respondents are presented with a list of 22 options, plus a ''Don't know/Unsure'' option, *and* a potential ''Other'' option, depending on their answers Q4. Professor Zauberman offered his view that this is indicative of choice overload. Zauberman WRT ¶ 70; *see, e.g.,* Alexander Chernev et al., *Choice overload: A conceptual review and meta-analysis,* 25 J. Consumer Psychol., no.2, 333–358 (2015).

Professor Zauberman argued that Professor Hauser's survey design nudges respondents toward choosing free music services and other non-royalty-bearing options, over paid music options, and nudges them to select low or non-royalty-bearing switching options. He asserted that 15 out of the 22 specific options in Q4 and Q5 lead to zero new royalties for record labels, and that this is disproportionally biased towards zero royalties options. Zauberman WRT ¶ 71. Professor Zauberman also opined that the options may confuse respondents by mixing types of content (*e.g.* ''non-music digital content'' or ''music on video sites''). He added that providing options that are not mutually exclusive (*e.g.* ''streaming service(s)'' or ''AM/FM radio broadcasts'') is troubling. Zauberman WRT ¶ 71. Professor Zauberman maintained that Professor Hauser's descriptions within the response options suffer from inconsistent framing and definitions, which he found to privilege free options. In Professor Zauberman's view the survey fails to emphasize ''free vs. paid'' music listening options in a consistent manner in Q4 and Q5, namely that the non-monetary cost of the free options is less clear or emphasized than the clear indication of the ''paid'' characteristics. Professor Zauberman pointed out that in Option 3, Professor Hauser chose to use the phrase ''have ads and that I do not need to pay for'' rather than simply saying ''free'' to contrast ''paid'' in Option 2. In Professor Zauberman's view, this wording in Option 3, rather than simply saying ''free on-demand music streaming service(s),'' makes the cost (or lack thereof) of the option less salient than the cost (or lack thereof) of its paid counterpart. Zauberman WRT ¶ 71.

Professor Zauberman also found fault with the Hauser survey for excluding options to which respondents might reasonably switch. He noted that the survey does not, for example, describe or offer listening to Sirius XM online as a response option. He argued that if legitimate options had been offered as potential choices, respondents might have been more likely to select other existing paid subscriptions. And, he added, limiting the number of royalty-bearing response options available is likely to depress the number of respondents who select royalty-bearing options. Zauberman WRT ¶ 71.

Professor Zauberman concluded that the cumulative effect of the criticized survey response options is to privilege certain response options (*e.g.,* AM/FM radio) over others. He maintained that Professor Hauser's survey failed to ensure that the survey hypothetical was as clear and well-defined as possible. Zauberman WRT ¶ 71.

Professor Simonson also criticized the Hauser survey response options, characterizing the survey as burying music within a wide range of content alternatives, such as traffic, religion, and sports. He pointed out that in the Hauser survey Q2 and Q3, ''music'' represented just one out of eight response options, and that all types and genres of music were reduced to just one item, listed alongside a wide range of equally prominent, unrelated categories. Simonson WRT ¶ 102–105.

Mr. Simonson asserted that respondents tend to choose among the options presented to them, citing scholarship on that conclusion:

> [R]espondents tend to confine their answers to the choices offered, even if the researcher does not wish them to do so (Bishop *et al.* 1988, Presser 1990). That is, people generally ignore the opportunity to volunteer a response and simply select among those listed, even if the best answer is not included.

Zauberman WRT ¶ 106 (citing Jon A. Krosnick, *Survey Research,* 50 Ann. Rev. Psychol. 537, 544 (1999)). Mr. Simonson argued that in the context of a proceeding about music, including numerous non-music response options biases survey results, including through diversification bias, order effects, and demand artifacts. Simonson WRT ¶ 106 (citing Fritz Strack, ''*Order Effects*'' *in Survey Research: Activation and Information Functions of Preceding Questions, in Context Effects in Social and Psychological Research* 23–34 (Norbert Schwarz & Seymour Sudman eds., 1992), *https://doi.org/10.1007/978-1-4612-2848-6_3*.

He referred to additional research, indicating that the mere fact that respondents are presented simultaneously with multiple options causes them to spread their choices among the options instead of choosing only the option they like most. He argued that a survey designer can decrease the percentage of respondents who indicate they will switch from one music service to another by presenting respondents with a wide range of options, and that the Hauser Survey does that by leading respondents to consider a wide set of switching options, including options that are unrelated to music. Simonson WRT ¶¶ 106, 67–74 (citing Itamar Simonson, *The Effect of Purchase Quantity and Timing on Variety Seeking Behavior,* 27 J. Marketing Res. 150 (1990); Daniel Read & George Loewenstein, *Diversification Bias: Explaining the Discrepancy in Variety Seeking Between Combined and Separated Choices,* 1 J. Experimental Psychol.: Applied 34 (1995); and Schlomo Benartzi & Richard H. Thaler, *Naive Diversification Strategies in Defined Contribution Saving Plans,* 91 Am. Econ. Rev. 79 (2001); and Craig R. Fox, David Bardolet & Daniel Lieb, *How Subjective Grouping of Options Influences Choice and Allocation: Diversification Bias and the Phenomenon of Partition Dependence,* 134 J. Experimental Psychol.: Gen. 538 (2005); Craig R. Fox, David Bardolet & Daniel Lieb, *Partition Dependence in Decision Analysis, Resource Allocation, and Consumer Choice,* 3 Experimental Bus. Res. 229 (2005)). Professor Simonson concluded that by offering ''irrelevant options'' the Hauser survey misrepresents people's real-world experience, in which other content does not generally satisfy a desire for music, and the result is likely to lower the likelihood that respondents choose music options. Simonson WRT ¶ 107.

iii. Two-Stage Decision Making Process

SoundExchange argues that Professor Hauser's two-stage decision-making structure compounds the alleged errors identified above and further depresses diversion to royalty-bearing options.

SoundExchange notes that the Hauser survey first asks respondents, in Q4, to identify from a list of 22 identified music and non-music options all of the alternatives they would ''consider'' switching to in place of simulcasts. Then, in Q5, the survey forces respondents to pick just one option from this consideration set that they would use if ''live AM/FM radio broadcasts from commercial radio stations over the internet were not available for the next five years.'' SoundExchange alleges that it was inappropriate for Professor Hauser to present his replacement questions using this ''consider-then-choose'' structure. SoundExchange argues that this two-stage process, in which respondents must consider a large set of options before making a final choice, does not match the decision-making processes that consumers actually would engage in if they were replacing their simulcast listening. Zauberman WRT ¶¶ 10–14, 73; Simonson WRT ¶¶ 108–109.

SoundExchange also argues that the Hauser survey is flawed because Professor Hauser provides no justification for forcing respondents, in Q5, to choose only *one* option to replace their simulcasting over the course of the next five years. SoundExchange asserts that in the real world consumers can replace music options with multiple substitutes, and takes issue with what it characterizes as an unrealistic notion that, for the next five years, respondents must limit themselves to only one alternative option. Zauberman WRT ¶ 73; Simonson WRT ¶¶ 112. SoundExchange notes that Professor Hauser acknowledges that it is ''not uncommon for individuals to have subscriptions to multiple services, even within the same service type'' and that some listeners employ multiple services ''because different services within the same service type may offer different features for listeners and different libraries of content.'' Hauser WDT ¶ 85. SoundExchange also posits that the requirement that respondents to the Hauser survey choose only one of the offered currently available options stands in contrast to the reality of a fast changing market. SX PFFCL ¶ 1245 (citing Tucker WDT ¶¶ 10–15).

SoundExchange observes that Professor Hauser attempts to ameliorate this concern by focusing respondents on the last three days, and asking what one alternative they would choose in situations similar to their most recent listening session. Hauser WDT ¶ 13 & n.8, app. D; 8/27/20 Tr. 4344 (Hauser). However, SoundExchange asserts that this approach fails because, although the survey does mention the last three days, the replacement questions themselves do not contain this language. SX PFFCL ¶ 1251 (citing Zauberman WRT ¶ 74–75 & n.92 (Professor Hauser's ''replacement question is for the next five years, not a single use'')). SoundExchange also argues that Professor Hauser's replacement questions create a winner-take-all problem, which biases his results. It offers the example scenario in which Netflix is the primary streaming video service for consumers, but that many consumers also use Amazon Prime Video to a lesser degree. If asked to name only one streaming video service that they use, consumers would choose Netflix. SoundExchange maintains that such responses would mask the extent to which the secondary choice, Amazon Prime Video, is used. Zauberman WRT ¶ 75. Professor Zauberman testified that this type of the winner takes all structure of the replacement questions ''is highly confusing,'' and ''tremendously underplays [the] secondary players''. 8/27/20 Tr. 4210–11 (Zauberman).

iv. Time Estimation Question

SoundExchange argues that Professor Hauser's time estimation question highlights the unreliability of his survey and biases the key questions that follow it. SX PFFCL ¶ 1262. It notes Professor Hauser's finding that, on average, respondents estimated that they spent 5.3 hours listening to AM/FM radio broadcasts from commercial radio stations over the internet in the past

three days (or approximately 1.75 hours per day). SX PFFCL ¶ 1263 (citing Hauser WDT ¶ 94). SoundExchange asserts that time estimate does not at all match reality, and that this mismatch highlights a bias in Professor Hauser's survey population. SX PFFCL ¶ 1264. It points to Professor Zauberman's testimony that, according to The Infinite Dial 2019, Digital AM/FM (*i.e.,* streaming AM/FM radio) accounts for only 3% of time spent listening to music, and the average online audio listener spends approximately 16.72 hours per week (or 2.39 hours per day) listening to *all* online audio sources. Professor Zauberman noted that, by contrast, Professor Hauser's time estimates, if accurate, would mean that AM/FM streamed over the internet accounts for more than 70% of *all* online audio listening time, on average. Zauberman WRT ¶ 76 (citing Edison Research & Triton Digital, *The Infinite Dial 2019* at 26; and Edison Research, *Share of Ear Q2 2019* at 16). Professor Zauberman added that Professor Hauser provides no empirical evidence, such as industry data, to suggest that respondents are able to provide reliable estimates, and that available industry data calls the accuracy of the time estimates derived from Professor Hauser's survey into question. Zauberman WRT ¶ 77. Professor Zauberman also argued that qualitative pretests in surveys cannot assure that this type of timing question is reliable or that the right timeframe is being used. Zauberman WRT ¶ 77; 8/27/20 Tr. 4181–82 (Zauberman) (a pretest is ''where you test for confusion,'' not an instrument for ''parameteriz[ing] your elements of your survey,'' like time); *id.* at 4291–92, 4293–94 (Simonson) (same).

Professor Zauberman argued that because the timing question is the first question in the main questionnaire, it has the potential to influence responses to all subsequent questions. He cites to scholarship indicating that starting with a difficult-to-estimate question can influence the way that respondents answer the rest of the questions, especially when the rest of the survey is complex and difficult to understand. Zauberman WRT ¶ 78 (citing Shari Seidman Diamond, *Reference Guide on Survey Research, in* Reference Manual on Scientific Evidence 359, 395–96 (2011); Seymour Sudman & Norbert Schwartz, *Contributions of Cognitive Psychology to Advertising Research,* 29 J. Advertising Res., no.3, 43–53 (1989); Jon A. Krosnick & Stanley Presser, *Question and Questionnaire Design, in Handbook of Survey Research* 263, 291–94 (2nd. ed. 2010)).

Professor Zauberman also faulted the Hauser surveys for not asking respondents to estimate listening time in the future. He maintained that absent responses about future use, any inferences made based on the offered results must rely on an *assumption* about the extent to which a hypothetical change in the marketplace (*i.e.,* the unavailability of AM/FM streaming) would in fact alter both the amount of time respondents spend listening to music in total, as well as for each of the options they would replace it with. Professor Zauberman argues that such an assumption would be problematic without empirical support. Zauberman WRT ¶ 79.

c. Responses to Criticism of the Hauser Survey

The NAB responded to criticism regarding the number and type of alternatives offered in the switching questions, by noting that Professor Hauser crafted the switching options based on his experience from prior rate-setting proceedings in which his surveys were accepted (including *SDARS III,* where the survey had 19 switching options), research into the different ways respondents access different types of content, industry studies, and the feedback he received in the course of conducting qualitative interviews and pretests. 8/27/20 Tr. 4340–44 (Hauser); Hauser WDT ¶¶ 19–20, 25, 31–33. Professor Hauser testified that his pretests confirmed that respondents found the options to be comprehensive but not too numerous, and to reflect the full scope of options they would consider instead of listening to simulcasts. 8/27/20 Tr. 4340–43 (Hauser). The NAB adds that SoundExchange has advanced arguments and evidence in this proceeding to establish that a wide variety of services, including on-demand video services, broadcast television, video games, and other forms of media, are in competition with each other, and that therefore it was not unreasonable for Professor Hauser to include a variety of services as switching options in his survey. *See, e.g.,* Trial Ex. 5387 at 28; Trial Exs. 5521, 5353, 5472; Orszag WRT ¶ 46 n.96 (citing public financial documents, including iHeart 10-Ks).

The NAB addresses SoundExchange's criticism of the Hauser survey for directing respondents to choose one switching option, when consumers in the real world might replace simulcast with more than one alternative, by noting that the survey was ''fielded over ten days, invitations were released at different times of the day to ensure representative by day of week.'' The NAB argues that this approach ensures a random draw in time from the distribution of all instances of listening to simulcast. 8/27/20 Tr. 4352–53, 4356–57 (Hauser). Professor Hauser maintained that under the approach he used, even if some respondents would listen to terrestrial radio for 60% of their time, but on-demand for the remaining 40%, and listening is reasonably randomly distributed, respondents would pick terrestrial radio 60% of the time and on-demand 40% of the time when asked about the most recent time they listened. 8/26/20 Tr. 4354 (Hauser); Hauser WDT ¶ 37.

The NAB addressed Professor Simonson's concern that the Hauser survey asked respondents to pick just one option that they would do for the next five years, by maintaining that Professor Hauser question was never meant to say that respondents will do the same thing in every similar situation. Professor Hauser indicated that the qualitative interviews and pretests confirmed that is not how respondents interpreted the question. 8/27/20 Tr. 4355–56 (Hauser); *see also* Hauser WDT app. G at 8. He testified that because respondents were primed to think of ''situations similar to'' the ''most recent time'' they listened to simulcast, their responses reflect what they would do in a similar circumstance, not what they would do ''repetitively each day over the next five years.'' 8/27/20 Tr. 4356–58 (Hauser).

The NAB argues that Professor Hauser's time estimation question is not unreliable and does not conflict with results in the Infinite Dial 2019 and Share of Ear surveys. It asserts that the critique is based on an ''apples-to-oranges mistake.'' *See, e.g.,* Zauberman WRT ¶ 76. Professor Hauser posits that his survey was focused on simulcast listeners, whereas the Infinite Dial and Share of Ear targeted listeners to *all* online audio. 8/27/20 Tr. 4361 (Hauser). He points out that Professor Zauberman's comparison does not take into account respondents who listened to zero hours of simulcasts. Professor Hauser offered that ''if you put those zeros in, that zero listening, my study lines up pretty well with the [I]nfinite [D]ial.'' *Id.* at 4361.

d. Judges' Conclusions Regarding the Hauser Survey

The Judges accept that there are a variety of choices to be made when designing a reliable survey. The selected design choices will often be subject to second-guessing. While the Judges are wary of unreasonably demanding ideal survey design, many critiques will

inevitably merit consideration, to varying degrees.

In this instance, the Judges find that the main hypothetical scenario set forth requiring respondents to predict what they would do if live AM/FM radio broadcasts from commercial radio stations over the internet were not available for the next five years is reasonable. While the record reflects some reason to caution against the long, five year, prediction timeframe as potentially confusing respondents, the Judges do not find that this to be unduly concerning in this instance. However, as discussed further below, the Judges find that the critique regarding the main hypothetical scenario not honing in on music content (thus skewing the results) is worthy of concern.

The Judges find that the Hauser survey approach to the time estimation question was unduly biased toward simulcast listeners in a manner that biased the overall results. The fact that the results of the time estimate question diverge so widely from what may be considered reasonable in light of available industry data exacerbates the Judges' concerns of bias. These concerns ultimately weigh against the overall reliability of the survey.[307]

The Judges find that the ''consider-then-choose'' structure is an acceptable design choice in this instance. A case could be made that certain consumer choices on specific products or services are ill-suited to such a format. However, SoundExchange has not established convincingly that the design is inappropriate in this case. The decision to offer only one option is more concerning, given that it is widely accepted that consumers often choose more than one music (or non-music) option, especially over a five year period. The NAB's argument that this concern is addressed by the survey being fielded over multiple days does little to ameliorate the Judges concern that, in this particular switching survey addressing music options, limiting respondents' choice to one option may confuse respondents and bias results. The NAB's reference to qualitative interviews does not establish to the Judges' satisfaction that respondents understood the question clearly, or that bias is not likely present in the results.

The actual response options provided are the most troubling aspect of the survey. Based on the expert testimony of Professors Zauberman and Simonson the Judges find that the number of choices, in the format provided, can reasonably be expected to produce biased and unreliable results. Professor Hauser indicates that he crafted the switching options based on his experience from prior rate-setting proceedings in which his surveys were accepted (including *SDARS III,* where the survey had 19 switching options). However, the *SDARS III* survey was offered in a different format in which the 19 choices were set forth in two stages. Additionally, the offered choices were far more oriented toward music options, which the Judges find more appropriate in the current proceeding to set rates for transmissions of recorded music.

The Judges also note that the defined parameters of not-on-demand music streaming services are limited in a troubling—and ultimately unreasonable—fashion. As SoundExchange noted, the category excludes Sirius XM online as a response option. Additionally, the category excludes a wider array of webcast transmissions that do not vary the music played based on an individual listener's preferences, which Dr. Leonard characterizes as ''internet radio.'' The 22 specific options in Q4 and Q5, on their face, and in reference to the definition of ''Not-on-demand music streaming services'' exclude ''internet radio.'' Professor Hauser did not explain or justify these exclusions adequately.

Professor Hauser testified that his pretests confirmed that respondents found the options to be comprehensive but not too numerous, and to reflect the full scope of options they would consider instead of listening to simulcasts. But, the offered options are not comprehensive. Professor Hauser stated that he generated the options from qualitative interviews, which explored what listeners of internet simulcasts of terrestrial commercial radio considered as substitutes for listening to internet simulcasts. However, it is not apparent that the pretests or interview clearly referenced the ensuing survey's hypothetical *loss* of simulcasting in the marketplace.

Professor Hauser testified that these interviewees described a number of different activities they would do if they could not listen to internet simulcasts of terrestrial commercial radio, including listening to music through paid and ad-supported streaming services, listening to podcasts, watching television or movies, and reading news on their computers or smartphones. He indicated that the qualitative interviews revealed that respondents were not familiar with the terms ''simulcast'' or ''simulcasting,'' nor were many of them familiar with the term ''terrestrial radio.'' Respondents understood the phrase ''live radio broadcasts over the internet'' to describe internet simulcasts of terrestrial radio. He used the responses to inform the list of alternatives for Q4 of the survey. However, Professor Hauser does not adequately explain why he only offered a subset of personalized ad-supported streaming services in the alternatives for Q4.

He also states that he augmented these option choices with additional background research into the different ways in which respondents may access different types of content, including Edison Research & Triton Digital, ''The Infinite Dial—The Heavy Radio Listeners Report,'' April 2018, available at *https://www.edisonresearch.com/heavy-radio-listeners-new-insights-from-the-infinite-dial*, p. 8; Edison Research & Triton Digital, ''The Infinite Dial 2019,'' 2019, available at *https://www.edisonresearch.com/infinite-dial-2019/*, p. 30. However, these two pieces of industry data do not exclude ''internet radio.''

Another of the NAB's witnesses, Dr. Leonard, who relied on Professor Hauser's survey and testimony for purposes of his opportunity cost analysis, addresses a related issue of his own treatment of internet radio as a product category. Dr. Leonard opined that internet radio is more similar to custom radio than to simulcast. He acknowledged that internet radio stations do not vary the music played based on an individual listener's preferences, which the Judges note is a characteristic that is shared with simulcasters. However, Dr. Leonard maintained that internet radio stations nonetheless *often* feature greater user functionality than is possible with a linear simulcast stream. He asserted *many* internet radio services (including AccuRadio) allow listeners to pause and skip songs on an internet radio station, which is not available with a simulcast. Dr. Leonard also offered that internet radio services do not feature much if any non-music content. He added that internet radio services are not localized services, they are not broadcasters subject to FCC regulation, and they have no public interest requirement nor any obligation to serve any local community. Finally, Dr. Leonard stated his own understanding that internet radio services are not a significant part of the streaming market. Therefore, he stated, his report did not treat internet radio services as distinct from custom radio services.

The Judges find that these observations do not explain or cure the absence of internet radio options in the

[307] The Judges are less troubled that the time estimate questions in the Hauser survey may be unduly confusing or that any confusion caused would unduly skew the overall results of the survey.

Hauser Survey. It is notable that for Dr. Leonard's analysis he proposed to treat internet radio services as undistinguished from (or part of) custom radio services, while Professor Hauser excluded it from the scope of any of the options he provided in his survey. Among the most compelling of *possible* reasons to exclude internet radio from the scope of the provided options might be that internet radio *may* offer distinct features such as allowing listeners to pause and skip songs, making it more closely similar to custom radio. However, the Judges do not have persuasive evidence of how widely-available such features are on internet radio. Furthermore, even if internet radio services are not a significant part of the current streaming market, that does not establish a compelling reason to exclude it from the scope of provided options in Professor Hauser's survey, because the survey was about a hypothetical marketplace over the next five years during which simulcasts are not available. Even if the NAB had offered the Judges compelling evidence of low market usage of internet radio in the contemporary world, that does not provide adequate reason to exclude an option that shares key characteristics with simulcasts. For instance, the Judges note that both internet radio and simulcasts may be amongst the most ''lean back'' offerings that do not vary the music played based on an individual listener's preferences, which is a reasonable basis for including internet radio as a potential switching option.

While the Judges do not fault the Hauser survey for including too many non-music options, that decision does tend to undermine any reasonable rationale for excluding relevant and readily apparent music options, like internet radio and Sirius XM online, that are not excluded in relied-upon industry studies.

For the above-stated reasons, the Judges do not rely on the Hauser survey to support the NAB's petition for a separate rate for simulcasters.

6. Judges' Conclusion Regarding Separate Rate for Simulcasters

Based on the entirety of the record in this proceeding and for the foregoing reasons, the Judges do not find that a separate rate category for simulcasters is warranted. Additionally, significant evidence in the record persuades the Judges that simulcasters and other commercial webcasters compete in the same submarket and therefore should be subject to the same rate. Granting simulcasters differential royalty treatment would distort competition in this submarket, promoting one business model at the expense of others.

The Judges' conclusion regarding the unreliability of the Hauser Survey also renders Dr. Leonard's opportunity cost modeling unreliable to the extent it depends on the survey results. Additionally, given the Judges' overall conclusion that the NAB has not sustained its case for a separate rate for simulcasters, we do not proceed through an unnecessary analysis of the NAB's requested royalty rates.

V. Noncommercial Webcasting Rates

Five entities representing noncommercial broadcasters filed petitions to participate in this proceeding. Three of them—College Broadcasters, Inc. (CBI), the Corporation for Public Broadcasting (CPB), and National Public Radio, Inc. (NPR)—entered into settlements and withdrew from further participation. *See* 85 FR 11857 (Feb. 28, 2020) (public broadcasters' (NPR/CPB) settlement); 85 FR 12745 (Mar. 2, 2020) (noncommercial educational webcasters' (CBI) settlement). Of the remaining two noncommercial participants, only one—the National Religious Broadcasters Noncommercial Music Licensing Committee (NRBNMLC)—participated actively. Educational Media Foundation, while technically a participant, participated only through its membership in the NRBNMLC. *See* Educational Media Foundation's Notice Re Joining in Direct Case of NRBNMLC (Sep. 23, 2019).

In the current rate period, noncommercial webcasters other than public broadcasters pay a minimum fee of $500 per station or channel, which entitles them to make up to 159,140 aggregate tuning hours (ATH) [308] per month of digital audio transmissions.[309] Digital audio transmissions in excess of that ATH threshold incur fees at the applicable commercial rate. 37 CFR 380.10(a)(2). The current rate structure for noncommercial webcasters (including the 159,140 ATH threshold and $500 minimum fee) has been in force since the Judges first adopted it nearly 14 years ago in *Web II. See Web II,* 72 FR at 24100.

A. Parties' Proposals

1. SoundExchange's Rate Proposal

a. Proposed Rates

SoundExchange proposes a continuation of the current rate structure for noncommercial webcasters but with the same across-the-board increases to the minimum fee and commercial rates that SoundExchange also proposes.[310] *See* SoundExchange's Proposed Rates and Terms at 3 (Written Direct Statement of SoundExchange vol. 1 sec. B) (Sep. 23, 2019) (SoundExchange Rate Proposal). Under SoundExchange's proposal, noncommercial webcasters would pay an annual minimum fee of $1000 per channel or station. This minimum fee would cover up to 159,140 ATH per month of digital audio transmissions. Noncommercial webcasters would be obligated to pay the applicable commercial rate for usage in excess of 159,140 ATH per month. *See id.*

b. Rationale and Justification

In proposing to continue the existing rate structure, SoundExchange endorses and adopts the rationale for the existing rate structure that the Judges articulated in *Web II,* when they originally put that rate structure in place. *See* SX PFFCL ¶¶ 1346–1354. SoundExchange asserts that there is no adequate marketplace benchmark for licenses to noncommercial webcasters. SoundExchange's expert, Mr. Orszag, testified that, to his knowledge, ''there is no market for licensing noncommercial services, and therefore no voluntary agreements negotiated in unregulated markets that could serve as potential benchmarks specific to such services.'' Orszag WDT ¶ 184.

Rather than basing its proposal on a benchmark analysis, therefore, SoundExchange's proposal rests on the economic insight articulated in *Web II* that larger noncommercial webcasters

[308] ''Aggregate Tuning Hours'' (ATH) are defined as the total hours of programming that the Licensee has transmitted during the relevant period to all listeners within the United States from all channels and stations that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions or noninteractive digital audio transmissions as part of a new subscription service, less the actual running time of any sound recordings for which the Licensee has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. 37 CFR 380.7 (2019). Or, more succinctly, the number of hours of programming on all channels and stations multiplied by the number of listeners.

[309] Noncommercial educational webcasters (NEWs) also pay a $500 minimum fee per channel or station that allows them to transmit up to 159,140 ATH per month. 37 CFR 380.22(a). NEWs that exceed that threshold in any month must pay the rates established for all other noncommercial webcasters. 37 CFR 380.22(b). NEWs that do not transmit more than 80,000 ATH on any channel or station for more than one month in the preceding year may also pay a ''proxy fee'' of $100 per year that entitles them to a waiver of the requirement to file reports of use. 37 CFR 380.23(g)(1). Other NEWs may elect to provide reports of use on a sample basis. 37 CFR 380.23(g)(2).

[310] SoundExchange's minimum fee proposals are discussed *infra,* section VI. SoundExchange's proposed rates for commercial webcasters are discussed *supra,* section IV.

have the same or similar competitive impact in the marketplace as similarly sized commercial webcasters. *See Web II,* 72 FR at 24097; *see also Web IV,* 81 FR at 26395 (''the Judges apply commercial rates to noncommercial webcasters above the ATH threshold because economic logic dictates that outcome, not because it was observed in benchmark agreements''). In *Web II,* the Judges recognized that noncommercial webcasters ''may constitute a distinct segment of the noninteractive webcasting market that in a willing buyer/willing seller hypothetical marketplace would produce different, lower rates'' than those for commercial webcasters but only ''up to a point'', *i.e.,* the point at which a noncommercial webcaster poses a ''threat of making serious inroads into the business of those services paying the commercial rate.'' *Web II,* 72 FR at 24097. The Judges employed the noncommercial webcaster's size, as measured by its listenership, as a ''proxy'' for determining when a noncommercial webcaster poses a competitive threat to commercial webcasters. *See id.* at 24098–99. Based on the then-average online listenership to NPR stations of 218 simultaneous users, the Judges set a threshold of 159,140 ATH per month for applying commercial webcasting rates.[311] *See id.* at 24099.

Although Mr. Orszag opined that he saw ''no reason why commercial and noncommercial services would be treated differently with respect to the rates they pay'' in an unregulated market, *id.* ¶ 185, he nevertheless supported the existing rate structure based on a history of settlements in rate proceedings. Mr. Orszag acknowledged that SoundExchange had reached settlements in the past with smaller noncommercial webcasters for a ''nominal per-channel rate.'' *Id.* ¶ 186. For larger noncommercial webcasters, ''there has long existed a demarcation at 159,140 aggregate tuning hours . . . per month'' under the compulsory license, ''with services that exceed that threshold paying commercial rates on the incremental usage.'' *Id.* ¶ 187. He contended ''[t]here is no empirical evidence to suggest, and no reason based in economic theory to think, that record companies would license large noncommercial services that compete meaningfully with commercial services at a fraction of the commercial rate.'' *Id.* He noted, moreover, ''this structure is supported by precedent and settlements of prior proceedings before the Judges.'' *Id.*

[311] (24 hrs. × 365 days 218 users) ÷ 12 mos. = 159,140 ATH/mo.

SoundExchange also presented expert testimony from Professor Catherine Tucker concerning the impact of the current rate structure on noncommercial webcasters. She testified that under the current noncommercial rates the vast majority of noncommercial webcasters pay only the minimum fee. *See* Trial Ex. 5604 ¶ 165 (Tucker WDT). In 2018 (the most recent year for which Professor Tucker had data), [REDACTED] out of a total of [REDACTED] noncommercial webcasters ([REDACTED]%) paid only the minimum fee per station. *See id.* Professor Tucker also testified that, among those noncommercial webcasters that exceed the music ATH threshold and must pay per-performance royalties, ''[REDACTED].'' *Id.* ¶ 166. Across the five noncommercial webcasters paying the most for excess usage, ''[REDACTED] [REDACTED].'' [312] *Id.* Professor Tucker also opined that these noncommercial webcasters would be ''well positioned'' to pay royalties under this rate structure even with the increases in the minimum fee and per-performance rates that SoundExchange proposes: [REDACTED].'' *Id.* ¶ 167.

c. NRBNMLC Response

NRBNMLC controverts nearly every element of SoundExchange's proffered rationale for its rate proposal (and, by extension, the Judges' rationale in *Web II, Web III,* and *Web IV* for the existing rate structure). *See* Services RPFFCL ¶¶ 1343–1348. Specifically, NRBNMLC rejects SoundExchange's assertions that no adequate marketplace benchmark exists for licenses to noncommercial webcasters, that there is no difference between commercial and noncommercial webcasters from the standpoint of the consumer, and that ''there has long been acceptance of the current royalty rate structure for noncommercial webcasters.'' *Id.* ¶¶ 1344, 1345, 1346.

Regarding Mr. Orszag's assertion concerning the lack of appropriate benchmarks, NRBNMLC economic expert Professor Richard Steinberg testified that the settlement agreement SoundExchange reached on behalf of record companies with NPR/CPB and, to a lesser extent, SoundExchange's settlement with CBI, constitute suitable benchmarks. *See* Trial Ex. 3060 ¶¶ 30–39 (AWDT of Richard Steinberg) (Steinberg WDT). NRBNMLC asserts that ''[t]he entities negotiating these agreements are precisely the type of entities who negotiated past agreements that the Judges and their predecessors have relied on as benchmarks in past webcasting proceedings.'' Services RPFFCL ¶ 1344. As examples, NRBNMLC refers to the agreement the Recording Industry Association of America (RIAA) negotiated with Yahoo! on behalf of record companies that ''the *Web I* CARP chose as its key benchmark;'' settlement agreements between SoundExchange and CBI, the National Association of Broadcasters (NAB), and Sirius XM, respectively, that the Judges cited in *Web III;* and a direct license between Merlin (an entity representing independent record companies) and Pandora that the Judges relied on in *Web IV.*[313] *Id.*

NRBNMLC argues that, contrary to Mr. Orszag's assertion, ''there are very real differences to consumers between noncommercial and commercial webcasters.'' The National Religious Broadcasters Noncommercial Music License Committee's Corrected Proposed Findings of Fact and Conclusions of Law ¶ 1345 (NRBNMLC PFFCL). For example, Jennifer Burkhiser, Director of Broadcast Regulatory Compliance and Issues Programming at Family Radio, Inc. (a large noncommercial religious broadcaster), testified that ''[t]hose who really listen to Christian music and . . . radio stations can tell the difference between commercial and non-commercial pretty easily. . . . [T]here's a big difference in motivation and just the programming content based on the two different drivers, profit or mission.'' 8/31/20 Tr. 4764 (Burkhiser); *see also* Steinberg WDT ¶ 19 (contrasting profit maximization and mission maximization); Trial Ex. 3061 ¶ 29 (CWDT of Joseph Cordes) (Cordes WDT) (stating that programming on noncommercial service, including music, ''is chosen for mission-driven reasons rather than commercial popularity''). Professor Steinberg also emphasized the absence of advertising from noncommercial programming. *See* 8/26/20 Tr. 3997 (Steinberg). Moreover, Professor Steinberg asserts as a matter of economic logic that, ''[e]ven if the webcasters play identical songs in an identical context, whether they are commercial or non-commercial, as long as there is different willingness to pay, there's a different market segment, and we would naturally expect different prices in each segment.'' 8/26/20 Tr. 4002 (Steinberg).

[312] The five noncommercial webcasters paying the most royalties for excess usage were [REDACTED]. Tucker WDT ¶ 166.

[313] NRBNMLC does not cite any economic testimony for this analysis of the suitability of SoundExchange's settlement agreements with NPR/CPB and CBI as benchmarks, or their comparability to benchmarks that the Judges used in past proceedings. The discussion is, rather, arguments of counsel.

NRBNMLC rejects SoundExchange's assertion that the existing rate structure for noncommercial webcasters has long been accepted, stating, ''there has *never* been noncommercial buyer acceptance of a structure incorporating above-threshold commercial-level per-performance fees.'' Services RPFFCL ¶ 1346. Counsel for NRBNMLC supports that statement with the observation that NRBNMLC has ''never proposed such a structure'' in past webcasting proceedings, and, up until *Web IV* rates went into effect, most noncommercial webcasters paid lower Webcaster Settlement Act (WSA) rates, instead of the rates set by the Judges. *See id.*

NRBNMLC also disputes a key underpinning of the current rate structure: That larger noncommercial webcasters pose a greater competitive threat to commercial webcasters. NRBNMLC economics expert Professor Joseph Cordes testified that there is ''no particular economic reason to believe'' that as noncommercial webcasters grow in size ''their attributes will converge to those of commercial broadcasters.'' 8/20/20 Tr. 3271–72 (Cordes). A noncommercial broadcaster's ''commitment to mission will, in fact, act as a restraint on their proclivity to simply want to go into a market and compete with commercial broadcasters. . . . So long as a nonprofit, indeed, has a strong commitment to mission, that is going to actually have an aversion to competing with its commercial counterparts, because that simply means it's going to have to devote scarce, time, energy and resources to competition rather than achieving its mission.'' *Id.* at 3273. In addition, Professor Steinberg testified that even larger noncommercial webcasters are unlikely to cannibalize markets for commercial webcasters. *See* Steinberg WDT ¶¶ 25, 42–53.

NRBNMLC argues that Professor Tucker's testimony concerning the largest noncommercial webcasters being ''well positioned'' to pay increased fees under SoundExchange's proposal is irrelevant and unsupported. NRBNMLC PFFCL ¶ 259. NRBNMLC cites the Register of Copyrights' recommendation to the Librarian of Congress in *Web I* for the proposition that an analysis of a licensee's ability to pay is not relevant to the willing buyer/willing seller standard applied under section 114. *See id.* ¶ 260 (citing *Web I,* 67 FR at 45254). NRBNMLC notes, moreover, that the five entities that Professor Tucker examined were all ''broadcasters whose primary focus is not simulcasting, which is only a small part of their overall operations'' and that, as broadcasters, they ''would incur numerous expenses in connection with their broadcast operations, including 'maintaining and operating their stations and translators' and 'applying for and maintaining FCC licenses'.'' *Id.* ¶ 262 (quoting 8/18/20 Tr. 2484–86).

2. NRBNMLC's Rate Proposal

a. Proposed Rates

Four days before the beginning of the evidentiary hearing in this proceeding, NRBNMLC submitted two proposed rate structures, which it refers to as ''Alternative 1'' and ''Alternative 2.'' [314] *See generally* NRBNMLC Amended Proposed Rates and Terms (Jul. 31, 2020) (NRBNMLC Rate Proposal). Since NRBNMLC does not refer to its original rate proposal in its proposed findings and conclusions, the Judges deem the original rate proposal to be superseded by the amended rate proposal, and consider only the latter.

Under NRBNMLC's Alternative 1, noncommercial webcasters would pay an annual minimum fee of $500 that would entitle them to make up to 1,909,680 ATH of digital audio transmissions in a year.[315] For transmissions in excess of that threshold, noncommercial webcasters would pay one third of the applicable per performance rate for the same type of transmissions by commercial webcasters.[316] *See id.* ex. A at 9.

NRBNMLC modelled its Alternative 2 on SoundExchange's settlement with NPR/CPB. *See id.* ex. B at 11–15 (redline showing changes from NPR/CPB settlement); NRBNMLC PFFCL ¶ 152. Under Alternative 2, NRBNMLC would pay a flat annual fee of $1,200,000 to SoundExchange on behalf of its members for usage by up to 795 noncommercial religious radio stations that NRBNMLC would name. *See id.* ex. A at 10–11. The proposal would permit NRBNMLC to add additional noncommercial radio stations by paying the minimum fees applicable to other noncommercial webcasters. *See id.* ex. A at 12. The religious radio stations that NRBNMLC names would be subject to an aggregate usage cap of 540,000,000 ATH in the first year, increasing by 15,000,000 ATH each year of the rate term. *See id.* ex. A at 11. The proposal does not establish any consequence for exceeding those thresholds.

Like the CBI and NPR/CPB settlement rates, Alternative 2 only applies to a subset of noncommercial webcasters—those noncommercial religious radio stations named by NRBNMLC. NRBNMLC proposes that all other noncommercial webcasters would be subject to Alternative 1. *See id.,* ex. A at 10.

b. Rationale and Justification

NRBNMLC argues that noncommercial webcasters occupy a separate market segment, in which noncommercial webcasters and record companies would agree to royalty rates well below rates in the commercial webcasting market. *See, e.g.,* 8/20/20 Tr. 3256 (Cordes); 8/26/20 Tr. 3998 (Steinberg); Cordes WDT ¶ 16. On the buyers' side of that submarket, noncommercial webcasters of all sizes are characterized by a lower willingness to pay as a result of the legal constraints placed on nonprofit entities. *See, e.g.,* 8/20/20 Tr. 3255–56, 3259–65 (Cordes). On the sellers' side of the submarket, record companies would agree to lower prices as a form of seller-side price discrimination in order to maximize their overall profits. *See, e.g.,* 8/26/20 Tr. 4001–02 (Steinberg); Steinberg WDT ¶ 45 n.14; Cordes WDT ¶ 21.

NRBNMLC advocates a benchmark approach to setting a noncommercial rate, contending that a benchmark approach is superior to using theoretical models to support a rate proposal. NRBNMLC PFFCL ¶ 125. ''[A] benchmark is, I think, always superior to a bunch of theorizing if one is available. . . .'' 8/26/20 Tr. 4028 (Steinberg). Specifically, NRBNMLC offers the 2019 NPR/CPB settlement with SoundExchange (2019 NPR/CPB Agreement) as a benchmark that supports its rate proposal.[317] *See, e.g.,*

[314] The Judges' procedural rules permit filing of an amended rate proposal at any time up to, and including, the filing of proposed findings and conclusions. *See* 37 CFR 351.4(b)(3). The NRBNMLC's revised rate proposal was thus timely under the rules.

[315] 1,909,680 ATH is an annualized version of the existing 159,140 monthly ATH threshold (159,140 12).

[316] Alternative 1 provides for separate above-threshold per-performance rates for noncommercial simulcasting, noncommercial nonsubscription webcasting, and noncommercial subscription webcasting. *See* NRBNMLC Amended Proposed Rates and Terms at 9. This structure parallels the rate structure that the Services propose for commercial webcasting.

[317] In his WDT, Professor Steinberg cites RIAA's offer in *Web I* to set a noncommercial rate at one-third the commercial rate as evidence to support a per-play rate at that level for performances in excess of an ATH threshold—a structure that corresponds with NRBNMLC's Alternative 1 rate proposal. *See* Steinberg WDT ¶ 61. NRBNMLC does not refer to this element of Professor Steinberg's written testimony in its proposed findings, nor did Professor Steinberg refer to it in his oral testimony. The Judges deem this argument to have been abandoned in favor of Professor Steinberg's use of the 2019 NPR/CPB Agreement to support NRBNMLC's rate proposal. To the extent that NRBNMLC does maintain that argument, the Judges find Professor Steinberg's reliance on a rejected proposal made in the course of litigation two decades ago to be unpersuasive.

Continued

NRBNMLC PFFCL ¶¶ 120–121. NRBNMLC contends that employing the 2019 NPR/CPB Agreement as a benchmark ''is far superior to using agreements with commercial webcasters to set all or any part of those rates.'' NRBNMLC PFFCL ¶ 122. According to Professor Steinberg, ''there are no appropriate benchmarks from the commercial submarket because . . . the non-commercial sector has a different willingness to pay.'' 8/26/20 Tr. 4028 (Steinberg). Notwithstanding NRBNMLC's submission of the 2019 NPR/CPB settlement with SoundExchange as a benchmark, NRBNMLC did not present a comprehensive analysis of that settlement by its expert witnesses. This is likely because NRBNMLC did not offer its rate proposal until after it had already submitted the written direct and rebuttal testimony of its witnesses.

As discussed *supra,* counsel for NRBNMLC argues that ''[t]he NPR benchmarks are by far the most comparable agreements to the agreements that noncommercial buyers would negotiate with sellers in the target market in this case.'' NRBNMLC PFFCL ¶ 121.[318] Counsel contends that the 2019 NPR/CPB Agreement involves the same types of buyers, the same sellers, the same works, the same rights, and the same license term as the target noncommercial compulsory license rate. *See id.* The Judges have used similar factors to assess the comparability of proffered benchmarks in past determinations. *See, e.g., Web III Remand,* 79 FR at 23115.

As to the specifics of NRBNMLC's Alternative 1 rate proposal, Professor Steinberg testified that, based on his review of SoundExchange's *Web IV* and *Web V* settlements with NPR/CPB, he concluded ''it's reasonable to have a minimum fee of $500 and a one-third the commercial broadcaster rate for additional usage.''[319] 8/26/20 Tr. 4039–40 (Steinberg).

To reach that conclusion, Professor Steinberg relied on a statement in SoundExchange's 2015 settlement agreement with NPR and CPB (2015 NPR/CPB Agreement) that breaks down the components of value included in the agreement's flat fee, and on an Excel workbook entitled ''[REDACTED] Analysis.''[320] According to Professor Steinberg, SoundExchange prepared the [REDACTED] Analysis ''[REDACTED]'' for purposes of [REDACTED] to be included in the 2015 NPR/CPB Agreement. Trial Ex. 3064 ¶ 3 (WRT of Richard Steinberg) (Steinberg WRT); *see* 8/26/20 Tr. 4030 (Steinberg). He contended that the [REDACTED] Analysis [REDACTED].[321] *See* Steinberg WRT ¶ 8; 8/26/20 Tr. 4029–30 (Steinberg).

The 2015 NPR/CPB agreement states:

> It is understood that the License Fee includes:
>
> (1) An annual minimum fee of $500 for each Covered Entity for each year during the Term;
>
> (2) Additional usage fees for certain Covered Entities; and
>
> (3) A discount that reflects the administrative convenience to the Collective of receiving annual lump sum payments that cover a large number of separate entities, as well as the protection from bad debt that arises from being paid in advance.

37 CFR 380.32(b); *see also* Steinberg WRT ¶ 8.

According to Professor Steinberg, the [REDACTED] Analysis provides, *inter alia,* [REDACTED]. *See id.* ¶ 5. [REDACTED][322] *Id.* ¶ 5; *see id.* ¶ 6. Professor Steinberg equated the [REDACTED] from the [REDACTED] Analysis with the first element of value cited in the 2019 NPR/CPB agreement and equated the [REDACTED] with the second element of value cited in that agreement. *See id.* ¶ 8; 8/26/20 Tr. 4031, 4034–35 (Steinberg).

Professor Steinberg noted that the [REDACTED] rates employed in the [REDACTED] Analysis are approximately [REDACTED] the then-prevailing per performance rates for commercial broadcasters. *See* Steinberg WRT ¶¶ 3, 6 & n.6. He thus concluded that the [REDACTED] used in the [REDACTED] analysis support a rate for noncommercial webcasters consisting of a $500 minimum fee and a per-performance fee for performances over the ATH threshold of one-third the prevailing rate for commercial broadcasters. *See* 8/26/20 Tr. 4039–40 (Steinberg).

As for the third element of value listed in the agreement (the discount for administrative convenience and protection against bad debt), Professor Steinberg stated:

> The most plausible explanation to account for the administrative convenience value component is that [SoundExchange] recognizes that its [REDACTED]. . . . We do not know what SX believed [REDACTED], but if it believed [REDACTED].

Steinberg WRT ¶ 9.

Professor Steinberg acknowledged that he lacked the data to conduct a similar analysis with respect to the 2019 NPR/CPB Agreement that NRBNMLC offers as a benchmark but contended ''the numbers in that agreement are consistent with this interpretation.'' *Id.* ¶ 10. He based this contention on what he described as a ''check to see whether the calculations were done in the same way . . . .'' 8/26/20 Tr. 4039 (Steinberg). He compared the average cost per music ATH under the 2015 NPR/CPB Agreement ($0.0020) with the corresponding metric for the 2019 NPR/CPB Agreement ($0.0021) and concluded that the calculation underlying the 2019 NPR/CPB Agreement ''does replicate the calculation'' underlying the 2016 NPR/CPB Agreement. *Id.; see also* Steinberg WRT ¶ 10. ''It would be better if l [REDACTED]'' *Id.*

With respect to Alternative 2, Professor Steinberg stated ''we can design a flat-fee structure the same way NPR did it'' with adjustments to scale up the fees and ATH caps to reflect a larger number of covered entities than in the 2019 NPR/CPB Agreement. 8/26/20 Tr. 4041 (Steinberg).

Professor Cordes, in his WDT, offers the SoundExchange-CBI settlement for the *Web IV* rate period as a benchmark. Again, the Judges deem this argument to have been abandoned by NRBNMLC in favor of reliance on Professor Steinberg's use of the more recent 2019 NPR/CPB agreement as a benchmark. To the extent that NRBNMLC does maintain the CBI *Web IV* settlement as a benchmark, the Judges note that the practical effect of the *Web IV* CBI settlement was to replicate the rate structure generally applicable to noncommercial webcasters under the *Web IV* determination. As the Judges noted in *Web IV,* although the parties to the settlement left the royalty rate for noncommercial educational webcasters (NEWs) undefined (NEWs that exceed the 159,140 ATH threshold are simply no longer eligible for the settlement rate), both parties were aware of SoundExchange's rate proposal for noncommercial webcasters that the Judges ultimately adopted. *See Web IV,* 81 FR at 26394. The Judges find Professor Cordes' assertion that both parties could have considered the agreement as effectively being a flat rate to be unreasonable and not credible. *See* Cordes WDT ¶ 36.

[318] *See supra* note 313 and accompanying text.

[319] Professor Steinberg views that rate as an upper bound of reasonable rates, arguing the rate ''may be a little high; that is, higher rates than we would see in a . . . willing buyer/willing seller framework with the religious non-commercial stations because they don't have access to government money.'' *Id.* at 4040 (Steinberg).

[320] The [REDACTED] Analysis was admitted into evidence as Trial Ex. 3022.

[321] Professor Steinberg analyzed the [REDACTED] Analysis in his written *rebuttal* testimony because NRBNMLC received the document in discovery after the submission of his written direct testimony. *See* Steinberg WRT ¶¶ 1, 3.

[322] The [REDACTED] Analysis used [REDACTED] of $[REDACTED] for 2014 and $[REDACTED] for 2015, while the commercial broadcaster rates for those years were $0.0023 and $0.0025. *See* Trial Ex. 3022; 37 CFR 380.12(a)(4)–(5) (2011). The [REDACTED] Analysis does not actually refer to the commercial broadcaster rates or the 3:1 ratio posited by Professor Steinberg. Instead, it labels the rates as ''[REDACTED].'' Trial Ex. 3022. The Judges, like SoundExchange, infer that ''[REDACTED]'' denotes the noncommercial webcaster settlement agreement under the Webcaster Settlement Act, which is a nonprecedential agreement. *See* SX RPFFCL (to NRBNMLC) ¶ 140. The Judges discuss this *infra,* at section V.B.1.c.iv.

You'd want to adjust the 800,000 [dollar annual fee] of [the] NPR [settlement] for the difference in the music ATH cap and the number of covered stations between the . . . religious non-commercials and the NPR non-commercials. But other than that, you'd structure for a—an additional minimum fee, you can add stations, and you could structure into a flat-fee structure all of the factors listed for administrative convenience as well.

Id. In essence, Professor Steinberg described the arithmetic process of scaling up the terms of the NPR/CPB settlement by 150% to cover a larger number of radio stations and a greater amount of music. *See* SX PFFCL ¶ 1615.

c. SoundExchange's Response

SoundExchange rejects NRBNMLC's use of the 2019 NPR/CPB agreement for multiple reasons. Moreover, SoundExchange contends that the 2019 NPR/CPB agreement fails to support NRBNMLC's rate proposals. Finally, SoundExchange questions the Judges' authority to adopt one of NRBNMLC's proposed alternatives.[323]

According to SoundExchange, Professor Steinberg ''utterly failed to do a proper benchmarking analysis.'' SX PFFCL ¶ 1497. Mr. Orszag described benchmarking as ''a process that uses rates freely negotiated in *unregulated* markets as a benchmark to set rates in a similar, regulated market.'' Orszag WDT ¶ 43 (emphasis added). SoundExchange notes that the parties to the 2019 NPR/CPB Agreement did not set a freely negotiated rate in an *unregulated* market, but the agreement was instead ''a settlement of a regulatory proceeding'' and thus ''not a proper benchmark.'' SX PFFCL ¶ 1497 (citing *SDARS III,* 83 FR at 65220 (acknowledging that a proffered settlement rate was ''not a marketplace benchmark'' but ''instead a regulated rate'')). SoundExchange notes that, as a settlement of a statutory rate, the 2019 NPR/CPB Agreement (and its predecessors) ''reflect not only their negotiating history and the parties' valuations of the elements of the deal, but also considerations such as the parties' predictions of litigation outcomes and potential savings of litigation costs, and the potential for a party dissatisfied with a litigation outcome to seek redress from Congress.'' SX RPFFCL (to NRBNMLC) ¶ 149 (citations omitted).

Even if the Judges were to find a settlement agreement informative, SoundExchange argues that NRBNMLC has not established that the 2019 NPR/CPB agreement is sufficiently comparable to serve as a benchmark. SoundExchange and NRBNMLC both acknowledge the critical importance of comparability in assessing the value of a proffered benchmark. *See* NRBNMLC PFFCL ¶¶ 120–121; SX RPFFCL (to NRBNMLC) ¶ 120 (citing *SDARS I,* 73 FR at 4088). According to SoundExchange, NRBNMLC bears the burden of establishing the comparability of its proposed benchmark to the target market, and has failed to do so. *See* SX RPFFCL (to NRBNMLC) ¶ 130 (citing *Web IV,* 81 FR at 26320).

SoundExchange asserts that neither of NRBNMLC's economic experts ''conducted a meaningful analysis of the comparability of SoundExchange's settlement with CPB/NPR to the hypothetical market for which the Judges must set rates in this proceeding.'' SX RPFFCL (to NRBNMLC) ¶ 121. According to SoundExchange, the only assessment of comparability put forward by NRBNMLC ''is solely the work of counsel for NRBNMLC.'' *Id.*

SoundExchange argues that the NPR/CPB agreements are not comparable benchmarks and that the Judges should reject them as they have in previous webcasting determinations. *See* SX PFFCL ¶ 1363 (citing *Web IV,* 84 FR at 26394). SoundExchange enumerates a number of differences between the NPR/CPB agreement and the hypothetical target market that it contends render that agreement valueless as a benchmark.[324] *See* SX RPFFCL (to NRBNMLC) ¶ 121.

SoundExchange also contends that the 2019 NPR/CBP agreement supports neither of NRBNMLC's alternative rate proposals. In addition to the other alleged infirmities of the agreement as a benchmark, SoundExchange notes that each of the alternative proposals lacks material elements of the proffered benchmark and/or includes elements that are not part of the proffered benchmark. Alternative 1 lacks the advance payment of royalties on an annual basis and the requirement of consolidated reporting as in the 2019 NPR/CPB agreement. *See* SX RPFFCL (to NRBNMLC) ¶ 154. It does, however, annualize the ATH threshold, which was not part of the [REDACTED] Analysis that Professor Steinberg reviewed. *See id.* Moreover, according to SoundExchange, the one-third of commercial rates for excess performances does not appear in the 2019 NPR/CPB agreement and is instead drawn from the [REDACTED] Analysis—an analysis of non-precedential WSA agreements that the Judges are not permitted to consider. *See id.*

With regard to NRBNMLC's Alternative 2, SoundExchange points out it also does not include consolidated reporting but does include a much larger number of covered entities and music ATH. *See id.* ¶ 159. According to SoundExchange, the requirement for consolidated reporting, in particular, is a ''major benefit'' of the NPR/CPB agreement for SoundExchange. *Id.* (quoting 8/17/20 Tr. 2232 (Tucker)).

In addition, SoundExchange argues that the Judges lack statutory authority to adopt Alternative 2 through a determination (as distinguished from a settlement). *See* SX PFFCL ¶ 1518. According to SoundExchange, 17 U.S.C. 114(f)(1) directs the Judges to determine rates binding on copyright owners and ''entities performing sound recordings.'' *Id.* (quoting 17 U.S.C. 114(f)(1)(B)). ''[T]here is no obvious statutory basis for adopting in a litigated proceeding a royalty to be paid by a committee of a trade association'' like NRBNMLC, as opposed to an entity performing sound recordings. *Id.* ¶ 1520. SoundExchange distinguishes NRBNMLC's Alternative 2 from its own settlement agreement with CPB and NPR, because 17 U.S.C. 801(b)(7) ''has special provisions that permit adoption of the CPB/NPR agreement as a settlement.'' *Id.*

B. Judges' Findings and Conclusions

1. Rejection of NPR/CPB Agreement as a Benchmark

NRBNMLC, as the participant offering the 2019 NPR/CPB Agreement as a benchmark in this proceeding, bears the burden of demonstrating that the agreement is sufficiently comparable to the target market to serve as a benchmark. To the extent that the benchmark market differs the target market, NRBNMLC bears the burden of adjusting the benchmark to account for

[323] In its reply to NRBNMLC's proposed findings, SoundExchange also argues that NRBNMLC's presentation of an [REDACTED] as part of its rebuttal case was procedurally improper and deprived SoundExchange of a reasonable opportunity to rebut that analysis. *See* SX RPFFCL (to NRBNMLC) ¶¶ 121, 241. However, SoundExchange did not seek to exclude Professor Steinberg's written rebuttal testimony in its pre-hearing motions. Nor did SoundExchange challenge any of the discussion of the [REDACTED] Analysis in the Steinberg WRT in its line-by-line objections. Nor did counsel for SoundExchange object when NRBNMLC offered the Steinberg WRT for admission at the hearing. *See* 8/26/20 Tr. 3993 (Steinberg). The Judges do not consider an objection first expressed in a party's proposed reply findings to be properly raised. Even if SoundExchange had raised its objection at the proper time, the Judges need not address this procedural argument in light of the Judges' rejection of the 2019 NPR/CPB Agreement as a benchmark on substantive grounds. *See infra* section V.B.1.

[324] As with NRBNMLC's contrary assertions, *see supra* note 313 and accompanying text, these contentions are in the form of arguments of counsel, rather than expert testimony.

those differences. NRBNMLC has failed to meet either burden. The Judges, therefore, reject the use of the 2019 NPR/CPB Agreement as a benchmark for setting noncommercial webcaster rates in this proceeding.

a. NRBNMLC Presented Insufficient Analysis of the Effect of Ongoing Litigation on the Benchmark Rate

The 2019 NPR/CPB Agreement is a settlement of ongoing rate litigation before the Judges. SoundExchange argues that that fact alone renders the agreement ''not a proper benchmark.'' SX PFFCL ¶ 1497. The Judges do not agree that a settlement of a rate proceeding is categorically barred from use in a benchmarking exercise. Section 114(f)(1)(B)(ii) permits the Judges to consider rates and terms from comparable voluntary license agreements, and it does not create an exception for voluntary agreements reached as a settlement of litigation. *Cf. Phonorecords III,* 84 FR at 1932–33 (finding ''it is beyond dispute that Congress has authorized the Judges, in their discretion, to consider such agreements as evidence'' under then-effective provisions of 17 U.S.C. 115(c)(3)(D)). Nevertheless, settlement agreements, unlike voluntary agreements reached outside the context of litigation, are not ''free from trade-offs motivated by avoiding litigation cost, as distinguished from the underlying economics of the transaction.'' *Phonorecords III,* 84 FR at 1935. To be informative on the question of willing buyer/willing seller rates, the proffered settlement must take into account trade-offs motivated by avoiding litigation cost.

NRBNMLC's economic experts did not perform any analysis to disaggregate trade-offs motivated by avoiding litigation cost from the underlying economics of the deal. Neither of NRBNMLC's economic experts even acknowledged the existence of the issue. Professor Cordes did not analyze the 2019 NPR/CPB Agreement at all and Professor Steinberg's analysis of the 2015 NPR/CPB Agreement sought to derive from the flat annual fee a rate for performances in excess of the ATH threshold without any attempt to make adjustments to account for considerations relating to litigation costs (or any justification for not doing so).

The Judges find that, in the absence of evidence concerning the effect of avoidance of litigation costs on the royalty rate agreed to by SoundExchange and NPR/CPB in their settlement agreement, NRBNMLC's analysis of the 2015 NPR/CPB Agreement is not adequately informative of a willing buyer/willing seller rate in the target market.

b. NRBNMLC Did Not Demonstrate That the Benchmark Was Comparable

Section 114 states that the Judges ''may consider the rates and terms for *comparable* types of audio transmission services and *comparable* circumstances under voluntary license agreements.'' 17 U.S.C. 114(f)(1)(B)(ii) (emphasis added). Congress thus directed the Judges to inquire into the comparability of a proffered voluntary license agreement. The Judges have long acknowledged that comparability is a key consideration in determining the usefulness of a proffered benchmark. *See, e.g., Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services,* 73 FR 4080, 4088 (Jan. 24, 2008) (*SDARS I*).

NRBNMLC presented no economic analysis concerning the comparability of its proffered benchmark. Instead, counsel for NRBNMLC prepared its own analysis as part of NRBNMLC's proposed findings. *See* NRBNMLC PFFCL ¶ 121. Drawing on factors that the Judges found relevant in past cases,[325] NRBNMLC contended that the proposed benchmark and target hypothetical market have the same types of buyers, same sellers, same works, same rights, and the same license term. *See* NRBNMLC PFFCL ¶ 121. Counsel for SoundExchange—also without the benefit of economic testimony—argues that the 2019 NPR/CPB Agreement is insufficiently comparable to the target hypothetical market. SX RPFFCL (to NRBNMLC) ¶ 121. SoundExchange contends that there are *different* buyers (CPB as opposed to individual webcasters), *different* sellers (SoundExchange as opposed to individual record companies), *different* sets of works (all commercial sound recordings as opposed to an individual record company's repertoire), and *different* rights and obligations. *See id.*

The 2019 NPR/CPB Agreement (and its predecessor agreements) licenses the use of sound recordings by noncommercial entities for noninteractive transmissions. The agreement is between SoundExchange—a collective operating on behalf of record companies and recording artists—and CPB—a private entity, created by the government, that provides funding for public broadcasting entities, including NPR stations. Under the agreement, CPB pays SoundExchange funds appropriated by Congress to cover use of commercial sound recordings by NPR stations. The Judges find that, as a general matter the NPR/CPB agreements share common elements with the target market but, as enumerated by SoundExchange, differ in their particulars.

There is insufficient expert testimony to determine the extent to which the similarities between the 2019 NPR/CPB Agreement and the target market support its use as a benchmark or the degree to which the differences between the agreement and the target market detract from that use (or require adjustments to the benchmark rates). As the party proffering the agreement as a benchmark, it was incumbent on NRBNMLC to adduce sufficient evidence to demonstrate that the agreement is sufficiently comparable to the target market. NRBNMLC failed to do so.

c. Professor Steinberg's Analysis of the 2019 NPR/CPB Agreement Is Based on Outdated Information That Applies Rates From a Non-Precedential WSA Settlement Agreement

i. The Contents of the [REDACTED] Analysis

NRBNMLC relies almost exclusively on Professor Steinberg's analysis of the [REDACTED] Analysis to derive rates from the 2019 NPR/CPB Agreement. *See* Steinberg WRT ¶¶ 4–10. The [REDACTED] Analysis is an Excel Workbook prepared by SoundExchange in ''[REDACTED],'' *id.* ¶ 3, that consists of [REDACTED] spreadsheets, labelled ''[REDACTED],'' and ''[REDACTED].'' Trial Ex. 3022. Professor Steinberg confined his analysis to the ''Estimations'' spreadsheet. *See* Steinberg WRT ¶¶ 4–10.

The heading for the ''[REDACTED]'' spreadsheet is ''[REDACTED] Analysis.'' The spreadsheet is divided into [REDACTED] sections labelled ''[REDACTED],'' and ''[REDACTED].'' Trial Ex. 3022, [REDACTED] sheet. Each section contains several lines of data and calculations. *See id.*

The ''[REDACTED]'' section of the ''[REDACTED]'' spreadsheet (rows [REDACTED]) seeks to estimate the [REDACTED] [REDACTED]. *See id.;* Steinberg WRT ¶ 4. That estimate is used in the sections that follow.

The ''[REDACTED]'' section (rows [REDACTED]) calculates the [REDACTED]. *See* Steinberg WRT ¶ 4 n.7. The spreadsheet calculates [REDACTED] by multiplying the

[325] *See, e.g., Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services,* 78 FR 23054, 23058 (Apr. 17, 2013) (''a benchmark market should involve the same buyers and sellers for the same rights'') (*SDARS II*).

[REDACTED] from the previous portion of the spreadsheet by [REDACTED], then multiplying that product by the ''[REDACTED]'' of [REDACTED]. Trial Ex. 3022, Estimations sheet, rows 19–22.

The ''[REDACTED]'' section (rows [REDACTED]) estimates [REDACTED]by multiplying the[REDACTED] by the ''[REDACTED].'' *Id.* rows [REDACTED]; *see* Steinberg WRT ¶ 5. Unlike the previous sections that calculate [REDACTED], this section includes an [REDACTED] as well. *See* Trial Ex. 3022, Estimations sheet, rows 26–28.

The ''[REDACTED]'' section (rows [REDACTED]) [REDACTED] Trial Ex. 3022, [REDACTED]sheet, rows [REDACTED]; *see* Steinberg WRT ¶ 6. The spreadsheet computes the [REDACTED]. *See id.*

To summarize, the ''[REDACTED]'' spreadsheet examines [REDACTED] scenarios: one in which [REDACTED]. SoundExchange computed [REDACTED]. *See* Steinberg WRT ¶¶ 4, 6 n.11; Trial Ex. 3022, [REDACTED] sheet, rows [REDACTED], [REDACTED], [REDACTED].

ii. The Purpose of the [REDACTED] Analysis

Professor Steinberg testified that SoundExchange prepared the [REDACTED] Analysis ''for the *Web IV* license agreement,'' *i.e.,* for purposes of computing the [REDACTED]. Steinberg WRT ¶ 3; *see* 8/26/20 Tr. 4030 (Steinberg). Professor Steinberg apparently infers that it was ''done for the *Web IV* license agreement,'' 8/26/20 Tr. 4030 (Steinberg), based on when it was performed and the fact that the annual flat fee in the agreement—$560,000—is ''at most, [REDACTED]'' of $[REDACTED]. Steinberg WRT ¶ 7. He attributes the [REDACTED] to [REDACTED]. *See id.*

By contrast, SoundExchange argues that the [REDACTED] analysis ''does not purport to address the *Web IV* CPB/NPR settlement.'' SX RPFFCL (to NRBNMLC) ¶ 140. SoundExchange describes it as ''an old and backward-looking document'' that ''[REDACTED]'' SX PFFCL ¶¶ 1507–1508.

The purpose for which SoundExchange performed the [REDACTED] Analysis is not apparent from the document itself. Neither scenario examined on the ''[REDACTED]'' spreadsheet is identified in a way that suggests that the purpose of the analysis is to derive a flat annual fee for a settlement in *Web IV.* As counsel for SoundExchange asserts in proposed findings, the document primarily looks backward at the experience under the *Web III*-era agreement.[326]

Extrinsic evidence of the purpose for the [REDACTED] Analysis is also lacking. There is no testimony or documentary evidence in the record that identifies who requested the [REDACTED] Analysis and for what purpose, who prepared it, and to whom it was circulated.

Nevertheless, the timing of the analysis ([REDACTED]) and the rough proximity of the value derived in the [REDACTED] scenario to the royalty rate adopted in the settlement agreement lend some support for the inference that the analysis was prepared for purposes of [REDACTED]. However, while a plausible inference, it is by no means a certainty—or even a strong probability.

Because there is a plausible basis to infer that the [REDACTED] Analysis was prepared for the 2015 NPR/CPB Agreement, the Judges will not discount the analysis entirely as a tool for deriving an implicit per-performance royalty rate from that agreement. However, given the exceedingly thin record on which that inference is based, the Judges give little weight to the [REDACTED] Analysis and the conclusions Professor Steinberg draws from it.

iii. Reliance on an Analysis Based on Ten-Year-Old Data

As described *supra,* SoundExchange prepared its estimations for the [REDACTED] scenarios in the [REDACTED] Analysis using usage data submitted by [REDACTED] *between [REDACTED] and [REDACTED]. See* Steinberg WRT ¶¶ 4, 6 n.11. SoundExchange used the data together with ''[REDACTED]'' rates to determine values for the *[REDACTED]* under [REDACTED] scenarios.[327]

The utilization of usage data that is as much as a decade old to interpret the 2019 NPR/CPB Agreement is not necessarily improper. However, the Judges require *some* explanation why the use of data from another era and another settlement agreement nevertheless yields reliable results. The Judges find Professor Steinberg's analysis unconvincing on this point. To apply the [REDACTED] Analysis to the 2019 NPR/CPB Agreement, Professor Steinberg relies on at least three inferences or assumptions that may be plausible individually but are unconvincing in aggregate.

First, as discussed *supra,* Professor Steinberg infers that SoundExchange prepared the [REDACTED] Analysis of the *Web III*-era data to [REDACTED] under the *Web IV*-era settlement. The Judges find that inference plausible but weakly supported by the evidence.

Second, Professor Steinberg infers that the annual royalty payments in the *Web V*-era settlement reflect the same underlying per-performance rate as the *Web IV*-era settlement. Professor Steinberg acknowledged that he lacked the information to perform an analysis similar to the [REDACTED] Analysis on the 2019 NPR/CPB Agreement. *See* Steinberg WRT ¶ 10. The best he could do under the circumstances was to assert that the numbers in the 2019 NPR/CPB Agreement are ''consistent with'' his interpretation of the [REDACTED] Analysis, based on a comparison of the average royalty per music ATH under each agreement. The Judges find this a weak basis for applying to the 2019 NPR/CPB Agreement an analysis that [REDACTED]. Professor Steinberg's own awareness of the weakness of this inference is reflected in his statement that ''[i]t would be better if I had the data to replicate the whole analysis [REDACTED].'' Steinberg WRT ¶ 10. In his written testimony, Professor Steinberg did not hold out his analysis as a basis for quantifying a per-performance rate, but only as an indication that the rate would be ''[REDACTED].'' *Id.*

Third, Professor Steinberg's analysis assumes that the discount for administrative convenience that is mentioned in the NPR/CPB agreements is separate from the minimum fee and the usage fee that the agreement recites. Professor Steinberg did not consider the possibility that the discount is reflected in either or both of the minimum fee and usage fee that are included in the flat annual payment. Instead, Professor Steinberg speculated that the discount resulted from SoundExchange's underestimation of excess usage by NPR stations that do not provide census reports of usage. The Judges reject that attempt to identify the discount included in the agreement as unsupported by the evidence.

In sum, the Judges find Professor Steinberg's application of the [REDACTED] Analysis to the 2019 NPR/CPB Agreement to be questionable, and they accord it little weight.

[326] The ''[REDACTED]'' spreadsheet in the [REDACTED] Analysis workbook does not shed any additional light on the question. The ''[REDACTED]'' are cryptic at best and appear to consist primarily of a [REDACTED]. The Judges draw no inferences one way or the other from the [REDACTED] spreadsheet.

[327] *See supra* section V.B.1.c.i.

iv. Reliance on Valuations Based on a Non-Precedential WSA Settlement

SoundExchange based the valuations it performed in the [REDACTED] Analysis on ''[REDACTED]'' per-performance rates. *See* Trial Ex. 3022 rows [REDACTED], [REDACTED]; Steinberg WRT ¶ 6 n.10. ''NCW'' is an abbreviation that SoundExchange uses for ''Non-Commercial Webcasters.'' *See* 9/9/20 Tr. 5829 (Ploeger). ''WSA'' is the commonly used abbreviation for ''Webcaster Settlement Act.''[328] *See, e.g., Web IV,* 81 FR at 26318. Based on the context and timing of the [REDACTED] Analysis, the Judges conclude that ''[REDACTED]'' refers to the Webcaster Settlement Act settlement agreement setting rates and terms for noncommercial webcasters that the Copyright Office published in the **Federal Register** on August 12, 2009. *See Notification of Agreements under the Webcaster Settlement Act of 2009,* 74 FR 40614, 40624–28 (Aug. 12, 2009). That settlement agreement set rates and terms that noncommercial webcasters could elect to pay in lieu of rates and terms set by the Judges for the period from 2006–2015.

The Webcaster Settlement Act of 2009 (2009 WSA) states that the provisions of a settlement agreement reached under the 2009 WSA are inadmissible as evidence and may not be taken into account by the Judges in any rate proceeding under section 114 or 112:

> Neither [the provisions of the WSA] nor any provisions of any agreement entered into pursuant to [the WSA], including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein, shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements by the Copyright Royalty Judges . . . . It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions, or notice and recordkeeping requirements, included in such agreements shall be considered as a compromise motivated by the unique business, economic and political circumstances of webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller . . . . This subparagraph shall not apply to the extent that [SoundExchange] and a webcaster that is party to [a WSA agreement] expressly authorize the submission of the agreement in a proceeding under this subsection.

17 U.S.C. 114(f)(4)(C). Section 6.3 of the NCW–WSA agreement contains similar language, making it clear that SoundExchange and the noncommercial webcasters did not ''expressly authorize'' use of the agreement in rate proceedings. *See* 74 FR at 40627.

On its face, it is apparent that the per-performance royalty rates that SoundExchange used in the [REDACTED] Analysis are rates derived from a non-precedential WSA agreement that the Judges are not permitted to consider in a rate proceeding. NRBNMLC does little to address this issue. Professor Steinberg's written rebuttal testimony, in which he analyzes the [REDACTED] Analysis, scarcely acknowledges that the rates he describes (imprecisely) as being [REDACTED] commercial per-performance rates were taken from the non-precedential NCW–WSA agreement.[329] In a proposed reply finding, counsel for NRBNMLC acknowledges that the rate comes from a non-precedential WSA agreement, and quotes from a memorandum opinion by the Register of Copyrights (Register) responding to questions referred by the Judges in *Web IV*—presumably to justify use of a nonprecedential rate in this context. *See* Services RPFFCL ¶ 1509 (quoting *Memorandum Opinion on Novel Material Questions of Law,* Docket No. 14–CRB–0001–WR, at 14–15 (Sep. 18, 2015) (*Memorandum Opinion*)). The reference is inapt. The Register opined that the WSA does not prevent the Judges from considering a direct license concluded outside of the WSA that incorporates terms ''that are copied from, are substantively identical to, have been influenced by, or refer to, the provisions of a WSA agreement.'' *Memorandum Opinion* at 10. The [REDACTED] Analysis does not examine a non-WSA agreement. It seeks to determine what [REDACTED] (parties to a separate non-precedential WSA Agreement)[330] would have paid under the NCW–WSA settlement agreement during the period when that settlement was in force.

The Judges conclude that they may not consider the [REDACTED] Analysis in accordance with the provisions of the Webcaster Settlement Act of 2009 as codified in 17 U.S.C. 114(f)(4)(C).

d. The 2019 NPR/CPB Agreement Does Not Support NRBNMLC's Rate Proposals

NRBNMLC relies on the 2019 NPR/CPB Agreement to support its rate proposal. As previously discussed, the Judges find inadequate evidentiary and analytical support for reliance on that agreement as a benchmark. Even if the Judges found the 2019 NPR/CPB Agreement to be a sound benchmark, the Judges find that it does not adequately support NRBNMLC's rate proposal.

SoundExchange has identified several elements from the 2019 NPR/CPB Agreement that are not present in NRBNMLC's two alternative rate proposals. To the extent these differences result in material differences between the benchmark and the proposed rates, the benchmark does not support the proposed rates without appropriate adjustment (or adequate explanation from a competent witness why an adjustment is unnecessary).

i. Absence of Up-Front Payment

Under NRBNMLC's proposed Alternative 1, each noncommercial webcaster would pay an annual $500 per station or channel minimum payment plus monthly payments of per-performance royalties at one-third the rate for commercial webcasters for transmissions in excess of 1,909,680 ATH per year. *See* NRBNMLC Rate Proposal ex. A at 2, 9. By contrast, the 2019 NPR/CPB Agreement requires up-front annual payments covering up to 530 NPR stations. *See* 85 FR 11857, 11857–58 (Feb. 28, 2020).

> The 2019 NPR/CPB Agreement recites that the rate reflects
>
> (1) An annual minimum fee for each Public Broadcaster for each year during the Term;
>
> (2) Additional usage fees for certain Public Broadcasters; and
>
> (3) A discount that reflects the administrative convenience to [SoundExchange] of receiving annual lump sum payments that cover a large number of separate entities, as well as the protection from bad debt that arises from being paid in advance.

Id. at 11858. The parties to the 2019 NPR/CPB Agreement prominently highlight the ''administrative convenience'' and ''protection from bad debt'' that result from the advance payment structure as being economically significant elements of the agreement that justify a discount in the royalty rate. NRBNMLC does not adjust the per-performance rate that it

[328] Congress enacted three Webcaster Settlement Acts: the Small Webcaster Settlement Act of 2002, Public Law 107–321, 116 Stat. 2780 (Dec. 4, 2002); the Webcaster Settlement Act of 2008, Public Law 110–435, 122 Stat. 4974 (Oct. 16, 2008); and the Webcaster Settlement Act of 2009, Public Law 111–36, 123 Stat. 1926 (Jun. 30, 2009).

[329] Professor Steinberg refers to labels in the CPB/NPR Analysis that mention ''NCW–WSA,'' but does not explain what the acronym means. *See* Steinberg WRT ¶ 6 n.10.

[330] *See Notification of Agreements under the Webcaster Settlement Act of 2009,* 74 FR 40614, 40620–24 (Aug. 12, 2009).

purportedly derives from the 2019 NPR/CPB Agreement to reflect the discount for advance payments. In the absence of any adjustment, the 2019 NPR/CPB Agreement does not support NRBNMLC's Alternative 1 rate proposal.

While NRBNMLC's Alternative 2 rate includes advance payments, the issue would persist even if the Judges adopted Alternative 2. Alternative 2 is not a stand-alone rate proposal, since it only covers a subset of noncommercial webcasters (religious broadcasters selected by NRBNMLC). NRBNMLC proposes that all other noncommercial webcasters (not otherwise covered by a settlement) would fall into Alternative 1. In effect, Alternative 1 is part of the Alternative 2 rate proposal.

ii. Absence of Consolidated Reporting

As part of their settlement, SoundExchange and CPB/NPR agreed to continue the practice of consolidating reports of use through CPB. *See* Joint Motion to Adopt Partial Settlement, Trial Ex. 3020 at 3 (Sep. 23, 2019) (2019 Settlement Motion). The parties aver that they did not include the details of that part of their agreement in the settlement submitted with their motion because the Judges had stated previously that they ''do not wish to codify in the Code of Federal Regulations [reporting] arrangements pertinent only to specific licensees.'' *Id.* at 3 n.2 (citing *Notice and Recordkeeping for Use of Sound Recordings under Statutory License,* Final Rule, 74 FR 52418, 52419 (Oct. 13, 2009) (''We have no intention of codifying these negotiated variances [from the Judges' regulations] in the future unless and until they come into such standardized use as to effectively supersede the existing regulations.'')).

By contrast, NRBNMLC's rate proposal does not require consolidated reporting of usage data. *See* 8/26/20 Tr. 4068–69 (Steinberg). NRBNMLC's Alternative 2 rate proposal includes a provision stating ''NRBNMLC and Noncommercial Religious Broadcasters shall submit reports of use and other information concerning website Performances as agreed upon with [SoundExchange]. In the absence of such an agreement, Noncommercial Religious Radio Stations shall submit reports of use in accordance with then-applicable regulations . . . .'' NRBNMLC Rate Proposal ex. A at 14. Unlike the settlement with NPR/CPB, there is no advance commitment to provide consolidated reporting. *Compare id. with* 2019 Settlement Motion at 3. NRBNMLC merely states that SoundExchange and the religious broadcasters are free to adopt an arrangement concerning reports of use that departs from the Judges' regulations. SoundExchange and religious broadcasters would have that ability without NRBNMLC's proposed language. *See Notice and Recordkeeping for Use of Sound Recordings Under Statutory License,* Final Rule, 74 FR at 52419 (''digital audio services are free to negotiate other formats and technical standards for data maintenance and delivery and may use those in lieu of regulations adopted by the Judges, upon agreement with [SoundExchange]'').

The record reflects that consolidated reporting has value to SoundExchange. Travis Ploeger, Director of License Management for SoundExchange, testified that CPB (through an entity called NPR Digital Services), collects usage information from NPR stations and provides quality assurance before providing the information to SoundExchange, thus making the information more efficient to process. *See* 9/9/20 Tr. 5803, 5822 (Ploeger); *see also* 8/17/20 Tr. 2232 (Tucker) (''one of the things that NPR does is it collects together the messy data of the individual stations and reports it as part of the agreement''). Professor Steinberg also recognized that consolidated reporting by CPB represents a cost savings to SoundExchange. *See* 8/26/20 Tr. 4068 (Steinberg).

NRBNMLC's proposed Alternative 2 thus differs materially from the proposed benchmark. NRBNMLC makes no attempt to adjust its proposed rate to compensate for this material difference, and provides no justification for not making an adjustment. *See* 8/26/20 Tr. 4068–69 (Steinberg). Rather, counsel for NRBNMLC faults *SoundExchange* for failing to quantify the value of consolidated reporting. *See* Services RPFFCL ¶ 1523. It is not SoundExchange's (or the Judges') responsibility to rescue NRBNMLC's faulty benchmark by proposing an appropriate adjustment. In the absence of an appropriate adjustment, the 2019 NPR/CPB Agreement does not support NRBNMLC's Alternative 2 rate proposal.

e. Conclusion Regarding NRBNMLC's Proposed NPR/CPB Benchmark

Each of the foregoing critiques counsels for limited or no reliance on the proffered benchmark. In aggregate, the critiques constitute an overwhelming argument for rejecting entirely the 2019 NPR/CPB Agreement as a benchmark. The Judges, therefore, reject NRBNMLC's use of the 2019 NPR/CPB Agreement as a benchmark.

2. Acceptance of Reasoning Underlying SoundExchange Rate Proposal

SoundExchange relies on the same reasoning adopted by the Judges in webcasting proceedings going back to *Web II* to support its proposed rate structure.[331] Absent persuasive counterarguments, the Judges will accept that reasoning.

a. Evaluation of NRBNMLC Counterarguments

NRBNMLC puts forward six principal counterarguments against the rationale that has supported the existing noncommercial rate structure since *Web II.* The Judges examine each of them in turn.

i. Noncommercial Webcasters Have a Lower Willingness To Pay Than Commercial Webcasters

A common theme throughout the testimony presented by NRBNMLC is that noncommercial webcasters occupy a distinct market segment from commercial webcasters and have a lower willingness to pay license fees. *See, e.g.,* 8/20/20 Tr. 3255–56 (Cordes); Cordes WDT ¶ 16; Steinberg WDT ¶ 15. NRBNMLC argues that the reason noncommercial webcasters (and nonprofit entities in general) have a lower willingness to pay than their commercial counterparts is the ''nondistribution constraint,'' *i.e.,* the prohibition under state and federal law on distribution of profits by nonprofit entities. *See* 8/26/20 Tr. 3996 (Steinberg); Steinberg WDT ¶ 14. ''[B]ecause profits can't be distributed, there are no shareholders. The Board of Directors has no financial interest in what the nonprofit does.'' 8/26/20 Tr. 3996 (Steinberg). Consequently, ''nonprofit organizations are free to pursue charitable missions that are not rewarded in the marketplace.'' *Id.*

The nondistribution constraint also limits the financing available to nonprofit entities. ''[B]ecause they can't distribute profits, there's no access to traditional equity capital. They can't issue shares of stock that pay dividends.'' *Id.* at 3997. The nondistribution constraint ''also may pose some challenges to [nonprofits] raising debt capital, because . . . it may limit the amount of collateral that they may be able to pledge in exchange for . . . debt financing.'' 8/20/20 Tr. 3265 (Cordes). Nonprofits are able to receive donations, ''[b]ut donations are limited because donations benefit a group of people. It's a classical public goods problem.'' Because of free ridership, ''each donor gives less than their

[331] *See supra,* section V.A.1.b.

willingness to pay in equilibrium.'' 8/26/20 Tr. 3998 (Steinberg). For noncommercial broadcasters specifically, FCC rules also limit their ability to raise funds by prohibiting the sale of advertising. *See* Steinberg WDT ¶ 28; *Web IV,* 81 FR at 26319–20. In sum, ''the limited access to capital and the fact that . . . there are no owners that can . . . capture the surplus, those two factors together from an economic perspective would lower the willingness to pay for—on the part of non-commercial broadcasters for license fees.'' 8/20/20 Tr. 3265 (Cordes). On this basis, NRBNMLC repeatedly criticizes the existing rate structure for requiring noncommercial webcasters to pay commercial per-performance royalties. *See, e.g.,* NRBNMLC PFFCL ¶ 31.

The Judges have recognized that noncommercial webcasters occupy a distinct submarket within the webcasting market. *See, e.g., Web IV,* 81 FR at 26319–20. For that reason, the Judges adopted the existing rate structure, which provides a substantial discount to noncommercial webcasters. Unlike commercial webcasters, noncommercial webcasters pay *no per-performance royalties* for any transmissions up to the 159,140 monthly ATH threshold. *See* 37 CFR 380.10(a)(2); *see also* SoundExchange Rate Proposal at 3, attach. at 21. A large majority of noncommercial webcasters pay only the annual minimum fee (currently $500) and pay no per-performance royalties at all. *See* Trial Ex. 5625 ¶¶ 9, 33 (WRT of Travis Ploeger) (Ploeger WRT) (''in 2018, approximately 97% of noncommercial webcasters at the statement of account level (96% at the parent company level) paid only the minimum fee.''). *All* noncommercial webcasters, regardless of size, benefit from this allowance. *See id.* ¶¶ 35, 37 (in 2018 Family Radio, [REDACTED] religious noncommercial webcasters, received an effective [REDACTED]% discount from commercial webcasting rates and EMF, the noncommercial webcaster [REDACTED], received an effective [REDACTED]% discount). SoundExchange's proposal would increase noncommercial rates (as well as commercial rates), but the discount for noncommercial webcasters would remain at a similar level on a percentage basis. *See id.* ¶¶ 36, 38.

NRBNMLC is not correct in stating that the current rate structure (and SoundExchange's proposal) requires noncommercial webcasters to pay commercial rates. A more accurate statement would be that the current rate structure (and SoundExchange's proposal) requires noncommercial webcasters to pay per-performance royalties on performances over the 159,140 ATH threshold at the same *marginal* rate as commercial webcasters.

NRBNMLC did not examine the question whether noncommercial webcasters' lower willingness to pay requires lower marginal rates as distinguished from lower average rates. The only passing reference to the question was in a colloquy between SoundExchange's expert, Professor Tucker, and the Judges:

> Q: As an economist, do you think the more important way to look at this or the more important data point is the marginal rate that's paid per-play or the average rate as you have depicted it?
>
> A: So as an economist, as I was thinking about incentives where, for programming, the marginal rate is going to be hugely important. . . . But when I think about the arguments which were proposed by the non-commercial broadcasters about the idea that non-profits deserve a discount, I think this is the right way of looking at it when thinking about the way that they were framing a discount.
>
> * * *
>
> Q: And so do you see that the non-commercial broadcasters would have a marginal decision to make as to whether or not it was worth it to pay the .0028, or whatever the rate would be, per-play based on how much revenue they can anticipate receiving through contributions or whatever donations they could receive as non-commercial broadcasters?
>
> A: You know, so I think as an economist one would have to acknowledge that that would play into their decision-making.

8/17/20 Tr. 2206–07 (Tucker). Professor Tucker's acknowledgement that marginal rates would have an impact on a noncommercial webcaster's decision-making does not persuade the Judges that average rates are unimportant.[332] Nor does it mean that the effective discount for noncommercial webcasters under the current rate structure is meaningless. More importantly, this testimony does not address the question of the appropriate role of marginal rates versus average rates in determining whether a given rate structure exceeds noncommercial webcasters' willingness to pay. NRBNMLC has not adequately developed this argument.

The Judges find, as they have in past proceedings, that noncommercial webcasters constitute a distinct submarket in which they have a lower willingness to pay for licenses than commercial webcasters. However, the Judges are not persuaded that a rate structure in which noncommercial webcasters pay no per-performance fees up to a threshold and commercial per-performance fees above that threshold is inconsistent with that finding.

ii. In an Unregulated Market Copyright Owners Would Be Willing To Accept Lower Royalties From Noncommercial Webcasters as a Form of Price Discrimination

NRBNMLC argues that the existence of separate submarkets for licensing sound recording performance rights to commercial and noncommercial webcasters fosters seller-side price discrimination that would result in lower royalty rates for noncommercial webcasters.[333] *See* NRBNMLC PFFCL ¶¶ 91–102. Professor Cordes testified that four conditions must be present for price discrimination to occur:

> (a) buyers need to have different price elasticities of demand (sensitivity to higher and lower prices); (b) sellers need to be able to identify which groups of buyers have higher and lower price elasticities of demand; (c) sellers need to have an incentive to differentiate between the price charged to buyers with lower price elasticities and the price charged to buyers with higher price elasticities; and (d) buyers benefiting from the lower prices must not be able to re-sell the good to other buyers.

Cordes WDT ¶ 22. According to Professor Cordes, the hypothetical market for webcasting services would be ''conducive for price discrimination to occur . . . .'' 8/20/20 Tr. 3266 (Cordes).

> Well, first of all, it would be quite easy, obviously, for sellers to be able to identify different segments of the market. You know who the commercial broadcasters are. You know who the non-commercial broadcasters are. So it's not hard to figure out, you know, which—which group is which. Secondly, because of the distinctive traits of nonprofit broadcasters, they would have a higher price elasticity of demand. They would be more likely to buy the good when they otherwise might not, if, in fact, the price were lowered to them. And, finally, non-commercial broadcasters would be prohibited by regulations from reselling the product.

Id. at 3267.

Even if the Judges were to accept the proposition that record companies would engage in seller-side price discrimination in the hypothetical unregulated market,[334] that does not

[332] The Judges note, in this regard, that NRBNMLC's Alternative 1 rate proposal also includes a tranche of performances up to an ATH threshold that do not require payment of per-performance royalties, thus lowering the effective average rate for all noncommercial webcasters. Presumably, the NRBNMLC proposal would not include this effective discount if it were meaningless to noncommercial webcasters.

[333] As relevant here, Professor Cordes defines price discrimination as ''the case in which sellers of a good or service are able to segment the market so that they are able to offer the same good or service at different prices to different groups of buyers.'' Cordes WDT ¶ 21.

[334] Professor Cordes acknowledged in his written testimony that he did not perform any empirical

advance NRBNMLC's attack on the current rate structure and SoundExchange's proposed rate structure. As discussed *supra,* both the existing rate structure and that proposed by SoundExchange provide noncommercial webcasters a substantial discount from the fees charged to commercial webcasters. Professor Cordes' testimony does not address whether price discrimination in the hypothetical market would result in discounts for noncommercial webcasters that would be greater than, less than, or the same as the discount under the current or proposed rates. Nor does it address the particular structure those discounts would take. Nothing in Professor Cordes' testimony concerning price discrimination invalidates or undermines SoundExchange's proposed rate structure.

iii. Concerns About Cannibalization of Commercial Markets by Larger Noncommercial Webcasters Are Unfounded

In *Web IV,* the Judges identified the risk of cannibalization as an important consideration in adopting a rate structure that imposes commercial rates for performances by noncommercial webcasters above the 159,140 ATH threshold. *See Web IV,* 81 FR 26392 (''there must be limits to the differential treatment for noncommercials to avoid 'the chance that small noncommercial stations will cannibalize the webcasting market more generally and thereby adversely affect the value of the digital performance right in sound recordings'''') (quoting *Web II,* 72 FR at 24097). NRBNMLC contends ''the cannibalization argument is unsupported by the record and unlikely to occur.'' Steinberg WDT ¶ 25. NRBNMLC argues that there are a number of differences between commercial and noncommercial entities that make it unlikely listeners will be attracted away from commercial to noncommercial webcasting.

(A) Noncommercial Broadcasters Do Not Seek To Compete With Commercial Broadcasters

NRBNMLC contends that, due to the constraints on, and mission-focus of, noncommercial broadcasters, they are averse to competing with commercial entities and are motivated instead to seek out ''unserved markets with respect to their mission.'' 8/26/20 Tr. 4008 (Steinberg); *see* Cordes WDT ¶ 16.

The concerns about cannibalization that the Judges articulated in past webcasting proceedings focus on potential displacement in listenership from commercial to noncommercial webcasters and is independent of noncommercial webcasters' *motivations.* The record shows that at least some noncommercial broadcasters seek to expand their audiences. *See* Emert WDT (*Web IV*) ¶ 38 (''It is obviously not ideal for a noncommercial religious broadcaster to turn listeners away from their programming, as it works against our mission of *reaching as many people as we can* with our message of hope and inspiration . . . .'') (emphasis added). Whatever the motivation to increase its listenership—whether it be to ''compete'' or to ''advance their mission''—it is the increase in listenership itself that poses a risk of cannibalization if that increase results from diverting listeners who otherwise would be listening to a commercial service. *See* 8/20/20 Tr. 3275–76 (Cordes) (acknowledging that even if a noncommercial webcaster did not set out to compete with commercial webcasters, the noncommercial webcaster could compete with commercial webcasters ''simply by growing large because of its popularity.''); *see also* Steinberg WDT ¶ 49 (acknowledging that ''it is possible that the cross-price elasticity between the submarkets is negative (indicating some degree of substitutability among listeners),'' though opining it is likely to be small due to differences in programming).

Moreover, SoundExchange provided examples of noncommercial webcasters that are in direct competition with commercial webcasters for listeners. Mr. Orszag offered the example of Prazor, a large internet-only noncommercial webcaster with multiple channels of Christian-themed music, and Sirius XM, a commercial service that carries multiple Christian-themed music channels on its internet service. *See* Orszag WRT ¶ 159. ''It is reasonable that a record company negotiating voluntary licenses with Prazor and Sirius XM in an unregulated marketplace would be mindful of the potential for competition between them and limit any discount it might be prepared to provide Prazor accordingly.'' [335] *Id.* (footnote omitted). In addition, Mr. Orszag testified concerning Salem Media, a large commercial Christian broadcaster, and EMF, a large noncommercial Christian broadcaster, which both have stations in Atlanta that broadcast in the Christian Adult Contemporary (Christian AC) format. *See* Orszag WRT ¶¶ 160–161.

> There is clear evidence of competition between Salem and EMF. WFSH is a Salem Christian music station in Atlanta, Georgia broadcasting as 104.7 The Fish and webcasting at *http://thefishatlanta.com/.* WAKL is EMF's K-Love affiliate in Atlanta. EMF acquired the station from for-profit Cumulus in mid-2019, changed its format from talk to Christian contemporary music, and rebranded it as WAKL. In connection with that acquisition, the press has noted that with those two stations and a third broadcasting in the same format, ''Atlanta has suddenly become a hotbed of Christian radio competition,'' and the competition included ''[a]ll three stations . . . simultaneously running aggressive billboard campaigns.''

Id. ¶ 161 (footnote omitted). The Judges find this evidence, albeit anecdotal, casts doubt on ''[t]he generalities concerning alleged programming differences that Dr. Steinberg and Dr. Cordes offer . . . .'' *Id.*

(B) Noncommercial Broadcasters Are Unlikely To Attract Listeners Away From Commercial Broadcasters

NRBNMLC argues that noncommercial broadcasters' commitment to mission results in important differences between their on-air programming and that of commercial webcasters. *See* Cordes WDT ¶ 19; 8/20/20 Tr. 3278 (Cordes); 8/31/20 Tr. 4763–64 (Burkhiser). Noncommercial broadcasts include mission-driven nonmusic content, and the music content is selected for its congruency with the mission rather than for its popularity with listeners. *See* Cordes WDT ¶ 29; 8/31/20 Tr. 4752–53 (Burkhiser). In addition, NRBNMLC asserts that noncommercial broadcasters pursue different types of listeners than commercial services. Unlike commercial broadcasters, who seek listeners who will increase advertising revenues, noncommercial broadcasters ''seek listeners who will best advance their mission.'' 8/26/20 Tr. 4007 (Steinberg).

analysis of the relative price elasticities of commercial and noncommercial webcasters. *See* Cordes WDT ¶ 24. Nor did he address in his oral testimony the incentives (or disincentives) for record companies to differentiate their prices (the third of his four conditions necessary for price discrimination to occur). For example, the risk of cannibalization, discussed *infra,* section V.B.2.a.iii, could affect record companies' incentives to engage in price discrimination. These would be relevant considerations in evaluating the strength of Professor Cordes' proposition concerning price discrimination in the hypothetical market.

[335] NRBNMLC disputes Mr. Orszag's conclusion, arguing that Prazor's listenership is too small to constitute a competitive threat to Sirius XM. *See* NRBNLC PFFCL ¶ 211. The Judges agree that, while Mr. Orszag's example shows that competition between Prazor and Sirius XM is possible, it is *de minimis* at present.

To rebut NRBNMLC's argument that the programming and audiences for those entities are so different that cannibalization is unlikely, SoundExchange introduced a study prepared by Massarsky Consulting that compared playlist information on commercial and noncommercial radio stations downloaded from Mediabase, a commercial database service that monitors airplay. *See* Ploeger WRT ¶¶ 25–26 app. C. This overlap study compared playlist information from 10 randomly selected commercial Christian AC radio stations with 10 randomly selected noncommercial Christian AC stations during the third quarter of 2019:

> [T]he resulting summaries showed that there was an overlapping repertoire of 961 recordings by 259 artists used by both one or more commercial stations and one or more noncommercial stations during the quarter. Those artists represented on both commercial and noncommercial playlists constituted just 49.0% of the artists played on the commercial stations and 74.4% of the artists played on the noncommercial stations, but their recordings were used disproportionately. Thus, plays of recordings by those artists made up 99.0% of the total plays on the commercial stations and 99.4% of the total plays on the noncommercial stations. Similarly, the recordings used on both commercial and noncommercial stations were 52.4% of the recordings played on the commercial stations and 70.5% of the recordings played on the noncommercial stations, but constituted 97.4% of the total plays on the commercial stations and 97.7% of the total plays on the noncommercial stations.

Id. ¶ 25 (footnote omitted).

NRBNMLC argues that this study ''suffer[s] from so many flaws as to be meaningless.'' NRBNMLC PFFCL ¶ 229. NRBNMLC enumerates several of what it views as flaws:

(1) SoundExchange Did Not Present Any Witnesses Who Were Familiar With the Design and Execution of the Study

NRBNMLC contends that Mr. Orszag and Mr. Ploeger were unaware of basic information concerning study design, including whether SoundExchange considered including genres other than Christian AC in the study.[336] *See* NRBNMLC PFFCL ¶¶ 230–231; 9/9/20 Tr. 5845–49 (Ploeger); 8/13/20 Tr. 2019 (Orszag). Nobody from Massarsky Consultant testified.

The Judges find the testimony of Mr. Ploeger and Mr. Orszag, including their testimony on cross-examination, provides a sufficient basis to assess the overlap study and its limitations. As discussed further, *infra,* the overlap study stands for a simple, and fairly limited, proposition: Commercial and noncommercial stations broadcasting in the Christian AC format play many of the same songs. Greater detail on the specific decisions that went into the design of the study are unnecessary to evaluate the study's support for that narrow proposition.

(2) The Study Did Not Replicate Real-World Behavior of Consumers

NRBNMLC faults the overlap study because it ''did not purport 'to replicate the real world in behavior of consumers.''' NRBNMLC PFFCL ¶ 232 (quoting 8/13/20 Tr. 2039 (Orszag)). NRBNMLC argues, therefore, that the study ''cannot be used to infer anything about listener behavior.'' NRBNMLC PFFCL ¶ 232.

In the quoted passage from Mr. Orszag's testimony, he argues against the premise of counsel's question on cross-examination, explaining the difference between a ''study'' and an ''experiment'':

> Q. So I will just ask you—I will ask you a more general question of do you agree with the proposition that litigation experiments need to replicate the marketplace to have external validity in measuring what market participants, you know, might do in that marketplace?
>
> * * * * *
>
> A. Thank you. So embedded in the words that you asked me in your question are lots of terms that are important for consideration here.
>
> The word ''experiment'' is very different than the concept of study and different from the concept of analysis . . . . An experiment, which is trying to replicate the real world in behavior of consumers, is a different question. It's not something I tackle in this matter . . . . But nothing that I do here is an experiment . . . . And nothing in my written direct or written rebuttal testimony in this case involves an experiment.
>
> So your question, thus, becomes difficult for me to answer in any kind of reliable way.

8/13/21 Tr. 2038–39 (Orszag). NRBNMLC has not identified a flaw in the overlap study. The study was not, and never was intended to be, an experiment. The Judges disagree that the study ''cannot be used to infer anything about listener behavior,'' however. The study provides information about the songs that commercial and noncommercial religious radio stations transmit in common. That is relevant information from which the Judges can draw inferences about whether listeners to commercial religious stations might listen to noncommercial religious stations, and vice versa.

(3) The Study Only Looked at Commercial AC Stations

NRBNMLC criticizes the overlap study for examining playlists only for stations broadcasting in the Christian AC format. *See* NRBNMLC PFFCL ¶ 233. ''As such,'' according to NRBNMLC, ''the study shows nothing about overlap in any other genre.'' *Id.*

SoundExchange has explained that it directed Massarsky Consulting to focus on the Christian AC format because that format is responsible for the majority of webcasting royalties from noncommercial stations. *See* Trial Ex. Ploeger WRT ¶ 22 ; 9/9/20 Tr. 5806, 5846 (Ploeger). Because the focus of the inquiry concerning cannibalization is on displacement of listenership, it is logical to examine the portion of the noncommercial webcasting market with the greatest listenership.

NRBNMLC does identify a limitation of the overlap study: That it focuses exclusively on Christian AC stations. That limitation, however, is not accidental—it is by design. Moreover, it is a reasonable design choice and was apparent from Mr. Ploeger's description of the study. *See* Ploeger WRT ¶ 25.

(4) The Sample of Stations Is Not Representative

NRBNMLC argues that the pool of Christian AC stations monitored by Mediabase is not representative of the universe of commercial and noncommercial religious stations, *see* NRBMNLC PFFCL ¶ 233 (citing 8/13/20 Tr. 2026 (Orszag)), or even of the universe of Christian AC stations. *See* NRBMNLC PFFCL ¶ 234 (citing Ploeger WRT ¶ 25; 8/13/20 Tr. 2025 (Orszag)). In addition, NRBNMLC contends that the ten commercial and ten noncommercial stations drawn from that pool is also unrepresentative. *See* NRBNMLC PFFCL ¶ 235 (citing 8/13/20 Tr. 2026–28 (Orszag)).

[336] Prior to the evidentiary hearing, NRBNMLC sought to exclude the overlap study, together with references to the study in Mr. Ploeger's and Mr. Orszag's testimony, on grounds that Mr. Ploeger, ''lacks both (a) the expertise necessary to determine and direct how the study should have been conducted and (b) basic factual knowledge regarding Mediabase, Massarsky Consulting, and the study's design and implementation.'' NRBNMLC Motion to Strike Written Rebuttal Testimony (WRT) of Travis Ploeger and Jonathan Orszag relating to Mediabase Study, at 3–4 (Mar. 11, 2020). The Judges denied the motion, concluding ''the Mediabase playlist database is the type of third-party commercial data source that industry participants rely on and that the Judges have relied upon in past proceedings when presented by lay witnesses.'' *Order Denying NRBNMLC Motion to Strike,* at 3 (Apr. 2, 2020). The Judges noted, however, that NRBNMLC raised legitimate questions concerning alleged deficiencies in Massarsky Consulting's methodology for selecting the subset of data presented in the study and Mr. Ploeger's alleged lack of knowledge about that methodology. *Id.* The Judges found those alleged deficiencies go to the weight rather than the admissibility of the study. *Id.*

By definition, a pool of stations in a single format is not representative of radio stations as a whole. Mr. Orszag readily agreed to this proposition. *See* 8/13/20 Tr. 2026 (Orszag). As discussed in the previous section, the overlap study's focus on the format that is responsible for the majority of webcasting royalties from noncommercial stations was a reasonable design choice.

Mr. Orszag testified that Mediabase monitors only larger stations and, in that sense, the pool of stations in its database is not representative of the broader universe of religious radio stations. *See id.* at 2025 (Orszag). However, Mr. Orszag stated that it was unnecessary to consider the small ''mom-and-pop stations'' because they do not pay royalties above the minimum fee. *Id.* at 2025–27. Again, the focus on stations with significant listenership that generate significant webcasting royalties is appropriate for the present inquiry.

Regarding NRBNMLC's contention that the sample of stations selected from the Mediabase database is unrepresentative, Mr. Orszag acknowledged that they are not representative of the larger universe of stations. ''By definition, they are going to be larger adult contemporary stations, so basically that means they are not going to be representative of all by definition, they represent the larger ones that qualify to be within the Mediabase data.'' 8/13/20 Tr. 2027–28 (Orszag).

The Judges find that the samples drawn from the nonrepresentative collection of Christian AC stations in the Mediabase database are, perforce, not representative of the overall universe of radio stations (or religious radio stations). That limits the extent to which the data derived from that sample can be projected to the broader radio universe. However, the purpose of the present exercise is not to project results to the entire universe of radio stations, but to the much narrower universe of radio stations likely to be subject to per-performance royalties under the current rate structure. The Judges also note that the sample was selected randomly, which diminishes the possibility of intentional bias.[337]

In sum, the Judges find the sample sufficiently representative of the segment of the radio market that is of interest here for the Judges to draw inferences about that market.

(5) Five of the Ten Commercial Stations Examined in the Study are Owned by the Same Company

NRBNMLC notes that Salem Media Group owns five of the ten commercial stations covered in the study. NRBNMLC PFFCL ¶ 237. Salem is the leading U.S. commercial Christian broadcaster. *See* Ploeger WRT ¶ 22. NRBNMLC stresses that ''Mr. Orszag did 'nothing to test empirically whether the effect of a single owner owning a big chunk of those stations would bias the analysis.' '' *Id.* (quoting 8/13/20 Tr. 2029 (Orszag). NRBNMLC also points out that only 12 of Salem's 100 stations broadcast in the Christian AC format. NRBNMLC PFFCL ¶ 237 (citing Trial Ex. 3049).

The fact that a large number of the stations that Massarsky Consulting randomly selected were owned by Salem is unsurprising and reflects Salem's position as one of the larger players in this market. Moreover, while owned by Salem, Mediabase data reflects that the five stations have distinct (albeit similar) playlists. *See* Ploeger WRT at app. C; Trial Ex. 3040.

The fact that a large majority of Salem stations broadcast in other formats is immaterial. By design, the overlap study is limited to Christian AC stations.[338]

(6) No Two Stations Used in the Study Operate in the Same Market

NRBNMLC argues that, because no two stations used in the study operate in the same market, ''listeners to the stations largely would not overlap or pose risk of cannibalization . . . .'' NRBNMLC PFFCL ¶ 238. The overlap study seeks to demonstrate that commercial and noncommercial stations broadcasting in the Christian AC format play many of the same songs. It does not purport to show the extent of geographic overlap. NRBNMLC's observation is not relevant. Moreover, it is factually incorrect as applied to webcasting, since any streamed station can be accessed from anywhere in the world regardless of where the broadcast station is located.

(7) The Study Measured the Existence, not the Extent, of Overlap

NRBNMLC observes that ''the study counts all plays of a recording as overlapping, as long as a recording is played just one time in one group and at least one time in the other group . . . .'' 8/13/20 Tr. 2032 (Orszag). NRBNMLC's suggestion is that the overlap study significantly overstates the degree of playlist overlap between commercial and noncommercial stations.

NRBNMLC's suggestion is not borne out by the underlying data. Trial Ex.3040 shows the number of ''spins'' of songs on each station. Some songs that are played frequently on some commercial stations are also played frequently on noncommercial stations. For example, [REDACTED] was played in excess of [REDACTED] times on [REDACTED] of the commercial stations and on [REDACTED] noncommercial stations [REDACTED]. *See* Trial Ex. 3040. Mr. Ploeger testified that ''the recordings used on both commercial and noncommercial stations were 52.4% of the recordings played on the commercial stations and 70.5% of the recordings played on the noncommercial stations, but constituted 97.4% of the total plays on the commercial stations and 97.7% of the total plays on the noncommercial stations.'' Ploeger WRT ¶ 25. In light of these statistics and a review of the underlying data, the Judges conclude that the scenario described in NRBNMLC's observation is very unlikely.

(8) The Study Did Not Measure Similarities or Differences in Nonmusic Programming

NRBNMLC observes that the overlap study did not examine any of the differences or similarities of nonmusic content between commercial and noncommercial stations and argues that it thus ignores important context. *See* NRBNMLC PFFCL ¶ 240. NRBNMLC contends ''[t]his is the very 'context that offers listeners quite different listening experiences and thereby removes the chance that they would be indifferent between the two listening experiences.' '' *Id.* (quoting Cordes WDT ¶ 29).

Again, the overlap study seeks to demonstrate that commercial and noncommercial stations broadcasting in the Christian AC format play many of the same songs. It does not purport to show that the listening experience on commercial and noncommercial stations is the same. While information about nonmusic content would have been helpful to the Judges in assessing the risk of cannibalization, its absence does not render the overlap study uninformative.

[337] NRBNMLC is critical of the fact that Mr. Ploeger, in his deposition, was unable to describe the technical process by which Massarsky Consulting carried out the random selection of stations. *See* NRBNMLC PFFCL ¶ 236. NRBNMLC does not controvert SoundExchange's assertion that the selection was random, and the Judges accept that assertion. The particular method by which the random selection took place is unimportant.

[338] *See infra,* section V.B.2.a.iii(B)(3).

(9) SoundExchange Did Not Conduct a Similar Study To Test Commercial/Noncommercial Overlap in Music Played on NPR Stations

NRBNMLC asserts that ''an equally fatal deficiency in the overlap study is that SoundExchange did not conduct a study to test commercial/noncommercial overlap of any musical genre played on NPR stations.'' NRBNMLC PFFCL ¶ 240. NRBNMLC argues that the absence of such a study renders the overlap study ''wholly uninformative'' as to how NRBNMLC's benchmark should be adjusted to account for any promotional or substitutional effect. *Id.* ¶ 243.

Once again, NRBNMLC criticizes the overlap study for not doing something it was not designed to do. Moreover, it is NRBNMLC's burden to show that its benchmark is comparable and to propose adjustments to the extent that it is not. Arguing that the overlap study does not carry that burden for NRBNMLC is not a valid criticism. Finally, NRBNMLC did not advance its benchmark analysis of the NPR agreement until Professor Steinberg's written *rebuttal* testimony, by which time it was too late for SoundExchange to design and conduct a study. The Judges will not hold SoundExchange's lack of prescience against it.

(10) The Judges' Conclusions Regarding the Overlap Study

The Judges find the overlap study to be informative on the question whether commercial and noncommercial stations play many of the same songs. Specifically, the Judges find that the overlap study demonstrates that there is substantial overlap in the music played by commercial and noncommercial stations broadcasting in the format that accounts for most noncommercial royalties. Due to the limitations in the overlap study, the Judges find that it does not support any conclusion as to the specific degree of overlap or whether the overlap actually results in audience diversion. Rather, it supports a conclusion that there is sufficient similarity in the music content of these stations to make diversion a realistic possibility.

(C) Listener Diversion Will Increase, Not Decrease, Record Company Royalties

NRBNMLC argues that a decrease in the cost of webcasting by noncommercial broadcasters will most likely cause listener diversion from those broadcasters' over-the-air broadcasts to their webcasts. *See* NRBNMLC PFFCL ¶ 212. Professor Steinberg testified that ''if we make webcasting less costly to stations, they are less likely to limit their webcasting,'' permitting more listeners to switch from the broadcast to the webcast. 8/26/20 Tr. 4011–12 (Steinberg). Because webcast plays bear royalties while terrestrial radio plays do not, Professor Steinberg argues that this form of diversion will enhance record company revenue. *See id.* at 4012.

NRBNMLC's hypothesis concerning the sources and destinations of listener diversion are speculative and unsupported by evidence. Since there is some internal logic to NRBNMLC's hypothesis, the Judges do not reject it outright, but they accord it little weight.

iv. Lower License Fees for Noncommercial Broadcasters Will Result in a Net Increase in Record Company Revenue

NRBNMLC argues that ''even with identical products, SoundExchange still would collect—and sound recording copyright owners would receive—the same or greater royalties if the noncommercial market segment were charged a lower per-performance rate due to the additional noncommercial buying activity that would occur.'' NRBNMLC PFFCL ¶ 217; *see* Steinberg WDT ¶ 46 (''[W]hen two statutory prices are set, one for each submarket, the price set for commercial webcasters can be the same as the single price, while the [noncommercial webcasters] are charged a lower price and hence buy more licenses. When more licenses are sold, the value of digital performance rights increases.''). This a reprise of the argument concerning price discrimination discussed *supra,* section V.B.2.a.ii.

The Judges find NRBMNLC's price discrimination argument unpersuasive. NRBNMLC's economic testimony establishes that one of the conditions necessary for price discrimination to take place in a market is ''sellers need to have an incentive to differentiate between the price charged to buyers with lower price elasticities and the price charged to buyers with higher price elasticities . . . .'' Cordes WDT ¶ 22. But the NRBNMLC has not demonstrated that such an incentive is present.

The NRBNMLC merely speculates that increased listenership on noncommercial internet stations will generate more royalties via a diversion of listeners from terrestrial broadcasts than are lost by the diversion of listeners away from commercial internet radio (*i.e.,* cannibalization). The NRBMNLC proffers no evidentiary support for this speculation, precluding any reliance by the Judges on this argument.

v. SoundExchange Failed To Provide Empirical Evidence of Cannibalization

Ironically, NRBMNLC contends that the record lacks empirical evidence of substantial cannibalization. *See* NRBNMLC PFFCL ¶ 219; Steinberg WDT ¶ 48 (''[T]here is no scientific study in the record demonstrating that cannibalization has ever occurred in this market.''). NRBNMLC notes that several record company witnesses testified that they were unaware of their companies ever having performed such an analysis. *See, e.g.,* 9/3/20 Tr. 5599 (Adadevoh). But there is no reason why SoundExchange should be required to provide evidence regarding cannibalization to support NRBMNLC's price discrimination argument.

The current rate structure for noncommercial webcasters, which has been in place since 2006, was designed to limit cannibalization of commercial webcasting by noncommercial webcasters. It is unsurprising that no participant has sought to measure the amount of cannibalization in the marketplace. If the rate structure has worked as intended, such a study would be expected to show little if any actual cannibalization. The Judges do not find the absence of empirical evidence of widespread cannibalization to undermine the argument that the *risk* of cannibalization under a different rate structure exists.

vi. The 2019 NPR/CPB Agreement Demonstrates That Copyright Owners Will License Noncommercial Broadcasters at a Lower Rate in Spite of Fears of Cannibalization

NRBNMLC argues that SoundExchange's repeated settlements with NPR/CPB show that record companies are willing to reach agreements with large noncommercial broadcasters ''at rates that are significantly lower on average than the current noncommercial rates.'' NRBNMLC PFFCL ¶ 244. ''If willing record company sellers were genuinely concerned about alleged cannibalization above the threshold from larger noncommercial broadcasters, they would not have agreed to accept lower rates from NPR stations.'' *Id.* ¶ 247.

The Judges concluded that NRBNMLC has failed to demonstrate that the 2019 NPR/CPB Agreement is a comparable benchmark. *See infra,* section V.B.1.b. In the absence of a demonstration of comparability, the Judges reject NRBNMLC's use of that agreement and its predecessors to demonstrate that

concerns about cannibalization are unfounded.

b. Judges' Conclusions Regarding Reasoning Underlying SoundExchange Proposed Rate Structure

NRBNMLC's counterarguments do not persuade the Judges to reject the rationale for setting rates for above-threshold transmissions equal to commercial rates. The Judges find that there is a risk that large noncommercial webcasters may draw listeners from commercial webcasters and that adopting a rate structure that applies commercial per-performance rates to above-threshold plays by those larger noncommercial webcasters is appropriate.

3. Adoption of Rate Structure

NRBNMLC relies entirely on the 2019 NPR/CPB Agreement as a benchmark to support its rate proposal.[339] Having rejected use of the 2019 NPR/CPB Agreement as a benchmark,[340] the Judges find NRBNMLC's rate proposal unsupported by the evidence and must reject it.[341]

By contrast, the Judges find that the rationale for a continuation of the noncommercial rate structure in place since 2006 remains valid. The Judges, therefore, adopt SoundExchange's proposal for a two-part rate structure under which noncommercial webcasters pay a minimum fee that entitles them to transmit performances of sound recordings up to an ATH threshold and pay commercial, nonsubscription per-performance rates [342] for transmissions in excess of that threshold.

Neither SoundExchange nor NRBNMLC proposed that the minimum fee for noncommercial webcasters should differ from the minimum fee for commercial webcasters. The Judges find that noncommercial webcasters should continue to pay the same per station or channel minimum fee as commercial webcasters.[343]

While both SoundExchange and NRBNMLC propose the same *average* ATH threshold, SoundExchange proposes retaining the current structure in which the ATH threshold is measured on a monthly basis (159,140 ATH per month), while NRBNMLC proposes (in its Alternative 1) that the ATH threshold be measured on an annual basis (1,909,680 ATH per year).[344]

NRBNMLC contends that annualizing the ATH threshold will ''account for seasonal listener peaks and valleys'' and ''lower transaction costs for both parties . . . .'' NRBNMLC PFFCL ¶ 158. Professor Steinberg testified that ''by doing it on an annual basis, you have lower transactions costs for both parties, and I didn't see any real reason . . . not to do it. I didn't see any real reason why we shouldn't save that money.'' 8/26/20 Tr. 4040 (Steinberg). NRBNMLC also argues that the NPR agreements support an annualized threshold since they include annual music ATH allotments. *See* NRBNMLC PFFCL ¶ 158.

NRBNMLC offered no evidence—apart from Professor Steinberg's unsubstantiated assertion—that an annualized ATH threshold would reduce transactions costs. NRBNMLC also offered no explanation why the NPR/CPB settlement agreements—agreements that include *both* an annual payment and an annual ATH allotment—supports a proposal that annualizes only the ATH allotment but retains monthly payments. The Judges find neither argument persuasive.

With regard to levelling out ''seasonal peaks and valleys,'' NRBNMLC made no case why that is an appropriate or desirable outcome. To be sure, it may well result in lower royalty payments for certain noncommercial webcasters—particularly those that perform large amounts of music with seasonal appeal, such as Christmas music. However, many commercial webcasters also perform large amounts of music with seasonal appeal, increasing the likelihood that noncommercial webcasters will divert listeners from commercial webcasts. Without a more developed argument, supported by evidence, the Judges will not make such a significant change to the method of applying the ATH threshold to noncommercial webcasters. The ATH threshold shall apply on a monthly basis. Noncommercial webcasters will be subject to per-performance royalties for transmissions in excess of 159,140 ATH in a month.

VI. Minimum Fee

Section 114 of the Copyright Act requires the Judges to determine a minimum fee for each type of service covered by the statutory license. *See* 17 U.S.C. 114(f)(1)(B). Section 112 contains a similar requirement for the statutory license for ephemeral recordings. *See* 17 U.S.C. 112(e)(3)–(4). For the current rate period, the minimum fee for all services is $500 annually for each station or channel, with an aggregate cap for each commercial webcaster of $50,000 (*i.e.,* 100 stations or channels).[345] *See* 37 CFR 380.10(b). For commercial webcasters, the minimum fee is credited toward per-performance usage fees. *See id.* For noncommercial webcasters, payment of the minimum fee covers usage up to 159,140 Aggregate Tuning Hours (ATH) of audio transmissions. *See id.* § 380.10(a)(1), (b).

For the forthcoming rate period, SoundExchange proposes to increase the minimum fee to $1,000 annually for each station or channel. *See* SoundExchange's Proposed Rates and Terms at 2 (Sep. 23, 2019) (SoundExchange Rate Proposal). SoundExchange also proposes to increase the aggregate cap for commercial webcasters to $100,000. *See id.* The Services each propose no change to the current $500 minimum fee and $50,000 cap. *See* Google LLC's Proposed Rates and Terms at 2 (Sep. 23, 2019) (Google Rate Proposal); NAB's Proposed Rates and Terms at 8 (Sep. 23, 2019) (NAB Rate Proposal); The NRBNMLC's Amended Proposed Noncommercial Webcaster Rates and Terms, ex. A at 9 (Jul. 31, 2020) (NRBNMLC Rate Proposal);[346] and Amended Proposed Rate and Terms of Sirius XM Radio Inc. and Pandora Media, LLC at 1 (Jan. 10, 2020) (Sirius XM Rate Proposal).

A. SoundExchange's Justification for Increasing the Minimum Fee

SoundExchange argues that it is ''reasonable and appropriate for the minimum fee at least to cover SoundExchange's administrative cost.'' SX RPFFCL (to Services) ¶ 358 (quoting *Digital Performance Right in Sound Recordings and Ephemeral Recordings,* 79 FR 64669, 64672 (Oct. 31, 2014) (*Web II Second Remand*)); *see* 8/13/20 Tr. 2055 (Orszag) (''it's important that that minimum fee be set at such a level that is consistent with the cost of processing and dealing with these royalty statements''). SoundExchange contends that its average per station or channel administrative cost more than doubled between 2013 and 2018, increasing from approximately $1,900 to approximately $4,448. *See* Ploeger WRT ¶¶ 13–14; *id.* app. A. ¶ 50 (WDT of Jon Bender) (Bender WDT). According to

[339] *See supra* note 317 and accompanying text.

[340] *See supra,* section V.B.1.

[341] In light of the Judges' rejection of the NRBNMLC rate proposal, they need not address SoundExchange's contention that they lack authority to adopt NRBNMLC's Alternative 2. *See* SX PFFCL ¶¶ 1518–1520; *supra,* section V.A.2.c.

[342] *See infra,* section IX.C.2.

[343] The Judges set the minimum fee *infra,* section VI.

[344] *See supra,* sections V.A.1.a and V.A.2.a.

[345] Five percent of the minimum fee is allocated to ephemeral recordings. *See* 37 CFR 380.10(d).

[346] The $500 minimum fee applies only to NRBNMLC's ''Alternative 1'' rate proposal. NRBNMLC's ''Alternative 2'' employs a flat annual payment that includes minimum fees and usage payments for multiple stations. *See* NRBNMLC Rate Proposal ex. A at 12.

SoundExchange, increasing the minimum fee from $500 to $1000 would ensure that every webcaster contributes reasonably to SoundExchange's average administrative costs, even if it does not cover them entirely. *See* Ploeger WRT ¶ 13; Bender WDT ¶ 51.

SoundExchange offers its settlement with CBI as confirmation of the need for an increase in the minimum fee. *See* SX PFFCL ¶¶ 1554–1556. In that settlement the parties agreed to an increase in the minimum fee, starting at $550 in 2021 and increasing annually in $50 increments to $750 in 2025. *See Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate Those Performances* (*Web V*), 85 FR 12745, 12746 (Mar. 4, 2020) (CBI Settlement). SoundExchange put forward two reasons why the increase in the CBI Settlement falls short of the 100% increase that it seeks in its rate proposal. ''*First,* it avoided the complexities and incremental costs of litigating with a group of webcasters that collectively paid only $336,800 in statutory royalties (including reporting waiver fees) in 2018.'' Ploeger WRT ¶ 15. ''*Second,* as a group, the noncommercial educational webcasters covered by the settlement impose lower costs on SoundExchange than other webcasters'' because 98% of them pay a $100 proxy fee that allows them not to file reports of use (thus alleviating SoundExchange of the cost of processing those reports or, if necessary, chasing down delinquent reports). *Id.* ¶ 16.

SoundExchange also contends that the $500 annual minimum fee has remained the same for more than twenty years, in spite of general increases in the cost of goods and services. *See* Bender WDT ¶ 42; 8/11/20 Tr. 1467 (Orszag). Mr. Orszag testified that using the Consumer Price Index (CPI–U) would be an appropriate, if imperfect, means of measuring the declining purchasing power of the minimum fee compared to the general cost of goods and services. *See* 8/11/20 Tr. 1469–71, 1473–74 (Orszag). Jonathan Bender, SoundExchange's former CEO, testified that ''[a]ccording to the Bureau of Labor Statistics' CPI inflation calculator, $500 in October 1998 was equivalent to $782.19 in August 2019. By the beginning of the next rate period in January 2021, that can reasonably be expected to exceed $800, and of course it will continue growing during the coming rate period.'' Bender WDT ¶ 43. Since prices for services have increased more rapidly than overall prices, SoundExchange contends it is reasonable to expect that its costs of administering the statutory license have increased more rapidly than the CPI–U. *See* 8/11/20 Tr. 1467–68 (Orszag).

SoundExchange notes that the minimum fee has not kept pace with per-performance royalty rates for webcasting. Mr. Bender testified that the total royalty rate for nonsubscription commercial webcasters increased 2.36 times between 1998 and 2019.[347] ''If the minimum fee today were set to cover the same number of performances as contemplated by the Librarian in *Web I,* it would be over $1180.'' Bender WDT ¶ 44. Performing the same calculation using 2006 rates under *Web II* as a starting point would yield a minimum fee of over $1437 for subscription services. *See id.* ¶ 45.

SoundExchange also seeks to justify an increase in the minimum fee by the generally increasing level of usage.

> SoundExchange has observed a marked increase in the average number of performances across all webcasters whose royalties are administered by SoundExchange. We are not aware of a corresponding increase in the average number of channels per webcaster, implying an increase in per channel or station usage. Growth in per channel or station usage means that if minimum fees are to both cover usage and ensure a contribution to the costs of administering the statutory license, minimum fees should go up.

Bender WDT ¶ 52.

In addition, SoundExchange notes that its proposed minimum fees are roughly in line with minimum fees charged for performing musical works by the performing rights organizations (PROs) that represent songwriters and music publishers. SoundExchange asserts that the Judges, and the Librarian before them, used musical works rates ''as a check on the reasonableness of the minimum fee under the statutory license.'' Bender WDT ¶ 53.

> Pursuant to the Judges' regulations under Section 118 of the Copyright Act, in 2021, the smallest college broadcasting stations will pay $746 just for use of ASCAP and BMI musical works, plus more if they license musical works through SESAC and Global Music Rights. College broadcasting stations affiliated with large schools will pay $1,928 for use of ASCAP and BMI musical works. In the case of public broadcasting entities, music format stations in even the smallest markets will pay $1,639 for use of ASCAP, BMI and SESAC musical works. In large markets the number is $14,532. As the Judges are well aware, ''sound recording rights are paid multiple times the amounts paid for musical works rights'' in unregulated markets.

Id. (citations and footnotes omitted).

Finally, SoundExchange contends that its proposed $100,000 cap on minimum fees for commercial webcasters with more than 100 stations or channels (up from $50,000 in the current rate period) ''is consistent with the minimum fees paid by PSS and SDARS and by new subscription services transmitted through cable and satellite television networks . . . .'' *Id.* ¶ 54 (citations omitted). SoundExchange avers the change will have a limited impact on commercial webcasters: ''In 2018, only 20 webcasters paid the $50,000 minimum fee and so would presumably pay a $100,000 minimum fee under SoundExchange's proposal. Of them, 18 ultimately paid total royalties in excess of $100,000.'' *Id.*

B. The Services' Response

The Services reject SoundExchange's effort to justify an increase in minimum fees based on increases in its average administrative cost, arguing that that measure is irrelevant. ''The purpose of the minimum fee is to cover SoundExchange's *incremental* administrative costs, not its *overall administrative costs*.'' Services RPFFCL ¶ 1536. The Services cite the CARP report and the Librarian's decision in *Web I* as concurring with this position. *See id.* (citing *Report of the Copyright Arbitration Royalty Panel,* Docket No. 2000–9 CARP DTRA 1&2, at 32, 95 (Feb. 20, 2002) (*Web I CARP Report*); *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings,* Final rule and order, Docket No. 2000–9 CARP DTRA 1&2, 67 FR 45240, 45263 (Jul. 8, 2002) (*Web I Determination*)).

The Services draw a contrast between the mechanism for funding SoundExchange's administration of the section 114 license and the Mechanical Licensing Collective's (MLC) administration of the section 115 license: Unlike the MLC, which is funded by an assessment on licensees (separate from, and in addition to, usage fees), SoundExchange's costs are deducted from the royalties it collects. *Compare* 17 U.S.C. 115(d)(7)(A) *with* 17 U.S.C. 114(g)(3). Based on this contrast, the Services conclude that ''using the minimum fee to help fund the overall administrative costs of SoundExchange would run afoul of the Act.'' Services RPFFCL ¶ 1536.

The Services also argue that SoundExchange's average cost calculation is flawed. The Services contend that SoundExchange began its

[347] Under the *Web I* rate structure, nonsubscription commercial webcasters paid $0.0007 per performance, plus an additional 8.8% for ephemeral recordings. Mr. Bender used the combined royalty of $0.0007616 (*i.e.,* 0.0007 × 1.088) in his calculations. *See* Bender WDT ¶ 44.

calculation with ''Total Operating Administrative Expenses'' rather than the cost of processing and distributing royalties. *See* Steinberg WRT ¶ 19. The Services argue that ''Total Operating Administrative Expenses'' covers administration of licenses other than webcasting, and improperly includes ''Property and Equipment Depreciation,'' ''Rate-Setting Proceedings Amortization,'' ''Interest expense,'' and ''Tax expense.'' *See id.;* 9/9/20 Tr. 5863, 5867–74 (Ploeger); Trial Ex. 3023 at 43 (SoundExchange Consolidated Financial Statements, Years Ended December 31, 2018 and 2017). NRBNMLC's expert, Professor Steinberg, opined that SoundExchange's estimate of administrative costs is ''grossly inflated.'' Steinberg WRT ¶ 19. The Services also fault SoundExchange for attributing 100 channels to services that actually had more than 100 channels or stations, which the Services contend also inflated SoundExchange's computation of administrative costs on a per-channel basis. Services RPFFCL ¶ 1545; *see* 9/9/20 Tr. 5857–58 (Ploeger); Bender WDT ¶ 49.

The Services dispute SoundExchange's assertion that its settlement with CBI confirms the need for an increase in the minimum fee, pointing out that the minimum fee increase in that settlement falls short of the increase that SoundExchange has proposed. *See* Services RPFFCL ¶ 1554. The Services argue that the minimum fee in the CBI agreement is, ''if anything, too high for broader application'' because CBI had more to gain by settling than SoundExchange. Steinberg WDT ¶ 31. While the Services acknowledge SoundExchange's explanation that a lower minimum fee is justified for CBI members because they impose lower costs on SoundExchange than do other services, the Services point out that the same rationale could apply to all commercial and noncommercial webcasters that pay only the minimum fee. *See* Services RPFFCL ¶ 1554. The Services opine that ''SoundExchange could decrease those costs further by deciding to waive reports of use for . . . noncommercial webcasters also webcasting at or below 80,000 monthly ATH.'' *Id.*

The Services dispute SoundExchange's argument that inflation over the past twenty years justifies a minimum fee increase. First, the Services deny that the current minimum fee has been in place that long, since the minimum fee under *Web I* was applied per licensee, not per station or channel. *See id.* ¶ 1557; 8/13/20 Tr. 2015 (Orszag). Second, the Services contend that ''SoundExchange agreed to $500 for 2020,'' in *Web IV,* ''so that year, not 1998, is the year from which to consider changes.'' Services RPFFCL ¶ 1558. Moreover, notwithstanding the general rate of inflation, the Services suggest that SoundExchange's processing costs have decreased over time due to increasing use of automation. *See id.* ¶ 1559; *see also* Bender WDT ¶¶ 9–10; 8/11/20 Tr. 1470 (Orszag).

Regarding SoundExchange's argument that the minimum fee has not kept pace with per-performance rates, the Services point out that the Judges have stated that the minimum fee ''is meant to cover administrative costs'' and ''does not address actual usage.'' *Web II,* 72 FR at 24099.

The Services describe SoundExchange's arguments based on rates for use of musical works as ''improper.'' Services RPFFCL ¶ 1564–1565. The Services note that SoundExchange has long opposed, and the Judges have long rejected, use of musical works fees for setting sound recording rates. *See, e.g., Web II,* 72 FR at 24092–95; *see also* Bender WDT ¶ 53 & n.16 (''the use of musical work rates to set sound recording rates has otherwise been thoroughly rejected, which SoundExchange believes is proper''). In addition, the Services argue that the rates cited by SoundExchange are not comparable because they are flat fees covering unlimited broadcasting rather than minimum fees. *See* Services RPFFCL ¶ 1564–1565 (citing 37 CFR 381.5(c)). The Services also note differences in the structure of the market for licensing musical works (*i.e.,* multiple collecting societies with mutually exclusive repertoires versus a single collective covering the entire industry), as well as differing administrative costs at the level of each individual collecting society. *See* Steinberg WRT ¶ 20.

Finally, the Services reject SoundExchange's reference to minimum fees for PSS and SDARS to justify increasing the cap on minimum fees for commercial webcasters, stating that the other statutory licenses are ''not applicable here.'' Services RPFFCL ¶ 1566.

C. The Judges' Findings and Conclusions Regarding the Minimum Fee

SoundExchange offers six measures by which it argues that the current $500 minimum fee should increase: SoundExchange's average administrative cost, the minimum fee agreed to by SoundExchange and CBI, inflation, per-performance sound recording royalty rates, usage, and minimum fees charged for broadcasting of musical works. The Services' reject each of these measures (or SoundExchange's application of them) for various reasons. Instead, they offer two possible measures for adjusting the minimum fee: SoundExchange's incremental administrative costs and anticipated inflation between 2020 and 2025.

1. Increased Average Administrative Cost Since 2013 Supports Increasing the Minimum Fee

a. Use of Incremental Versus Average Administrative Costs

The Judges and their predecessors have never determined that the minimum fee under section 114 exists solely to cover SoundExchange's incremental administrative costs. To be sure, the Services have made that argument consistently since *Web I.* However, the Judges and their predecessors have never embraced it.

In *Web I,* for example, the CARP concurred with the Services that

> one purpose of the minimum fee is to protect against a situation in which the licensee's performances are such that it costs the license administrator more to administer the license than it would receive in royalties. Another arguable purpose is to capture the intrinsic value of a service's *access* to the full blanket license, irrespective of whether the service actually transmits any performances.

Web I CARP Report at 95. The CARP did not find that the minimum fee existed solely to cover incremental costs, access value, or both.

In his review of the *Web I CARP Report,* the Librarian stated ''the Panel could propose any rate consistent with the agreements so long as the proposed rate would cover costs for administering the license *and access to the works.*'' [348] *Web I Determination,* 67 FR at 45263 (emphasis added). Whether the CARP and the Librarian were referring to average or incremental costs of administering the license, it is clear that both agreed that covering those costs was only *one* purpose for the minimum fee.

As the Services acknowledge, in later decisions the Judges routinely referred to the minimum fee as covering SoundExchange's ''administrative cost''

[348] The minimum fee selected by the CARP was the lowest minimum fee found in the benchmarks put before the panel. *See id.* The CARP reasoned that a ''sophisticated and experienced negotiator . . . would not negotiate a minimum fee that would expose it to a loss.'' *Id.*

The Services point out, correctly, that the Librarian referred to ''the incremental cost of licensing'' in a separate passage. *See* Services RPFFCL ¶ 1536. Elsewhere, including the passage quoted in the text, the Librarian refers merely to ''costs for administering the license.''

or ''average administrative cost,'' rather than SoundExchange's incremental cost of administering the license. *See, e.g., Web II,* 72 FR at 24096; *Web III,* 79 FR at 23124; and *Web IV,* 81 FR at. 26396–97.

The Services are unable to point to relevant statutory language or legislative history that supports their position. While the Copyright Act itself is silent as to the purpose of the minimum fee, legislative history instructs that ''[a] minimum fee should ensure that copyright owners are fairly compensated in the event that other methodologies for setting rates might deny copyright owners an adequate royalty.'' H.R. Rep. No. 105–796, at 85 (1998) (*DMCA Conference Report*). The *DMCA Conference Report* plainly does not limit a minimum fee merely to covering incremental costs of administering the license. Covering incremental costs is one element of ensuring that copyright owners are ''fairly compensated,'' but it is not the only element. Covering incremental costs is the bare minimum that a minimum fee must accomplish.

The Judges find the Service's argument contrasting the funding mechanism for SoundExchange with the funding mechanism for the Mechanical Licensing Collective to be inapt. The minimum fee is not an assessment, over and above royalties, that funds SoundExchange's operations. For commercial webcasters, the minimum fee is credited against usage. For noncommercial webcasters, the minimum fee includes a substantial quantity of usage. While there are webcasters whose usage falls below the amount that is covered by the minimum fee, that is simply inherent in the nature of any minimum fee. The fact that some webcasters do not recoup the entire value of the minimum fee does not convert it into an administrative assessment.

There is little testimony in the record on the subject of whether, from an economic standpoint, it is preferable to refer to incremental or average costs in setting the minimum fee. The following colloquy between Mr. Orszag and the Judges is on point:

> Q: Mr. Orszag, you mentioned a couple of times that you look at average cost, not incremental . . .. I'm equating that with marginal cost. But doesn't economics, basic economic principles [counsel] . . . that pricing should equal marginal cost if it's otherwise competitive?
>
> A: But pricing in those discussions also say that we need to ensure that the pricing covers costs as well, because if everyone got marginal cost pricing, then it could be the situation where everyone is getting a low price but they're not actually covering the cost to administer the service.
>
> * * * * *
>
> Q: Are you saying—are you saying this is a declining cost of business for SoundExchange so the marginal cost is below average cost at the—at the level of production?
>
> A: I—I would assume that to be the case here. If [you] add one new licensee, the cost of adding that one licensee is far below the cost of the first licensee. And so we need to—one would need to ensure that the—the total costs are covered so that the service can actually be provided in that circumstance.

8/12/20 Tr. 1760–61 (Orszag). Mr. Orszag's unrebutted testimony supports setting the minimum fee with reference to SoundExchange's average administrative cost.

The Judges, consistent with prior determinations, conclude that they may consider SoundExchange's average administrative cost in setting the minimum fee.

b. Computation of Average Administrative Cost

Professor Steinberg testified that SoundExchange's computation of administrative costs was flawed because it ''does not distinguish between administrative costs attributable to licensing and processing fees from other administrative costs associated with running any modern corporation.'' Steinberg WRT ¶ 19. The Services contend that SoundExchange improperly included in its calculation of average administrative costs a number of items unrelated to license administration, such as property and equipment depreciation, interest and tax expenses, and amortization of the cost of participating in rate-setting proceedings. *See id.;* Services RPFFCL ¶ 1545.

This aspect of Professor Steinberg's testimony follows from the Service's position that the function of the minimum fee is to cover SoundExchange's incremental cost of licensing. Given the Judges' conclusion that they may consider SoundExchange's average administrative cost in establishing a minimum fee, the Judges accord it no weight.

Similarly, the Judges do not find SoundExchange's inclusion of costs related to the administration of licenses other than the webcasting license to be improper given that the Judges will consider SoundExchange's average administrative cost. SoundExchange has computed that average by dividing its total administrative costs by its total number of licensees (webcasting and non-webcasting), then dividing that quotient by the estimated number of channels or stations per licensee. *See* Bender WDT ¶¶ 48–50; 9/9/20 Tr. 5893 (Ploeger). That is an appropriate means of determining SoundExchange's average administrative cost per channel or station.

Finally, the Judges do not find SoundExchange's estimation of the number of channels or stations per licensee to be improper. In deriving that estimate, SoundExchange attributed 100 channels or stations to licensees that had more than 100 channels or stations. The existing and proposed minimum fee structure caps minimum fees for commercial webcasters at 100 times the per-channel or station minimum fee. SoundExchange's methodology thus divides per-licensee administrative costs over the average number of channels or stations *for which licensees pay the minimum fee.*[349] *See* Bender WDT ¶ 49. The Judges find that it is appropriate to limit consideration to channels or stations for which licensees pay the minimum fee, given that the purpose of the calculation is to find a basis for setting that minimum fee.

The Judges find SoundExchange's calculation of its average administrative cost on a per-channel or station basis to be acceptable. The Judges are mindful that, because it is based on an estimation of the number of channels or stations per licensee, it is itself an estimate rather than a precise quantification.

c. Judges' Conclusions Concerning Increased Average Administrative Cost as a Basis for Increasing the Minimum Fee

The record reflects that SoundExchange's estimate of its average administrative cost on a per-channel or station basis increased from approximately $1,900 to approximately $4,448 between 2013 and 2018, an increase of 2.34 times. *See* Ploeger WRT ¶¶ 13–14; Bender WDT ¶ 50. While both are estimates, SoundExchange calculated both using the same methodology.

The absolute amount of SoundExchange's estimated average administrative cost exceeds SoundExchange's proposed minimum fee by a significant amount. The relative increase in average administrative costs (134%, which would yield a minimum fee of $1170) also exceeds the relative increase in the minimum fee that SoundExchange is seeking (100%, yielding a minimum fee of $1000). The

[349] While the regulations do not cap minimum fees for noncommercial licensees, no noncommercial licensee has more than 100 channels or stations. *See* Ploeger WRT ¶ 9 n.2.

Judges conclude that the evidence relating to SoundExchange's average administrative cost supports the increased minimum fee that SoundExchange has proposed.

2. SoundExchange's Settlement With CBI Supports Increasing the Minimum Fee

SoundExchange and CBI agreed to a gradual increase in the minimum fee to $750 by 2025. This increase is materially different from that proposed by SoundExchange, both in its magnitude and its gradual implementation. Nevertheless, SoundExchange offers it as confirmation of the need for an increase in the minimum fee and offers two explanations for the difference between the agreement and the proposed minimum fee: Litigation savings and a lower cost for processing usage statements from CBI members. *See* SX PFFCL ¶¶ 1554–1556 (and record citations therein).

On the existing record, the Judges cannot accept SoundExchange's first explanation. As the Services point out, both parties saved litigation costs by settling, and it is entirely possible that the litigation savings were of equal or greater value to CBI than SoundExchange.

SoundExchange's second explanation is a stronger justification for the lower increase. The Judges reject the Services' counterargument that other low usage webcasters would have similarly low processing costs if they, like the noncommercial educational webcasters covered by the CBI agreement, were permitted to pay a proxy fee and thus avoid submitting reports of use. *See* Services RPFFCL ¶ 1554. They are not permitted to do that. The Judges will not assume away a cost that SoundExchange bears, based on the Services' counterfactual.

The Judges conclude that the CBI agreement is evidence that willing buyers and willing sellers would agree to a minimum fee that exceeds the existing minimum fee. The unique circumstances of the CBI agreement may indicate that the increase agreed to in that settlement may be toward the low end of reasonable minimum fees. However, given the indeterminacy of the effect of litigation costs on the parties' relative bargaining positions, the Judges find that they cannot derive a specific minimum fee amount from that settlement.

3. General Inflation Since 2006 Supports an Increased Minimum Fee

SoundExchange argues that increases in the general level of prices while the $500 minimum fee has been in effect, as measured by the CPI–U, is another justification for increasing the minimum fee. The Services appear to acknowledge inflation as a justification for increasing the minimum fee, although they would have the Judges look only to prospective inflation from 2020 to 2025 because ''SoundExchange agreed to $500 for 2020'' in its *Web IV* rate proposal. Services RPFFCL ¶ 1558.

The Judges reject the Services' argument that the current $500 minimum fee is a willing buyer/willing seller rate because SoundExchange and the Services both proposed that amount in *Web IV.* The current minimum fee was determined by the Judges and imposed as part of the regulatory scheme. SoundExchange's rate proposal was a position taken in a regulatory proceeding, not the action of a willing seller in a market unconstrained by a statutory license.

The Judges also reject SoundExchange's contention that the appropriate starting point for calculating inflation is 1998. The *Web I* minimum fee was calculated per licensee, not per channel or station. *See* 8/13/20 Tr. 2015 (Orszag). It was not the same fee that the Judges adopted for the *Web II* rate period, beginning in 2006, that was assessed on a per-channel or station basis. The current $500 annual per-channel or station minimum fee has been in place since 2006; 2006 is the appropriate base year for any inflation calculation.

According to the Bureau for Labor Statistics, the CPI–U for January 2006 was 198.3, and the CPI–U for December 2020 was 260.474.[350] That represents a 31.35% increase. Consequently, to have the equivalent purchasing power of the minimum fee in 2006, the current minimum fee would need to increase to $656.77.

The Judges recognize that general inflationary data are an imperfect substitute in this context for data concerning changes to SoundExchange's actual costs. Nevertheless, the Judges find that the increase in inflation over the period from 2006 to the end of 2020 reflects an erosion in the purchasing power of the minimum fee that supports an increase, though not necessarily the doubling that SoundExchange seeks.

[350] *See Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. city average, all items, by month, https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202101.pdf* (last visited May 24, 2021). The Judges take official notice of these publicly available government data.

4. Other Justifications for Increasing the Minimum Fee

The Judges reject SoundExchange's additional justifications for increasing the minimum fee: Increased royalty rates, increased usage, and failure to keep pace with minimum fees for public performance of musical works. While the minimum fee is recoupable against charges for usage, it is not a usage fee as such. SoundExchange has provided no reasoned explanation why the minimum fee should be tied to the royalty rates or the amount of usage, and the Judges see no reason, *a priori,* that it should be.

Regarding the minimum fees charged by PROs for public performance of musical works, the Judges (at SoundExchange's urging) have long rejected use of musical works rates in setting sound recording rates. *See, e.g., Web II,* 72 FR at 24092–95; Bender WDT ¶ 53 & n.16. The Judges see no reason to make an exception for the minimum fee.

5. Conclusion

The three justifications offered by SoundExchange and accepted by the Judges suggest a range of minimum fees from $656.77 at the low end to $1,170 at the high end. The Judges find this range to represent the zone of reasonable minimum fees supported by the record in this proceeding.

Of the three accepted justifications, the Judges find the increase in SoundExchange's average administrative cost to be the most compelling. Unlike the inflation approach, average administrative cost relates directly to actual costs incurred by SoundExchange. Unlike the minimum fee agreed to by SoundExchange and CBI, the average administrative cost does not suffer from the indeterminacy of the relative savings in litigation costs achieved by the parties to the settlement. The Judges recognize that the average administrative cost put forward by SoundExchange is an estimate since it incorporates SoundExchange's estimate of the average number of channels or stations per licensee. Consequently, the Judges regard the 134% increase in average administrative costs, and the $1,170 minimum fee it implies, as an upper limit on a reasonable minimum fee. Nevertheless, since the Judges find the average administrative cost approach to be the most compelling, the Judges find that the minimum fee should be set closer to this upper limit than to the lower limit (set using the rate of inflation).

SoundExchange's proposed $1,000 minimum fee falls comfortably within the zone of reasonable minimum fees determined by the Judges and falls closer to the high end of that range. The Judges, therefore, adopt SoundExchange's proposed $1,000 per-channel or station minimum fee for the forthcoming rate period. The Judges also adopt SoundExchange's proposal to increase the cap on minimum fees for commercial webcasters to $100,000, in effect retaining the existing 100 channel or station cap for each commercial licensee. The Judges deem this adjustment to be arithmetically necessary because failure to increase the cap would negate the increase in the minimum fee for the largest webcasters (who would effectively pay the same amount on half as many channels).

VII. Ephemeral License Rate and Terms

Section 112 of the Copyright Act creates a statutory license to make phonorecords to facilitate the transmission of sound recordings under the section 114(f) statutory license and requires the Judges to determine reasonable rates and terms of royalty payments for making those so-called ''ephemeral recordings.'' 17 U.S.C. 112(e). During the current rate period, the royalty for ephemeral recordings is part of the total royalty for webcasting and constitutes 5% of that amount. 37 CFR 380.10(d).

SoundExchange proposes that the Judges retain the current royalty rate and rate structure for ephemeral recordings in the forthcoming rate period with some ''clarifying editorial changes'' to the relevant regulatory terms. SX PFFCL ¶ 1568; *see* SoundExchange's Proposed Rates and Terms at 3, 22 (Sep. 23, 2019) (SoundExchange Rate Proposal). Most of the Services propose to retain the existing provision on ephemeral recordings. *See* Sirius XM and Pandora First Amended Proposed Rates and Terms at 1 (proposing that the current terms continue except as otherwise indicated); Google Proposed Rates and Terms at 1; NAB Proposed Rates and Terms at 9; NRBNMLC Amended Proposed Rates and Terms ex. A at 9 (Alternative 1). In its Alternative 2 rate proposal, NRBNMLC includes the same editorial changes that SoundExchange proposes. *See* NRBNMLC Amended Proposed Rates and Terms ex. A at 12 (Alternative 2). The Services do not dispute SoundExchange's proposal to adopt 37 CFR 380.10(d) with the editorial changes SoundExchange and NRBNMLC propose.[351] *See* Services RPFFCL ¶¶ 1576–1577.

As in *Web IV,* SoundExchange relies on the designated testimony of economist Dr. George Ford from *Web III. See* Trial Ex. 5616 (Designated WDT of George Ford) (Ford Des. WDT); *Web IV,* 81 FR at 26397–98. Dr. Ford testified that ''it is typical for ephemeral copy rights to be expressly included among the grant of rights provided'' in marketplace agreements between record companies and music services. Ford Des. WDT at 11. ''Most of these agreements do not set a distinct rate for those ephemeral copies, incorporating them instead into the overall rate that the [music services] pay[] for the combined ephemeral copy rights and performance rights.'' *Id.* at 11–12. Dr. Ford also testified that to the extent marketplace agreements do set a royalty rate for ephemeral recordings they generally express that rate as a percentage of an overall bundled rate for both performances and ephemerals. *See* Ford Des. WDT at 12–14.

SoundExchange also offers several direct licenses in the record of this proceeding as evidence that marketplace agreements do not set distinct rates (as distinguished from bundled rates) for ephemeral recordings. *See, e.g.,* Trial Ex. 4035 at 11–12, 16–19 (2015 agreement between [REDACTED] and [REDACTED] granting [REDACTED]); Trial Ex. 5037 at 3–4, 5–9 (2017 agreement between [REDACTED] and [REDACTED] granting [REDACTED]).

As to the specific allocation of royalties between the performance and ephemeral recording rights, SoundExchange notes that this allocation has no effect on the Services. *See* SX PFFCL ¶ 1574. Rather, the real interested parties in determining the allocation are record companies and performing artists because payments under section 114 are subject to a mandatory division between artists and record companies and payments under section 112 are not. *See id.;* Ford Des. WDT at 13–14; 17 U.S.C. 114(g)(2). ''Because the willing buyer'' (*i.e.,* the music service) ''is disinterested with respect to that allocation, the agreement between the record companies and the artists thereby becomes the best indication of the proper allocation of royalties.'' Ford Des. WDT at 14. Dr. Ford testified to the existence of an agreement between artists and record companies that 5% of royalties should be allocated to the ephemeral recordings right and 95% should be allocated to the performance right. *See id.* at 15. Mr. Bender testified that the SoundExchange board of directors, which is comprised of record company and performing artist representatives, ''adopted a resolution reflecting agreement that 5% of the royalties for the bundle of rights should be attributable to the Section 112(e) ephemeral royalties, with the rest being allocated to the Section 114 performance royalties.'' Bender WDT ¶ 56. SoundExchange avers that ''[a]s a result, a 95%–5% split 'credibly represents the result that would in fact obtain in a hypothetical marketplace negotiation between a willing buyer and the interested willing sellers under the relevant constraints.' '' SX PFFCL ¶ 1575 (quoting Ford Des. WDT at 15).[352]

SoundExchange states that the editorial changes it seeks to 37 CFR 380.10(d) more ''clearly state[ ] the effect of the 95%–5% split,'' and opines that ''[t]his change will not have any effect other than making the current rule clearer.'' SX PFFCL ¶ 1576. SoundExchange notes that the change is consistent with NRBNMLC's Alternative 2 proposal and with SoundExchange's settlements with CBI and NPR/CPB. *See id.* ¶¶ 1568, 1577.

The Judges find the testimony and agreements that SoundExchange cites in its proposed findings to be persuasive as to both the inclusion of ephemeral recordings royalties within a bundled rate for performances and ephemerals and the specific allocation of 5% of the bundled royalty to the section 112(e) license. The Judges also find SoundExchange's proposed editorial changes to be appropriate and supported by the record. The Judges, therefore, adopt SoundExchange's proposals regarding ephemeral recordings in their entirety.

VIII. Terms

One of the purposes of this proceeding is to establish terms for the administration of the rates the Judges

[351] SoundExchange and the Services are generally on the same page regarding ephemeral recordings, except as to the question whether the right to make ephemeral recordings has independent economic value. *Compare* SX PFFCL ¶ 1570 (and sources cited therein) (''ephemeral copies have economic value to services that publicly perform sound recordings because these services cannot, as a practical matter, properly function without those copies'') *with* Services RPFFCL ¶ 1570 (and sources cited therein) (''While the Services do not dispute that ephemeral recording right is frequently needed, it does not have independent economic value.''). The Judges need not (and do not) resolve this largely academic question to determine an ephemeral recordings rate.

[352] The SoundExchange Board resolution reflecting the agreement between artists and copyright owners is not in the record. Dr. Ford's and Mr. Bender's testimony concerning the agreement, therefore, is hearsay. The Judges exercise their discretion under 37 CFR 351.10(a) to admit and consider this hearsay testimony.

determine for the rate period 2021 to 2025. The parties proposed adoption of certain terms to be included in Subchapter E of Chapter III, title 37 CFR The Judges have weighed the proposals and the arguments of the parties in support of or opposed to various regulatory provisions and adopt the Terms as detailed in ''Exhibit A'' to this determination. The parties' proposals, and the Judges' rulings, include the following.[353]

A. Standards for the Adoption of Terms and Other Regulatory Language

The Judges' employ the willing buyer/willing seller standard to establish terms for the administration of royalty rates. 17 U.S.C. 114(f)(1)(B); *Web II,* 72 FR at 24102. SoundExchange offers that the Judges have an obligation to adopt terms that will facilitate an efficient collection, distribution, and administration of the statutory royalties. SX PFFCL ¶ 1578 (citing *Web II,* 72 FR at 24102); *see* also *SDARS II,* 78 FR at 23073. The Judges clarify that decisions to adopt terms, while informed by policy considerations, such as those suggested by SoundExchange, are ultimately guided by record evidence. Rulemaking proceedings are the proper avenue for consideration of several of the terms requested in this proceeding. As is addressed below, the Judges have a pending rulemaking proceeding in which they may address several such proposals.

SoundExchange also argues for consistency of terms with those applicable to satellite radio and preexisting services. SX PFFCL ¶¶ 1579–1583. The Services counter that the standard the Judges must apply regarding proposed terms is the willing buyer/willing seller standard. Services RPFFCL ¶¶ 1579–1583. As stated above, the Judges' decision regarding terms is informed by such considerations but is guided ultimately by the willing buyer/willing seller standard. As SoundExchange acknowledges, the market for webcasting is different from other services, and different rates and terms apply. In addition, evidence differs across proceedings. As a general matter, the Judges seek consistency across the regulatory provisions administering rates, *to the extent consistency is warranted or permitted by the specific facts of individual rate proceedings.*

[353] The Judges also adopt several of the proposed changes that are merely technical, structural, or conforming amendments to the regulations.

B. Designating SoundExchange as the Collective

The Judges designate SoundExchange as the Collective under this Determination. SoundExchange participated in this proceeding as the existing and presumed Collective. SoundExchange proposed to continue as the Collective. *See* SoundExchange Proposed Rates and Terms at 12. No party objected to SoundExchange continuing in the role of Collective. The Judges acknowledge the administrative and technological knowledge base developed by SoundExchange over its years of service as the Collective. Finding sufficient basis, in the entirety of the record, for SoundExchange to serve, the Judges re-designate SoundExchange to serve as the Collective for purposes of collecting, monitoring, managing, and distributing sound recording royalties established by part 380 of the Judges' regulations.

C. Audit Terms

There are several issues presented in this proceeding regarding the audit provisions. The more persuasive evidence points to resolution of most of the issues in favor of continuing to apply the existing terms. The record contains evidence of a number of contracts that have substantially similar audit provisions to such regulations. The audit provisions are addressed below.

1. Late Fee for Late Payments Discovered in Audits

The Services propose a separate interest rate for late payments resulting from underpayments discovered in audits. The Services propose a fee for audit-discovered late payments that is lower than the prevailing 1.5% late fee. Specifically, the Services propose the interest rate for preexisting subscription services and satellite radio services,[354] which looks to the federal post-judgment rate in 28 U.S.C. 1961. Services PFFCL ¶¶ 328–330; Second Amended Proposed Rates and Terms of Sirius XM Radio Inc. and Pandora Media at 2; NAB Proposed Rates and Terms at 6; Google Proposed Rates and Terms at 3; NRBNMLC's Amended Proposed Rates and Terms ex. A at 6. SoundExchange counters, in part, that the current context differs from PSS/SDARS. SX PFFCL ¶¶ 1593–1601. The Judges agree that the context differs, but that is not the determining factor. As addressed below, the contract terms negotiated by willing buyers and willing sellers, in evidence from similar markets, are persuasive.

[354] *See* 37 CFR 382.7(g).

Both the Services and SoundExchange make arguments about good faith and bad faith on the part of stakeholders in the context of audit-discovered late payments. SX PFFCL ¶¶ 1605–1609; Services PFFCL ¶ 329. The Judges find insufficient evidence in the record to suggest that any actor, in this context, is or has been significantly motived by, or acted in, bad faith. Such matters, if confronted, may be adequately addressed by the re-adoption of other requirements in the existing audit provision, such as those requiring reasonableness, the use of a Qualified Auditor, and actions being in accordance with generally accepted auditing standards. As for the arguments over whether the late fee, applied to all late payments, is a hardship, the Judges make no judgment either way. Such late fees in exemplary contracts demonstrate that willing parties have agreed to such terms, even if they may at times function as a hardship. *See, e.g.,* Trial Ex. 4035 at 20, 28; Trial Ex. 5111 at 24, 34. Relatedly, the Services put forth an argument that applying a general late fee rate to audit-discovered late payments is unnecessarily ''punitive.'' Services RPFFCL ¶¶ 1617–1618. The Judges find that differences between a reasonable late fee being viewed as alternatively punitive or motivating are largely semantics. Indeed, the Services recognize that in its original context, the general late fee of 1.5% monthly interest rate plainly serves as a short-term penalty to incentivize timely payment. Services PFFCL ¶ 330. Based on the entirety of the record, the Judges find a late fee, applicable across all late payments, motivates compliance, as it should.

Specifically, several contract terms negotiated by willing buyers and willing sellers on matters such as this one serve as reliable evidence. *See, e.g.,* Trial Ex. 5013 at 80; Trial Ex. 5037 at 69 (regarding ''late payments discovered in audit''). The Judges find that the contracts in evidence indicate sufficient and persuasive instances in which willing buyers and willing sellers negotiated that the same late fee rate exists for any late payments, without separate treatment of underpayments discovered in an audit. *Id.* The Judges therefore conclude that the designated late fees will apply to any late payments, [REDACTED] the underpayments are discovered in audits.

The Judges re-adopt the monthly late fee of 1.5 percent. The Judges observe that in admitted contracts, there is a range from [REDACTED] up to

[REDACTED]%. *See, e.g.,* Trial Ex. 2013 ([REDACTED]); Trial Ex. 4035 at 20, 28 ([REDACTED]%); Trial Ex. 5013 at 38, 80 ([REDACTED]%); Trial Ex. 5074 at 2 ([REDACTED]%), 5037 at 68–69 ([REDACTED]%). The 1.5% rate is an accepted rate in the market. For this reason, the Judges adopt it as the generally applicable late fee, and reject the Services' proposed change.

2. Frequency of Audits

SoundExchange proposes adoption of a provision regarding frequency of audits that would allow it to conduct multiple audits of a licensee in parallel, with each audit covering a different period of time. Specifically, SoundExchange proposes a change to reflect that the payor's payments for a particular year may be audited only once, rather than that a licensee may be audited only once a year. SoundExchange suggests a need for such a provision by offering evidence of various delays in recent audits. It also notes that its proposal is similar in effect to the statutory provision concerning audits of services licensed under the section 115 blanket license. SX PFFCL ¶¶ 1619–1622. The Services dispute that delays in audit processing are attributable to licensees or that licensees may benefit from prolonging the audit process. Services RPFFCL ¶¶ 1620–1621. The Services indicate that several of the Services' benchmark agreements limit the frequency of audits. Services RPFFCL ¶ 1622; *see, e.g.,* Trial Ex. 5013 at 79; Trial Ex. 5037 at 69 (regarding ''audit'' no more than once per calendar year). The Judges are informed by the terms in negotiated contracts addressing the frequency of audits, cited by the Services and otherwise—namely, those that limit audits of a payor's or licensee's payments to once per year. The Judges find that such evidence, and the record as a whole, does not support SoundExchange's proposal to allow an audit of a payor or licensee more than once in any year. The Judges, therefore, reject SoundExchange's proposal.

3. Audit Deadlines and Audit Fee Shifting

SoundExchange proposes response deadlines within audits, alleging various delays in past audit processes. SX PFFCL ¶¶ 1623–1630. SoundExchange also proposes that the costs of an audit be shifted to the licensee if the auditor is not provided requested information that is in the possession of the licensee or its contractor within 60 days after a written request therefor, again, referring to various alleged delays in past audit processes. SX PFFCL ¶¶ 1631–1642. The Services dispute the causes and nature of the alleged delays and offer that there is a lack of record evidence to support the SoundExchange proposals. Services PFFCL ¶¶ 1623–1642. Sirius XM, Pandora, and NAB propose what they characterize as a much more effective solution than the SoundExchange proposal, which is to require that audits be completed within one year of being noticed. Services PFFCL ¶¶ 341–346. The Judges find that the record does not provide persuasive evidence that either side's proposals would be negotiated by willing buyers and willing sellers. The Judges do not adopt the proposed deadlines or fee shifting. The Judges are persuaded that the existing, and broadly re-proposed, provisions requiring reasonableness, the use of a Qualified Auditor, and actions being in accordance with generally accepted auditing standards, adequately address the concerns regarding delays. At the same time, these existing provisions are persuasively supported by record evidence, such as relevant contracts negotiated by willing buyers and willing sellers. *See, e.g.,* Trial Ex. 5013 at 70–80. Trial Ex. 5037 at 69 (regarding [REDACTED]).

4. Auditor's Right To Consult Its Client

SoundExchange requests terms clarifying that an auditor may consult with its client throughout the audit process, including to advise the client concerning the status of the audit, request information from the client relevant to the audit, and request the client's views concerning tentative findings and other issues. In support of this proposal, SoundExchange points to alleged impediments to efficient completion of audits that may be alleviated by its request. SX PFFCL ¶¶ 1643–1655. The Services oppose this requested provision, alleging that it would disrupt the proper independence of an auditor. Services PFFCL ¶¶ 353–356; Services RPFFCL ¶¶ 1623–1642. The Judges find that the record does not provide persuasive evidence that SoundExchange's proposals would be negotiated by willing buyers and willing sellers. The Judges do not adopt the proposed provisions allowing auditors broad consultation with its client. The Judges are persuaded that the existing, and re-proposed, provisions requiring the use of a Qualified Auditor and actions being in accordance with generally accepted auditing standards appropriately address the scope of client and third-party-auditor consultations. At the same time, these existing provisions are persuasively supported by record evidence, such as relevant contracts negotiated by willing buyers and willing sellers. *See, e.g.,* Trial Ex. 5013 at 79; Trial Ex. 5037 at 69 (regarding [REDACTED]).

5. Credit for Overpayment

Sirius XM/Pandora and NAB propose that the Judges specify that the amount of any overpayment discovered in an audit may be deducted from the next payment(s) due. Services PFFCL ¶¶ 333–334; Sirius XM and Pandora First Amended Proposed Rates and Terms at 2; NAB Proposed Rates and Terms at 6. Sirius XM, Pandora, NAB, and the NRBNMLC suggest that the proposal is a matter of basic fairness and is in line with regulations issued by the Copyright Office related to the audit of statements of account under the statutory licenses in secs. 111 and 115. Services PFFCL ¶¶ 335–338. SoundExchange, in its opposition to this proposal, submits that it is unnecessary, as isolated overpayments in an audit are rare, and such overpayments have been offset by larger underpayments. SoundExchange adds that the proposal is administratively burdensome, noting that the money may not be recoupable once it is paid to artists. SX PFFCL ¶¶ 1656–1660. On the balance of the record, the Judges are in agreement with SoundExchange. In addition, in this context, the burden of submitting accurate payments is on the licensee, and the licensee bears the risk of overpayment. Therefore, the Judges do not adopt this proposal.

6. ''Net'' Underpayments

Under existing regulations, SoundExchange must bear the costs of audits that it requests unless the auditor determines that there was an underpayment of 10% or more, in which case the service being audited pays the reasonable cost of the audit. 37 CFR 380.6(h). NAB and the NRBNMLC seek to clarify that the costs of an audit shifted to a service only in the case of a *net* underpayment (*i.e.* underpayments less any overpayments) of 10% or more. NAB, through its witness, Tres Williams, offered the view that the clarification better reflects practices in the marketplace. Services PFFCL ¶ 339 (citing Williams WDT ¶ 42). The Judges are persuaded by the entirety of the record, including the testimony of Mr. Williams and relevant marketplace contracts in the record, that the proposal is representative of practices negotiated by willing buyers and willing sellers in the marketplace. *See, e.g.,* Trial Ex. 5013 at 80; Trial Ex. 5037 at 69 (regarding [REDACTED]). The Judges, therefore, adopt the proposal.

D. Statements of Account Showing Recoupment of Minimum Fees

SoundExchange proposes that even services that pay the minimum fee be required to file statements of account and reports of use. It urges that such reporting would pose a minimal burden on licensees and would promote timely and accurate calculation of minimum fee recoupment. SoundExchange avers that, in the absence of statements of account showing recoupment of minimum fees, SoundExchange frequently finds itself inquiring of licensees concerning missing statements of account, only to be told that the licensee's usage to date is covered by a minimum fee payment. SX PFFCL ¶¶ 1664–1666. The Services oppose any requirement to report usage when royalties are not due, noting that licensees already are required to certify their statements of account on an annual basis. The Services also indicate that the proposed change would be unnecessary and burdensome. Services RPFFCL ¶¶ 1664–1666. The Judges appreciate the desire to ensure the accuracy of payments, including minimum payments. However, the Judges note that the record contains little useful evidence regarding how licensees in this category would address such reports in a willing buyer/willing seller context. Additionally the Judges observe that goals of the requested provision may be addressed through revisions to the Reports of Use provisions in 37 CFR 370. A related rulemaking is pending, and the Judges intend to refresh the record on the subjects of that rulemaking. *See* Docket No. 14–CRB–0005 RM.

E. Account Numbers and Reporting of ISRCs

SoundExchange proposes requirements for the use of account numbers on payments, statements of accounts, and reports of use. SXPFFCL ¶¶ 1667–1670. The Services do not oppose SoundExchange on this matter. Services RPFFCL ¶¶ 1667–1670. The Judges find the proposal a reasonable and appropriate means of improving the efficiency of processing payments, statements of account, and reports of use and, therefore, adopt the proposal.

SoundExchange proposes a provision requiring licensees to use International Standard Recording Codes (ISRCs) in their reports of use, where available and feasible, notwithstanding 37 CFR 370.4(d)(2)(v). SoundExchange expresses concern that the current regulations addressing reports of use are not sufficient to identify unambiguously which recordings a service used. SX PFFCL ¶¶ 1671–1678. The Services point to the rulemaking that may address the use of ISRCs and suggest that it would be inappropriate to shift onto the Services the effort of gathering such information, which the Services often do not have complete access to and which originates with SoundExchange's own members in the first instance. Services RPFFCL ¶¶ 1671–1678. The Judges note that the record contains little useful evidence regarding how licensees would address such a requirement in a willing buyer/willing seller context. Additionally the Judges observe that goals of the requested provision may be addressed through the Reports of Use provisions in 37 CFR 370. A related rulemaking is pending, and the Judges intend to refresh the record on the subjects of that rulemaking. *See* Docket No. 14–CRB–0005 RM.

F. Reporting Usage of Directly Licensed Tracks

SoundExchange proposes adopting a provision requiring reporting of directly-licensed sound recordings excluded from royalty calculations. It offers that similar provisions have proven helpful for identifying potential payment errors and disputes relating to the classification of recordings as directly licensed. SX PFFCL ¶¶ 1679–1684. The Services submit that SoundExchange has not pointed to evidence of any instance of significant errors in categorizing directly-licensed tracks, nor has it indicated that its ability to audit a webcaster would not be sufficient to allow it to address any such errors. They add that SoundExchange does not require this information to distribute royalties that are paid to it under the statutory license and that, in some instances, licensees are bound by confidentiality provisions preventing such disclosure. Services RPFFCL ¶¶ 1679–1684. The Judges find that the record, including the instances of negotiated agreements regarding holding such direct license information confidential, is persuasive evidence for not adopting the requested provision. The Judges, therefore, do not adopt the proposal.

G. Unclaimed Funds

SoundExchange proposes that if it is unable, for a period of three years, to identify or locate a copyright owner or performer who is entitled to receive a royalty distribution, it may apply such ''unclaimed funds'' to offset any costs deductible under 17 U.S.C. 114(g)(3), as it was permitted to do prior to *Web IV.* It points to the Music Modernization Act (MMA) and the new provisions in sections115(d)(3)(J)(i)–(ii) and 114(g)(7) as a signal from Congress that the Judges are authorized to preempt state property law claims to unclaimed funds. It urges that the Judges need not, and should not, direct SoundExchange to act in accordance with applicable federal, state, or common law with regard to such funds. SX PFFCL ¶¶ 1685–1694. The Services oppose SoundExchange's request, pointing out that it would allow SoundExchange to spend the unclaimed funds on legislative and litigation expenses and potentially profit from the use of such funds. They further note that if SoundExchange is authorized to use unclaimed funds to offset its administrative costs, it may undermine the Collective's case regarding minimum fees. Services RPFFCL ¶¶ 1692–1693. Sirius XM and Pandora oppose the requested provision for similar reasons and go on to dispute the application of section 115(d)(3)(J)(i)–(ii) to the request. Sirius XM and Pandora request that the Judges require that any unclaimed funds be distributed among copyright owners based on usage data, instead of providing a windfall to SoundExchange. Pandora/Sirius XM PFFCL ¶¶ 250–252.

The Judges agree with Sirius XM and Pandora that the provisions of sec. 115 are not applicable to the current proposal. The Judges also accept SoundExchange's arguments that the new section 114(g)(7) authorizes regulations that preempt state law and are persuaded that the MMA provision expresses a policy choice favoring such preemption. On the entirety of current record, the Judges are not convinced that the unclaimed funds should be distributed among copyright owners based on usage data. The Judges are persuaded that the more appropriate path (and the path that is consistent with intent of Congress) is to allow the Collective (*i.e.,* SoundExchange), after three years,[355] to apply unclaimed funds against administrative expenses, thus reducing the burden of administrative expenses that must be borne by copyright owners and performing artists.

H. Proxy Distribution for Missing Reports of Use

SoundExchange proposes a provision to allow the use of proxy data to distribute royalties in certain circumstances in which adequate reports of use are not available. SX PFFCL ¶¶ 1695–1705. The Judges are

[355] The proposed three-year period is not in dispute. *See* 17 U.S.C. 507(b). The three-year period for the unclaimed funds term (in then § 260.7) was adopted on June 18, 2003, and remains based in the statute, 17 U.S.C. 507(b). *See* 68 FR 36469.

not persuaded by SoundExchange's arguments or evidence in favor of the particular proposal to allow proxy distribution. The Judges observe that SoundExchange points to prior authorizations allowing proxy distributions which were granted through rulemaking authority as opposed to determinations of rates and terms. The Judges also observe SoundExchange's citations to the new provisions of section 114(g)(7). The Judges again note the pending rulemaking and the Judges' intent to refresh the record on the subjects of that rulemaking. *See* Docket No. 14–CRB–0005 RM.

I. Definition of Performance

Google proposes that the Judges delete text from definition of Performance setting out that an example of a performance is ''the delivery of any portion of a single track from a compact disc to one listener.'' Google Proposed Rates and Terms at 3. SoundExchange opposes deletion of the text, urging that the entirety of the definition is necessary to know what the sound recording unit is that must be counted, especially for particular types of recordings such as Classical music tracks. SX PFFCL ¶¶ 1706–1709. The entirety of the record is persuasive to the Judges that the entirety of the definition should be maintained. The Judges, therefore, reject Google's proposal.

IX. Royalty Rates Determined by the Judges

A. Annual Price Level Adjustments to Statutory Royalty Rates

In *Web IV,* the Judges set statutory rates for the first year of the rate term (2016) and specified that the rates would be adjusted annually for the reminder of the rate term to reflect cumulative changes in the CPI–U from a base level set in November 2015. *See Web IV,* 81 FR at 26404; 37 CFR 380.10(c). The Judges effectively broke with their practice in *Web II* and *Web III* of specifying annual increases, relying on Professor Shapiro's *Web IV* testimony that ''a regulatory provision requiring an annual price level adjustment is preferable to an implicit or explicit prediction of future inflation (or deflation).'' *Web IV,* 81 FR at 26404. With the exception of the NAB, all of the participants' rate proposals would continue the practice established in *Web IV* of making annual price level adjustments based on the CPI–U. *See* SoundExchange Rate Proposal at 2–3; Sirius XM and Pandora Second Amended Proposed Rates and Terms at 1; Google Proposed Rates and Terms at 4; NRBNMLC Amended Proposed Rates and Terms ex. A at 9 (Alternative 1).

The NAB opposes price level increases to the statutory rates. *See* NAB PFFCL ¶¶ 207–208. The NAB bases its proposal to eliminate price level increases on a discussion in Dr. Leonard's written testimony:

> [A]s an economic matter, any yearly increase in the statutory rate should be tied to the increase in prices in a narrower industry—*e.g.,* music services and the royalties paid by such services. Prices in other industries reflected in the CPI *may* be driven by economic factors that play no role in the music industry. Conversely music prices *may* be driven by economic factors that play no role in other industries. For either reason the general CPI *may* have low correlation with prices in the music industry.

Leonard WDT ¶ 119 (emphasis added). Dr. Leonard then argues that a review of prices in the music industry ''suggests little, if any, change in recent years.'' *Id.* ¶ 120. Dr. Leonard notes that the retail price for subscription streaming services has remained the same or declined over the past several years, implying that per subscriber royalties (which are generally calculated as a percentage of the subscription price) have also stayed constant or declined. *See id.* He also states that ''the per-play royalty for sound recording rights for ad-supported Spotify was lower in the first quarter of 2019 as compared to 2018.'' *Id.*

The NAB states that SoundExchange's proposal is based on testimony from Mr. Orszag that assumes ''that revenue can be expected to increase over time at least at the rate of inflation.'' NAB PFFCL ¶ 208 (quoting Orszag WDT ¶ 82 n.118). The NAB argues that Mr. Orszag ''did not distinguish between subscription and advertising revenues, did not analyze whether services' revenues per-play have actually increased at the rate of inflation, and did not analyze whether simulcasters revenues per simulcast play have actually increased at the rate of inflation.'' *Id.*

In support of inflation-based price level increases, SoundExchange cites testimony from Professor Shapiro and Mr. Orszag supporting inflation-indexed rates. *See* SX RPFFCL (to NAB) ¶ 208 (citing Shapiro WDT at 4; Orszag WRT ¶ 138; Peterson WDT ¶ 14 (''The recommended per-play rate could be escalated for inflation as measured by the consumer price index (CPI).''); Willig WDT ¶ 55 (deriving average rates for five-year period, then using discount rate equal to rate of inflation to compute 2021 rate)).

SoundExchange argues that Professor Leonard's analysis of pricing is inadequate because of its reliance on subscription pricing in a market that is dominated by ad-supported services, and because his perception of the trend for effective per-play royalty rates for ad supported services is based on inadequate data. *See* SX RPFFCL (to NAB) ¶ 207. As to the latter point, SoundExchange also refers to Mr. Orszag's testimony that advertising prices are a more relevant metric and have increased faster than the CPI. *See id.* (citing Orszag WRT ¶ 137).

Finally, SoundExchange argues that ''there is no basis for singling out simulcasters for a special analysis of inflationary trends,'' noting that the NAB bears the burden of demonstrating that simulcasters are entitled to a differentiated rate.

The Judges find Dr. Leonard's testimony concerning price level adjustments unpersuasive. Dr. Leonard's statements concerning the difference between general inflation and inflation in the music industry (*e.g.,* ''the general CPI *may* have low correlation with prices in the music industry'') is both tentative and poorly supported by the market evidence he analyzes. In this regard, the Judges agree with the critique lodged by SoundExchange and Mr. Orszag. *See* SX RPFFCL (to NAB) ¶ 207; Orszag WRT ¶ 137.

More critically, the NAB fails to provide persuasive evidence to support its proposal that statutory royalty rates should remain at the same level throughout the rate term for all types of services. That proposal contains an implicit assumption that price levels will remain the same across the music industry over the next five years. That is hardly self-evident. In the absence of persuasive evidence that prices will remain static across the entire music industry for the next five years, the Judges will not presume that to be the case. The NAB has not presented such persuasive evidence.[356]

The Judges find a price level adjustment based on changes to the CPI–U to be supported by the testimony of economists who testified on behalf of SoundExchange and the Services. Moreover, the Judges find changes in the CPI–U to be a reasonable proxy for

[356] If the NAB had presented evidence of some other index that it demonstrated was more closely aligned with price changes in the music services, the Judges could have considered such an index as an alternative to the CPI–U. However, the NAB did not present such evidence, leaving the Judges with a choice between a five-year freeze on the statutory rates or an extension tied to a reasonable index. The Judges find that rates adjusted based on the CPI–U are clearly preferable to rates that are frozen arbitrarily for the duration of the five-year rate term.

measuring changes in price levels in the relevant industries.[357]

Consequently, the Judges will set statutory rates for the year 2021 and index those rates for inflation over the remainder of the rate term using 2020 as the base year. Specifically, for the years 2022 through 2025, the rates shall be adjusted to reflect any inflation or deflation, as measured by changes in the Consumer Price Index for All Urban Consumers (U.S. City Average, all items) (CPI–U) announced by BLS in November of the immediately preceding year, as described in the regulations set forth in this Determination.

B. Minimum Fee

In accordance with the Judges' analysis, *supra,* section VI.C, the annual minimum fee applicable to commercial webcasters shall be $1,000 per channel or station, subject to an annual cap of $100,000 per licensee. The minimum fee shall be non-refundable, but shall be credited against usage fees.

The annual minimum fee applicable to noncommercial webcasters (other than those covered by SoundExchange's settlements with CBI and NPR/CPB), shall be $1,000 per channel or station. The minimum fee shall be non-refundable, and shall cover usage up to 159,140 ATH per month.

C. Commercial Rates

1. Commercial Subscription Rates

In accordance with the Judges' analysis *supra,* section IV, the royalty rate for noninteractive subscription services is $0.0026 per play. In computing this rate, the Judges take note that Professor Shapiro and Mr. Orszag agree that the benchmark rate needs to be adjusted to reflect the actual increase in the CPI–U for 2020 because the economic data on which they rely is current only into 2019. *See* Shapiro WDT at 2 (recommending 2019 as the applicable base year to measure price level changes in 2020); Orszag WDT ¶ 82 n.118. (requesting that the Judges follow their procedure in the prior webcasting rate proceeding, *see Web IV,* 81 FR at 26405, where the Judges adjusted a steering-based benchmark rate to reflect actual inflation in the year prior to the first year of the new rate period (*i.e.,* 2015 for the 2016–2020 rate period)). Applying this approach, the Judges note that in 2020, the CPI–U increased by 1.4%. *https://www.bls.gov/opub/ted/2021/consumer-price-index-2020-in-review.htm* (accessed June 10, 2021). Applying a 1.4% adjustment to the $0.0026 rate increases the rate to $0.0026364 which, when rounded, remains at $0.0026 for 2021.[358]

2. Commercial Nonsubscription Rates

Having found the weighted consideration of Mr. Orszag's and Professor Shapiro's benchmark model analyses for the ad-supported market yielded a rate of $0.0023 per play, and Dr. Peterson's benchmark model analysis for the ad-supported market yielded a rate of $0.0021 per play, the Judges conclude that the more granular, label-specific, analysis and application of adjustments to account for funneling/conversion in Dr. Peterson's benchmark analysis lends greater weight to the $0.0021 per-play rate. The Judges apply the same methodology for adjusting this ad-supported rate as they applied in the immediately preceding paragraph for the subscription rate, and for the same reasons. Here too, the 1.4% increase in the CPI–U does not increase the statutory rate set by the Judges, *i.e.,* it increases the rate to $0.0021294 which, when rounded, remains at $0.0021.[359] The Judges note that this conclusion is also supported by the limited guideposts yielded by Professor Willig's Shapley Model-derived rates, as adjusted by the Judges, which indicate that effectively competitive rates would be less than $0.0023 for ad-supported services. For these reasons, and in accordance with the Judges' analysis *supra,* section IV, the royalty rate for ad-supported, or commercial nonsubscription, services is $0.0021 per play.

3. Ephemeral Recording Rate

In accordance with the Judges' analysis *supra,* section VII, the royalty rate for ephemeral recordings under 17 U.S.C. 112(e) applicable to commercial webcasters shall be included within, and constitute 5% of, the royalties such webcasters pay for performances of sound recordings under section 114 of the Act.

D. Noncommercial Rates

1. NPR–CPB/SoundExchange Settlement

The Judges have previously adopted the settlement agreement between SoundExchange, on one hand, and National Public Radio and the Corporation for Public Broadcasting, on the other, for simulcast transmissions by public radio stations. *See Digital Performance Right in Sound Recordings and Ephemeral Recordings, Final Rule,* 85 FR 11857 (Feb. 28, 2020). The rates and terms governing transmissions and ephemeral recordings by the entities that are covered by that settlement agreement for the period 2021–2025 shall be as set forth in the agreement and codified at 37 CFR 380.30–380.32 (subpart D).

2. CBI/SoundExchange Settlement

The Judges have previously adopted the settlement agreement between SoundExchange, and College Broadcasters, Inc., for transmissions by Noncommercial Educational Webcasters (NEWs). *See Digital Performance Right in Sound Recordings and Ephemeral Recordings, Final Rule,* 85 FR 12745 (Mar. 4, 2020). The rates and terms governing transmissions and ephemeral recordings by NEWs for the period 2021–2025 shall be as set forth in the agreement and codified at 37 CFR 380.20–380.22 (subpart C).

3. All Other Noncommercial Webcasters

In accordance with the Judges' analysis *supra,* section V.B, the royalty rate for webcast transmissions by all other noncommercial webcasters during the 2021–2025 rate period shall be $1000 annually for each station or channel for all webcast transmissions totaling not more than 159,140 Aggregate Tuning Hours (ATH) in a month, for each year in the rate term. In addition, if, in any month, a noncommercial webcaster makes total transmissions in excess of 159,140 ATH on any individual channel or station, the noncommercial webcaster shall pay per-performance royalty fees for the transmissions it makes on that channel or station in excess of 159,140 ATH at the rate of $0.0021 per performance, as adjusted annually upward or downward to reflect changes in the CPI–U from the CPI–U published by BLS in November 2020.

[357] The Judges note that when rates in a voluntary settlement must be extended beyond the term of a settlement to cover the period of a statutory rate term, Congress has instructed the Judges to adjust those rates ''to reflect national monetary inflation during the additional period the rates remain in effect.'' 17 U.S.C. 805. The Judges view this as support for the proposition that national inflation rates are a reasonable proxy for price changes in the relevant industries.

[358] The $0.0026 rate is also supported by the Judges' finding that Professor Willig's Shapley Model-derived rates serve only as *limited guideposts,* indicating that *effectively competitive* rates generated via a Shapley Value Model would be less than $0.0028 per play for subscription services. When ''the Judges are confronted with evidence that, standing alone, is not itself wholly sufficient, they may rely on that evidence ''to *guide* the determination,'' *i.e.,* by using it as a ''*guide post*'' when considering the application of more compelling evidence. *SDARS II,* 78 FR at 23063, 23066 (emphasis added).

[359] No other party that addressed the ad-supported rate issue objected to the Judges making the same CPI–U adjustment, to bring older economic data more current, as the Judges did in *Web IV.*

4. Ephemeral Recording Rate

The royalty rate for ephemeral recordings under 17 U.S.C. 112(e) applicable to noncommercial webcasters shall be the same as the rate applicable to commercial webcasters; that is, royalties for ephemeral recordings shall be included within, and constitute 5% of, the royalties such webcasters pay for performances of sound recordings under section 114 of the Act.

X. Conclusion

On the basis of the foregoing, the Judges propound the rates and terms described in this Determination. No participant having filed a timely petition for rehearing, the Judges have made no substantive alterations to the body of the Initial Determination. However, in accordance with the Judges' *Order Granting Motion to Conform Regulations to Determination* (Jun. 30, 2021), the Judges have modified the regulatory provisions in Exhibit A to add provisions concerning the use of account numbers that had been omitted from the provisions attached to the Initial Determination as the result of a clerical error. In addition, the Judges have corrected a clerical error in the heading to section VIII.E, *supra,* and various typographical, grammatical, citation, and punctuation errors throughout the Determination. The Register of Copyrights may review the Judges' Determination for legal error in resolving a material issue of substantive law under title 17, United States Code. The Librarian shall cause the Judges' Determination, and any correction thereto by the Register, to be published in the **Federal Register** no later than the conclusion of the 60-day review period.

Dated: July 22, 2021.

Jesse M. Feder,

Chief Copyright Royalty Judge.

Steve Ruwe,

Copyright Royalty Judge.

David R. Strickler,

Copyright Royalty Judge.

List of Subjects in 37 CFR Part 380

Copyright, Sound recordings.

Final Regulations

In consideration of the foregoing, the Copyright Royalty Judges amend part 380 of title 37 of the Code of Federal Regulations as follows:

PART 380—RATES AND TERMS FOR TRANSMISSIONS BY ELIGIBLE NONSUBSCRIPTION SERVICES AND NEW SUBSCRIPTION SERVICES AND FOR THE MAKING OF EPHEMERAL REPRODUCTIONS TO FACILITATE THOSE TRANSMISSIONS

■ 1. The authority citation for part 380 continues to read as follows:

Authority: 17 U.S.C. 112(e), 114(f), 804(b)(3).

■ 2. Revise subpart A to read as follows:

Subpart A—Regulations of General Application

Sec.

380.1 Scope and compliance.
380.2 Making payment of royalty fees.
380.3 Delivering statements of account.
380.4 Distributing royalty fees.
380.5 Handling Confidential Information.
380.6 Auditing payments and distributions.
380.7 Definitions.

§ 380.1 Scope and compliance.

(a) *Scope.* Subparts A and B of this part codify rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by certain Licensees in accordance with the applicable provisions of 17 U.S.C. 114 and for the making of Ephemeral Recordings by those Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2021, through December 31, 2025.

(b) *Limited application of terms and definitions.* The terms and definitions in subpart A of this part apply only to subpart B of this part, except as expressly adopted and applied in subpart C or subpart D of this part.

(c) *Legal compliance.* Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 must comply with the requirements of this part and any other applicable regulations.

(d) *Voluntary agreements.* Notwithstanding the royalty rates and terms established in any subparts of this part, the rates and terms of any license agreements entered into by Copyright Owners and Licensees may apply in lieu of these rates and terms.

§ 380.2 Making payment of royalty fees.

(a) *Payment to the Collective.* A Licensee must make the royalty payments due under this part to SoundExchange, Inc., which is the Collective designated by the Copyright Royalty Board to collect and distribute royalties under this part.

(b) *Monthly payments.* A Licensee must make royalty payments on a monthly basis. Payments are due on or before the 45th day after the end of the month in which the Licensee made Eligible Transmissions.

(c) *Minimum payments.* A Licensee must make any minimum annual payments due under subpart B of this part by January 31 of the applicable license year. A Licensee that as of January 31 of any year has not made any eligible nonsubscription transmissions, noninteractive digital audio transmissions as part of a new subscription service, or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e), but that begins making such transmissions after that date must make any payment due by the 45th day after the end of the month in which the Licensee commences making such transmissions.

(d) *Late fees.* A Licensee must pay a late fee for each payment and each Statement of Account that the Collective receives after the due date. The late fee is 1.5% (or the highest lawful rate, whichever is lower) of the late payment amount per month. The late fee for a late Statement of Account is 1.5% of the payment amount associated with the Statement of Account. Late fees accrue from the due date until the date that the Collective receives the late payment or late Statement of Account.

(1) *Waiver of late fees.* The Collective may waive or lower late fees for immaterial or inadvertent failures of a Licensee to make a timely payment or submit a timely Statement of Account.

(2) *Notice regarding noncompliant Statements of Account.* If it is reasonably evident to the Collective that a timely-provided Statement of Account is materially noncompliant, the Collective must notify the Licensee within 90 days of discovery of the noncompliance.

(e) *Use of account numbers.* If the Collective notifies a Licensee of an account number to be used to identify its royalty payments for a particular service offering, the Licensee must include that account number on its check or check stub for any payment for that service offering made by check, in the identifying information for any payment for that service offering made by electronic transfer, in its statements of account for that service offering under § 380.4, and in the transmittal of its Reports of Use for that service offering under § 370.4 of this chapter.

§ 380.3 Delivering statements of account.

(a) *Statements of Account.* Any payment due under this part must be accompanied by a corresponding Statement of Account that must contain the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address (if any) and other contact information of the person to be contacted for information or questions concerning the content of the Statement of Account;

(3) The account number assigned to the Licensee by the Collective for the relevant service offering (if the Licensee has been notified of such account number by the Collective);

(4) The signature of:

(i) The Licensee or a duly authorized agent of Licensee;

(ii) A partner or delegate if the Licensee is a partnership; or

(iii) An officer of the corporation if the Licensee is a corporation.

(5) The printed or typewritten name of the person signing the Statement of Account;

(6) If the Licensee is a partnership or corporation, the title or official position held in the partnership or corporation by the person signing the Statement of Account;

(7) A certification of the capacity of the person signing;

(8) The date of signature; and

(9) An attestation to the following effect: I, the undersigned owner/officer/partner/agent of the Licensee have examined this Statement of Account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence and that it fairly presents, in all material respects, the liabilities of the Licensee pursuant to 17 U.S.C. 112(e) and 114 and applicable regulations adopted under those sections.

(b) *Certification.* Licensee's Chief Financial Officer or, if Licensee does not have a Chief Financial Officer, a person authorized to sign Statements of Account for the Licensee must submit a signed certification on an annual basis attesting that Licensee's royalty statements for the prior year represent a true and accurate determination of the royalties due and that any method of allocation employed by Licensee was applied in good faith and in accordance with U.S. GAAP.

§ 380.4 Distributing royalty fees.

(a) *Distribution of royalties.* (1) The Collective must promptly distribute royalties received from Licensees to Copyright Owners and Performers that are entitled thereto, or to their designated agents. The Collective shall only be responsible for making distributions to those who provide the Collective with information as is necessary to identify and pay the correct recipient. The Collective must distribute royalties on a basis that values all performances by a Licensee equally based upon the information provided under the Reports of Use requirements for Licensees pursuant to § 370.4 of this chapter and this subpart.

(2) The Collective must use its best efforts to identify and locate copyright owners and featured artists in order to distribute royalties payable to them under sec. 112(e) or 114(d)(2) of title 17, United States Code, or both. Such efforts must include, but not be limited to, searches in Copyright Office public records and published directories of sound recording copyright owners.

(b) *Unclaimed funds.* If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this part, the Collective must retain the required payment in a segregated trust account for a period of three years from the date of the first distribution of royalties from the relevant payment by a Licensee. No claim to distribution shall be valid after the expiration of the three-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3).

(c) *Retention of records.* Licensees and the Collective shall keep books and records relating to payments and distributions of royalties for a period of not less than the prior three calendar years.

(d) *Designation of the Collective.* (1) The Judges designate SoundExchange, Inc., as the Collective to receive Statements of Account and royalty payments from Licensees and to distribute royalty payments to each Copyright Owner and Performer (or their respective designated agents) entitled to receive royalties under 17 U.S.C. 112(e) or 114(g).

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced for the applicable royalty term by a successor Collective according to the following procedure:

(i) The nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding SoundExchange's cessation or dissolution shall vote by a majority to recommend that the Copyright Royalty Judges designate a successor and must file a petition with the Copyright Royalty Judges requesting that the Judges designate the named successor and setting forth the reasons therefor.

(ii) Within 30 days of receiving the petition, the Copyright Royalty Judges must issue an order designating the recommended Collective, unless the Judges find good cause not to make and publish the designation in the **Federal Register**.

§ 380.5 Handling Confidential Information.

(a) *Definition.* For purposes of this part, ''Confidential Information'' means the Statements of Account and any information contained therein, including the amount of royalty payments and the number of Performances, and any information pertaining to the Statements of Account reasonably designated as confidential by the party submitting the statement. Confidential Information does not include documents or information that at the time of delivery to the Collective is public knowledge. The party seeking information from the Collective based on a claim that the information sought is a matter of public knowledge shall have the burden of proving to the Collective that the requested information is in the public domain.

(b) *Use of Confidential Information.* The Collective may not use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(c) *Disclosure of Confidential Information.* The Collective shall limit access to Confidential Information to:

(1) Those employees, agents, consultants, and independent contractors of the Collective, subject to an appropriate written confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related directly thereto who require access to the Confidential Information for the purpose of performing their duties during the ordinary course of their work;

(2) A Qualified Auditor or outside counsel who is authorized to act on behalf of:

(i) The Collective with respect to verification of a Licensee's statement of account pursuant to this part; or

(ii) A Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to this part;

(3) Copyright Owners and Performers, including their designated agents, whose works a Licensee used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114 by the Licensee whose Confidential Information is being supplied, subject to an appropriate

written confidentiality agreement, and including those employees, agents, consultants, and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate written confidentiality agreement, who require access to the Confidential Information to perform their duties during the ordinary course of their work;

(4) Attorneys and other authorized agents of parties to proceedings under 17 U.S.C. 8, 112, 114, acting under an appropriate protective order.

(d) *Safeguarding Confidential Information.* The Collective and any person authorized to receive Confidential Information from the Collective must implement procedures to safeguard against unauthorized access to or dissemination of Confidential Information using a reasonable standard of care, but no less than the same degree of security that the recipient uses to protect its own Confidential Information or similarly sensitive information.

§ 380.6 Auditing payments and distributions.

(a) *General.* This section prescribes procedures by which any entity entitled to receive payment or distribution of royalties may verify payments or distributions by auditing the payor or distributor. The Collective may audit a Licensee's payments of royalties to the Collective, and a Copyright Owner or Performer may audit the Collective's distributions of royalties to the owner or performer. Nothing in this section shall preclude a verifying entity and the payor or distributor from agreeing to verification methods in addition to or different from those set forth in this section.

(b) *Frequency of auditing.* The verifying entity may conduct an audit of each licensee only once a year for any or all of the prior three calendar years. A verifying entity may not audit records for any calendar year more than once.

(c) *Notice of intent to audit.* The verifying entity must file with the Copyright Royalty Judges a notice of intent to audit the payor or distributor, which notice the Judges must publish in the **Federal Register** within 30 days of the filing of the notice. Simultaneously with the filing of the notice, the verifying entity must deliver a copy to the payor or distributor.

(d) *The audit.* The audit must be conducted during regular business hours by a Qualified Auditor who is not retained on a contingency fee basis and is identified in the notice. The auditor shall determine the accuracy of royalty payments or distributions, including whether an underpayment or overpayment of royalties was made. An audit of books and records, including underlying paperwork, performed in the ordinary course of business according to generally accepted auditing standards by a Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(e) *Access to third-party records for audit purposes.* The payor or distributor must use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit.

(f) *Duty of auditor to consult.* The auditor must produce a written report to the verifying entity. Before rendering the report, unless the auditor has a reasonable basis to suspect fraud on the part of the payor or distributor, the disclosure of which would, in the reasonable opinion of the auditor, prejudice any investigation of the suspected fraud, the auditor must review tentative written findings of the audit with the appropriate agent or employee of the payor or distributor in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the payor or distributor reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit. The auditor must include in the written report information concerning the cooperation or the lack thereof of the employee or agent.

(g) *Audit results; underpayment or overpayment of royalties.* If the auditor determines the payor or distributor underpaid royalties, the payor or distributor shall remit the amount of any underpayment determined by the auditor to the verifying entity, together with interest at the rate specified in § 380.2(d). In the absence of mutually-agreed payment terms, which may, but need not, include installment payments, the payor or distributor shall remit promptly to the verifying entity the entire amount of the underpayment determined by the auditor. If the auditor determines the payor or distributor overpaid royalties, however, the verifying entity shall not be required to remit the amount of any overpayment to the payor or distributor, and the payor or distributor shall not seek by any means to recoup, offset, or take a credit for the overpayment, unless the payor or distributor and the verifying entity have agreed otherwise.

(h) *Paying the costs of the audit.* The verifying entity must pay the cost of the verification procedure, unless the auditor determines that there was a net underpayment (*i.e.,* underpayments less any overpayments) of 10% or more, in which case the payor or distributor must bear the reasonable costs of the verification procedure, in addition to paying or distributing the amount of any underpayment.

(i) *Retention of audit report.* The verifying party must retain the report of the audit for a period of not less than three years from the date of issuance.

§ 380.7 Definitions.

For purposes of this part, the following definitions apply:

Aggregate Tuning Hours (ATH) means the total hours of programming that the Licensee has transmitted during the relevant period to all listeners within the United States from all channels and stations that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions or noninteractive digital audio transmissions as part of a new subscription service, less the actual running time of any sound recordings for which the Licensee has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under title 17, United States Code. By way of example, if a service transmitted one hour of programming containing Performances to 10 listeners, the service's ATH would equal 10 hours. If three minutes of that hour consisted of transmission of a directly-licensed recording, the service's ATH would equal nine hours and 30 minutes (three minutes times 10 listeners creates a deduction of 30 minutes). As an additional example, if one listener listened to a service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the service's ATH would equal 10 hours.

Collective means the collection and distribution organization that is designated by the Copyright Royalty Judges, and which, for the current rate period, is SoundExchange, Inc.

Commercial Webcaster means a Licensee, other than a Noncommercial Webcaster, Noncommercial Educational Webcaster, or Public Broadcaster, that makes Ephemeral Recordings and eligible digital audio transmissions of sound recordings pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114(d)(2).

Copyright Owners means sound recording copyright owners, and rights owners under 17 U.S.C. 1401(l)(2), who are entitled to royalty payments made under this part pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.

Digital audio transmission has the same meaning as in 17 U.S.C. 114(j).

Eligible nonsubscription transmission has the same meaning as in 17 U.S.C. 114(j).

Eligible Transmission means a subscription or nonsubscription transmission made by a Licensee that is subject to licensing under 17 U.S.C. 114(d)(2) and the payment of royalties under this part.

Ephemeral recording has the same meaning as in 17 U.S.C. 112.

Licensee means a Commercial Webcaster, a Noncommercial Webcaster, a Noncommercial Educational Webcaster, a Public Broadcaster, or any entity operating a noninteractive internet streaming service that has obtained a license under 17 U.S.C. 114 to make Eligible Transmissions and a license under 17 U.S.C. 112(e) to make Ephemeral Recordings to facilitate those Eligible Transmissions.

New subscription service has the same meaning as in 17 U.S.C. 114(j).

Noncommercial Educational Webcaster means a Noncommercial Educational Webcaster under subpart C of this part.

Noncommercial Webcaster has the same meaning as in 17 U.S.C. 114(f)(4)(E), but excludes a Noncommercial Educational Webcaster or Public Broadcaster.

Nonsubscription transmission has the same meaning as in 17 U.S.C. 114(j).

Payor means the entity required to make royalty payments to the Collective or the entity required to distribute royalty fees collected, depending on context. The Payor is:

(1) A Licensee, in relation to the Collective; and

(2) The Collective in relation to a Copyright Owner or Performer.

Performance means each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission (*e.g.,* the delivery of any portion of a single track from a compact disc to one listener), but excludes the following:

(1) A performance of a sound recording that does not require a license (*e.g.,* a sound recording that is not subject to protection under title 17, United States Code);

(2) A performance of a sound recording for which the service has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events; and

(ii) Does not contain an entire sound recording, other than ambient music that is background at a public event, and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

Public broadcaster means a Public Broadcaster under subpart D of this part.

Qualified auditor means an independent Certified Public Accountant licensed in the jurisdiction where it seeks to conduct a verification.

Subscription transmission has the same meaning as in 17 U.S.C. 114(j).

Transmission has the same meaning as in 17 U.S.C. 114(j)(15).

■ 3. Revise subpart B to read as follows:

Subpart B—Commercial Webcasters and Noncommercial Webcasters

§ 380.10 Royalty fees for the public performance of sound recordings and the making of ephemeral recordings.

(a) *Royalty fees.* For the year 2021, Licensees must pay royalty fees for all Eligible Transmissions of sound recordings at the following rates:

(1) *Commercial webcasters.* $0.0026 per Performance for subscription services and $0.0021 per Performance for nonsubscription services.

(2) *Noncommercial webcasters.* $1000 per year for each channel or station and $0.0021 per Performance for all digital audio transmissions in excess of 159,140 ATH in a month on a channel or station.

(b) *Minimum fee.* Licensees must pay the Collective a minimum fee of $1,000 each year for each channel or station. The Collective must apply the fee to the Licensee's account as credit towards any additional royalty fees that Licensees may incur in the same year. The fee is payable for each individual channel and each individual station maintained or operated by the Licensee and making Eligible Transmissions during each calendar year or part of a calendar year during which it is a Licensee. The maximum aggregate minimum fee in any calendar year that a Commercial Webcaster must pay is $100,000. The minimum fee is nonrefundable.

(c) *Annual royalty fee adjustment.* The Copyright Royalty Judges shall adjust the royalty fees each year to reflect any changes occurring in the cost of living as determined by the most recent Consumer Price Index for All Urban Consumers (U.S. City Average, all items) (CPI–U) published by the Secretary of Labor before December 1 of the preceding year. The calculation of the rate for each year shall be cumulative based on a calculation of the percentage increase in the CPI–U from the CPI–U published in November, 2020 (260.229) and shall be made according to the following formulas: For subscription performances, $(1 + (C_y - 260.229)/260.229) \times \$0.0026$; for nonsubscription performances, $(1 + (C_y - 260.229)/260.229) \times \$0.0021$; for performances by a noncommercial webcaster in excess of 159,140 ATH per month, $(1 + (C_y - 260.229)/260.229) \times \$0.0021$; where C_y is the CPI–U published by the Secretary of Labor before December 1 of the preceding year. The adjusted rate shall be rounded to the nearest fourth decimal place. The Judges shall publish notice of the adjusted fees in the **Federal Register** at least 25 days before January 1. The adjusted fees shall be effective on January 1.

(d) *Ephemeral recordings royalty fees; allocation between ephemeral recordings and performance royalty fees.* The Collective must credit 5% of all royalty payments as payment for Ephemeral Recordings and credit the remaining 95% to section 114 royalties. All Ephemeral Recordings that a Licensee makes which are necessary and commercially reasonable for making noninteractive digital transmissions are included in the 5%.

Dated: September 20, 2021.

Jesse M. Feder,

Chief Copyright Royalty Judge.

Approved by:

Carla D. Hayden,

Librarian of Congress.

[FR Doc. 2021–20621 Filed 10–26–21; 8:45 am]

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FEDERAL REGISTER

Vol. 86 Wednesday,

No. 205 October 27, 2021

Part III

The President

Proclamation 10293—United Nations Day, 2021

Memorandum of October 22, 2021—Temporary Certification Regarding Disclosure of Information in Certain Records Related to the Assassination of President John F. Kennedy

Federal Register
Vol. 86, No. 205
Wednesday, October 27, 2021

Presidential Documents

Title 3—

The President

Proclamation 10293 of October 22, 2021

United Nations Day, 2021

By the President of the United States of America

A Proclamation

Seventy-six years ago, emerging from the ashes of a devastating World War, countries around the world embarked on a shared mission: creating a rules-based international order, grounded in democratic values, to advance universal human rights, promote the peaceful settlement of disputes, and ensure adherence to international law. The United Nations was—and remains—the cornerstone of that international order, contributing to unmatched strides towards peace and prosperity shared around the world. Our collective resolve, expressed in the United Nations Charter, remains to uphold our ''faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.'' On United Nations Day, we celebrate the achievements of this bold declaration, reaffirm the inherent humanity that unites us, and renew our commitment to building a future that advances peace, dignity, and security for all.

Today, we stand in a moment of great pain and extraordinary possibility. Globally, nearly 5 million lives have been lost due to the COVID–19 pandemic, climate catastrophes continue to ravage our communities, inequalities and inequities are on the rise, democracy is under threat, and abuses of emerging technologies are destabilizing societies. Yet we also have new tools and new opportunities to rebuild a better world that is safer and freer for generations yet to come. It is clear that these global challenges require global cooperation, and the United States is determined to lead alongside our allies and partners to tackle the most pressing issues of our age. The United Nations remains the most important forum of its kind for mobilizing collective action to resolve global problems, maintain international peace and security, advance human rights, promote health and well-being, protect the vulnerable and marginalized, and sustain a rules-based international order. As the largest financial contributor to the United Nations, the United States has a deep stake in strengthening and modernizing the multilateral system to better enable us to meet the challenges of the 21st century.

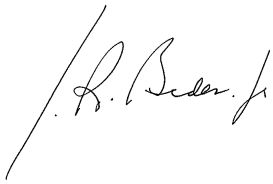
The United Nations remains critical to advancing our national security and foreign policy interests. Since I took office, my Administration has rejoined the Paris Climate Agreement, launched a campaign for a seat on the United Nations Human Rights Council, and restored United States membership in and funding for the World Health Organization. Because none of us will be safe until all of us are safe, the United States is providing over $15 billion toward the global COVID–19 response and has delivered more than 190 million doses of the COVID–19 vaccine to nations around the world, including our COVAX donations. To date, we have pledged to donate more than 1.2 billion doses of the COVID–19 vaccine, and we will continue to think big and do what we must to lead the world out of this pandemic. To ensure that the United Nations can play its central role in delivering global solutions for today's challenges, my budget proposal calls for the United States to pay its share of the United Nations' annual regular and peacekeeping budgets in full. With these key contributions, we are making

clear to the world that America is committed to fulfilling its historic role and responsibility to safeguard and strengthen the rules-based order.

We are at an inflection point in history. The choices we make in the next few years—whether or not we come together to face our greatest global challenges—will determine our future for decades to come. The United States stands firmly in support of the United Nations and will continue to rally the world to action not just with the example of our power but with the power of our example. Let us remember that our determination and faith in a better future laid the groundwork for the creation of the United Nations 76 years ago. Now, in a new century, we must work with allies and partners to strengthen the United Nations to effectively and efficiently tackle the challenges that defy political borders and geographical boundaries today. Tremendous work lies ahead of us, but we all share the responsibility to recommit ourselves to the original vision and values enshrined in the United Nations Charter: freedom, equality, opportunity, and human dignity. By doing so, we can build back a better world and ensure America's lasting leadership on the world stage.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim October 24, 2021, as United Nations Day. I urge the Governors of the United States and its Territories, and the officials of all other areas under the flag of the United States, to observe United Nations Day with appropriate ceremonies and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-second day of October, in the year of our Lord two thousand twenty-one, and of the Independence of the United States of America the two hundred and forty-sixth.



[FR Doc. 2021–23559
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Presidential Documents

Memorandum of October 22, 2021

Temporary Certification Regarding Disclosure of Information in Certain Records Related to the Assassination of President John F. Kennedy

Memorandum for the Heads of Executive Departments and Agencies

Section 1. *Policy.* In the President John F. Kennedy Assassination Records Collection Act of 1992 (44 U.S.C. 2107 note) (the ''Act''), the Congress declared that ''all Government records concerning the assassination of President John F. Kennedy . . . should be eventually disclosed to enable the public to become fully informed about the history surrounding the assassination.'' The Congress also found that ''most of the records related to the assassination of President John F. Kennedy are almost 30 years old, and only in the rarest cases is there any legitimate need for continued protection of such records.'' Almost 30 years since the Act, the profound national tragedy of President Kennedy's assassination continues to resonate in American history and in the memories of so many Americans who were alive on that terrible day; meanwhile, the need to protect records concerning the assassination has only grown weaker with the passage of time. It is therefore critical to ensure that the United States Government maximizes transparency, disclosing all information in records concerning the assassination, except when the strongest possible reasons counsel otherwise.

Sec. 2. *Background.* The Act permits the continued postponement of disclosure of information in records concerning President Kennedy's assassination only when postponement remains necessary to protect against an identifiable harm to the military defense, intelligence operations, law enforcement, or the conduct of foreign relations that is of such gravity that it outweighs the public interest in disclosure. Since 2018, executive departments and agencies (agencies) have been reviewing under this statutory standard each redaction they have proposed that would result in the continued postponement of full public disclosure. This year, the National Archives and Records Administration (NARA) has been reviewing whether it agrees that each redaction continues to meet the statutory standard. The Archivist of the United States (Archivist), however, has reported that ''unfortunately, the pandemic has had a significant impact on the agencies'' and NARA and that NARA ''require[s] additional time to engage with the agencies and to conduct research within the larger collection to maximize the amount of information released.'' The Archivist has also noted that ''making these decisions is a matter that requires a professional, scholarly, and orderly process; not decisions or releases made in haste.'' The Archivist therefore recommends that the President ''temporarily certify the continued withholding of all of the information certified in 2018'' and ''direct two public releases of the information that has'' ultimately ''been determined to be appropriate for release to the public,'' with one interim release later this year and one more comprehensive release in late 2022.

Sec. 3. *Temporary Certification.* In light of the agencies' proposals for continued postponement under the statutory standard, the Archivist's request for an extension of time to engage with the agencies, and the need for an appropriate review and disclosure process, I agree with the Archivist's recommendation. Temporary continued postponement is necessary to protect against identifiable harm to the military defense, intelligence operations, law enforcement, or the conduct of foreign relations that is of such gravity

that it outweighs the public interest in immediate disclosure. Accordingly, by the authority vested in me as President by the Constitution and the laws of the United States of America, including section 5(g)(2)(D) of the Act, I hereby certify that all information within records that agencies have proposed for continued postponement under section 5(g)(2)(D) shall be withheld from full public disclosure until December 15, 2022.

Sec. 4. *Interim Release.* Any information currently withheld from public disclosure that agencies have not proposed for continued postponement shall be reviewed by NARA before December 15, 2021, and shall be publicly released on that date. Out of respect for the anniversary of President Kennedy's assassination, such release shall not occur before December 15, 2021.

Sec. 5. *Intensive 1-Year Review.* (a) Over the next year, agencies proposing continued postponement and NARA shall conduct an intensive review of each remaining redaction to ensure that the United States Government maximizes transparency, disclosing all information in records concerning the assassination, except when the strongest possible reasons counsel otherwise. This review shall include documents within the assassination records collection designated as ''not believed relevant'' by the Assassination Records Review Board established under the Act, but nonetheless placed within the collection by the Assassination Records Review Board.

(b) Any information that an agency proposes for continued postponement beyond December 15, 2022, shall be limited to the absolute minimum under the statutory standard. An agency shall not propose to continue redacting information unless the redaction is necessary to protect against an identifiable harm to the military defense, intelligence operations, law enforcement, or the conduct of foreign relations that is of such gravity that it outweighs the public interest in disclosure. In applying this statutory standard, an agency shall:

(i) Accord substantial weight to the public interest in transparency and full disclosure of any record that falls within the scope of the Act; and

(ii) Give due consideration that some degree of harm is not grounds for continued postponement unless the degree of harm is of such gravity that it outweighs the public interest.

(c) For any record containing information that an agency proposes for continued postponement beyond December 15, 2022, the agency shall provide, no later than December 15, 2021:

(i) an unclassified letter, to be signed by the head of the agency, providing a written description of the types of information for which the agency is proposing continued postponement and reasons for which the agency is proposing continued postponement of such information;

(ii) an unclassified index identifying for each such record the reasons for which the agency is proposing continued postponement of information in such record; and

(iii) a specific proposed date identifying for each such record when the agency reasonably anticipates that continued postponement of information in such record no longer would be necessary or, if that is not possible, a specific proposed date for each such record identifying when the agency would propose to next review again after December 15, 2022, whether the information proposed for continued postponement in such record still satisfies the statutory standard for postponement.

(d) NARA shall review each proposed redaction, no later than September 1, 2022, in consultation with:

(i) The Department of Defense if the agency proposing the redaction asserts an anticipated harm to the military defense;

(ii) The Office of the Director of National Intelligence if the agency proposing the redaction asserts an anticipated harm to intelligence operations;

(iii) The Department of Justice if the agency proposing the redaction asserts an anticipated harm to law enforcement; and

(iv) The Department of State if the agency proposing the redaction asserts an anticipated harm to the conduct of foreign relations.

(e) The relevant consulting agency, as designated pursuant to subsection (d) of this section, shall provide its assessment to NARA as to whether the information proposed for continued postponement satisfies the statutory standard for such postponement. In reviewing a proposed redaction, NARA or the relevant consulting agency, as designated pursuant to subsection (d) of this section, should consult with the agency that proposed the redaction.

(f) If NARA does not agree that a proposed redaction meets the statutory standard for continued postponement, it shall inform the agency that proposed the redaction. After consultation with NARA, the agency that proposed the redaction may, no later than October 1, 2022:

(i) withdraw the proposed redaction; or

(ii) refer the decision on continued postponement to the President through the Counsel to the President, accompanied by an explanation of why continued postponement remains necessary to protect against an identifiable harm to the military defense, intelligence operations, law enforcement, or the conduct of foreign relations that is of such gravity that it outweighs the public interest in disclosure.

(g) If NARA agrees that a proposed redaction meets the asserted statutory standard for continued postponement, the Archivist shall recommend to the President, no later than October 1, 2022, that continued postponement from public disclosure of the information is warranted after December 15, 2022.

(h) At the conclusion of the 1-year review, any information still withheld from public disclosure that agencies do not propose for continued postponement beyond December 15, 2022, shall be released to the public on that date.

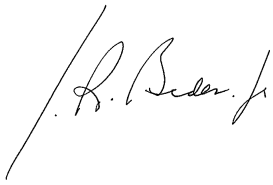
(i) At the conclusion of the 1-year review, each unclassified letter described in subsection (c)(i) of this section and each unclassified index described in subsection (c)(ii) of this section shall be disclosed to the public on December 15, 2022, with any updates made to account for any information initially proposed for continued postponement that is not postponed from public disclosure beyond December 15, 2022.

Sec. 6. *Digitization and Democratization of Records.* (a) Since the 1990s, more than 250,000 records concerning President Kennedy's assassination—more than 90 percent of NARA's collection—have been released in full to the public. Only a small fraction of the records contains any remaining redactions. But many records that have been fully disclosed are inaccessible to most members of the public unless they travel to NARA's location in College Park, Maryland.

(b) The Archivist shall issue a plan, no later than December 15, 2021, to digitize and make available online NARA's entire collection of records concerning President Kennedy's assassination.

(c) The Archivist shall provide additional context online about the records that have been withheld in full under sections 10 and 11 of the Act—primarily documents containing tax-related information of the Internal Revenue Service or the Social Security Administration—that are not subject to the Presidential certification requirement under section 5 of the Act.

Sec. 7. *Publication.* The Archivist is hereby authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, October 22, 2021

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Federal Register

Vol. 86, No. 205

Wednesday, October 27, 2021

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Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
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FEDERAL REGISTER PAGES AND DATE, OCTOBER

54339–54586 1
54587–54800 4
54801–55468 5
55469–55684 6
55685–56180 7
56181–56644 8
56645–56830 12
56831–57002 13
57003–57320 14
57321–57524 15
57525–57748 18
57749–57984 19
57985–58202 20
58203–58550 21
58551–58762 22
58763–59008 25
59009–59278 26
59279–59602 27

CFR PARTS AFFECTED DURING OCTOBER

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

2 CFR

1402 57529

3 CFR

Proclamations

10266 55443
10267 55445
10268 55447
10269 55449
10270 55451
10271 55455
10272 55459
10273 55461
10274 55463
10275 55469
10276 55471
10277 55473
10278 56181
10279 57003
10280 57005
10281 57007
10282 57009
10283 57307
10284 57309
10285 57321
10286 57335
10287 57349
10288 57749
10289 58197
10290 58199
10291 58201
10292 58203
10293 59597

Executive Orders

11287 (amended by 14048) 55465
12382 (amended by 14048) 55465
13231 (amended by 14048) 55465
13265 (amended by 14048) 55465
13621 (superseded by 14050) 58551
13889 (superseded in part by 14048) 55465
14048 55465
14049 57313
14050 58551

Administrative Orders

Presidential Determinations:
No. 2022–1 of Oct. 8, 2021 57525
No. 2022–2 of Oct. 8, 2021 57527
Memorandums:
Memorandum of October 22, 2021 59599
Notices:
Notice of October 6, 2021 56829
Notice of October 12, 2021 57319
Notice of October 25, 2021 59277

5 CFR

532 57355
849 57011
890 55980
1630 58205

Proposed Rules:

894 57764

6 CFR

5 55475
27 57532

Proposed Rules:

5 ..... 55528, 58226

7 CFR

210 57544
220 57544
226 57544
870 54339
966 57356
1427 54339
1728 57015
1755 57015
4280 54587

Proposed Rules:

984 56840

8 CFR

270 57532
274a 57532
280 57532

Proposed Rules:

208 57611
235 57611
1003 57611
1208 57611
1235 57611

10 CFR

52 56645
72 ..... 54341, 54801, 55685
110 55476
429 ..... 56608, 56790
430 ..... 56608, 56790
431 58763
1704 57549

Proposed Rules:

72 54410
429 ..... 54412, 59308
430 57378
431 ..... 54412, 59308
460 59042

12 CFR

365 59279
611 58559
612 58559

614 54347
615 54347
620 54347
621 58559
628 54347
700 59282
701 59282
703 59282
704 59282
712 59289
713 59282
Proposed Rules:
628 58042
1002 56356

14 CFR

13 54514
25 54588
39 ....54801, 54803, 55479, 55685, 56831, 56833, 57022, 57025, 57027, 57030, 57033, 57550, 57552, 57555, 57558, 57560, 57564, 57567, 57569, 57571, 57574, 57577, 57579, 57751, 59009
71 ....54361, 54362, 54590, 54600, 54602, 55483, 55688, 58794, 58795, 59014, 59015, 59016, 59018
91 55485
97 ....54604, 54606, 56835, 56837
Proposed Rules:
39 ....54663, 55538, 55542, 55545, 55747, 55749, 56217, 56220, 56225, 56227, 56229, 56232, 56658, 56660, 56840, 57078, 57081, 58228, 58597, 58600, 59062
71 ....55752, 55754, 56234, 56662, 56843, 56845, 57083, 58230, 58604, 58606, 58607, 58608, 58609, 58611, 58613, 58814, 58816, 58817, 58819, 58822, 58823, 58825, 59065, 59067, 59068
73 57611

15 CFR

290 56183
732 54807
734 54807
736 54807
738 54807
740 ....54807, 58205
742 54814
744 54807
748 54807
750 54807
770 54807
772 ....54807, 58205
774 ....54807, 55492, 58205
1500 55494
Proposed Rules:
740 58615
774 ....58615, 59070

16 CFR

1 54819
305 57985

17 CFR

232 55689
239 55689
Proposed Rules:
229 58232
232 57478
240 ....57478, 58232
249 ....57478, 58232
270 57478
274 ....57478, 58232

18 CFR

389 54610

19 CFR

4 57532
Ch. I 58216, 58218
122 57991

21 CFR

16 55224
73 ....55494, 56183
510 57992
516 57992
520 57992
522 57992
526 57992
556 57992
558 57992
860 54826
878 56195
1100 54300
1107 ....55224, 55300
1114 55300
Proposed Rules:
800 58150
801 58150
808 58150
874 58150

22

41 55692

24 CFR

247 55693
570 59302
880 55693
882 55693
884 55693
966 55693
Proposed Rules:
203 54876
206 54876

25 CFR

90 54364
150 58796

26 CFR

1 54367
54 55756
300 57753
Proposed Rules:
54 55980

28 CFR

2 56645
16 54368
Proposed Rules:
523 57612
541 57612

29 CFR

1400 54851
1915 54611
2510 55980
2590 55980
Proposed Rules:
1910 59309
1915 59309
1917 59309
1918 59309
1926 59309
1928 59309
2550 57272

30 CFR

950 59019

31 CFR

591 ....58016, 59024

32 CFR

323 54371
507 54615

33 CFR

1 ....58560, 59303
27 57532
100 ....54620, 55702, 56205, 58220, 58573, 58575, 58797, 59029
117 ....54851, 58799
165 ....54371, 54622, 56205, 56206, 57358, 57581, 58801, 58803, 58805, 59031, 59033
175 ....58560, 59303
334 56208
Proposed Rules:
100 54879
117 58827
167 59326
328 58829
334 56236

34 CFR

Proposed Rules:
Ch. II 54881, 54883
Ch. VI 54666

37 CFR

1 57035
6 55498
380 59362
Proposed Rules:
201 59327
220 59327
222 59327
223 59327
224 59327
385 58626

38 CFR

3 ....56213, 57583
17 56646
36 56213
38 59035
Proposed Rules:
1 55547
3 57084
8 56846
17 58237
21 ....57084, 57094

39 CFR

111 58398
211 58398
Proposed Rules:
3050 55548
3055 57385

40 CFR

9 ....55116, 55704
51 57585
52 ....54373, 54375, 54377, 54379, 54624, 54626, 54628, 55501, 56838, 57058, 57585, 57586, 58220, 58577, 58579, 58581, 58592, 58593, 58807
70 54379
84 55116
180 ....56652, 56653, 57753
262 54381
264 54381
265 54381
282 57757
716 54386
721 55704
Proposed Rules:
52 ....54887, 56848, 57388, 57769, 58627, 58630, 59073, 59075, 59327, 59333
62 59336
81 59075
82 55549
120 58829
174 58239
180 58239
271 54894
372 57614
721 56664
761 58730
1502 55757
1507 55757
1508 55757

41 CFR

300–90 54630
300–74 54630
Appendix E to Ch. 301 54630
Proposed Rules:
51 56679
52 56679
53 56679
54 56679

42 CFR

51c 54390
59 56146
412 ....54631, 58019
413 58019
425 58019
455 58019
495 58019
Proposed Rules:
422 58245
423 58245
438 58245
498 58245

43 CFR

420 59039
3000 54636

45 CFR

147 55980
149 55980
670 54396
1157 58809
1304 55509
Proposed Rules:
1 58042
305 57770

46 CFR

25 ....58560, 59303
Proposed Rules:
50 57896
52 57896

53 57896
54 57896
56 57896
57 57896
58 57896
59 57896
61 57896
62 57896
63 57896
64 57896

47 CFR

1 54852
25 54396
27 57369
54 ....55515, 59304
63 54396
64 ....54871, 58039
73 ....54396, 54852
74 54852
90 58809

Proposed Rules:

52 57390
54 57097
64 ....54897, 57390, 59084
73 ....54416, 54417

48 CFR

503 55516
511 55516
512 55516
513 55516
514 55516
515 55516
517 55516
519 55516
522 55516
523 55516
527 55516
528 55516
529 55516
532 55516
536 55516
537 55516
538 55516
539 55516
541 55516
542 55516
543 55516
546 55516
549 55516
552 ....55516, 57372
570 55516
802 54402
852 ....54402, 54405
853 54402
871 54405
1502 55708
1512 55708
1513 55708
1516 55708
1532 55708
1539 55708
1552 55708

Proposed Rules:

Ch. 1 57404
2 55769
19 55769
52 55769
332 57102
352 57102
Ch. 28 58526
1426 59338
1452 59338
1480 59338

49 CFR

Ch. III 57060
382 55718
383 55718
384 55718
390 55718
392 55718
801 54641
1503 57532

Proposed Rules:

23 58053

50 CFR

10 54642
17 ....57373, 57588
219 58474
622 ....54657, 54871, 54872, 58434
635 ....54659, 54873
648 ....54875, 56657, 57376, 58595
660 ....54407, 55525, 58810
665 55743
679 ....58040, 58596

Proposed Rules:

17 ....55775, 57104, 57773, 58831, 59346
21 54667
217 56857
300 ....55560, 55790
424 59353
622 57629
648 54903
660 59109
665 59357
679 55560
680 55560

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List October 20, 2021

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