FEDERAL REGISTER

Vol. 88 Thursday,
No. 153 August 10, 2023

Pages 54223–54486

OFFICE OF THE FEDERAL REGISTER

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1650; Project Identifier AD–2023–00795–T; Amendment 39–22517; AD 2023–15–05]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all The Boeing Company Model 737 airplanes equipped with CFM International, S.A. (CFM) Model LEAP–1B series turbofan engines. This AD was prompted by a report indicating that use of engine anti-ice (EAI) in dry air for more than five minutes during certain environmental and operational conditions can cause overheating of the engine inlet inner barrel beyond the material design limit, resulting in failure of the engine inlet inner barrel and severe engine inlet cowl damage. This AD requires revising the existing airplane flight manual (AFM) to limit the use of EAI in certain conditions and revising the operator's existing minimum equipment list to prohibit dispatch under a certain item. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective August 25, 2023.

The FAA must receive comments on this AD by September 25, 2023.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at *regulations.gov* by searching for and locating Docket No. FAA–2023–1650; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: James Laubaugh, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; phone: 206–231–3622; email: *james.laubaugh@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under **ADDRESSES**. Include Docket No. FAA–2023–1650 and Project Identifier AD–2023–00795–T at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this final rule because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this final rule.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this AD contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this AD, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this AD. Submissions containing CBI should be sent to James Laubaugh, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; phone: 206–231–3622; email: *james.laubaugh@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA has received a report in June 2023 indicating that flight testing and analysis revealed that the use of EAI in dry air for more than five minutes during certain combinations of altitude, total air temperature, and N1 settings can result in engine inlet cowl temperatures exceeding design limits when not in visible moisture. Excessive heat buildup can cause overheat of the engine inlet inner barrel beyond the material design limit, resulting in failure of the engine inlet inner barrel and severe engine inlet cowl damage. There have been no reports of in-service failures of the engine inlet inner barrel to date.

This condition as previously described, if not addressed, could result in departure of the inlet and potential fan cowl failure and departure from the airplane. The departure of the inlet may cause fuselage and/or window damage, potentially resulting in decompression and hazard to window-seated passengers aft of the wing and/or impact damage to the wing, flight control surfaces, and/or empennage, which could result in loss of control of the airplane. Inlet loss also causes significantly increased aerodynamic drag and asymmetric lift due to wing blanking, which risks fuel exhaustion on certain flights, resulting in a forced off-airport landing and injury to passengers. The FAA is issuing this AD to address the unsafe condition on these products.

FAA's Determination

The FAA is issuing this AD because the agency has determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

AD Requirements

This AD requires revising the existing AFM to limit the use of engine anti-ice in certain conditions. This AD also requires revising the operator's existing minimum equipment list (MEL) to prohibit dispatch under Master Minimum Equipment List (MMEL) Item 30–21–01B (EAI valve locked open). Further analysis of this item is necessary to determine whether continued use will cause failure of the engine inlet inner barrel.

Compliance With AFM Revision

Section 91.9 prohibits any person from operating a civil aircraft without complying with the operating limitations specified in the AFM. FAA regulations also require operators to furnish pilots with any changes to the AFM (14 CFR 121.137) and pilots in command to be familiar with the AFM (14 CFR 91.505).

MMEL Revision

This AD refers to Item 30–21–01B (Engine (Cowl) Anti-Ice Valves), Boeing 737 MAX (B–737–7/-8/-8200/-9) MMEL, Revision 5, dated June 3, 2022; this item is also included in an operator's FAA-approved minimum equipment list (MEL). This AD prohibits dispatch or release of the airplane under conditions currently allowed by that item in the MMEL. The FAA plans to revise the MMEL to remove that item in a future revision; operators would then be required to also remove that item from their existing FAA-approved MEL.

Interim Action

The FAA considers this AD to be an interim action. The manufacturer is currently developing a modification that will address the unsafe condition identified in this AD. Once this modification is developed, approved, and available, the FAA might consider additional rulemaking.

Justification for Immediate Adoption and Determination of the Effective Date

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) authorizes agencies to dispense with notice and comment procedures for rules when the agency, for ''good cause,'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without providing notice and seeking comment prior to issuance. Further, section 553(d) of the APA authorizes agencies to make rules effective in less than thirty days, upon a finding of good cause.

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies forgoing notice and comment prior to adoption of this rule because operating EAI in dry air for more than five minutes during certain environmental and operational conditions can cause overheating of the engine inlet inner barrel beyond the material design limit, resulting in failure of the engine inlet inner barrel and severe engine inlet cowl damage. If not addressed, this could result in departure of the inlet and potential fan cowl failure and departure from the airplane. The departure of the inlet may cause fuselage and/or window damage, potentially resulting in decompression and hazard to window-seated passengers aft of the wing and/or impact damage to the wing, flight control surfaces, and/or empennage, which could result in loss of control of the airplane. Further, inlet loss causes significantly increased aerodynamic drag and asymmetric lift due to wing blanking, which risks fuel exhaustion on certain flights, resulting in a forced off-airport landing and injury to passengers. Accordingly, notice and opportunity for prior public comment are impracticable and contrary to the public interest pursuant to 5 U.S.C. 553(b)(3)(B).

In addition, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days, for the same reasons the FAA found good cause to forgo notice and comment.

Regulatory Flexibility Act

The requirements of the Regulatory Flexibility Act (RFA) do not apply when an agency finds good cause pursuant to 5 U.S.C. 553 to adopt a rule without prior notice and comment. Because the FAA has determined that it has good cause to adopt this rule without notice and comment, RFA analysis is not required.

Costs of Compliance

The FAA estimates that this AD affects 402 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
AFM/MEL revision	1 work-hour × $85 per hour = $85	$0	$85	$34,170

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs describes in more detail the scope of the Agency's authority.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

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

(2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2023–15–05 The Boeing Company: Amendment 39–22517; Docket No. FAA–2023–1650; Project Identifier AD–2023–00795–T.

(a) Effective Date

This airworthiness directive (AD) is effective August 25, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all The Boeing Company Model 737 airplanes equipped with CFM International, S.A. (CFM) Model LEAP–1B series turbofan engines, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 30, Ice and Rain Protection; 71, Powerplant.

(e) Unsafe Condition

This AD was prompted by a report indicating that use of engine anti-ice (EAI) in dry air for more than five minutes during certain environmental and operational conditions can cause overheating of the engine inlet inner barrel beyond the material design limit, resulting in failure of the engine inlet inner barrel and severe engine inlet cowl damage. The FAA is issuing this AD to address use of EAI in certain environmental and operational conditions. The unsafe condition, if not addressed, could result in departure of the inlet and potential fan cowl failure and departure from the airplane. The departure of the inlet may cause fuselage and/or window damage, potentially resulting in decompression and hazard to window-seated passengers aft of the wing and/or impact damage to the wing, flight control surfaces, and/or empennage, which could result in loss of control of the airplane. Inlet loss also causes significantly increased aerodynamic drag and asymmetric lift due to wing blanking, which risks fuel exhaustion on certain flights, resulting in a forced off-airport landing and injury to passengers.

(f) Compliance

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

(g) Airplane Flight Manual (AFM) Revision

Within 15 days after the effective date of this AD: Revise the Limitations Section of the existing AFM to include the information specified in figure 1 to paragraph (g) of this AD. This may be done by inserting a copy of figure 1 to paragraph (g) of this AD into the existing AFM.

Figure 1 to paragraph (g) - *Engine anti-ice AFM revision*

(Required by AD 2023-15-05)

Engines – Anti-Ice System

Do not operate Engine Anti-Ice (EAI) in-flight when not in actual or anticipated icing conditions.

CAUTION: Operation of EAI when not in actual or anticipated icing conditions may result in severe engine inlet damage or failure.

(h) Minimum Equipment List (MEL) Revision

Within 15 days after the effective date of this AD or upon completion of the AFM revision required by paragraph (g) of this AD, whichever occurs first: Revise the operator's existing FAA-approved MEL to prohibit dispatch under the MEL item corresponding with Master Minimum Equipment List (MMEL) Item 30–21–01B (Engine (Cowl) Anti-Ice Valves).

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, AIR–520, Continued Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (j) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by The Boeing Company Organization Designation Authorization (ODA) that has been authorized by the Manager, AIR–520, Continued Operational Safety Branch, FAA, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(j) Related Information

For more information about this AD, contact James Laubaugh, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; phone: 206–231–3622; email: *james.laubaugh@faa.gov.*

(k) Material Incorporated by Reference

None.

Issued on July 31, 2023.

Victor Wicklund,

Deputy Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023–17197 Filed 8–7–23; 4:15 pm]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1010; Airspace Docket No. 23–AGL–15]

RIN 2120–AA66

Amendment of Class E Airspace; Yankton, SD

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the Class E airspace at Yankton, SD. This action is the result of an airspace review caused by the decommissioning of the Yankton very high frequency omnidirectional range (VOR) as part of the VOR Minimum Operating Network (MON) Program.

DATES: Effective 0901 UTC, November 30, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: A copy of the Notice of Proposed Rulemaking (NPRM), all comments received, this final rule, and all background material may be viewed online at *www.regulations.gov* using the FAA Docket number. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year.

FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.* You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends the Class E surface airspace and the Class E airspace extending upward from 700 feet above the surface at Chan Gurney Municipal Airport, Yankton, SD, to support instrument flight rule operations at this airport.

History

The FAA published an NPRM for Docket No. FAA–2023–1010 in the **Federal Register** (88 FR 29568; May 8, 2023) proposing to amend the Class E airspace at Yankton, SD. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Incorporation by Reference

Class E airspace designations are published in paragraphs 6002 and 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document amends the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document. These amendments will be published in the next update to FAA Order JO 7400.11.

FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This amendment to 14 CFR part 71:

Modifies the Class E surface area to within a 5.1-mile (increased from a 4.1-mile) radius of Chan Gurney Municipal Airport, Yankton, SD; removes the Yankton VOR/DME and all associated extensions from the airspace legal description; and removes the city associated with the airport in the header of the airspace legal description to comply with changes to FAA Order JO 7400.2P, Procedures for Handling Airspace Matters;

And modifies the Class E airspace extending upward from 700 feet above the surface to within a 7.6-mile (decreased from a 7.8-mile) radius of Chan Gurney Municipal Airport; and removes the city associated with the airport in the header of the airspace legal description to comply with changes to FAA Order JO 7400.2P.

Regulatory Notices and Analyses

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

Environmental Review

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

Lists of Subjects in 14 CFR 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

Paragraph 6002 Class E Airspace Areas Designated as a Surface Area.

* * * * *

AGL SD E2 Yankton, SD [Amended]

Chan Gurney Municipal Airport, SD
(Lat 42°55′00″ N, long 97°23′09″ W)

Within a 5.1-mile radius of the Chan Gurney Municipal Airport.

* * * * *

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

* * * * *

AGL SD E5 Yankton, SD [Amended]

Chan Gurney Municipal Airport, SD
(Lat 42°55′00″ N, long 97°23′09″ W)

That airspace extending upward from 700 feet above the surface within a 7.6-mile radius of Chan Gurney Municipal Airport.

* * * * *

Issued in Fort Worth, Texas, on August 3, 2023.

Martin A. Skinner,

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

[FR Doc. 2023–16952 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1352; Airspace Docket No. 23–ASO–24]

RIN 2120–AA66

Amendment of Class D and Class E Airspace; Columbus, MS

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: A final rule was published in the **Federal Register** on June 30, 2023, amending Class D airspace, Class E surface airspace, and Class E airspace extending upward from 700 feet above the surface for Golden Triangle Regional Airport, Columbus, MS, by updating the airport's description header and geographic coordinates, as well as the geographic coordinates of Columbus AFB, Columbus-Lowndes County Airport, Oktibbeha Airport, and McCharen Field. This action corrects the Class E airspace extending upward from 700 feet above the surface description by correcting the geographic coordinates of Oktibbeha Airport.

DATES: Effective 0901 UTC, October 5, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

History

The FAA published a final rule in the **Federal Register** (88 FR 42227, June 30, 2023) for Doc. No. FAA–2023–1352, updating the geographic coordinates of Golden Triangle Regional Airport, Columbus AFB, Columbus-Lowndes County Airport, Oktibbeha Airport, and McCharen Field. After publication, the FAA found the geographic coordinates for Oktibbeha Airport were inadvertently transposed. This action corrects this error.

Correction to the Final Rule

Pursuant to the authority delegated to me, the amendment of Class E airspace extending upward from 700 feet above the surface for Columbus, MS, in Docket No. FAA–2023–1352, as published in the **Federal Register** on June 30, 2023 (88 FR 42227), is corrected as follows:

§ 71.1 [Corrected]

■ 1. On page 42228, in the second column, correct the geographic coordinates for Oktibbeha Airport to read:

(Lat 33°29′52″ N, long 88°40′53″ W)

Issued in College Park, Georgia, on August 2, 2023.

Andreese C. Davis,

Manager Airspace & Procedures Team South, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2023–16761 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1004; Airspace Docket No. 23–ASO–18]

RIN 2120–AA66

Amendment of Class E Airspace; Greenville, NC

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E surface airspace and Class E airspace extending upward from 700 feet above the surface for the Greenville, NC area, as a new instrument approach procedure has been designed for ECU Health Medical Center Heliport. This action also makes an editorial change.

DATES: Effective 0901 UTC, October 5, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: A copy of the Notice of Proposed Rulemaking (NPRM), all comments received, this final rule, and all background material may be viewed online at *www.regulations.gov* using the FAA Docket number. Electronic retrieval helps and guidelines are available on the website. It is available 24 hours a day, 365 days a year.

FAA Order JO 7400.11G Airspace Designations and Reporting Points and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.* You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: John Goodson, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Avenue, College Park, GA 30337; Telephone: (404) 305–5966.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

History

The FAA published a notice of proposed rulemaking for Docket No. FAA 2023–1004 in the **Federal Register** (88 FR 29557; May 8, 2023), proposing to amend Class E airspace for Greenville, NC. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Incorporation by Reference

Class E airspace designations are published in paragraphs 6002 and 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, incorporated by reference in 14 CFR 71.1 annually. This document amends the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES**

section of this document. These amendments will be published in the next FAA Order JO 7400.11 update.

FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This action amends 14 CFR part 71 by:

We are amending the Class E surface airspace for Pitt-Greenville Airport, Greenville, NC, by increasing the radius to 4.6 miles (previously 4.4 miles) and replacing the outdated term Notice to Airmen with the term Notice to Air Missions.

Amending the Class E airspace extending upward from 700 feet above the surface by increasing the radius of the Pitt-Greenville Airport to 7.1 miles (previously 6.4 miles) and establishing an extension of 1.1 miles on each side of the Pitt-Greenville Airport's 008° bearing extending from the airport's 7.1-mile radius to 13.4 miles northeast of the airport. In addition, this action establishes Class E airspace extending upward from 700 feet above the surface within a 6.2-mile radius of ECU Health Medical Center.

Controlled airspace is necessary for the area's safety and management of instrument flight rules (IFR) operations.

Regulatory Notices and Analyses

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

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures,'' paragraph 5–6.5a.

This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances warrant the preparation of an environmental assessment.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as Paragraph 6002. Class E Surface Airspace.

Paragraph 6002 Class E Surface Airspace.

* * * * *

ASO NC E2 Greenville, NC [Amended]

Pitt-Greenville Airport, NC
(Lat 35°38′09″ N, long 77°23′03″ W)

That airspace extending upward from the surface within a 4.6-mile radius of Pitt-Greenville Airport. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will be continuously published in the Chart Supplement.

* * * * *

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

* * * * *

ASO NC E5 Greenville, NC [Amended]

Pitt-Greenville Airport, NC
(Lat 35°38′09″ N, long 77°23′03″ W)
ECU Health Medical Center Heliport
(Lat 35°36′32″ N, long 77°24′19″ W)

That airspace extending upward from 700 feet above the surface within a 7.1-mile radius of Pitt-Greenville Airport and 1.1 miles on each side of the Pitt-Greenville Airport's 008° bearing extending from the airport's 7.1-mile radius to 13.4 miles northeast of the airport, and that airspace extending upward from 700 feet above the surface within a 6.2-mile radius of ECU Health Medical Center Heliport.

* * * * *

Issued in College Park, Georgia, on August 1, 2023.

Lisa E. Burrows,

Manager, Airspace & Procedures Team North, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2023–16678 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–0919; Airspace Docket No. 23–AGL–11]

RIN 2120–AA66

Amendment of Class E Airspace; Rush City, MN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the Class E airspace at Rush City, MN. This action is the result of an airspace review caused by the decommissioning of the Rush City non-directional beacon (NDB). The geographic coordinates of the airport are also being updated to coincide with the FAA's aeronautical database.

DATES: Effective 0901 UTC, November 30, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: A copy of the Notice of Proposed Rulemaking (NPRM), all comments received, this final rule, and all background material may be viewed online at *www.regulations.gov* using the FAA Docket number. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year.

FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/*. You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the

agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends the Class E airspace, extending upward from 700 feet above the surface, at Rush City Regional Airport, Rush City, MN, to support instrument flight rule operations at this airport.

History

The FAA published an NPRM for Docket No. FAA–2023–0919 in the **Federal Register** (88 FR 34459; May 30, 2023) amending the Class E airspace at Rush City Regional Airport, Rush City, MN. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Incorporation by Reference

Class E airspace designations are published in paragraphs 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document amends the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document. These amendments will be published in the next update to FAA Order JO 7400.11.

FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This amendment to 14 CFR part 71modifies the Class E airspace extending upward from 700 feet above the surface within a 6.4-mile (decreased from a 6.5-mile radius) of Rush City Regional Airport, Rush City, MN; removes the Rush City NDB from the airspace legal descriptions; and updates the geographic coordinates of the airport to coincide with the FAA's aeronautical database.

Regulatory Notices and Analyses

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

Environmental Review

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

Lists of Subjects in 14 CFR 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

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

* * * * *

AGL MN E5 Rush City, MN [Amended]

Rush City Regional Airport,WI
(Lat 45°41′50″ N, long 92°57′08″ W)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of Rush City Regional Airport.

* * * * *

Issued in Fort Worth, Texas, on August 3, 2023.

Martin A. Skinner,

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

[FR Doc. 2023–16969 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1082; Airspace Docket No. 23–ASO–21]

RIN 2120–AA66

Amendment of Class E Airspace; Covington, TN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E airspace extending upward from 700 feet above the surface for Covington Municipal Airport, Covington, TN, as a new instrument approach procedure has been designed for this airport.

DATES: Effective 0901 UTC, October 5, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: A copy of the Notice of Proposed Rulemaking (NPRM), all comments received, this final rule, and all background material may be viewed online at *www.regulations.gov* using the FAA Docket number. Electronic retrieval helps, and guidelines are available on the website. It is available 24 hours a day, 365 days a year.

FAA Order JO 7400.11G Airspace Designations and Reporting Points and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/*. You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in

Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority, as it amends Class E airspace in Covington, TN, to support IFR operations in the area.

History

The FAA published a notice of proposed rulemaking for Docket No. FAA 2023–1082 in the **Federal Register** (88 FR 29579; May 08, 2023), proposing to amend Class E airspace for Covington Municipal Airport, Covington, TN. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Incorporation by Reference

Class E airspace designations are published in Paragraph 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, incorporated by reference in 14 CFR 71.1 annually. This document amends the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document. These amendments will be published in the next FAA Order JO 7400.11 update.

FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This action amends 14 CFR part 71 by amending Class E airspace extending upward from 700 feet above the surface for Covington Municipal Airport, Covington, TN, to accommodate area navigation (RNAV) global positioning system (GPS) standard instrument approach procedures (SIAPs) serving this airport. This amendment supports a new instrument approach at this airport. The existing radius would be increased to 10.2 miles (previously 7 miles). Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations in the area.

Regulatory Notices and Analyses

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

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures,'' paragraph 5–6.5a.

This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances warrant the preparation of an environmental assessment.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

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

* * * * *

ASO TN E5—Covington, TN [Amended]

Covington Municipal Airport, TN
(Lat 35°35′00″ N, long 89°35′14″ W)

That airspace extends upward from 700 feet above the surface within a 10.2-mile radius of Covington Municipal Airport.

* * * * *

Issued in College Park, Georgia, on August 2, 2023.

Andreese C. Davis,

Manager, Airspace & Procedures Team South, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2023–16908 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1533; Airspace Docket No. 23–AWA–4]

RIN 2120–AA66

Amendment of Class C Airspace; Palm Beach International Airport, West Palm Beach, FL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule, correction.

SUMMARY: This action corrects a final rule published by the FAA in the **Federal Register** on July 18, 2023, that amends the Palm Beach International Airport, FL Class C airspace description as published in FAA Order JO 7400.11G, dated August 19, 2022. In the rule, the text describing Area C of the Class C airspace area was inadvertently omitted from the Palm Beach, FL Class C airspace description. This action restores the text for Area C to the Class C description.

DATES: Effective date 0901 UTC, October 5, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: A copy of the final rule, this final rule correction, and all background material may be viewed online at *www.regulations.gov* using the FAA Docket number. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year.

FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/*. You may also contact the Rules and Regulations Group, Office of

Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Brian Vidis, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

History

The FAA published a final rule in the **Federal Register** for Docket No. FAA–2023–1533 (88 FR 45812; July 18, 2023) that amended the text header in the Palm Beach International Airport, FL Class C airspace description as published in FAA Order JO 7400.11G. The change removed the words ''Palm Beach International Airport'' from the first line in the Class C description and replaced them with the words ''West Palm Beach''. This change aligned with the current formatting standard which requires that the city location of the airport be stated on the first line of the description and the airport name be stated on the second line. In the regulatory text of the rule, the text describing Area C of the Class C airspace area was inadvertently omitted. This action reinserts Area C in the Class C description.

Correction to Final Rule

Accordingly, pursuant to the authority delegated to me, in Docket No. FAA–2023–1533, as published in the **Federal Register** of July 18, 2023 (88 FR 45812), FR Doc. 2023–15147, is corrected as follows:

Amend the West Palm Beach, FL Airspace Class C description by adding Area C to the description, to read as follows:

§ 71.1 [Corrected]

* * * * *

ASO FL C West Palm Beach, FL [Corrected]

Palm Beach International Airport, FL
(Lat. 26°40′59″ N, long. 80°05′44″ W)
Palm Beach County Park Airport
(Lat. 26°35′35″ N, long. 80°05′06″ W)

Boundaries.

Area A. That airspace extending upward from the surface to and including 4,000 feet MSL within a 5-mile radius of the Palm Beach International Airport, excluding that airspace within a 2-mile radius of the Palm Beach County Park Airport.

Area B. That airspace extending upward from 1,600 feet MSL to and including 4,000 feet MSL within an area bounded on the north by a line direct from the intersection of the Florida Turnpike (highway 91) and Lantana Road to the intersection of a 5-mile radius of the Palm Beach International Airport and a 2-mile radius west of the Palm Beach County Park Airport and a 2-mile radius north of the Palm Beach County Park Airport, on the east by a line direct from the intersection of a 5-mile radius of the Palm Beach International Airport and a 2-mile radius east of the Palm Beach County Park Airport to the intersection of a 10-mile radius of the Palm Beach International Airport and U.S. 1, on the south by a 10-mile radius of the Palm Beach International Airport, and on the west by the Florida Turnpike.

Area C. That airspace extending upward from1,200 feet MSL to and including 4,000 feet MSL within a 10-mile radius of the Palm Beach International Airport, excluding area B.

* * * * *

Issued in Washington, DC, on August 1, 2023.

Karen L. Chiodini,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2023–16689 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2022–0265; Airspace Docket No. 19–AAL–55]

RIN 2120–AA66

Establishment of United States Area Navigation (RNAV) Route T–386 in the Vicinity of Fairbanks, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: The FAA is correcting a final rule published by the FAA in the **Federal Register** on July 25, 2023, that establishes United States Area Navigation (RNAV) T-route T–386 in the vicinity of Fairbanks, AK, in support of a large and comprehensive T-route modernization project for the state of Alaska. The geographical coordinates listed in the route description are incorrect.

DATES: Effective date 0901 UTC, October 5, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Rules and Regulations Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Steven Roff, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

History

The FAA published a final rule for Docket No. FAA–2022–0265 in the **Federal Register** (88 FR 47757; July 25, 2023), that establishes RNAV T-route T–386 in the vicinity of Fairbanks, AK. The geographical coordinates listed in the route description are incorrect.

Correction to Final Rule

Accordingly, pursuant to the authority delegated to me, the geographical coordinates in Docket No. FAA–2022–0265, as published in the **Federal Register** of July 25, 2023 (88 FR 47757), FR Doc. 2023–15674, on page 47758, the geographical coordinates for RNAV T-route T–386 in the vicinity of Fairbanks, AK are corrected to read as follows:

* * * * *

T–386 Fairbanks, AK (FAI) to WEXIK, AK [New]

Fairbanks, AK (FAI)	VORTAC	(Lat. 64°48′00.25″ N, long. 148°00′43.11″ W)
DEYEP, AK	FIX	(Lat. 65°12′15.59″ N, long. 145°31′19.80″ W)
WUTGA, AK	WP	(Lat. 65°21′19.16″ N, long. 145°29′46.87″ W)
FIXEG, AK	WP	(Lat. 65°34′22.46″ N, long. 144°47′14.83″ W)
JEGPA, AK	WP	(Lat. 65°36′37.54″ N, long. 144°25′23.87″ W)
WEXIK, AK	WP	(Lat. 65°49′39.86″ N, long. 144°04′50.79″ W)

* * * * *

Issued in Washington, DC, on July 27, 2023.

Karen L. Chiodini,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2023–16316 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2022–0215; Airspace Docket No. 19–AAL–61]

RIN 2120–AA66

Amendment of United States Area Navigation (RNAV) Route T–228 in the Vicinity of Cape Newenham, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: The FAA is correcting a final rule published by the FAA in the **Federal Register** on July 24, 2023, that amends United States Area Navigation (RNAV) route T–228 in the vicinity of Cape Newenham, AK, in support of a large and comprehensive T-route modernization project for the state of Alaska. The geographical coordinates listed for ZIKNI, AK, Waypoint (WP) and RUFVY, AK, WP in the route description are incorrect.

DATES: Effective date 0901 UTC, October 5, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Rules and Regulations Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Steven Roff, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

History

The FAA published a final rule for Docket No. FAA–2022–0215 in the **Federal Register** (88 FR 47366; July 24, 2023), that amended RNAV route T–228 in the vicinity of Cape Newenham, AK. The geographical coordinates listed for the ZIKNI, AK, WP and RUFVY, AK, WP in the route descriptions are incorrect.

Correction to Final Rule

Accordingly, pursuant to the authority delegated to me, the longitude degrees for ZIKNI, AK, WP and RUFVY, AK, WP reflected in Docket No. FAA–2022–0215, as published in the **Federal Register** of July 24, 2023 (88 FR 47366), FR Doc. 2023–15584, on page 47367, the geographical coordinates for RNAV route T–228 in the vicinity of Cape Newenham, AK are corrected to read as follows:

* * * * *

T–228 ZIKNI, AK TO ROCES, AK [AMENDED]

ZIKNI, AK	WP	(Lat. 58°39′21.68″ N, long. 162°04′13.87″ W)
RUFVY, AK	WP	(Lat. 59°56′34.16″ N, long. 164°02′03.72″ W)
Hooper Bay, AK (HPB)	VOR/DME	(Lat. 61°30′51.65″ N, long. 166°08′04.13″ W)
Nome, AK (OME)	VOR/DME	(Lat. 64°29′06.39″ N, long. 165°15′11.43″ W)
HIPIV, AK	WP	(Lat. 66°15′29.11″ N, long. 166°03′23.59″ W)
ECIPI, AK	WP	(Lat. 67°55′48.11″ N, long. 165°29′58.07″ W)
Barrow, AK (BRW)	VOR/DME	(Lat. 71°16′24.33″ N, long. 156°47′17.22″ W)
Deadhorse, AK (SCC)	VOR/DME	(Lat. 70°11′57.11″ N, long. 148°24′58.17″ W)
ROCES, AK	WP	(Lat. 70°08′34.29″ N, long. 144°08′15.59″ W)

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Issued in Washington, DC, on July 27, 2023.

Karen L. Chiodini,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2023–16318 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–0995; Airspace Docket No. 23–ASO–17]

RIN 2120–AA66

Amendment of Class E Airspace; Nashville, TN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: A final rule was published in the **Federal Register** on July 24, 2023, amending Class E airspace designated as an extension to a Class C surface area and Class E airspace extending upward from 700 feet above the surface in Nashville, TN. This action corrects the geographic coordinates of Nashville International Airport and Nashville VORTAC under the Class E airspace designated as an extension to a Class C surface area.

DATES: Effective 0901 UTC, October 5, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

History

The FAA published a final rule in the **Federal Register** (88 FR 47362, July 24, 2023) for Doc. No. FAA–2023–0995, amending Class E airspace designated as an extension to the Class C surface area of Nashville International Airport. After publication, the FAA found the geographic coordinates for Nashville International Airport and Nashville VORTAC were displayed incorrectly. This action corrects this error.

Correction to the Final Rule

Accordingly, pursuant to the authority delegated to me, the amendment of Class E airspace designated as an extension to the Class C surface area for Nashville International Airport, TN, in Docket No. FAA–2023–0995, as published in the **Federal Register** on July 24, 2023 (88 FR 47362), is corrected as follows:

§ 71.1 [Corrected]

■ 1. On page 47363, in the second column, under ASO TN E3 Nashville, TN [Amended], correct the geographic coordinates for Nashville International Airport to read:

* * * * *

(Lat 36°07′28″ N, long 86°40′41″ W)

* * * * *

■ 2. On page 47363, in the second column, under ASO TN E3 Nashville, TN [Amended], correct the geographic coordinates for Nashville VORTAC to read:

* * * * *

(Lat 36°08′13″ N, long 86°41′05″ W)

* * * * *

Issued in College Park, Georgia, on August 2, 2023.

Andreese C. Davis,

Manager, Airspace & Procedures Team South, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2023–16762 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–0735; Airspace Docket No. 23–ASW–11]

RIN 2120–AA66

Amendment of Class E Airspace; Ruston, LA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the Class E airspace at Ruston, LA. This action is the result of an airspace review caused by the decommissioning of the Ruston non-directional beacon (NDB). The geographic coordinates of the airport are also being updated to coincide with the FAA's aeronautical database.

DATES: Effective 0901 UTC, November 30, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: A copy of the Notice of Proposed Rulemaking (NPRM), all comments received, this final rule, and all background material may be viewed online at *www.regulations.gov* using the FAA Docket number. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year.

FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.* You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

History

The FAA published an NPRM for Docket No. FAA–2023–0735 in the **Federal Register** (88 FR 36979; June 6, 2023) amending the Class E airspace at Ruston, LA. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Incorporation by Reference

Class E airspace designations are published in paragraph 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document amends the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. FAA Order Jo 7400.11G is publicly available as listed in the **ADDRESSES** section of this document. These amendments will be published in the next update to FAA Order JO 7400.11.

FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This amendment to 14 CFR part 71 modifies the Class E airspace extending upward from 700 feet above the surface to within a 6.5-mile radius of Ruston Regional Airport, Ruston, LA, and updates the geographic coordinates of the airport to coincide with the FAA's aeronautical database.

Regulatory Notices and Analyses

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

Environmental Review

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

Lists of Subjects in 14 CFR 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

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

* * * * *

ASW LA E5 Ruston, LA [Amended]

Ruston Regional Airport, LA
(Lat 32°30′48″ N, long 92°35′18″ W)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Ruston Regional Airport.

* * * * *

Issued in Fort Worth, Texas, on August 3, 2023.

Martin A. Skinner,

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

[FR Doc. 2023–16968 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Census Bureau

15 CFR Part 30

[Docket No. 230802–0181]

RIN 0607–AA61

Foreign Trade Regulations (FTR): State Department Directorate of Defense Trade Controls Filing Requirement and Clarifications to Current Requirements

AGENCY: Census Bureau, Commerce Department.

ACTION: Final rule.

SUMMARY: The Census Bureau issues this final rule amending its regulations to reflect new export reporting requirements related to the State Department, Directorate of Defense Trade Controls (DDTC) Category XXI Determination Number. Specifically, the Census Bureau is adding a conditional data element, DDTC Category XXI Determination Number, when ''21'' is selected in the DDTC USML Category Code field in the Automated Export System (AES) to represent United States Munitions List (USML) Category XXI. In addition, this rule makes remedial changes to the Foreign Trade Regulations (FTR) to update International Traffic in Arms Regulations (ITAR) references in existing data elements: DDTC Significant Military Equipment Indicator and DDTC Eligible Party Certification Indicator. This rule also makes other remedial changes to the FTR.

DATES: This final rule is effective November 8, 2023.

FOR FURTHER INFORMATION CONTACT: Omari S. Wooden, Assistant Division Chief, Data User and Respondent Outreach, Economic Management Division, Census Bureau by phone (301) 763–3829 or by email *omari.s.wooden@census.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Census Bureau is amending the Foreign Trade Regulations (FTR) to add a conditional data element, Directorate of Defense Trade Controls (DDTC) Category XXI Determination Number, when ''21'' (see Appendix L of the Automated Export System Trade Interface Requirements (AESTIR)) is selected in the DDTC United States Munitions List (USML) Category Code field in the Electronic Export Information (EEI). The FTR defines the DDTC USML Category Code as the USML category of the article being exported (22 CFR) part 121).

Public Law 106–113 amended 13 U.S.C. 301, to add subsection ''(h)'' directing the Secretary of Commerce to require, by regulation, the mandatory electronic filing of export information through the Automated Export System (AES) for items identified in the Commerce Control List (CCL) and the USML. Under the authorities in chapter 9 of title 13, U.S.C., the Secretary of Commerce will collect additional data on the export of items under DDTC USML Category Code ''21'' to identify and validate commodities for which DDTC USML Category Code ''21'' is cited.

The DDTC Category XXI Determination Number is a unique number issued by DDTC in conjunction with a notification that a specific commodity is described in USML Category XXI. Information on valid USML Category XXI determinations and the prospective AES error code may be found in the Frequently Asked Questions section of DDTC's website (*www.pmddtc.state.gov*).

The Census Bureau published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** on May 3, 2023 (88 FR 27815) to add the conditional data element, DDTC Category XXI Determination Number, when ''21'' is selected in the DDTC USML Category Code field in the Automated Export System (AES) as well as to make the remedial changes originally proposed in the NPRM published December 15, 2021 in the **Federal Register** (86 FR 71187). Comments to these remedial changes were favorable.

Finally, the U.S. Department of Homeland Security and the U.S. Department of State concur with the revisions to the FTR as required by 13 U.S.C. 302 and Public Law 107–228, division B, title XIV, section 1404.

Response to Comments

The Census Bureau received three comments on the NPRMs published in the **Federal Register** on December 15, 2021 (86 FR 71187) and May 3, 2023 (88 FR 27815). A summary of the comments and the Census Bureau's response are provided below.

Comment. The commenter stated that it is unclear if the Census Bureau proposed to update the published penalty amount in § 30.71 as it still states $10,000 and has not been $10,000 for years. The commentor suggested to update the correct current amount, in conjunction with the footnote update proposed.

Response. The Census Bureau has reviewed this comment and disagrees that the amount shown in § 30.71 should reflect the current amount with the footnote to address the adjustment for inflation. The $10,000 referenced in § 30.71 is consistent with 13 U.S.C. 305. The current penalty amounts are published in 15 CFR 6.3(d).

Comment. The commenter recommends that the Census Bureau eliminate the Dun and Bradstreet Number (DUNS) for reporting the U.S. Principal Party in Interest Identification Number (USPPI ID) because reporting the DUNS requires the company to also report their Employer Identification Number (EIN) and adds to reporting burden and filing mistakes thus increasing risks of incurring a fine and/or penalty. The commenter also recommended that the Census Bureau review and publish the percentage of shipments where the DUNS is used as the filer ID. The commenter also stated that if the Census Bureau decides to keep the DUNS as a USPPI ID, then § 30.3(e)(1)(ii) needs to reflect that when the USPPI uses the DUNS as their filer ID, they must also provide the FPPI's authorized agent their EIN. As currently proposed in the NPRM, the USPPI either provides the EIN or DUNS.

Response. The Census Bureau has reviewed this comment and disagrees with removing the DUNS as an option for reporting the USPPI ID. USPPIs who have postdeparture filing privileges support the use of the DUNS as the USPPI ID because USPPIs prefer to have the less sensitive DUNS rather than the EIN shown on the front page of bills of

lading/air waybills and other commercial documents as part of the postdeparture filing citation. However, as a result of this comment, FTR Appendix B to Part 30—AES Filing Citation, Exemption and Exclusion Legends (II and III) will be changed from USPPI EIN to USPPI Identification Number to allow either the EIN or DUNS. In regard to the comment of the USPPI using the DUNS as the filer ID, the Census Bureau agrees and has changed § 30.3(e)(1)(ii) to reflect the requirement to provide the USPPI Identification Number as defined under § 30.6(a)(1)(iii).

Comment. The commenter expressed appreciation for the clarification of § 30.6(a)(1)(iii); specifically, clarifying that, when the DUNS is reported as the USPPI ID type, the EIN is also required. The commenter stated that the use of the DUNS and EIN as the USPPI ID has been a mystery to most EEI filers and many EEI transmission software systems are not programmed to accommodate this requirement. According to the commenter, the users of many transmission software systems select USPPI ID type as either DUNS or EIN and then enter a number. Selecting the DUNS option alone fails. As a result, users typically select the ''EIN'' option and then enter a DUNS number. Alternatively, filers will obtain an EIN and only report that number. Therefore, the commenter stated that the practice is that many, if not most, filers do not report both the DUNS and EIN. The commenter believes that it is unlikely, even with this clarification, that EEI filers will begin to transmit both DUNS and EIN or that software providers will change their systems. The commenter stated that it would be helpful if Census could provide further information on the reason and value of receiving the DUNS number.

Response. The Census Bureau historically has given USPPIs the option of providing the DUNS or EIN as the USPPI ID. The option of reporting the less sensitive DUNS instead of the EIN became more favorable to USPPIs who were approved for the postdeparture filing program because the postdeparture filing exemption contains the USPPI ID which is visible on the front of commercial documents. However, when the DUNS is reported as the USPPI ID in the AES, the Census Bureau also requires an EIN. The Census Bureau must have the EIN to link to the Business Register to collect information for the Profile of U.S. Exporting Companies statistical release.

Changes to the Proposed Rule Made by This Final Rule

As discussed above, after consideration of the comments received on the proposed rule, the Census Bureau includes in this final rule an additional change to § 30.3(e)(1)(ii) to reference the USPPI Identification Number instead of USPPI EIN or DUNS. This change will provide consistency with § 30.6(a)(1)(iii), which states that, if the USPPI Identification Number is reported as a DUNS, the submission of the EIN of the USPPI also is required. Additionally, FTR Appendix B to Part 30—AES Filing Citation, Exemption and Exclusion Legends (II and III) will be changed from USPPI EIN to USPPI Identification Number to allow further consistency with § 30.6(a)(1)(iii).

Program Requirements

Pursuant to the Foreign Relations Act, Public Law 107–228 and 13 U.S.C. 302, the Census Bureau is amending relevant sections of the FTR to revise or clarify export reporting requirements. Therefore, the Census Bureau is amending 15 CFR part 30 by making the following revisions:

- Revise § 30.2(d)(3) to remove the language, ''(See subpart B of this part for export control requirements for these types of transactions.),'' as the exclusion overrides the export control requirements.
- Revise § 30.3(e)(1)(ii) to remove USPPI EIN or DUNS and replace with USPPI Identification Number.
- Revise § 30.6(a)(1)(iii) to clarify that, when the Dun and Bradstreet Number (DUNS) is reported as the U.S. Principal Party in Interest (USPPI) Identification Number, the Employer Identification Number (EIN) of the USPPI also is required to be reported in the Automated Export System.
- Revise § 30.6(b)(3) to amend the Foreign Trade Zone (FTZ) identifier to allow for nine digits. The increased number of digits is required because of the increase in the number of subzones.
- Revise § 30.6(b)(16)(ii) to amend the DDTC Significant Military Equipment (SME) indicator by updating the ITAR references as a result of DDTC relocating certain ITAR provisions to improve the overall structure of the ITAR.
- Revise § 30.6(b)(16)(iii) to amend the DDTC eligible party certification indicator by updating the ITAR references as a result of DDTC relocating certain ITAR provisions to improve the overall structure of the ITAR.
- Revise § 30.6(b)(16)(ix) to add the conditional data element ''DDTC Category XXI Determination Number.'' The ''DDTC Category XXI Determination Number'' will be the unique number issued by DDTC to a member of the regulated community (usually the original equipment manufacturer) in conjunction with a notification that a specific commodity is described in USML Category XXI. This number is required only when citing Category XXI as an export classification and is used to confirm that an authoritative DDTC USML Category XXI determination is being referenced to do so.
- Revise § 30.37(u) to remove and reserve the exemption for technical data. This exemption is covered under § 30.2(d)(3), making the exemption redundant.
- Revise § 30.55 to remove the citation ''19 CFR 103.5'' and add in its place ''19 CFR part 103.''
- Revise § 30.71 to amend the Note to paragraph (b) to address the yearly adjustments for civil penalties as a result of inflation.
- Revise § 30.74 to amend paragraph (c)(5) to remove information that may become outdated and referencing the Census Bureau website to obtain the most current method for submitting a Voluntary Self-Disclosure.
- Revise FTR Appendix B to Part 30—AES Filing Citation, Exemption and Exclusion Legends (II and III) to remove USPPI EIN and add in its place USPPI Identification Number.

Rulemaking Requirements

Regulatory Flexibility Act

The Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy, Small Business Administration that this rule will not have a significant economic impact on a substantial number of small entities. There were no comments on this certification in the proposed rule.

In the current Foreign Trade Regulations, the Electronic Export Information (EEI) shall be filed through the Automated Export System (AES) for all exports of physical goods. The AES is the electronic system for collecting Shipper's Export Declaration (SED) (or any successor document) information from persons exporting goods from the United States, Puerto Rico, Foreign Trade Zones located in the United States and Puerto Rico, the U.S. Virgin Islands, between the U.S. and Puerto Rico, and to the U.S. Virgin Islands from the United States or Puerto Rico. Under this final rule, export shipments with ''21'' in the DDTC USML Category Code field will be required to report the DDTC Category XXI Determination Number.

In calendar year 2022, authorized agents and U.S. Principal Parties in

Interest reported the DDTC USML Category Code of ''21'' on 0.6% of EEI records. A large majority of the EEI records involved export shipments of defense articles from branches of the Department of Defense. Based on these statistics, the Census Bureau believes this rule will not create any economic impact on companies including a substantial number of small entities. As a result, a final regulatory flexibility analysis is not required, and none has been prepared.

Executive Orders

This rule has been determined to not be significant for purposes of Executive Order 12866. This rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 13132.

Paperwork Reduction Act

Notwithstanding any other provisions of law, no person is required to respond to, nor shall a person be subject to, a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a valid Office of Management and Budget (OMB) control number.

The information collection requirements included in this rule will be submitted to OMB for review under OMB Control Number 0607–0152. The information collection associated with that control number was approved after 60-day and 30-day public comment periods (87 FR 70777; 88 FR 7680). This rule changes existing requirements for the information collection but will not impact the current reporting-hour burden approved under that control number. Public comment is sought regarding: whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Submit comments on these or any other aspects of the collection of information to *www.reginfo.gov/public/do/PRAMain.* Find this collection under OMB Control Number 0607–0152—AES Program.

Robert L. Santos, Director, Census Bureau, approved the publication of this notification in the **Federal Register**.

List of Subjects in 15 CFR Part 30

Economic statistics, Exports, Foreign trade, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, the Census Bureau is amending 15 CFR part 30 as follows:

PART 30—FOREIGN TRADE REGULATIONS

■ 1. The authority citation for 15 CFR part 30 continues to read as follows:

Authority: 5 U.S.C. 301; 13 U.S.C. 301–307; Reorganization plan No. 5 of 1990 (3 CFR 1949–1953 Comp., p. 1004); Department of Commerce Organization Order No. 35–2A, July 22, 1987, as amended, and No. 35–2B, December 20, 1996, as amended; Public Law 107–228, 116 Stat. 1350.

■ 2. Amend § 30.2 by revising paragraph (d)(3) to read as follows:

§ 30.2 General requirements for filing Electronic Export Information (EEI).

* * * * *

(d) * * *

(3) Electronic transmissions and intangible transfers.

* * * * *

■ 3. Amend § 30.3 by revising paragraphs (e)(1)(ii) to read as follows:

§ 30.3 Electronic Export Information filer requirements, parties to export transactions, and responsibilities of parties to export transactions.

* * * * *

(e) * * *

(1) * * *

(ii) USPPI Identification Number.

* * * * *

■ 4. Amend § 30.6 by revising paragraphs (a)(1)(iii), (b)(3), (b)(16)(ii) and (iii), and adding paragraph (b)(16)(ix) to read as follows:

§ 30.6 Electronic Export Information data elements.

* * * * *

(a) * * *

(1) * * *

(iii) *USPPI identification number.* Report the Employer Identification Number (EIN) of the USPPI. If the USPPI has only one EIN, report that EIN. If the USPPI has more than one EIN, report the EIN that the USPPI uses to report employee wages and withholdings, and not the EIN used to report only company earnings or receipts. Use of another company's EIN is prohibited. If a USPPI reports a DUNS, the EIN is also required to be reported. If a foreign entity is in the United States at the time goods are purchased or obtained for export, the foreign entity is the USPPI. In such situations, when the foreign entity does not have an EIN, the authorized agent shall report a border crossing number, passport number, or any number assigned by CBP on behalf of the foreign entity.

* * * * *

(b) * * *

(3) *FTZ identifier.* If goods are removed from a FTZ and not entered for consumption, report the FTZ identifier. This is the unique 9-digit alphanumeric identifier assigned by the Foreign Trade Zone Board that identifies the FTZ, subzone or site from which goods are withdrawn for export.

* * * * *

(16) * * *

(ii) *DDTC Significant Military Equipment (SME) indicator.* A term used to designate articles on the USML (22 CFR part 121) for which special export controls are warranted because of their capacity for substantial military utility or capability. See sections 120.36 and 120.10(c) of the ITAR (22 CFR parts 120 through 130) for a definition of SME and for items designated as SME articles, respectively.

(iii) *DDTC eligible party certification indicator.* Certification by the U.S. exporter that the exporter is an eligible party to participate in defense trade. See 22 CFR 120.16(c). This certification is required only when an exemption is claimed.

* * * * *

(ix) *DDTC Category XXI Determination Number.* The unique number issued by DDTC to a member of the regulated community (usually the original equipment manufacturer) in conjunction with a notification that a specific commodity is described in USML Category XXI. This number is required only when citing USML Category XXI as an export classification and is used to confirm that an authoritative USML Category XXI determination is being referenced to do so.

* * * * *

§ 30.37 [Amended]

■ 5. Amend § 30.37 by removing and reserving paragraph (u).

■ 6. Amend § 30.55 by revising the introductory text to read as follows:

§ 30.55 Confidential information, import entries, and withdrawals.

The contents of the statistical copies of import entries and withdrawals on file with the Census Bureau are treated as confidential and will not be released without authorization by CBP, in accordance with 19 CFR part 103 relating to the copies on file in CBP offices. The importer or import broker must provide the Census Bureau with

information or documentation necessary to verify the accuracy or resolve problems regarding the reported import transaction.

* * * * *

■ 7. Amend § 30.71 by revising the note to paragraph (b) to read as follows:

§ 30.71 False or fraudulent reporting on or misuse of the Automated Export System.

* * * * *

Note 1 to paragraph (b): The civil monetary penalties are adjusted for inflation annually based on The Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410; 28 U.S.C. 2461), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134) and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Section 701 of Pub. L. 114–74). In accordance with this Act, as amended, the penalties in title 13, chapter 9, sections 304 and 305(b), United States Code are adjusted and published each year in the **Federal Register** no later than January 15th.

■ 8. Amend § 30.74 by revising paragraph (c)(5) to read as follows:

§ 30.74 Voluntary self-disclosure.

* * * * *

(c) * * *

(5) *Where to make voluntary self-disclosures.* The information constituting a Voluntary Self-Disclosure or any other correspondence pertaining to a Voluntary Self-Disclosure may be submitted to the U.S. Census Bureau, Branch Chief, Trade Regulations Branch by methods permitted by the Census Bureau. See *www.census.gov/trade* for more details.

* * * * *

■ 9. Amend appendix B by revising the entries for ''II. Postdeparture Citation—USPPI'' and ''III. Postdeparture Citation–Agent'' to read as follows

Appendix B to Part 30—AES Filing Citation, Exemption and Exclusion Legend

* * * * *

II. Postdeparture Citation—USPPI, USPPI is filing the EEI	AESPOST USPPI Identification Number Date of Export (mm/dd/yyyy). Example: AESPOST 12345678912 01/01/2017.
III. Postdeparture Citation—Agent, Agent is filing the EEI	AESPOST USPPI Identification Number—Filer ID Date of Export (mm/dd/yyyy). Example: AESPOST 12345678912—987654321 01/01/2017.

* * * * *

Dated: August 3, 2023.

Shannon Wink,

Program Analyst, Policy Coordination Office, U.S. Census Bureau.

[FR Doc. 2023–16970 Filed 8–9–23; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2023–0634]

Safety Zones; Annual Events in the Captain of the Port Buffalo Zone

AGENCY: Coast Guard, DHS.

ACTION: Notification of enforcement of regulations.

SUMMARY: The Coast Guard will enforce a safety zone that encompasses certain navigable waters on Lake Erie, for D-Day Conneaut, in Conneaut, OH. This action is necessary and intended for the safety of life and property on navigable waters during this event. During the enforcement period, no person or vessel may enter the respective safety zone without the permission of the Captain of the Port Buffalo or a designated representative.

DATES: The regulations in 33 CFR 165.939, entry (c)(2) of Table to § 165.939, will be enforced from 1:45 p.m. through 5:45 p.m. each day from August 17, 2023, through August 19, 2023.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, call or email Lieutenant Jared Stevens, Waterways Management Division, U.S. Coast Guard Marine Safety Unit Cleveland; telephone 216–937–0124, email *D09-SMB-MSUCLEVELAND-WWM@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce Safety Zones; Annual Events in the Captain of the Port Buffalo Zone, as listed in 33 CFR 165.939, Table 165.939(c)(2) in Conneaut, OH on all U.S. waters of Conneaut Township Park, Lake Erie, within an area starting at 41°57.71′ N, 080°34.18′ W, to 41°58.36′ N, 080°34.17′ W, to 41°58.53′ N, 080°33.55′ W, to 41°58.03′ N, 080°33.72′ W (NAD 83), and returning to the point of origin.

Pursuant to 33 CFR 165.23, entry into, transiting, or anchoring within the safety zone during an enforcement period is prohibited unless authorized by the Captain of the Port Buffalo or a designated representative. Those seeking permission to enter the safety zone may request permission from the Captain of Port Buffalo via channel 16, VHF–FM. Vessels and persons granted permission to enter the safety zone shall obey the directions of the Captain of the Port Buffalo or his designated representative. While within a safety zone, all vessels shall operate at the minimum speed necessary to maintain a safe course.

This notice of enforcement is issued under authority of 33 CFR 165.939 and 5 U.S.C. 552(a). In addition to this notice of enforcement in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of this enforcement period via Broadcast Notice to Mariners or Local Notice to Mariners. If the Captain of the Port Buffalo determines that the safety zone need not be enforced for the full duration stated in this notice, they may use a Broadcast Notice to Mariners to grant general permission to enter the respective safety zone. This notification is being issued by the Coast Guard Sector Buffalo Prevention Department Head at the direction of the Captain of the Port.

Dated: August 2, 2023.

Jeff B. Bybee,

Commander, U.S. Coast Guard, Sector Buffalo Prevention Department Head.

[FR Doc. 2023–17167 Filed 8–9–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0607]

RIN 1625–AA87

Safety Zone; HBPW James DeYoung Powerplant Explosive Demolition; Macatawa

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

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a safety zone for the James DeYoung Powerplant Explosive Demolition on August 10, 2023. This safety zone is located on all waters of

the Macatawa River within a circle with a 1000-foot radius from the demolition site located at the James DeYoung Powerplant in position 42°47.726′ N 086°6.81′ W. During the enforcement period, the operator of any vessel in the regulated area must comply with directions from the Patrol Commander or any Official Patrol displaying a Coast Guard ensign.

DATES: This rule is effective from 8:30 a.m. through 9:45 a.m. August 10, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2023–0607 in the search box and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions about this rule, call or email Petty Officer Brianna Southard, USCG SECTOR Lake Michigan—Waterways Management Division, U. S. Coast Guard; telephone 414–747–7188, email *D09-SMB-SECLakeMichigan-WWM@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the event sponsor changed the date of the demolition and did not provide the Captain of the Port enough notice to accommodate the comment period. It is impracticable to conduct a notice-and-comment rulemaking and have this temporary rule in place by August 10, 2023.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because immediate action is needed to ensure the safety vessels during the James DeYoung Powerplant Explosive Demolition on August 10, 2023.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port Sector Lake Michigan (COTP) has determined that potential hazards associated with the explosive demolition, will be a safety concern for anyone within a 1000-foot radius of the demolition site. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone during the demolition.

IV. Discussion of the Rule

This rule establishes a safety zone from 8:30 a.m. until 9:45 a.m. on August 10, 2023. The safety zone will cover all navigable waters within a 1000-foot radius of position 42°47.726′ N 086°6.81′ W in the vicinity of the James DeYoung Powerplant on the Macatawa River, Holland, MI. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters during the demolition. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a ''significant regulatory action,'' under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, location and duration of the safety zone. The safety zone will impact a small part of the waterway and is designed to minimize impact on navigable waters. This rule will prohibit entry into certain navigable waters of Macatawa River in Holland, MI, and is not anticipated to exceed 1 hour in duration. Moreover, under certain conditions vessels may still transit through the safety zone when permitted by the COTP Lake Michigan.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves safety zone with a 1000-foot radius on the Macatawa River around position 42°47.726′ N 086°6.81′ W on August 10, 2023, from 8:30 a.m. until 9:45 a.m. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 46 U.S.C. 70034, 70051, 70124; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Add § 165.T09–0607 to read as follows:

§ 165.T09–0607 Safety Zone; Macatawa River, Holland, MI.

(a) *Location.* Holland, MI. In the vicinity of the James DeYoung Power Plant near the Macatawa River within 1000-feet of the demolition site in position 42°47.726′ N 086°6.8′ W.

(b) *Regulations.* The following regulations apply to this safety zone.

(1) The general regulations in § 165.23.

(2) All vessels must obtain permission from the Captain of the Port (COTP) Lake Michigan or his or her designated representative to enter, move within, or exit a safety zone established in this section when the safety zone is enforced. Vessels and persons granted permission to enter one of the safety zones listed in this section must obey all lawful orders or directions of the COTP Lake Michigan or his or her designated representative. Upon being hailed by the U.S. Coast Guard by siren, radio, flashing light or other means, the operator of a vessel must proceed as directed.

(c) *Enforcement period.* The regulation in this section will be enforced from 8:30 a.m. through 9:45 a.m. on August 10, 2023. The Captain of the Port Sector Lake Michigan, or a designated representative may suspend enforcement of the safety zone at any time.

Dated: August 4, 2023.

Joseph B. Parker,

Captain, U.S. Coast Guard, Captain of the Port Sector Lake Michigan.

[FR Doc. 2023–17168 Filed 8–9–23; 8:45 am]

BILLING CODE 9110–04–P

POSTAL SERVICE

39 CFR Part 111

Intelligent Mail Package Barcode Compliance Quality

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service is amending *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®) to add an additional Intelligent Mail® package barcode (IMpb®) validation under the ''Barcode Quality'' compliance category.

DATES: *Effective* October 1, 2023.

FOR FURTHER INFORMATION CONTACT: Steven Jarboe at (202) 268–7690, Devin Qualls at (202) 268–3287, or Garry Rodriguez at (202) 268–7281.

SUPPLEMENTARY INFORMATION: On June 28, 2023, the Postal Service published a notice of proposed rulemaking (88 FR 41871–41872) to add an additional IMpb validation. In response to the proposed rule, the Postal Service did not receive any formal comments.

The Postal Service is adding a third validation under the ''Barcode Quality'' compliance category that will require that an IMpb must include a valid, unique 3-digit STC that accurately represents the mail class, product, and service combination on the physical label affixed to the package. Additionally, the IMpb on the package must also correspond with electronic package level details and Extra Services Code(s) contained within the Shipping Services File (SSF). Any variance in the data presented in the electronic submission of a parcel or a variance with the physical aspect of the label affixed to a parcel presented for mailing will be subject to the IMpb noncompliance fee if a mailer falls below the 98 percent threshold.

We believe this revision will ensure IMpb quality enabling the Postal Service to provide customers with a more efficient mailing experience.

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

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

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

Accordingly, 39 CFR part 111 is amended as follows:

PART 111—[AMENDED]

■ 1. The authority citation for 39 CFR part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 13 U.S.C. 301–307; 18 U.S.C. 1692–1737; 39 U.S.C. 101, 401–404, 414, 416, 3001–3018, 3201–3220, 3401–3406, 3621, 3622, 3626, 3629, 3631–3633, 3641, 3681–3685, and 5001.

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

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

* * * * *

200 Commercial Letters, Flats, and Parcels

* * * * *

204 Barcode Standards

* * * * *

2.0 Standards for Package and Extra Service Barcodes

2.1 Intelligent Mail Package Barcode

* * * * *

2.1.8 Compliance Quality Thresholds

* * * * *

EXHIBIT 2.1.8—IMpb COMPLIANCE QUALITY THRESHOLDS

Compliance categories	Compliance codes	Validations	Compliance thresholds
* * *	* * *	* * *	*
Barcode Quality * * *.			
* * *	* * *	* * *	*

[Revise the text in the ''Barcode Quality'' compliance category under the ''Validation'' column by adding a third validation to read as follows:]

• The IMpb must include a valid, unique 3-digit Service Type Code that accurately represents the mail class, product, and service combination on the physical label affixed to the package and the electronic package level details and Extra Services Code(s) in the Shipping Services File.

* * * * *

Sarah Sullivan,

Attorney, Ethics & Legal Compliance.

[FR Doc. 2023–16981 Filed 8–9–23; 8:45 am]

BILLING CODE P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2022–0731, FRL–10545–02–R10]

Air Plan Approval; WA; Smoke Management Plan Update

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving Washington State Implementation Plan (SIP) revisions submitted on August 10, 2022. The submitted revisions incorporate the most recent updates to Washington's Smoke Management Plan and reflect state legislative and regulatory changes. The EPA is approving the revisions based on our determination that the revisions are consistent with Clean Air Act requirements.

DATES: This final rule is effective September 11, 2023.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R10–OAR–2022–0731. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available at *https://www.regulations.gov,* or please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Randall Ruddick, EPA Region 10, 1200 Sixth Avenue (Suite 155), Seattle, WA 98101, (206) 553–1999, *ruddick.randall@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document wherever ''we'' or ''our'' is used, it means the EPA.

Table of Contents

I. Background

On March 23, 2023, the EPA proposed to approve Washington's August 10, 2022, SIP submission revising the Washington Smoke Management Plan (88 FR 17481). The reasons for our proposed approval are included in the proposal and will not be restated here. The public comment period closed on April 24, 2023. We received one anonymous comment in support of our proposed action; therefore, we are finalizing our action as proposed.

II. Final Action

The EPA is approving and incorporating by reference, where appropriate, Washington's 2022 submitted revisions into the Washington SIP 40 CFR part 52, subpart WW as discussed in our March 23, 2023, proposed approval (88 FR 17481). Once this approval becomes effective, the Washington SIP will include the following statutes and regulations:

• RCW 52.12.103, Burning Permits—Issuance—Contents (state effective March 27, 1984);

• RCW 52.12.104, Burning Permits—Duties of permittee (state effective March 27, 1984);

• RCW 76.04.005, Definitions. (1) ''Additional fire hazard'' (5) ''Department protected lands'' (9) ''Forest debris'' (11) ''Forestland'' (12) ''Forestland owner,'' ''owner of forestland,'' ''landowner,'' or ''owner'' (13) ''Forest material'' (15) ''Landowner operation'' (18) ''Participating landowner'' (20) ''Slash'' (21) ''Slash burning'' (23) ''Unimproved lands'' (state effective July 24, 2015);

• RCW 76.04.205, Burning Permits—Civil Penalty (state effective July 25, 2021);
• RCW 70A.15.1030, Definitions. (21) ''Silvicultural burning'' (state effective June 11, 2020);
• RCW 70A.15.5000, Definition of ''outdoor burning'' (state effective July 26, 2020);
• RCW 70A.15.5010, (2) Outdoor burning—Fires prohibited—Exceptions (state effective June 11, 2020);
• RCW 70A.15.5020, Outdoor burning—Areas where prohibited—Exceptions—Use for management of storm or flood-related debris—Silvicultural burning, except (3) (state effective June 11, 2020);
• RCW 70A.15.5120, Burning permits for abating or prevention of forest fire hazards, management of ecosystems, instruction on silvicultural operations—Issuance—Fees (state effective June 11, 2020);
• RCW 70A.15.5130, Silvicultural forest burning—Reduce statewide emissions—Exemption—Monitoring program (state effective July 28, 2019);
• RCW 70A.15.5140, Burning permits for abating or prevention of forest fire hazards, management of ecosystems, instruction on silvicultural operations—Conditions for issuance and use of permits—Air quality standards to be met—Alternate methods to lessen forest debris (state effective June 11, 2020);
• RCW 70A.15.5150, Cooperation between department of natural resources and state, local, or regional air pollution authorities—Withholding of permits (state effective June 11, 2020);
• RCW 70A.15.5190, Outdoor burning allowed for managing storm or flood related debris (state effective June 11, 2020);
• WAC 332–24–201, Burning Permit Program—Requirements and Exceptions (state effective June 30, 1992);
• WAC 332–24–205, General rules—minimum requirements for all burning, except (13) (state effective November 22, 2019);
• WAC 332–24–211, Specific rules for small fires not requiring a written burning permit (solely for the purpose of establishing the size threshold for burns covered by the Smoke Management Plan) (state effective June 30, 1992);
• WAC 332–24–217, Burning permit—penalty (state effective June 30, 1992);
• WAC 332–24–221, Specific rules for burning that requires a written burning permit (state effective February 1, 2012).

In addition, the EPA is proposing to approve, but not incorporate by reference, into the Washington SIP at 40 CFR part 52, subpart WW the Department of Natural Resources Smoke Management Plan, state effective May 10, 2022 (including all Appendices to such plan), as such plan applies to silvicultural burning regulated by DNR.

We note that, as provided in 40 CFR 52.2476 of the Washington SIP, any variance or exception to the 2022 SMP granted by DNR or Ecology must be submitted by Washington for approval to EPA in accordance with the requirements for revising SIPs in 40 CFR 51.104 and any such variance or exception does not modify the requirements of the federally approved Washington SIP until approved by EPA as a SIP revision.

III. Incorporation by Reference

In this document, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of regulatory provisions described in section II of this preamble and set forth in the amendments to 40 CFR part 52 in this document. The EPA has made, and will continue to make, these materials reasonably available through *https://www.regulations.gov* and at the EPA Region 10 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by the EPA for inclusion in the SIP, have been incorporated by reference by the EPA into that plan, are fully federally enforceable under sections 110 and 113 of the Clean Air Act as of the effective date of the final rule of the EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[1]

IV. Statutory and Executive Order Reviews

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

• Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
• 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); and
• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act.

Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. The EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' The EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

The air agency did not evaluate environmental justice considerations as part of its SIP submittal; the Clean Air Act and applicable implementing regulations neither prohibit nor require such an evaluation. The EPA did not perform an EJ analysis and did not consider EJ in this action. Due to the

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

nature of this action, it is expected to have a neutral to positive impact on the air quality of the affected area. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of Executive Order 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

In addition, the SIP is not approved to apply on any Indian reservation land in Washington except as specifically noted below and is also not approved to apply in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law. Washington's SIP is approved to apply on non-trust land within the exterior boundaries of the Puyallup Indian Reservation, also known as the 1873 Survey Area. Under the Puyallup Tribe of Indians Settlement Act of 1989, 25 U.S.C. 1773, Congress explicitly provided state and local agencies in Washington authority over activities on non-trust lands within the 1873 Survey Area. Consistent with EPA policy, the EPA provided a consultation opportunity to potentially affected tribes in a letter dated May 24, 2022.

This action is subject to the Congressional Review Act, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 10, 2023. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. See section 307(b)(2).

List of Subjects in 40 CFR Part 52

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

Dated: July 12, 2023.

Casey Sixkiller,

Regional Administrator, Region 10.

For the reasons set forth in the preamble, 40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart WW—Washington

■ 2. Amend § 52.2470 as follows:

■ a. In paragraph (c), table 1, by adding:

■ i. The heading ''Washington Administrative Code, Chapter 332–24—Forest Protection'' and the entries ''332–24–201'', ''332–24–205'', ''332–24–211'', ''332–24–217'', and ''332–24–221'' immediately after the entry ''173–492–100'';

■ ii. The heading ''Revised Code of Washington, Chapter 52.12—Fire Protection Districts, Powers—Burning Permits'' and the entries ''52.12.103'' and ''52.12.104'' immediately after newly added entry ''332–24–221'';

■ iii. The heading ''Revised Code of Washington, Chapter 70A.15—Washington Clean Air Act'' and the entries ''70A.15.1030(21)'', ''70A.15.5000'', ''70A.15.5010(2)'', ''70A.15.5020'', ''70A.15.5120'', ''70A.15.5130'', ''70A.15.5140'', ''70A.15.5150'', ''70A.15.5190'' immediately after newly added entry ''52.12.104''; and

■ iv. The heading ''Revised Code of Washington, Chapter 76.04—Washington Clean Air Act'' and the entries ''76.04.005'' and ''76.04.205'' immediately after newly added entry ''70A.15.5190''; and

■ b. In paragraph (e), table 2, by adding the heading ''Smoke Management Planning'' and the entry ''Department of Natural Resources 2022 Smoke Management Plan'' immediately after the entry for ''Regional Haze Progress Report''.

The additions read as follows:

§ 52.2470 Identification of plan.

* * * * *

(c) * * *

TABLE 1—REGULATIONS APPROVED STATEWIDE

[Not applicable in Indian reservations (excluding non-trust land within the exterior boundaries of the Puyallup Indian Reservation) and any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction.]

State citation	Title/subject	State effective date	EPA approval date	Explanations
*	*	*	*	*
Washington Administrative Code, Chapter 332–24—Forest Protection				
332–24–201	Burning Permit Program—Requirements and Exceptions.	6/30/92	8/10/2023, [INSERT **Federal Register** CITATION].	
332–24–205	General rules—Minimum Requirements for All Burning.	11/22/19	8/10/2023, [INSERT **Federal Register** CITATION].	Except section (13).
332–24–211	Specific rules for small fires not requiring a written burning permit.	7/31/92	8/10/2023, [INSERT **Federal Register** CITATION].	Included for the purpose of setting the size limit for burns covered by the Department of Natural Resources 2022 Smoke Management Plan in paragraph (e), Table 2.
332–24–217	Burning permit requirements—Penalty.	7/31/92	8/10/2023, [INSERT **Federal Register** CITATION].	

TABLE 1—REGULATIONS APPROVED STATEWIDE—Continued

[Not applicable in Indian reservations (excluding non-trust land within the exterior boundaries of the Puyallup Indian Reservation) and any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction.]

State citation	Title/subject	State effective date	EPA approval date	Explanations
332–24–221	Specific Rules for Burning That Requires a Written Burning Permit.	2/1/12	8/10/2023, [INSERT **Federal Register** CITATION].	
Revised Code of Washington, Chapter 52.12—Fire Protection Districts, Powers—Burning Permits				
52.12.103	Burning permits—Issuance—Contents..	3/27/84	8/10/2023, [INSERT **Federal Register** CITATION].	
52.12.104	Burning permits—Duties of permittee	3/27/84	8/10/2023, [INSERT **Federal Register** CITATION].	
Revised Code of Washington, Chapter 70A.15—Washington Clean Air Act				
70A.15.1030(21)	Definitions. ''Silvicultural burning''	6/11/20	8/10/2023, [INSERT **Federal Register** CITATION].	
70A.15.5000	Definition of ''outdoor burning''	7/26/20	8/10/2023, [INSERT **Federal Register** CITATION].	
70A.15.5010 (2)	Outdoor burning—Fires prohibited—Exceptions.	6/11/20	8/10/2023, [INSERT **Federal Register** CITATION].	Except (1).
70A.15.5020	Outdoor burning—Areas where prohibited—Exceptions—Use for management of storm or flood-related debris—Silvicultural burning.	6/11/20	8/10/2023, [INSERT **Federal Register** CITATION].	Except (3).
70A.15.5120	Burning permits for abating or prevention of forest fire hazards, management of ecosystems, instruction or silvicultural operations—issuance—Fees.	6/11/20	8/10/2023, [INSERT **Federal Register** CITATION].	
70A.15.5130	Silvicultural forest burning—Reduce statewide emissions Exemption—Monitoring program.	7/28/19	8/10/2023, [INSERT **Federal Register** CITATION].	
70A.15.5140	Burning permits for abating or prevention of forest fire hazards, management of ecosystems, instruction or silvicultural operations—Conditions for issuance and use of permits—Air quality standards to be met—Alternate methods to lessen forest debris.	6/11/20	8/10/2023, [INSERT **Federal Register** CITATION].	
70A.15.5150	Cooperation between department of natural resources and state, local, or regional air pollution authorities—Withholding of permits.	6/11/20	8/10/2023, [INSERT **Federal Register** CITATION].	
70A.15.5190	Outdoor burning allowed for managing storm or flood-related debris.	6/11/20	8/10/2023, [INSERT **Federal Register** CITATION].	
Revised Code of Washington, Chapter 76.04—Washington Clean Air Act				
76.04.005	Definitions	7/24/15	8/10/2023, [INSERT **Federal Register** CITATION].	Except (2), (3), (4), (6), (7), (8), (10), (14), (16), (17), (19), (22)
76.04.205	Burning Permits—Civil Penalty	7/25/21	8/10/2023, [INSERT **Federal Register** CITATION].	

* * * * * (e) * * *

TABLE 2—ATTAINMENT, MAINTENANCE, AND OTHER PLANS

Name of SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Explanations
* *	*	*	* *	*
Smoke Management Planning				
Department of Natural Resources 2022 Smoke Management Plan.	Statewide	8/10/22	8/10/2023, [INSERT **Federal Register** CITATION]..	
* *	*	*	* *	*

[FR Doc. 2023–16409 Filed 8–9–23; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2018–0158; FRL–11022–01–OCSPP]

(2S)-5-Oxopyrrolidine-2-carboxylic Acid (L–PCA); Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of (2S)-5-Oxopyrrolidine-2-carboxylic Acid (L–PCA) in or on all food commodities when used as a plant growth regulator in accordance with label directions and good agricultural practices. Exponent, on behalf of Verdesian Life Sciences U.S., LLC, submitted a petition, pursuant to the Federal Food, Drug, and Cosmetic Act (FFDCA), asking the EPA to amend its regulations to establish an exemption from the requirement of a tolerance for residues of the pesticide, when used as a plant growth regulator on agricultural crops, turf and ornamental plants. Instead, EPA is establishing an exemption from the requirement of a tolerance for residues L–PCA in or on all food commodities when applied in buffered end-use products and used in accordance with label directions and good agricultural practices. This regulation eliminates the need to establish a maximum permissible level for residues of L–PCA when used in accordance with this exemption.

DATES: This regulation is effective August 10, 2023. Objections and requests for hearings must be received on or before October 10, 2023 and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2018–0158, is available at *https://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room, and the OPP Docket is (202) 566–1744. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Madison Le, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (202) 566–1400; email address: *BPPDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, greenhouse owner, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of 40 CFR part 180 through the Office of the Federal Register's e-CFR site at *https://www.ecfr.gov/current/title-40.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a(g), any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2018–0158 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing and must be received by the Hearing Clerk on or before October 10, 2023. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2018–0158, by one of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically

any information you consider to be CBI or other information whose disclosure is restricted by statute.

- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *https://www.epa.gov/dockets/where-send-comments-epa-dockets.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

II. Background and Statutory Findings

In the **Federal Register** of May 18, 2018 (83 FR 23247) (FRL–9976–87), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide tolerance petition (PP 8F8663) by Exponent, on behalf of Verdesian Life Sciences U.S., LLC, 1001 Winstead Dr., Suite 480, Cary, NC 27513. The petition requested that 40 CFR part 180 be amended to establish an exemption from the requirement of a tolerance for residues of L–PCA, when used as a plant growth regulator on agricultural crops, turf, and ornamental plants, in accordance with label directions and good agricultural practices. That document referenced a summary of the petition prepared by the petitioner, Verdesian Life Sciences U.S., LLC, which is available in docket EPA–HQ–OPP–2018–0158 at *https://www.regulations.gov.* No substantive comments were received in response to this Notice of Filing.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings but does not include occupational exposure. Pursuant to FFDCA section 408(c)(2)(B), in establishing or maintaining in effect an exemption from the requirement of a tolerance, EPA must take into account the factors set forth in FFDCA section 408(b)(2)(C), which require EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .'' Additionally, FFDCA section 408(b)(2)(D) requires that the Agency consider ''available information concerning the cumulative effects of a particular pesticide's residues'' and ''other substances that have a common mechanism of toxicity.''

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be clearly demonstrated that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no harm to human health. If EPA is able to determine that a tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, an exemption from the requirement of a tolerance may be established.

Consistent with FFDCA section 408(c)(2)(A), and the factors specified in FFDCA section 408(c)(2)(B), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for L–PCA including exposure resulting from the exemption established by this action. EPA's assessment of exposures and risks associated with L–PCA follows.

A. Toxicological Profile

L–PCA is derived from L-glutamic acid via an intramolecular condensation reaction. L–PCA is naturally found in mammalian tissues. L–PCA has a non-toxic mode of action and can effectively enhance upregulation of the glutamine synthesis pathway. When applied to plants, it has demonstrated effects, such as increased growth, increased nodulation, and greater fresh weight. It also has seed priming properties. L–PCA has a long history of use in consumer products, including dietary supplements and cosmetic products.

L–PCA can be applied in various forms (free acids or salts), but it releases a common moiety that is the pesticidally-active component and serves as the basis for risk assessment and tolerance regulation. Since L–PCA is a strong acid, buffered solutions will contain some salt form, but not enough at any moment in time to be toxicologically relevant.

In the field, the above rationale continues to apply when active ingredient is in solution. If the products dry out on plants and then someone touches them, there would likely be some exposure from the salt form, however, it will not change the toxicology since it would not stay in the salt form once it was solubilized upon ingestion/contact with water.

With regard to the overall toxicological profile, L–PCA is of low toxicity. Acute toxicity data indicate that L–PCA is of low acute oral, dermal, and inhalation toxicity. However, with its low pH (2), it is likely corrosive. The available data suggest it is not a skin sensitizer.

Studies from the open scientific literature on the sodium salt analog, Na–PCA, were submitted to satisfy the 90-day oral for L–PCA. The Na–PCA toxicity database is considered appropriate for use in L–PCA risk assessment when EP formulations are buffered. There is an expectation that EP formulations for use as plant growth regulators will be buffered because unbuffered solutions will not be effective as a plant growth regulator, *i.e.,* unbuffered solutions would likely destroy the plant due to the acidity of L–PCA. This is because buffered L–PCA behaves similarly to Na–PCA. There is comparable acute toxicity between the proposed EP formulations and Na–PCA. Further, both L–PCA and Na–PCA are naturally occurring and are products of human metabolism. Using a weight of the evidence (WOE) approach, these studies allowed EPA to establish a no-observed-adverse-effect-level (NOAEL) of 849 mg/kg/day for subchronic oral toxicity for L–PCA in buffered end-use products.

For developmental toxicity, a non-guideline 1-generation reproduction toxicity screening study was submitted on Na–PCA in lieu of a developmental toxicity study. The study showed no treatment-related effects on offspring body weights, body weight gains or on post-implantation losses, mean litter size, numbers of live and dead pups born, sex ratio, or the birth or survival indices. No gross or microscopic pathology of the reproductive tract was seen, and reproductive performance was not affected by treatment. While this study is not a guideline developmental toxicity study, EPA has determined that the screening study is acceptable to satisfy the prenatal developmental toxicity data at this time for the specified products. This decision is based on the fact that no observable toxicity was produced at the limit dose

level in this study and an effect would not be expected from structurally related compounds.

EPA determined that 90-day inhalation toxicity and 90-day dermal studies were not required to assess the risks from L–PCA for the following reasons: (1) physical and chemical properties of the buffered formulations of L–PCA are similar to those of Na–PCA; (2) estimated margins of error (MOEs) are more than 10X the level of concern (LOC); and (3) no irritation was observed in studies conducted using the buffered end-use products.

The available data indicates that the active ingredient is non-mutagenic.

B. Toxicological Points of Departure/ Levels of Concern

Based on the toxicological profile, EPA did not identify any toxicological endpoints of concern for *L–PCA.*

C. Exposure Assessment

1. *Dietary exposure from food, feed uses, and drinking water.* No toxicological endpoint of concern was identified for L–PCA, and therefore, a quantitative assessment of dietary exposure is not necessary. As part of its qualitative risk assessment for L–PCA, the Agency considered the potential for dietary exposure to residues of the chemical. EPA concludes that dietary (food and drinking water) exposures are possible. However, due to the lack of a toxicological endpoint, dietary risk is not of concern.

2. *Non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* textiles (clothing and diapers), carpets, swimming pools, and hard surface disinfection on walls, floors, tables). There are currently no proposed residential uses for this active ingredient, therefore a residential exposure assessment is not necessary.

3. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.'' EPA has not found that L–PCA shares a common mechanism of toxicity with any other substances, and it does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed L–PCA does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *https://www.epa.gov/pesticide-science-and-assessing-pesticide-risks/cumulative-assessment-risk-pesticides.*

D. Safety Factor for Infants and Children

FFDCA Section 408(b)(2)(C) provides that EPA shall retain an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the Food Quality Protection Act (FQPA) Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor. An FQPA safety factor is not required at this time for L–PCA because there are no threshold effects; no dietary endpoints have been selected based on the lack of human-relevant adverse effects at limit doses in the 90-day oral toxicity study and prenatal developmental toxicity study.

E. Aggregate Risk

Based on the available data and information, EPA has concluded that a qualitative aggregate risk assessment is appropriate to support the pesticidal use of L–PCA in buffered end-use products, and that risks of concern are not anticipated from aggregate exposure to the substance in this manner. This conclusion is based on the low toxicity of the active ingredient and its salts, which release a common moiety that is the basis for the risk assessment. Due to the lack of toxicity, EPA concludes that there is no aggregate risk from exposure to L–PCA.

A full explanation of the data upon which EPA relied and its risk assessment based on those data can be found within the September 20, 2022, document entitled ''Product Chemistry Review and Human Health Risk Assessment for FIFRA Section 3 Registrations of (2S)-5-Oxopyrrolidine-2-carboxylic Acid (L–PCA) Technical, containing 99.1% L–PCA, VLS 2002–03, Containing 25.0% L–PCA and VLS 2002–03–0.10, Containing 10.0% L–PCA.'' This document, as well as other relevant information, is available in the docket for this action as described under **ADDRESSES**.

IV. Determination of Safety for U.S. Population, Infants and Children

Based on the Agency's assessment, EPA concludes that there is reasonable certainty that no harm will result to the U.S. population, including infants and children, from aggregate exposure to residues of L–PCA.

V. Other Considerations

Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes since the Agency is establishing an exemption from the requirement of a tolerance without any numerical limitation.

VI. Conclusions

Therefore, EPA is establishing an exemption for residues of L–PCA in or on all food commodities when used as a plant growth regulator in accordance with label directions and good agricultural practices.

VII. Statutory and Executive Order Reviews

This action establishes an exemption from the requirement of a tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance exemption in this final rule, do not require the issuance of a proposed rule, the requirements of the

Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or Tribal Governments, on the relationship between the National Government and the States or Tribal Governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

VIII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: August 4, 2023.

Edward Messina,

Director, Office of Pesticide Programs.

Therefore, for the reasons stated in the preamble, EPA is amending 40 CFR part 180 as follows:

PART 180—TOLERANCES AND EXEMPTIONS FOR PESTICIDE CHEMICAL RESIDUES IN FOOD

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Add § 180.1404 to subpart D to read as follows:

§ 180.1404 (2S)-5-Oxopyrrolidine-2-carboxylic Acid (L–PCA); exemption from the requirement of a tolerance.

An exemption from the requirement of a tolerance is established for residues of the pesticide, (2S)-5-Oxopyrrolidine-2-carboxylic Acid (L–PCA) in or on all food commodities when used as a plant growth regulator in accordance with label directions and good agricultural practices.

[FR Doc. 2023–17135 Filed 8–9–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 73

Select Agent Determination Concerning Coxiella burnetii Phase II, Nine Mile Strain, Plaque Purified Clone 4 With Reversion to Wildtype cbu0533

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Determination.

SUMMARY: The Centers for Disease Control and Prevention (CDC), located within the Department of Health and Human Services (HHS), has determined that an excluded attenuated strain, *Coxiella burnetii* Phase II, Nine Mile Strain, plaque purified clone 4, has, in one instance, been shown to spontaneously mutate when passaged *in vivo.* The resulting mutant, *C. burnetii* Phase II, Nine Mile Strain, plaque purified clone 4 with reversion to wildtype *cbu0533,* has enhanced pathogenicity and virulence. Therefore, *C. burnetii* Phase II, Nine Mile Strain, plaque purified clone 4 with reversion to wildtype *cbu0533* is not an excluded strain but is a select agent and subject to the HHS select agent and toxin regulations.

DATES: This determination is effective August 10, 2023.

FOR FURTHER INFORMATION CONTACT: Samuel S. Edwin Ph.D., Director, Division of Select Agents and Toxins, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop H21–4, Atlanta, Georgia 30329, Telephone: (404) 718–2000.

SUPPLEMENTARY INFORMATION: *Coxiella burnetti* is a select agent that is regulated pursuant to the HHS select agent and toxin regulations (42 CFR part 73). *C. burnetii* is a gram-negative intracellular bacterium that causes Q Fever. Q Fever is a zoonotic disease that causes flu-like symptoms in humans, including fever, chills, fatigue, and muscle pain. Humans become infected when they are in close contact with infected animal fluids and products.

The HHS select agent regulations (42 CFR part 73) established a process by which an attenuated strain of a select biological agent that does not have the potential to pose a severe threat to public health and safety may be excluded from the requirements of the regulations. On October 15, 2003, *C. burnetii* Phase II, Nine Mile Strain, plaque purified clone 4 was excluded from HHS select agent regulations as it does not pose a significant threat to public health and safety (*https://selectagents.gov/sat/exclusions/hhs.htm*).

As set forth under 42 CFR 73.4(e)(2), if an excluded attenuated strain is subjected to any manipulation that restores or enhances its virulence, the resulting select agent will be subject to the requirements of the regulations. On March 20, 2023, an entity informed CDC of a reversion whereby *C. burnetii* Phase II, Nine Mile Strain, plaque purified clone 4 spontaneously mutated. The *C. burnetii* Phase II, Nine Mile Strain, plaque purified clone 4 with reversion to wildtype *cbu0533* displayed increased pathogenicity and virulence. The entity stated that after the excluded strain was injected into guinea pigs, a spontaneous reversion occurred that resulted in a mutant strain of the agent and the guinea pigs subsequently exhibited elevated fever and weight loss. The genetic mutation that led to the mutant strain was the reversion and restoration of a deletion in the *cbu0533 gene.* CDC subject matter experts have determined that this reversion in *cbu0533* restored virulence and pathogenicity. Therefore, *C. burnetii* Phase II, Nine Mile Strain, plaque purified clone 4 with reversion to wildtype *cbu0533* is determined to be a select agent and subject to 42 CFR part 73.

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2023–16929 Filed 8–9–23; 8:45 am]

BILLING CODE 4163–18–P

Proposed Rules

Federal Register
Vol. 88, No. 153
Thursday, August 10, 2023

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 TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1692; Airspace Docket No. 23–AEA–13]

RIN 2120–AA66

Establishment of Class E Airspace; Warrenton, VA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes establishing Class E airspace extending upward from 700 feet above the surface in Warrenton, VA, as new instrument approach procedures have been designed for Fauquier Hospital Emergency Transport Heliport, Warrenton, VA.

DATES: Comments must be received on or before September 25, 2023.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2023–1692 and Airspace Docket No. 23–AEA–13 using any of the following methods:

* *Federal eRulemaking Portal:* Go to *www.regulations.gov* and follow the online instructions for sending your comments electronically.

* *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

* *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except for Federal holidays.

* *Fax:* Fax comments to Docket Operations at (202) 493–2251.

Docket: Background documents or comments received may be read at *www.regulations.gov* anytime. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except for Federal holidays.

FAA Order JO 7400.11G Airspace Designations and Reporting Points and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.* You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: John Goodson, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Avenue, College Park, GA 30337; Telephone: (404) 305–5966.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority, as it would establish Class E airspace in Warrenton, VA.

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. Comments are specifically invited on the proposal's overall regulatory, aeronautical, economic, environmental, and energy-related aspects. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only once if comments are filed electronically, or commenters should send only one copy of written comments if comments are filed in writing.

The FAA will file in the docket all comments it receives and a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments it receives on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible without incurring expense or delay. The FAA may change this proposal in light of the comments it receives.

Privacy: 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 editing, 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.*

Availability of Rulemaking Documents

An electronic copy of this document may be downloaded online at *www.regulations.gov.* Recently published rulemaking documents can be accessed through the FAA's web page at *www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except for Federal holidays. An informal docket may also be examined between 8:00 a.m. and 4:30 p.m., Monday through Friday, except on federal holidays at the office of the Eastern Service Center, Federal Aviation Administration, Room 350, 1701 Columbia Avenue, College Park, GA 30337.

Incorporation by Reference

Class E airspace designations are published in Paragraph 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, incorporated by reference in 14 CFR 71.1 annually. This document proposes to amend the current version of that order, FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and

effective September 15, 2022. These updates will be published in the next FAA Order JO 7400.11 update. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document.

FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA proposes an amendment to 14 CFR part 71 by establishing Class E airspace extending upward from 700 feet above the surface within a 6.0-mile radius of Fauquier Hospital Emergency Transport Heliport, Warrenton, VA, as new instrument approach procedures have been designed for the heliport.

Controlled airspace is necessary for the area's safety and management of instrument flight rules (IFR) operations. This action is necessary to support IFR operations in the area.

Regulatory Notices and Analyses

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

Environmental Review

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

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

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

* * * * *

AEA VA E5 Warrenton, VA [Established]

Fauquier Hospital Emergency Transport Heliport, VA
(Lat. 38°42′47″ N, long. 77°48′35″ W)

That airspace extending upward from 700 feet above the surface within a 6.0-mile radius of Fauquier Hospital Emergency Transport Heliport.

* * * * *

Issued in College Park, Georgia, on August 3, 2023.

Lisa E. Burrows,

Manager, Airspace & Procedures Team North, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2023–16959 Filed 8–9–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1674; Airspace Docket No. 23–ASO–33]

RIN 2120–AA66

Amendment of Class D and Class E Airspace; Eastman, GA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class D airspace and Class E airspace extending upward from 700 feet above the surface for Heart of Georgia Regional Airport, Eastman, GA. This action would increase the radius of the Class D airspace and the Class E airspace extending upward from 700 feet above the surface, as well as amend verbiage in the Class D description. This action would also update the airport's name and geographic coordinates for the Class E airspace extending upward from 700 feet above the surface.

DATES: Comments must be received on or before September 25, 2023.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2023–1674 and Airspace Docket No. 23–ASO–33 using any of the following methods:

* *Federal eRulemaking Portal:* Go to *www.regulations.gov* and follow the online instructions for sending your comments electronically.

* *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

* *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except for Federal holidays.

* *Fax:* Fax comments to Docket Operations at (202) 493–2251.

Docket: Background documents or comments received may be read at *www.regulations.gov* anytime. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except for Federal holidays.

FAA Order JO 7400.11G Airspace Designations and Reporting Points and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.* You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A,

Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority, as it would amend Class D and Class E airspace in Eastman, GA. An airspace evaluation determined that this update is necessary to support IFR operations in the area.

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. Comments are specifically invited on the proposal's overall regulatory, aeronautical, economic, environmental, and energy-related aspects. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only once if comments are filed electronically, or commenters should send only one copy of written comments if comments are filed in writing.

The FAA will file in the docket all comments it receives and a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments it receives on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible without incurring expense or delay. The FAA may change this proposal in light of the comments it receives.

Privacy: 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.*

Availability of Rulemaking Documents

An electronic copy of this document may be downloaded through the internet at *www.regulations.gov.* Recently published rulemaking documents can be accessed through the FAA's web page at *www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Operations office (see **ADDRESSES** section for address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the office of the Eastern Service Center, Federal Aviation Administration, Room 210, 1701 Columbia Ave., College Park, GA 30337.

Incorporation by Reference

Class D and Class E airspace designations are published in Paragraphs 5000 and 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 annually. This document proposes to amend the current version of that order, FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022. These updates will be published in the next FAA Order JO 7400.11 update. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document.

FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA proposes an amendment to 14 CFR part 71 to amend Class D airspace and Class E airspace extending upward from 700 feet above the surface for Heart of Georgia Regional Airport, Eastman, GA, by increasing the Class D radius to 4.6-miles (previously 4.4 miles) and the Class E airspace extending upward from 700 feet above the surface to 7.1-miles (previously 7.0 miles), and update the geographic coordinates to coincide with the FAA's database. This action would also replace Notice to Airmen with Notice to Air Missions and Airport/Facility Directory with Chart Supplement in the Class D description. Finally, this action would update the airport name to Heart of Georgia Regional Airport (formerly Eastman-Dodge County Airport) in the Class E airspace extending upward from 700 feet above the surface. Controlled airspace is necessary for the area's safety and management of instrument flight rules (IFR) operations.

Regulatory Notices and Analyses

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

Environmental Review

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

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * *

ASO GA D Eastman, GA [Amended]

Heart of Georgia Regional Airport, GA
(Lat. 32°12′59″ N, long. 83°07′43″ W)

That airspace extends upward from the surface to and including 2,500 feet MSL within a 4.6-mile radius of the Heart of Georgia Regional Airport. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter be continuously published in the Chart Supplement.

* * * * *

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

* * * * *

ASO GA E5 Eastman, GA [Amended]

Heart of Georgia Regional Airport, GA
(Lat. 32°12′59″ N, long. 83°07′43″ W)

That airspace extending upward from 700 feet above the surface within a 7.1-mile radius of Heart of Georgia Regional Airport.

* * * * *

Issued in College Park, Georgia, on August 2, 2023.

Andreese C. Davis,

Manager, Airspace & Procedures Team South, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2023–16763 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1147; Airspace Docket No. 22–AAL–55]

RIN 2120–AA66

Amendment of Alaskan Very High Frequency (VHF) Omnidirectional Range (VOR) Federal Airway V–333 in the Vicinity of Shishmaref, AK, and Revocation of Alaskan VOR Federal Airway V–401 in the Vicinity of Ambler, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Alaskan VOR Federal Airway V–333 and to revoke Alaskan VOR Federal Airway V–401. The FAA is taking this action due to the pending decommissioning of the Shishmaref, AK, and Ambler, AK, Nondirectional Radio Beacons (NDB). The identifier V–333 is also used as an identifier for Domestic VOR Federal Airway V–333 in the vicinity of Rome, GA. The identifier V–401 is also used as an identifier for Domestic VOR Federal Airway V–401 in the vicinity of Worland, WY. This proposed airspace action only pertains to the Alaskan V–333 and V–401. The V–333 near Rome, GA and V–401 near Worland, WY, would not be affected by this proposed airspace action.

DATES: Comments must be received on or before September 25, 2023.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2023–1147 and Airspace Docket No. 22–AAL–55 using any of the following methods:

* *Federal eRulemaking Portal:* Go to *www.regulations.gov* and follow the online instructions for sending your comments electronically.

* *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

* *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

* *Fax:* Fax comments to Docket Operations at (202) 493–2251.

Docket: Background documents or comments received may be read at *www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.* You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Steven Roff, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it proposes to amend Alaskan VOR Federal Airway V–333 and revoke Alaskan VOR Federal Airway V–401.

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only one time if comments are filed electronically, or commenters should send only one copy of written comments if comments are filed in writing.

The FAA will file in the docket all comments it receives, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments it receives on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The FAA may change this proposal in light of the comments it receives.

Privacy: 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.*

Availability of Rulemaking Documents

An electronic copy of this document may be downloaded through the internet at *www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Operations office (see **ADDRESSES** section for address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the office of the Western Service Center, Federal Aviation 2200 South 216th St., Des Moines, WA 98198.

Incorporation by Reference

Alaskan VOR Federal airways are published in paragraph 6010(b) of FAA Order JO 7400.11, Airspace Designations and Reporting Points,

which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. These updates would be published in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

Background

In 2003, Congress enacted the Vision 100-Century of Aviation Reauthorization Act (Pub L., 108–176), which established a joint planning and development office in the FAA to manage the work related to the Next Generation Air Transportation System (NextGen). Today, NextGen is an ongoing FAA-led modernization of the nation's air transportation system to make flying safer, more efficient, and more predictable.

In support of NextGen, this proposal is part of an ongoing, large and comprehensive T-route modernization project in the state of Alaska. The project mission statement states: ''To modernize Alaska's Air Traffic Service route structure using satellite-based navigation development of new T-routes and optimization of existing T-routes will enhance safety, increase efficiency and access, and will provide en route continuity that is not subject to the restrictions associated with ground-based airway navigation.''

As part of this initiative, the Shishmaref, AK, and Ambler, AK, NDBs are scheduled to be decommissioned. As a result, portions of Alaskan V–333 and V–401 in its entirety will become unusable. This airspace action proposes to amend the Alaskan V–333 by removing the portion of the airways that rely on the Shishmaref NDB and revoke Alaskan V–401 airway it its entirety. The mitigations to these amendments are already in place. United States Area Navigation (RNAV) route T–228 overlays Alaskan VOR Federal Airway V–333. Alaskan VOR Federal Airway V–401 extends between Ambler, AK, NDB, Kotzebue, AK, VOR distance measuring equipment (VOR/DME) and Shishmaref, AK, NDB. T–233 is near V–401 to the south between the Ambler, AK, NDB and the Kotzebue, AK, VOR/DME. RNAV route T–364 overlies the V–401 between Kotzebue, AK, VOR/DME and Shishmaref, AK, NDB.

The VOR Federal airway identifier V–333 is used in Alaska and in the Rome, GA, area. The VOR Federal airway identifier V–401 is used in Alaska and in the Worland, WY, area. This proposed airspace action only pertains to the Alaskan V–333 and V–401. It would not affect the V–333 near Rome, GA or the V–401 near Worland, WY.

The Proposal

The FAA proposes to amend 14 CFR part 71 by amending Alaskan VOR Federal airway V–333 and revoking Alaskan VOR Federal airway V–401 in its entirety. The Domestic VOR Federal airways V–333 and V–401 would remain unchanged. The proposed airspace actions are described below.

V–333: The Alaskan V–333 currently extends between the Hooper Bay, AK, VOR/DME, Nome, AK, VOR/DME, and the Shishmaref, AK, NDB. The FAA proposes to revoke the portion of the Alaskan V–333 that extends between the Nome, AK, VOR/DME and the Shishmaref, AK, NDB. As amended, Alaskan V–333 would extend between the Hooper Bay, AK, VOR/DME and the Nome, AK, VOR/DME. The Domestic route V–333 would remain unchanged.

V–401: The Alaskan V–401 extends between the Ambler, AK, NDB, Kotzebue, AK, VOR/DME, and the Shishmaref, AK, NDB. The FAA proposes to revoke the Alaskan V–401 in its entirety. The domestic V–401 would remain unchanged.

Regulatory Notices and Analyses

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

Environmental Review

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

Paragraph 6010(b) Alaskan VOR Federal Airways.

* * * * *

V–333 [Amended]

From Hooper Bay, AK; to Nome, AK.

* * * * *

V–401 [Remove]

* * * * *

Issued in Washington, DC, on August 3, 2023.

Karen L. Chiodini,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2023–16978 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1006; Airspace Docket No. 22–AWP–65]

RIN 2120–AA66

Modification of Class E Airspace; Minden-Tahoe Airport, Minden, NV

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify the Class E airspace extending upward from 700 feet above the surface at Minden-Tahoe Airport, Minden, NV.

Additionally, this action proposes administrative amendments to update the airport's existing Class E airspace legal description. These actions would support the safety and management of instrument flight rules (IFR) operations at the airport.

DATES: Comments must be received on or before September 25, 2023.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2023–1006 and Airspace Docket No. 22–AWP–65 using any of the following methods:

* *Federal eRulemaking Portal:* Go to *www.regulations.gov* and follow the online instructions for sending your comments electronically.

* *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

* *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

* *Fax:* Fax comments to Docket Operations at (202) 493–2251.

Docket: Background documents or comments received may be read at *www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.* You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Keith T. Adams, Federal Aviation Administration, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198; telephone (206) 231–2428.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only one time if comments are filed electronically, or commenters should send only one copy of written comments if comments are filed in writing.

The FAA will file in the docket all comments it receives, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments it receives on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The FAA may change this proposal in light of the comments it receives.

Privacy: 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.*

Availability of Rulemaking Documents

An electronic copy of this document may be downloaded through the internet at *www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Operations office (see **ADDRESSES** section for address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198.

Incorporation by Reference

Class E5 airspace designations are published in paragraph 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. These updates would be published in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 to modify the Class E airspace extending upward from 700 feet above the surface at Minden-Tahoe Airport, Minden, NV.

The southern portion should have an extension .5 miles past the radius on a 180 bearing with a width of 1.2 miles on each side to better contain arriving IFR operations below 1,500 feet above the surface. Additionally, the northern portion of the existing Class E airspace should have an extension .2 miles past the 6.5-mile radius on a 359 bearing with a width of 1.8 nautical miles on each side to better contain departing IFR operations until they reach 1,200 feet above the surface.

Finally, the FAA proposes administrative modifications to the airport's associated legal descriptions. The geographic coordinates located on line three of the text header should be updated to match the FAA's database.

Regulatory Notices and Analyses

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) is not a ''significant regulatory action'' under Executive

Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

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

* * * * *

AWP NV E5 Minden, NV [Amended]

Minden-Tahoe Airport, NV
(Lat. 39°00′02″ N, long. 119°45′04″ W)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of the Minden-Tahoe Airport and 1.8 miles on each side of a 359° bearing from the airport extending from the 6.5-mile radius to 6.57 miles north of the airport and 1.2 miles on each side of a 180 bearing from the airport extending from the 6.5-mile radius to 7 miles south of the airport.

* * * * *

Issued in Des Moines, Washington, on August 2, 2023.

B.G. Chew,

Group Manager, Operations Support Group, Western Service Center.

[FR Doc. 2023–17016 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1736; Airspace Docket No. 23–AEA–14]

RIN 2120–AA66

Amendment of Class D and Class E Airspace; Lynchburg, VA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class D airspace, Class E surface airspace, and Class E airspace designated as an extension to a Class D surface area for Lynchburg Regional Airport/Preston Glenn Field, Lynchburg, VA. This action would increase the radius for this airport, as well as amending verbiage in the descriptions.

DATES: Comments must be received on or before September 25, 2023.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2023–1736 and Airspace Docket No. [23–AEA–14) using any of the following methods:

* *Federal eRulemaking Portal:* Go to *www.regulations.gov* and follow the online instructions for sending your comments electronically.

* *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

* *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except for Federal holidays.

* *Fax:* Fax comments to Docket Operations at (202) 493–2251.

Docket: Background documents or comments received may be read at *www.regulations.gov* anytime. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except for Federal holidays.

FAA Order JO 7400.11G Airspace Designations and Reporting Points and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.* You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority, as it would amend Class D and Class E airspace in Lynchburg, VA. An airspace evaluation determined that this update is necessary to support IFR operations in the area.

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only once if comments are filed electronically, or commenters should send only one copy of written comments if comments are filed in writing.

The FAA will file in the docket all comments it receives and a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting

on this proposal, the FAA will consider all comments it receives on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible without incurring expense or delay. The FAA may change this proposal in light of the comments it receives.

Privacy: 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 edits, 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.*

Availability of Rulemaking Documents

An electronic copy of this document may be downloaded through the internet at *www.regulations.gov.* Recently published rulemaking documents can be accessed through the FAA's web page at *www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Operations office (see **ADDRESSES** section for address, phone number, and hours of operations). An informal docket may also be examined during regular business hours at the office of the Eastern Service Center, Federal Aviation Administration, Room 210, 1701 Columbia Ave., College Park, GA 30337.

Incorporation by Reference

Class D and Class E airspace designations are published in Paragraphs 5000, 6002, and 6004 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 annually. This document proposes to amend the current version of that order, FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022. These updates would subsequently be published in the next update to FAA Order JO 7400.11. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document. FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA proposes an amendment to 14 CFR part 71 to amend Class D airspace and Class E surface airspace by:

- Updating the airport name to Lynchburg Regional Airport/Preston Glenn Field (previously Lynchburg Regional-Preston Glenn Field Airport).
- Increasing the radius to 4.6 miles (previously 4.5 miles).
- Removing the city name from the airport header.
- Removing the state name from the Falwell Airport header.
- Replacing the terms Notice to Airmen with Notice to Air Missions and Airport/Facility Directory with Chart Supplement.
- Removing the Lynchburg VORTAC from the description, as it is unnecessary in describing the airspace.

The FAA proposes an amendment to 14 CFR part 71 to amend Class E airspace designated as an extension to a Class D surface area by:

- Updating the airport name to Lynchburg Regional Airport/Preston Glenn Field
- Removing the Lynchburg VORTAC from the description is unnecessary in describing the airspace.

Regulatory Notices and Analyses

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

Environmental Review

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

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * *

AEA VA D Lynchburg, VA [Amended]

Lynchburg Regional Airport/Preston Glenn Field, VA
(Lat. 37°19′31″ N, long. 79°12′04″ W)
Falwell Airport
(Lat. 37°22′41″ N, long. 79°07′20″ W)

That airspace extending upward from the surface to and including 3,400 feet MSL within a 4.6-mile radius of Lynchburg Regional Airport/Preston Glenn Field, excluding the portion within a .5-mile radius of Falwell Airport. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter be published continuously in the Chart Supplement.

* * * * *

Paragraph 6002 Class E Surface Airspace.

* * * * *

AEA VA E2 Lynchburg, VA [Amended]

Lynchburg Regional Airport/Preston Glenn Field, VA
(Lat. 37°19′31″ N, long. 79°12′04″ W)
Falwell Airport
(Lat. 37°22′41″ N, long. 79°07′20″ W)

That airspace extending upward from the surface within a 4.6-mile radius of Lynchburg Regional Airport/Preston Glenn Field, excluding the portion within a .5-mile radius of Falwell Airport. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter be published continuously in the Chart Supplement.

* * * * *

Paragraph 6004 Class E Airspace Designated as an Extension to Class D or Class E Surface Area.

* * * * *

AEA VA E4 Lynchburg, VA [Amended]

Lynchburg Regional Airport/Preston Glenn Field, VA
(Lat. 37°19′31″ N, long. 79°12′04″ W)

That airspace extending upward from the surface within 1.6-miles each side of the 028° bearing of Lynchburg Regional Airport/

Preston Glenn Field, extending from the 4.6-mile radius to 7.1 miles northeast of the airport, and within 1.2-miles each side of the 208° bearing of the airport, extending from the 4.6-mile radius to 6.5-miles southwest of the airport.

* * * * *

Issued in College Park, Georgia, on August 3, 2023.

Lisa E. Burrows,

Manager, Airspace & Procedures Team North, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2023–16947 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Parts 801 and 803

RIN 3084–AB46

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

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

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') is extending the deadline for filing comments on its notice of proposed rulemaking (''NPRM'') regarding the Premerger Notification; Reporting and Waiting Period Requirements.

DATES: For the NPRM published in the **Federal Register** on June 27, 2023 (88 FR 42178), the comment deadline is extended from August 28, 2023, to September 27, 2023.

ADDRESSES: Interested parties may file a comment online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''16 CFR parts 801–803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300''' on your comment, and file your comment online at *https://www.regulations.gov,* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610, (Annex H), Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Robert L. Jones, Assistant Director, Premerger Notification Office, Bureau of Competition, Federal Trade Commission, 400 7th Street SW, Room CC–5301, Washington, DC 20024.

SUPPLEMENTARY INFORMATION:

I. Comment Period Extension

On June 27, 2023, the Commission announced and made public its notice of proposed rulemaking regarding the Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules (''HSR Form Change''), including its request for public comment on all aspects of the proposed rule. The NPRM was subsequently published in the **Federal Register**, with August 28, 2023, established as the deadline for the submission of comments. *See* 88 FR 42178 (June 29, 2023).

Interested parties have requested an extension of the public comment period to give them additional time to respond to the NPRM's request for comment. While the Commission believes that the current 60-day period—which is 62 days after public release of the notice of proposed rulemaking—is sufficient for meaningful comment and public participation, the Commission agrees to allow the public additional time to prepare and file comments. The Commission therefore extends the comment period to September 27, 2023, to provide commenters a total of 92 days from the public release of the NPRM on June 27, 2023. This is a 30-day extension of the 60-day comment period from publication in the **Federal Register** on June 29, 2023.

II. Request for Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before September 27, 2023. Write ''16 CFR parts 801–803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov* website.

Because of the agency's security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comment online through *https://www.regulations.gov.* To ensure the Commission considers your online comment, please follow the instructions on the web-based form.

If you file your comment on paper, write ''16 CFR parts 801–803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610, (Annex H), Washington, DC 20580. If possible, please submit your paper comment to the Commission by overnight service.

Because your comment will be placed on the publicly accessible website, *https://www.regulations.gov,* you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not contain sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential,''—as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including, in particular, competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c). The written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(b). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted publicly at *https://www.regulations.gov*—as legally required by FTC Rule 4.9(b), 16 CFR 4.9(b)—we cannot redact or remove your comment, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), 16 CFR 4.9(c), and the General Counsel grants that request.

Visit the Commission's website, *www.ftc.gov,* to read this publication and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or

before September 27, 2023. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

By direction of the Commission.

April J. Tabor,

Secretary.

[FR Doc. 2023–17143 Filed 8–9–23; 8:45 am]

BILLING CODE 6750–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2022–0604; FRL–10574–01–R9]

Air Plan Approval; CA; San Joaquin Valley Air Pollution Control District; Removal of Excess Emissions Provisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve State Implementation Plan (SIP) revisions to the San Joaquin Valley Air Pollution Control District (SJVAPCD) portion of the California State Implementation Plan (SIP). The revisions were submitted by the California Air Resources Board (CARB), on behalf of SJVAPCD, in response to EPA's May 22, 2015, finding of substantial inadequacy and SIP call for certain provisions in the SIP related to exemptions and affirmative defenses applicable to excess emissions during startup, shutdown, and malfunction (SSM) events. EPA is proposing approval of the SIP revisions because the Agency has determined that they are in accordance with the requirements for SIP provisions under the Clean Air Act (CAA or the Act).

DATES: Comments must be received on or before September 11, 2023.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2022–0604 at *https://www.regulations.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*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.* If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Christine Vineyard, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 947–4125 or by email at *vineyard.christine@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document wherever ''we'' or ''our'' is used, it refers to EPA.

Table of Contents

I. Background

On February 22, 2013, the EPA issued a Federal Register notice of proposed rulemaking outlining EPA's policy at the time with respect to SIP provisions related to periods of SSM. EPA analyzed specific SSM SIP provisions and explained how each one either did or did not comply with the CAA with regard to excess emission events.[1] For each SIP provision that EPA determined to be inconsistent with the CAA, EPA proposed to find that the existing SIP provision was substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call under CAA section 110(k)(5). On September 17, 2014, EPA issued a document supplementing and revising what the Agency had previously proposed on February 22, 2013, in light of a D.C. Circuit decision that determined the CAA precludes authority of the EPA to create affirmative defense provisions applicable to private civil suits. EPA outlined its updated policy that affirmative defense SIP provisions are not consistent with CAA requirements. EPA proposed in the supplemental proposal document to apply its revised interpretation of the CAA to specific affirmative defense SIP provisions and proposed SIP calls for those provisions where appropriate (79 FR 55920, September 17, 2014).

On June 12, 2015, pursuant to CAA section 110(k)(5), EPA finalized ''State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction,'' (80 FR 33839, June 12, 2015), hereafter referred to as the ''2015 SSM SIP Action.'' The 2015 SSM SIP Action clarified, restated, and updated EPA's interpretation that SSM exemption and affirmative defense SIP provisions are inconsistent with CAA requirements. The 2015 SSM SIP Action found that certain SIP provisions in 36 states were substantially inadequate to meet CAA requirements and issued a SIP call to those states to submit SIP revisions to address the inadequacies. EPA established an 18-month deadline by which the affected states had to submit such SIP revisions. States were required to submit corrective revisions to their SIPs in response to the SIP calls by November 22, 2016.

EPA issued a Memorandum in October 2020 (2020 Memorandum), which stated that certain provisions governing SSM periods in SIPs could be viewed as consistent with CAA requirements.[2] Importantly, the 2020 Memorandum stated that it ''did not alter in any way the determinations made in the 2015 SSM SIP Action that identified specific state SIP provisions that were substantially inadequate to meet the requirements of the Act.'' Accordingly, the 2020 Memorandum had no direct impact on the SIP call issued to SJVAPCD in 2015. The 2020 Memorandum did, however, indicate EPA's intent at the time to review SIP calls that were issued in the 2015 SSM SIP Action to determine whether EPA should maintain, modify, or withdraw

[1] State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 78 FR 12460 (Feb. 22, 2013).

[2] October 9, 2020 memorandum ''Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans,'' from Andrew R. Wheeler, Administrator.

particular SIP calls through future agency actions.

On September 30, 2021, EPA's Deputy Administrator withdrew the 2020 Memorandum and announced EPA's return to the policy articulated in the 2015 SSM SIP Action (2021 Memorandum).[3] As articulated in the 2021 Memorandum, SIP provisions that contain exemptions or affirmative defense provisions are not consistent with CAA requirements and, therefore, generally are not approvable if contained in a SIP submission. This policy approach is intended to ensure that all communities and populations, including minority, low-income, and indigenous populations overburdened by air pollution, receive the full health and environmental protections provided by the CAA.[4] The 2021 Memorandum also retracted the prior statement from the 2020 Memorandum of EPA's plans to review and potentially modify or withdraw particular SIP calls. That statement no longer reflects EPA's intent. EPA intends to implement the principles laid out in the 2015 SSM SIP Action as the agency takes action on SIP submissions, including this SIP submittal provided in response to the 2015 SIP call.

With regard to the SJVAPCD SIP, in the 2015 SSM SIP Action, the EPA determined that the rules in the following table were substantially inadequate to meet CAA requirements (80 FR 33840, 33973):

District	Rule number	Adopted	Submitted	Rule title
San Joaquin Valley APCD (Fresno County APCD)	110	2/17/2022	4/14/2022	Equipment Breakdown.
San Joaquin Valley APCD (Stanislaus County APCD)	110	2/17/2022	4/14/2022	Equipment Breakdown.
San Joquin Valley APCD (Kern County APCD)	111	2/17/2022	4/14/2022	Equipment Breakdown.
San Joaquin Valley APCD (Kings County APCD)	111	2/17/2022	4/14/2022	Equipment Breakdown.
San Joaquin Valley APCD (Tulare County APCD)	111	2/17/2022	4/14/2022	Equipment Breakdown.
San Joaquin Valley APCD (Madera County APCD)	113	2/17/2022	4/14/2022	Equipment Breakdown.

Each of these SIP provisions provide an affirmative defense available to sources for excess emissions that occur during a breakdown condition (*i.e.,* malfunction). The rationale underlying EPA's determination that the provisions were substantially inadequate to meet CAA requirements, and therefore to issue a SIP call to SJVAPCD to remedy the provisions, is detailed in the 2015 SSM SIP Action and the accompanying proposals.

CARB, on behalf of SJVAPCD, submitted the SIP revisions on April 14, 2022, in response to the SIP call issued in the 2015 SSM SIP Action. In its submission, California is requesting that EPA revise the SJVAPCD SIP by removing the rules in the table above from the California SIP.

II. Analysis of SIP Submission

EPA is proposing to approve SJVAPCD's April 14, 2022 SIP submission. Affirmative defense provisions like these are inconsistent with CAA requirements and removal of these provisions would strengthen the SIP. This action, if finalized, would remove the affirmative defense provisions from the SJVAPCD portion of the EPA-approved SIP for California. EPA is proposing to find that these revisions are consistent with CAA requirements and that they adequately address the specific deficiencies that EPA identified in the 2015 SSM SIP Action with respect to the SJVAPCD portion of the California SIP.

III. Proposed Action

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). EPA is proposing to approve California's April 14, 2022 SIP submission requesting removal of (i) Fresno County ''Rule 110 Equipment Breakdown''; (ii) Kern County ''Rule 111 Equipment Breakdown''; (iii) Kings County ''Rule 111 Equipment Breakdown''; (iv) Madera County ''Rule 113 Equipment Breakdown''; (v) Stanislaus County ''Rule 110 Equipment Breakdown''; and (vi) Tulare County ''Rule 111 Equipment Breakdown'' from the California SIP. We are proposing approval of the SIP revisions because we have determined that they are consistent with the requirements for SIP provisions under the CAA. EPA is further proposing to determine that such SIP revisions correct the deficiencies identified in the May 22, 2015 SIP call. EPA is not reopening the 2015 SSM SIP Action and is only taking comment on whether these SIP revisions are consistent with CAA requirements and whether they address the ''substantial inadequacy'' of the specific SJVAPCD SIP provisions identified in the 2015 SSM SIP Action.

IV. Incorporation by Reference

In this document, EPA is proposing to amend regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, and as described in section I of the preamble, EPA is proposing to remove provisions from Fresno County, Kern County, Kings County, Madera County, Stanislaus County, and Tulare County portions of the California SIP. EPA has made, and will continue to make, these documents generally available through *https://www.regulations.gov* and at the EPA Region 9 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

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011).
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).
- Is certified as not having a significant economic impact on a

[3] September 30, 2021, memorandum ''Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy,'' from Janet McCabe, Deputy Administrator.

[4] 80 FR 33985.

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.

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

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

The State did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA did not perform an EJ analysis and did not consider EJ in this action. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

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

Dated: July 25, 2023.

Martha Guzman Aceves,

Regional Administrator, Region IX.

[FR Doc. 2023–16975 Filed 8–9–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2023–0341, FRL–11175–01–R10]

Air Plan Approval; Washington; Southwest Clean Air Agency; Emission Standards and Controls for Sources Emitting Gasoline Vapors

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) proposes to approve a revision to the Washington State Implementation Plan (SIP) for the Southwest Clean Air Agency (SWCAA) jurisdiction as it relates to the ozone National Ambient Air Quality Standard. This proposed revision updates SWCAA's requirements in the SIP for Stage I and Stage II vapor recovery systems at gasoline dispensing facilities including: decommissioning existing Stage II systems incompatible with onboard refueling vapor recovery systems on or before January 1, 2023; allowing removal from service of Stage II vapor recovery equipment compatible with onboard refueling vapor recovery on or after January 1, 2023; and removing the requirement for Stage II vapor recovery at new installations. The proposed revisions to the SIP also include, among other changes, revised requirements for installation of enhanced conventional nozzles, installation of low permeation hoses, and annual testing based on facility throughput. SWCAA's submittal, in coordination with the Washington Department of Ecology, incudes a demonstration that such removal of Stage II requirements is consistent with the Clean Air Act and EPA guidance.

DATES: Comments must be received on or before September 11, 2023.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R10–OAR–2023–0341 at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Jeff Hunt, EPA Region 10, 1200 Sixth Avenue—Suite 155, Seattle, WA 98101, at (206) 553–0256, or *hunt.jeff@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, it is intended to refer to the EPA.

I. Background

Ozone is a gas composed of three oxygen atoms. Ground-level ozone is generally not emitted directly from a vehicle's exhaust or an industrial smokestack but is created by a chemical reaction between nitrogen oxides (NO_X) and volatile organic compounds (VOC) in the presence of sunlight and high ambient temperatures. VOC and NO_X emissions often are referred to as ''precursors'' to ozone formation. Thus, ozone is known primarily as a summertime air pollutant. Motor vehicle exhaust and industrial emissions, gasoline vapors, chemical solvents and natural sources can emit or contain NO_X and/or VOC. Urban areas tend to have high concentrations of ground-level ozone, but areas without

significant industrial activity and with relatively low vehicular traffic are also subject to increased ozone levels because wind carries ozone and its precursors hundreds of miles from their sources. In 1979, under section 109 of the Clean Air Act (CAA or the Act), the EPA established the primary and secondary National Ambient Air Quality Standards (NAAQS) for ozone at 0.12 parts per million (ppm) averaged over a 1-hour period (44 FR 8202, February 8, 1979). In 1997, we revised the primary and secondary NAAQS for ozone to set the acceptable level of ozone in the ambient air at 0.08 ppm, averaged over an 8-hour period (62 FR 38856, July 18, 1997). In 2008, we further revised the primary and secondary ozone NAAQS to 0.075 ppm, averaged over an 8-hour period (73 FR 16436, March 27, 2008). In 2015, we again revised the primary and secondary ozone NAAQS to 0.070 ppm, averaged over an 8-hour period (73 FR 16436, March 27, 2008). For additional information on ozone, visit *https://www.epa.gov/ozone-pollution.*

Stage II vapor recovery is an air pollution control technology for automobiles and other on-road mobile sources. When an automobile or other vehicle is brought into a gas station to be refueled, the empty portion of the gas tank on the vehicle contains gasoline vapors, which are VOCs. When liquid gasoline is pumped into the partially empty gas tank in the vehicle the vapors are displaced out of the tank as the tank fills with liquid gasoline. Where air pollution control technology is not used, these vapors are emitted into the air. In the atmosphere, these VOCs can, in the presence of sunlight, react with NO_X and VOCs from other sources to form ozone. The Stage II system consists of special nozzles and coaxial hoses at each gas pump that capture vapor from the vehicle's fuel tank and route them to underground or above ground storage tanks during the refueling process. Stage II vapor recovery systems are specifically installed at gasoline dispensing facilities and capture the refueling fuel vapors at the gasoline pump nozzle. The system directs the displaced vapors back to the underground storage tank at the gasoline dispensing facility to prevent the vapors from escaping to the atmosphere.

Onboard refueling vapor recovery (ORVR) is another emission control system that can capture fuel vapors from vehicle gas tanks during refueling. ORVR systems are carbon canisters installed directly on automobiles to capture the fuel vapors displaced from the gasoline tank before they are released to the atmosphere. The fuel vapors captured in the carbon canisters are then combusted in the engine when the automobile is started and operated after refueling.

Stage II vapor recovery systems and vehicle ORVR systems were initially both required by the 1990 Amendments to the CAA, with Stage II requirements applying to certain nonattainment areas. Under CAA section 182(b)(3) ozone nonattainment areas classified as moderate and above were required to adopt Stage II requirements. CAA section 202(a)(6), requires an onboard system of capturing vehicle refueling emissions, commonly referred to as an ORVR system. In 1994, the EPA promulgated ORVR standards (59 FR 16262, April 6, 1994). Section 202(a)(6) of the CAA required that the EPA's ORVR standards apply to light-duty vehicles manufactured beginning in the fourth model year after the model year in which the standards were promulgated, and that ORVR systems provide a minimum evaporative emission capture efficiency of 95 percent.[1] ORVR equipment has been phased in for new light duty vehicles (passenger vehicles) beginning with model year 1998 and starting with model year 2001 for light-duty trucks and most heavy-duty gasoline powered vehicles. Since 2006, ORVR has been a required emissions control on nearly all new gasoline-powered highway vehicles having less than 14,000 pounds gross vehicle weight rating. CAA section 202(a)(6) provides discretionary authority to the Administrator, by rule, to revise or waive the application of the Stage II requirements for areas classified as Serious, Severe, or Extreme for ozone, as appropriate, after such time as the Administrator determines that onboard emissions control systems are in widespread use throughout the motor vehicle fleet.

On May 16, 2012, the EPA issued a national rulemaking making the finding that ORVR systems are in ''widespread use'' and determined that emission reductions from ORVR alone are essentially equal to and will soon surpass the emission reductions achieved by Stage II alone (see 77 FR 28772 at 28772). In the May 16, 2012 action, we noted that each year, non-ORVR-equipped vehicles continue to be replaced with ORVR-equipped vehicles and Stage II and ORVR systems capture the same VOC emissions and thus, are redundant. *Id.* The EPA also determined that ORVR systems are in widespread use and waived the Stage II requirement for gasoline dispensing facilities if doing so did not interfere with attaining or maintaining the ozone standards. *Id.* at 28776–28779. The EPA also noted that any state currently implementing Stage II vapor recovery programs may submit SIP revisions that would allow for the phase-out of Stage II vapor recovery systems including a CAA section 110(l) analysis showing that its removal did not interfere with attaining or maintaining the ozone standards. *Id.*

The Portland/Vancouver area was designated an interstate ozone nonattainment area in 1978. On November 15, 1990, the CAA Amendments of 1990 were enacted. (Pub. L. 101–549, 104 Stat. 2399, codified at 42 U.S.C. 7401–7671q). Under section 181(a)(1) of the 1990 CAA, the area was further classified as a ''Marginal'' ozone nonattainment area. This interstate nonattainment area consisted of the southern portion of Clark County, Washington, and portions of Multnomah, Clackamas, and Washington Counties in Oregon. In 1997, the EPA redesignated the Portland/Vancouver area to attainment (62 FR 27204, May 19, 1997). The Portland/Vancouver area was designated as ''unclassifiable/attainment'' due to the data showing the area was below the new NAAQS for subsequent updates, including the 1997 8-hour ozone NAAQS (69 FR 23857, April 30, 2004), the 2008 8-hour ozone NAAQS (77 FR 30088, May 21, 2012), and the 2015 8-hour ozone NAAQS (82 FR 54232, November 16, 2017).

The Portland/Vancouver area was not subject to Stage II requirements under the 1990 Clean Air Act Amendments as it was classified as Marginal nonattainment for the 1-hour NAAQS for ozone, rather than Moderate or above. However, SWCAA in coordination with the Washington Department of Ecology submitted SWAPCA 491 ''Emission Standards and Controls for Sources Emitting Gasoline Vapors'' (state effective November 21, 1996, subsequently renamed to SWCAA 491) which contained Stage II requirements as a SIP-strengthening measure approved concurrently with redesignation of the Portland/Vancouver area to attainment (see proposed rulemaking, 62 FR 10501, March 7, 1997, at page 10507). On August 11, 2015 (80 FR 48033), the EPA approved SWCAA's maintenance plan update for the Vancouver portion of the Portland/Vancouver area that specifically anticipated and modeled widespread use of ORVR and the full decommissioning of Stage II in the modeling demonstration of continued attainment through 2015. The SWCAA maintenance plan update and the

[1] Unlike Stage II, which is a requirement only in certain ozone nonattainment areas, ORVR requirements apply to vehicles everywhere.

modeling demonstration are included in the docket for this action.

II. SWCAA's SIP Revision

On June 22, 2023, SWCAA, in coordination with the Washington Department of Ecology as the Governor's designee for revisions to the SIP, submitted the current version of SWCAA 491 ''Emission Standards and Controls for Sources Emitting Gasoline Vapors'' (state effective February 7, 2020) for EPA approval. Since the EPA's last approval of SWCAA 491, SWCAA revised the regulations four times. Effective June 24, 2000, SWCAA updated the regulations to revise applicability of the Stage II vapor recovery program, which is now replaced by the applicability provisions of the current SWCAA 491. Other changes to SWCAA 491, effective June 24, 2000, are generally SIP-strengthening in nature including the addition of gasoline marine vessel loading and unloading vapor control requirements, which are now contained in the current version of SWCAA 491. The exact revisions in 2000 are in redline/strikeout format included in the docket for this action under WSR 00–11–149. Effective March 18, 2001 (WSR 01–05–067), SWCAA made minor changes to SWCAA 491 to reflect the name change from ''Southwest Pollution Control Authority'' to ''Southwest Clean Air Agency.'' Effective June 18, 2017 (WSR 17–11–080), SWCAA consolidated all agency fees into a single location and updated the cross reference in SWCAA 491–030 accordingly. We note that the 2000, 2001, and 2017 revisions to SWCAA 491 were not previously submitted as updates to the SIP. However, to the extent these revisions are retained in the current version of SWCAA 491 submitted for approval, we are proposing to determine that these relatively minor changes since our last update to the SIP in 1997 are approvable.

The most substantive changes to SWCAA 491 since the EPA's last approval are detailed in WSR 20–03–031, state effective February 7, 2020. Among other changes, this revision to SWCAA 491 included the following: added a requirement to install enhanced conventional (ECO) nozzles; added a requirement that low permeation hoses be installed on higher volume gasoline dispensing facilities without balance type Stage II vapor recovery equipment by no later than January 1, 2023; added a requirement for annual testing of Stage I vapor recovery systems; [2] added a requirement that new or upgraded gasoline storage tanks be equipped with Stage I enhanced vapor recovery equipment; removed a requirement that gasoline dispensing facilities install Stage II vapor recovery equipment; allowed removal from service of Stage II vapor recovery equipment compatible with ORVR on or after January 1, 2023; allowed removal from service of Stage II vapor recovery equipment incompatible with ORVR on or after January 3, 2020; required removal from service of Stage II vapor recovery equipment incompatible with ORVR no later than January 1, 2023; and revised the applicability threshold for low flow nozzles to align SWCAA rules with Federal rules. In the SIP submittal, SWCAA provided a demonstration that VOC emission reductions from enhanced conventional nozzles and low permeation hoses will outweigh the annual emissions impact of removing Stage II requirements. Therefore, SWCAA requested removal of Stage II vapor recovery system requirements in the SIP for SWCAA's jurisdiction.

III. The EPA's Evaluation of the Revision

The EPA's primary consideration for determining the approvability of SWCAA's revisions to remove Stage II vapor control requirements and provide for decommissioning of Stage II equipment within SWCAA's jurisdiction is whether these revisions comply with section 110(l) of the Act. Section 110(l) requires that a revision to the SIP not interfere with any applicable requirement concerning attainment and reasonable further progress (RFP), or any other applicable requirement of the Act. The EPA can approve a SIP revision that removes or modifies control measures in the SIP once the state or local agency makes a ''noninterference'' demonstration that such removal or modification will not interfere with attainment of the NAAQS, RFP, or any other CAA requirement.

The EPA reviewed SWCAA's submittal with the revised SWCAA 491 regulatory text as well as the accompanying analysis of emissions impacts. We propose to determine that SWCAA's June 22, 2023, SIP revision addresses the EPA's Widespread Use for Onboard Refueling Vapor Recovery and Stage II Waiver (77 FR 28772) and is consistent with the EPA's ''Guidance on Removing Stage II Gasoline Vapor Control Programs from State Implementation Plans and Assessing Comparable Measures'' (EPA–457/B–12–001, August 7, 2012).[3] In accordance with the EPA 2012 Guidance on Removing Stage II, SWCAA submitted a demonstration that the Stage II decommissioning will not interfere with attainment or maintenance of the ozone NAAQS. This demonstration was based on an analysis of precursor VOC emissions from removal of Stage II controls at GDFs, as well as emission reduction benefits from other changes to the regulations such as requirements for enhanced conventional nozzles and low permeation hoses. SWCAA estimated emissions impacts using the guidance methodologies from the EPA 2012 Guidance showing an overall benefit to air quality and a reduction of VOC emissions upon full implementation of the rule requirements in 2023. SWCAA estimated the impact on emissions from decommissioning Stage II in its jurisdiction by using EPA approved equations from the same 2012 guidance, to assess compliance with CAA 110(l). A detailed spreadsheet with the equation calculations and supporting inputs is included in the docket for this action.

The demonstration indicates that the emissions benefit of retaining Stage II requirements is rapidly diminishing with vehicle fleet turnover and ORVR penetration. As discussed in the EPA 2012 Guidance, the EPA has developed equations to assist states in evaluating the emissions consequences of phasing out existing Stage II programs. These equations may be used to calculate an ''increment,'' which identifies the area-wide emission control gained from Stage II installations as ORVR technology phases in. For example, using the equations in the EPA 2012 Guidance, SWCAA calculated the increment declining from 4.0% in 2020 to 1.1% in 2023 for Clark County, the most populous county in SWCAA's jurisdiction. Projecting these increments to full implementation of the rule in 2023, the removal of Stage II vapor recovery systems would result in minimal increases in VOC emissions of 18.31 tons per year (tpy) for SWCAA's entire jurisdiction. Additionally, SWCAA calculated the emission reduction benefits of enhanced conventional nozzles and low permeation hoses. These emission reduction benefits are estimated to be 33.84 tpy, outweighing the emissions increase from decommissioning Stage II

[2] Stage I vapor recovery is a system in which gasoline vapors are forced from the storage tank into a vapor-tight gasoline tank truck or vapor collection and control system through direct displacement by the gasoline loaded into the storage tank.

[3] The guidance document is available at: *https://www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2/20120807_page_stage2_removal_guidance.pdf.*

requirements. Overall, the 2020 regulatory changes are projected to result in a net reduction of 15.99 tpy VOC with full implementation of the rule. In addition, the EPA expects that market saturation of ORVR-equipped vehicles will remain static or increase in the years after 2023, meaning the air quality benefits of these changes will continue into the future.

Lastly, the removal of Stage II is consistent with the current maintenance plan update for the Vancouver portion of the Portland/Vancouver ozone area (80 FR 48033, August 11, 2015). As previously discussed, this maintenance plan update was approved by the EPA in 2015. The associated modeling, included in the docket for this action, anticipated the decommissioning of Stage II in the projection of continued ozone attainment for the 1997 8-hour ozone NAAQS.[4] For the 2008 and 2015 ozone NAAQS, all counties within SWCAA's jurisdiction are designated attainment/unclassifiable. We believe that removal of Stage II vapor recovery systems would have a negligible impact on ozone levels which are offset by the emission reduction benefits of other requirements in the revised SWCAA 491. Thus, we proposed to determine that approval of the SIP revision would not interfere with any applicable requirement concerning attainment and maintenance of any ozone standard and is compliant with CAA section 110(l).

IV. Proposed Action

We are proposing to find that SWCAA's demonstration for removal of Stage II equipment meets section 110(l) of the Act. Therefore, we are proposing to approve and incorporate by reference SWCAA 491 ''Emission Standards and Controls for Sources Emitting Gasoline Vapors'' state effective February 7, 2020. This version of the regulation removes from the Washington SIP the requirement for Stage II vapor recovery systems in SWCAA's jurisdiction and adds additional VOC controls such as the installation of enhanced conventional nozzles and low permeation hoses, as well as other historic changes since the EPA's last approval as discussed in section II of this preamble.

V. Incorporation by Reference

In this document, the EPA is proposing to include in a final rule, regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference SWCAA 491 discussed in section IV of this preamble. The EPA has made, and will continue to make, these documents generally available through *https://www.regulations.gov* and at the EPA Region 10 Office (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 Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Clean Air Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 14094 (88 FR 21879, April 11, 2023);
- 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 subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it approves a state program;
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act.

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

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

The Southwest Clean Air Agency did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA did not perform an EJ analysis and did not consider EJ in this action. Due to the nature of the action being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

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.*

[4] Consistent with EPA guidance, SWCAA evaluated compliance with the 1997 8-hour ozone NAAQS because the former 1-hour ozone NAAQS was replaced by the 1997 8-hour standard. See 62 FR 38856 (July 18, 1997) and 75 FR 24542 (May 5, 2010).

Dated: August 1, 2023.

Casey Sixkiller,

Regional Administrator, Region 10.

[FR Doc. 2023–16791 Filed 8–9–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2023–0023; FF09E21000 FXES1111090FEDR 234]

RIN 1018–BH13

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Sacramento Mountains Checkerspot Butterfly

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*), a butterfly from New Mexico, under the Endangered Species Act of 1973, as amended (Act). In total, approximately 1,636.9 acres (662.4 hectares) in Otero County, New Mexico, fall within the boundaries of the proposed critical habitat designation. We also announce the availability of a draft economic analysis of the proposed designation of critical habitat for the Sacramento Mountains checkerspot butterfly.

DATES: We will accept comments received or postmarked on or before October 10, 2023. Comments submitted electronically using the Federal eRulemaking Portal (see ADDRESSES, below) must be received by 11:59 p.m. eastern time on the closing date. We must receive requests for a public hearing, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by September 25, 2023.

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–R2–ES–2023–0023, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box 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–R2–ES–2023–0023, 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. We will post all comments on *https://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Information Requested, below, for more information).

Availability of supporting materials: For this proposed critical habitat designation, the coordinates or plot points or both from which the maps are generated are included in the decision file for this critical habitat designation and are available, along with other supporting materials, at *https://www.regulations.gov* at Docket No. FWS–R2–ES–2023–0023 and on the Service's website at *https://www.fws.gov/about/region/southwest.*

FOR FURTHER INFORMATION CONTACT: Shawn Sartorius, Field Supervisor, U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna NE, Albuquerque, NM 87113; telephone 505–346–2525. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, when we determine that any species is an endangered or threatened species, we are required to designate critical habitat, to the maximum extent prudent and determinable. Designations of critical habitat can be completed only by issuing a rule through the Administrative Procedure Act rulemaking process (5 U.S.C. 551 *et seq.*).

What this document does. We propose to designate critical habitat for the Sacramento Mountains checkerspot butterfly, which is listed as an endangered species under the Act.

The basis for our action. Under section 4(a)(3) of the Act, if we determine that a species is an endangered or threatened species we must, to the maximum extent prudent and determinable, designate critical habitat. Section 3(5)(A) of the Act defines critical habitat as (i) the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Section 4(b)(2) of the Act states that the Secretary must make the designation on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impacts of specifying any particular area as critical habitat.

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

(1) Specific information on:

(a) The amount and distribution of Sacramento Mountains checkerspot butterfly habitat;

(b) Any additional areas occurring within the range of the species in Otero County, New Mexico, that should be included in the designation because they (i) are occupied at the time of listing and contain the physical or biological features that are essential to the conservation of the species and that may require special management considerations, or (ii) are unoccupied at the time of listing and are essential for the conservation of the species;

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change; and

(d) To evaluate the potential to include areas not occupied at the time of listing, we particularly seek comments regarding whether occupied areas are adequate for the conservation of the species. Additionally, please provide specific information regarding whether or not unoccupied areas would, with reasonable certainty, contribute to the conservation of the species and contain at least one physical or biological feature essential to the

conservation of the species. We also seek comments or information regarding whether areas not occupied at the time of listing qualify as habitat for the species.

(7) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(8) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation, and the related benefits of including or excluding specific areas.

(9) Information on the extent to which the description of probable economic impacts in the draft economic analysis is a reasonable estimate of the likely economic impacts and the description of the environmental impacts in the draft environmental assessment is complete and accurate and any additional information regarding probable economic impacts that we should consider.

(10) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act, in particular for those on Tribal lands. We are considering the land owned by the Mescalero Apache Tribe in Unit 3 (Spud Patch Canyon) for exclusion. If you think we should exclude any additional areas, please provide information supporting a benefit of exclusion.

(11) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, do not provide substantial information necessary to support a determination. Section 4(b)(2) of the Act directs that the Secretary shall designate critical habitat on the basis of the best scientific data available.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *https://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, 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. We will post all hardcopy submissions on *https://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *https://www.regulations.gov.*

Because we will consider all comments and information we receive during the comment period, our final designation may differ from this proposal. Based on the new information we receive (and any comments on that new information), our final designation may not include all areas proposed, may include some additional areas that meet the definition of critical habitat, or may exclude some areas if we find the benefits of exclusion outweigh the benefits of inclusion and exclusion will not result in the extinction of the species.

Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received by the date specified in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing. We may hold the public hearing in person or virtually via webinar. We will announce any public hearing on our website, in addition to the **Federal Register**. The use of virtual public hearings is consistent with our regulations at 50 CFR 424.16(c)(3).

Previous Federal Actions

On January 25, 2022, we published a proposed rule in the **Federal Register** (87 FR 3739) to list the Sacramento Mountains checkerspot butterfly as an endangered species (16 U.S.C. 1531 *et seq.*). At the time of our proposal, we determined that designation of critical habitat was prudent but not determinable because we lacked specific information on the impacts of our designation. In our proposed listing rule, we stated we were in the process of obtaining information on the impacts of the designation. We published the final listing rule on January 31, 2023. Please refer to the proposed and final listing rules (87 FR 3739, January 25, 2022; 88 FR 6177; January 31, 2023) for a detailed description of previous Federal actions concerning this butterfly.

Peer Review

An assessment team prepared a current condition assessment report for the Sacramento Mountains checkerspot butterfly. The assessment team was composed of Service biologists, in consultation with other species experts. The current condition assessment report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past and present factors (both negative and beneficial) affecting the species.

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we solicited independent scientific review of the information contained in the Sacramento Mountains checkerspot butterfly current condition assessment report. We sent the report to five independent peer reviewers and received three responses. Results of this structured peer review process can be found at *https://www.regulations.gov* at Docket No. FWS–R2–ES–2021–0069, which is the docket for the listing rules for the Sacramento Mountains checkerspot butterfly, or Docket No. FWS–R2–ES–2023–0023, which is the docket number for this rulemaking. In preparing this proposed rule, we incorporated the results of these reviews, as appropriate, into the current condition assessment report, which is the foundation for this proposed rule.

Background

The Sacramento Mountains checkerspot butterfly (butterfly) is a subspecies of the Anicia checkerspot, or variable checkerspot, in the Nymphalidae (brush-footed butterfly) family that is native to the Sacramento Mountains in south-central New Mexico. The Sacramento Mountains checkerspot butterfly inhabits high-altitude meadows in the upper-montane and subalpine zone at elevations between 2,380 and 2,750 meters (m) (7,800 and 9,000 feet (ft)) within the Sacramento Mountains, which is an isolated mountain range in south-central New Mexico (Service 2005 et al., p. 9). The species requires host plants for

larvae, nectar sources for adults, and climatic moisture.

Since 1998, populations have been known from 10 meadow units on U.S. Forest Service (Forest Service) land (Forest Service 1999, p. 2). The meadows cover the occupied areas within the species' range and give the most accurate representation of species and habitat conditions available. These meadow units include Bailey Canyon, Pines Meadow Campground, Horse Pasture Meadow, Silver Springs Canyon, Cox Canyon, Sleepygrass Canyon, Spud Patch Canyon, Deerhead Canyon, Pumphouse Canyon, and Yardplot Meadow. The species has been extirpated from several of these meadows recently. The Yardplot Meadow was sold and developed, while suitable habitat in Horse Pasture Meadow was eliminated by logging (Forest Service 2017, p. 3) but has since become somewhat revegetated. No adults or caterpillars have been detected within Pumphouse Canyon since 2003, and the species has likely been extirpated at that site (Forest Service 2017, p. 3). In 2020, all 10 meadows were surveyed for butterflies and larvae; a total of 8 butterflies were detected in only Bailey Canyon and Pines Meadow Campground combined (Forest Service 2020a, p. 3), and no larval tents were found at any site (Forest Service 2020a, pp. 1–3; Hughes 2020, pers. comm.).

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the 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, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation also does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the Federal agency would be required to consult with the Service under section 7(a)(2) of the Act. However, even if the Service were to conclude that the proposed activity would likely result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement ''reasonable and prudent alternatives'' to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat).

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the current condition assessment report (Service 2022, entire) and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented

under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in section 9 of the Act. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of the species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of those planning efforts calls for a different outcome.

Physical or Biological Features Essential to the Conservation of the Species

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas we will designate as critical habitat from within the geographical area occupied by the species at the time of listing, we consider the physical or biological features that are essential to the conservation of the species and which may require special management considerations or protection. The regulations at 50 CFR 424.02 define ''physical or biological features essential to the conservation of the species'' as the features that occur in specific areas and that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features.

A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity. For example, physical features essential to the conservation of the species might include gravel of a particular size required for spawning, alkaline soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or absence of a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic essential to support the life history of the species.

In considering whether features are essential to the conservation of the species, we may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

Summary of Essential Physical or Biological Features

We derive the specific physical or biological features essential to the conservation of Sacramento Mountains checkerspot butterfly from studies of the species' habitat, ecology, and life history as described below. Additional information can be found in the current condition assessment report (Service 2022, entire; available on *https://www.regulations.gov* at Docket No. FWS–R2–ES–2023–0023).

The main larval host plant for the Sacramento Mountains checkerspot butterfly is the New Mexico beardtongue (*Penstemon neomexicanus*) (Ferris and Holland 1980, p. 7), also known as New Mexico penstemon. The larvae rely nearly entirely upon the New Mexico beardtongue during pre- and post-diapause. Because of the Sacramento Mountains checkerspot butterfly's dependency on New Mexico beardtongue, it is vulnerable to any type of habitat degradation that reduces the host plant's health and abundance (Service et al. 2005, p. 9). New Mexico beardtongue is a member of the Plantaginaceae, or figwort, family (Oxelman et al. 2005, p. 425). These perennial plants prefer wooded slopes or open glades in ponderosa pine and spruce/fir forests at elevations between 1,830 and 2,750 m (6,000 and 9,000 ft) (New Mexico Rare Plant Technical Council 1999, entire). New Mexico beardtongue is native to the Sacramento Mountains within Lincoln and Otero Counties (Sivinski and Knight 1996, p. 289). The plant is perennial, has purple or violet-blue flowers, and grows to be half a meter tall (1.9 ft). New Mexico beardtongue occurs in areas with loose soils or where there has been recent soil disturbance, such as eroded banks and pocket gopher burrows (Pittenger and Yori 2003, p. ii).

The preferred adult nectar source is orange sneezeweed (*Hymenoxys hoopesii*), a native perennial forb (Service et al. 2005, p. 9). To contribute to the species' viability, orange sneezeweed must bloom at a time that corresponds with the emergence of adult Sacramento Mountains checkerspot butterflies. Although orange sneezeweed flowers are most frequently used, the butterfly has been observed collecting nectar on various other native nectar sources (Service et al. 2005, pp. 9–10). If orange sneezeweed is not blooming during the adult flight period (*i.e.,* experiencing phenological mismatch), the butterfly's survival and fecundity could decrease.

Before human intervention, the habitat of the Sacramento Mountains checkerspot butterfly was dynamic, with meadows forming and reconnecting due to natural wildfire regimes (Service et al. 2005, p. 21). These patterns would have facilitated natural dispersal and recolonization of meadow habitats following disturbance events, especially when there was high butterfly population density in adjacent meadows (Service et al. 2005, p. 21). Currently, spruce-fir forests punctuate suitable butterfly habitat (*i.e.,* mountain meadows), creating intrinsic barriers to butterfly dispersal and effectively isolating populations from one another (Pittenger and Yori 2003, p. 1). Preliminary genetic research suggested there is extremely low gene flow across the species' range or between meadows surveyed (Ryan 2021, pers. comm.). If new sites are to become colonized or recolonized by the butterfly, meadow areas will need to be connected enough to allow dispersal from occupied areas. Therefore, habitat connectivity is needed for genetically healthy populations across the species' range (Service 2022, p. 11).

We have determined that the following physical or biological features are essential to the conservation of the Sacramento Mountains checkerspot butterfly:

(1) Open meadow, grassland habitat within the larger mixed-conifer forest in high-altitude areas within the upper-montane and subalpine zones at elevations between 2,380 and 2,750 meters (m) (7,800 and 9,000 feet (ft))

within the Sacramento Mountains of southern New Mexico.

(2) The larval food plant (host plant), primarily New Mexico beardtongue (*Penstemon neomexicanus*), or other potential host plants such as other *Penstemon* species and tobacco root (*Valeriana edulis*), is present as:

(a) Patches of plants clustered together;

(b) Large, robust individual plants; and/or

(c) Stands of plants adjacent to other tobacco root plants.

(3) Access to nectar sources, primarily orange sneezeweed (*Hymenoxys hoopesii*), native Asteraceae species, and other native flowering plants.

(4) Habitat connectivity consisting of up to 890 m (2,920 ft) between populations or areas of suitable habitat to allow for dispersal and gene flow.

(5) Less than 5 percent canopy cover.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection.

A detailed discussion of activities influencing the Sacramento Mountains checkerspot butterfly and its habitat can be found in the proposed listing rule (87 FR 3739; January 25, 2022). It is possible all areas of critical habitat may require some level of management to address the current and future threats to the physical or biological features. The features essential to the conservation of this species may require special management considerations or protection to reduce the following threats: incompatible grazing by large ungulates, recreation, invasive and nonnative plants, climate change (*i.e.,* drought, altered precipitation regime), and altered fire regime. Management activities that could ameliorate these threats include, but are not limited to, erecting exclosures or other methods to remove browse pressure from large ungulates; growing and transplanting nectar sources, including orange sneezeweed, New Mexico beardtongue, and other native nectar sources; managing invasive plant species; reducing recreational use; and instituting fire management aimed at reducing tree stocking within forested areas surrounding meadows. These management activities may protect the physical or biological features for the species by improving and protecting suitable habitat and connectivity throughout the range of the butterfly.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat. We are proposing to designate critical habitat in areas within the geographical area occupied by the species at the time of listing. We also are proposing to designate specific areas outside the geographical area occupied by the species because we have determined that a designation limited to occupied areas would be inadequate to ensure the conservation of the species. Occupied areas are inadequate for the conservation of this species because the species needs to have sufficient quality and quantity of habitat for adequately resilient populations, numerous populations to create redundancy to survive catastrophic events, and enough genetic diversity to allow for adaptations to changing environmental conditions (representation) to achieve viability. Currently, the Sacramento Mountains checkerspot butterfly is extant in two locations, representing only two metapopulation units, which is insufficient to support a robust, functioning metapopulation structure and, therefore, the viability of the species. We are reasonably certain that the unoccupied areas will contribute to the conservation of the species and contain one or more of the physical or biological features and are, therefore, considered habitat for the species. Additionally, the unoccupied units qualify as ''habitat'' for the species because they contain the resources necessary (*i.e.,* open meadow, grassland habitat with nectar sources) to support the life processes of the Sacramento Mountains checkerspot butterfly.

To identify critical habitat units for the Sacramento Mountains checkerspot butterfly, we used a variety of sources for species data. We used literature published on the species (Ferris and Holland 1980, entire; Forest Service 1999, entire; Pittenger and Yori 2003, entire) and the conservation plan developed by the Service (2005, entire) to determine habitat needs and locations of the butterfly. We also relied on annual Forest Service survey reports and data collected between 1999 and 2020 (Forest Service 1999, entire; Forest Service 2017, entire; Forest Service 2020a, entire) and associated mapping data (Forest Service 2020b, unpaginated) provided by the Forest Service for areas currently occupied by the Sacramento Mountains checkerspot butterfly and areas surveyed regularly. We supplemented this information with expert knowledge gathered during the development of the current condition assessment report (Service 2022, entire).

We determined that an area (in this case a meadow) was occupied at the time of listing for Sacramento Mountains checkerspot butterfly if:

(1) The meadow is located within the historical range of the species;

(2) The meadow contains at least physical or biological features (1) through (3), and (5), as described above under *Summary of Essential Physical or Biological Features;*

(3) Adults have been observed during surveys from 3 or more of the most recent consecutive years (2021 and earlier); and

(4) There is evidence of reproduction during one of the three most recent consecutive surveys (2021 and earlier).

Therefore, if meadows do not meet these criteria, we determined that those areas were unoccupied at the time of listing. The sources of data for our occupied proposed critical habitat units for the Sacramento Mountains checkerspot butterfly were the original digitized polygons provided by the Forest Service.

For areas outside the geographical area occupied by the species at the time of listing, we delineated critical habitat unit boundaries using the original digitized polygons provided by the Forest Service and the 2020 National Agricultural Imagery Program (NAIP) 0.6-meter imagery. We resampled the NAIP imagery to 1 meter using ESRI ArcGIS Pro and classified that data into two classes: open space or tree cover. We were then able to identify areas that had greater than 95 percent open canopy, as required by the species. Using the Focal Statistics results (95–100 percent) as a guide, we digitized new polygons at the 1:5000 scale and updated the original Forest Service polygons to include and connect areas that meet the definition of critical habitat for the Sacramento Mountains checkerspot butterfly.

In summary, for areas outside the geographical area occupied by the species at the time of listing, we delineated critical habitat unit boundaries using the following criteria:

(1) Areas within the historical range of the species (*i.e.,* areas where the butterfly was detected by Forest Service surveys, but not necessarily in the past 3 consecutive years).

(2) Areas with 95 percent or greater open canopy.

(3) Areas not currently occupied but presumed to be suitable habitat because they contain at least some of the essential physical or biological features.

(4) Habitat that provides connectivity due to its proximity between currently occupied and/or unoccupied areas.

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical or biological features necessary for the Sacramento Mountains checkerspot butterfly. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

We propose to designate as critical habitat lands that we have determined are occupied at the time of listing (*i.e.,* currently occupied) and that contain one or more of the physical or biological features that are essential to support life-history processes of the species. We have determined that occupied areas are inadequate to ensure the conservation of the species. Therefore, we have also identified, and propose for designation as critical habitat, unoccupied areas that are essential for the conservation of the species.

Units are proposed for designation based on one or more of the physical or biological features being present to support the Sacramento Mountains checkerspot butterfly's life-history processes. Some units contain all of the identified physical or biological features and support multiple life-history processes. Some units contain only some of the physical or biological features necessary to support the Sacramento Mountains checkerspot butterfly's particular use of that habitat.

The proposed critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document under Proposed Regulation Promulgation. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to the public on *https://www.regulations.gov* at Docket No. FWS–R2–ES–2023–0023 and on our internet site *https://www.fws.gov/about/region/southwest.*

Proposed Critical Habitat Designation

We are proposing nine units as critical habitat for the Sacramento Mountains checkerspot butterfly. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the Sacramento Mountains checkerspot butterfly. The nine areas we propose as critical habitat are: (1) Bailey Canyon; (2) Pines Meadow Campground; (3) Spud Patch Canyon; (4) Silver Springs Canyon; (5) Horse Pasture Meadow; (6) Sleepygrass Canyon; (7) Pumphouse Canyon; (8) Deerhead Canyon; and (9) Cox Canyon. Table 1 shows the proposed critical habitat units, the approximate area, land ownership, and occupancy of each unit.

TABLE 1—PROPOSED CRITICAL HABITAT UNITS FOR SACRAMENTO MOUNTAINS CHECKERSPOT BUTTERFLY

[Area estimates reflect all land within critical habitat unit boundaries, including areas being considered for exclusion]

Unit name	Occupied	Land ownership * acres (hectares)			Total
		Federal	Tribal	Private	
1. Bailey Canyon	Yes	200.5 (81.1)			200.5 (81.1)
2. Pines Meadow Campground	Yes	62.2 (25.2)		0.2 (0.08)	62.4 (25.2)
3. Spud Patch Canyon	No	203.9 (82.5)	22.4 (9.1)	50.9 (20.6)	277.2 (112.2)
4. Silver Springs Canyon	No	132.9 (53.8)		70.5 (28.5)	203.4 (82.3)
5. Horse Pasture Meadow	No	82.4 (33.4)			82.4 (33.4)
6. Sleepygrass Canyon	No	123.5 (50.0)		100.0 (40.5)	223.5 (90.5)
7. Pumphouse Canyon	No	134.4 (54.4)		2.2 (0.9)	136.6 (55.3)
8. Deerhead Canyon	No	22.1 (8.9)		11.0 (4.5)	33.1 (13.4)
9. Cox Canyon	No	132.1 (53.5)		285.7 (115.6)	417.8 (169.0)
Total		1,093.9 (442.7)	22.4 (9.1)	520.5 (210.6)	1,636.9 (662.4)

* **Note:** Area sizes may not sum due to rounding.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for the Sacramento Mountains checkerspot butterfly, below. All areas in the unoccupied units (Units 3 through 9) meet the definition of critical habitat because they are outside the geographical area occupied by the species at the time of listing, were historically occupied by the Sacramento Mountains checkerspot butterfly, and are essential for the conservation of the species (see each unit description below for details). Units 3 through 9 qualify as habitat for the species because they contain the resources necessary (*i.e.,* open meadow, grassland habitat with nectar sources) to support the life processes of the Sacramento Mountains checkerspot butterfly. The Forest Service is assessing the unoccupied meadows to prioritize them for habitat restoration efforts that would benefit the Sacramento Mountains checkerspot butterfly. Once restored, these areas will be used to establish future occupancy via translocations and reintroductions. Establishing new populations in suitable habitat through captive rearing

and reintroduction or translocation is part of our recovery planning efforts for the Sacramento Mountains checkerspot butterfly. Individuals from extant meadows (Bailey Canyon and Pines Meadow Campground) may be translocated to currently unoccupied meadows once they contain suitable habitat. Additionally, captive rearing efforts are ongoing from which we plan to reintroduction individuals to restored meadows. We are reasonably certain that these areas will contribute to the conservation of the Sacramento Mountains checkerspot butterfly because these areas were historically occupied by the species and, since the species is currently restricted to two canyon systems, it is necessary to expand the existing population into other areas to reach recovery. Furthermore, we are working closely with the Forest Service, where a majority of the proposed critical habitat falls on Forest Service-managed lands, to ensure conservation measures and habitat restoration are conducted and ongoing in all areas possible to support the species for translocations and reintroductions. Additionally, the threats specified in each unit (see descriptions below), can be managed in ways to ensure survival and future reproduction of reintroduced populations. Site-specific reasons that we are reasonably certain that each area will contribute to the conservation of the species are explained below.

Unit 1: Bailey Canyon

Unit 1 consists of approximately 200.5 ac (81.1 ha) and is in the Sacramento Ranger District in the northwestern portion of the butterfly's range. The unit is occupied and is located entirely on the Lincoln National Forest. This unit contains physical or biological features (1) through (3) and (5), as described above under *Summary of Essential Physical or Biological Features.*

Threats that are occurring in this area include incompatible grazing by large ungulates, recreation, invasive and nonnative plants, climate change, and altered fire regime. The Forest Service is actively managing this unit by surveying for the butterfly during the active period, erecting exclosures to allow habitat to recover, and planting New Mexico beardtongue and other native nectar sources. This unit may require special management considerations to control invasive plant species, reduce recreational use, and reduce or remove browse pressure from large ungulates.

Unit 2: Pines Meadow Campground

Unit 2 consists of approximately 62.4 ac (25.2 ha) and is located in the northwestern portion of the butterfly's range. The unit is primarily in the Sacramento Ranger District. The unit is occupied and contains all of the physical or biological features described above under *Summary of Essential Physical or Biological Features.*

Threats that are occurring in this area include incompatible grazing by large ungulates, recreation, invasive and nonnative plants, climate change, and altered fire regime. The Forest Service is actively managing some areas of this unit by surveying for the butterfly during the species' active period and erecting exclosures to allow habitat to recover. This unit may require special management considerations to control invasive plant species, reduce recreational use, and reduce or remove browse pressure from f large ungulates.

Unit 3: Spud Patch Canyon

Unit 3 consists of a total of approximately 277.2 ac (112.2 ha) and is located in the northeastern portion of the butterfly's historical range. The unit is primarily within the Sacramento Ranger District. This unit contains physical or biological features (1) through (3) and (5), as described above under *Summary of Essential Physical or Biological Features.* This unit is unoccupied and is essential for the conservation of the species because it contains most of the physical or biological features essential to the species and was historically occupied by the species. This unit would provide a suitable reintroduction site for the species and once established, would increase the species redundancy and representation by serving as a separate source population should any catastrophic events impact the other meadows proposed for designation as critical habitat. The Forest Service is currently conducting riparian restoration in this area, which will help expand and revitalize habitat for the Sacramento Mountains checkerspot butterfly through the reestablishment of native plant species. Because this unit is mostly located on Federal land and would contribute to metapopulation dynamics and genetic rescue should a population be reestablished, we are reasonably certain that the unit will contribute to the conservation of the species.

Threats that are occurring in this area include incompatible grazing by large ungulates, recreation, invasive and nonnative plants, climate change, and altered fire regime. The Forest Service is surveying for adult butterflies annually in some of the areas on the Lincoln National Forest in this unit. Within this unit, a total of 22.4 ac (9.1 ha) of land owned by the Mescalero Apache Tribe is being considered for exclusion.

Unit 4: Silver Springs Canyon

Unit 4 consists of approximately 203.4 ac (82.3 ha) in the north-central portion of the butterfly's historical range and lies to the northeast of the village of Cloudcroft. The unit is partly within the Sacramento Ranger District and is unoccupied. This unit contains physical or biological features (1), (3), and (5), as described above under *Summary of Essential Physical or Biological Features.* This unit is essential for the conservation of the species because it contains most of the physical or biological features essential to the conservation of the species and would increase species redundancy and representation by serving as a separate population from the other meadows proposed for designation as critical habitat if a population is reestablished in this areas in the future, contributing to metapopulation dynamics while enhancing connectivity between meadows with recently detected butterflies and meadows that contain suitable habitat. Because this unit is primarily on federally owned lands and abuts areas that are currently occupied by the Sacramento Mountains checkerspot butterfly, we are reasonably certain that the unit will contribute to the conservation of the species.

Threats that are occurring in this area include incompatible grazing by large ungulates, recreation, invasive and nonnative plants, climate change, and altered fire regime. The Forest Service is also surveying the areas on the Lincoln National Forest in this unit annually for adult butterflies.

Unit 5: Horse Pasture Meadow

Unit 5 consists of approximately 82.4 ac (33.4 ha) and is located in the central portion of the butterfly's historical range. It lies to the east of the village of Cloudcroft. This unit is unoccupied, contains all of the physical or biological features described above under *Summary of Essential Physical or Biological Features,* and is entirely on the Lincoln National Forest in the Sacramento Ranger District. This unit is essential for the conservation of the species because it contains all of the physical or biological features essential to the conservation of the species and would increase species redundancy by serving as a separate population from other meadows proposed for designation as critical habitat should a

population be reestablished in this area in the future, contributing to metapopulation dynamics while enhancing connectivity between meadows with recently detected butterflies and meadows that contain suitable habitat. Because this unit abuts an area that is currently occupied by the Sacramento Mountains checkerspot butterfly, we are reasonably certain that the unit will contribute to the conservation of the species.

Threats that are occurring in this area include incompatible grazing by large ungulates, recreation, invasive and nonnative plants, climate change, and altered fire regime. Suitable habitat in Horse Pasture Meadow was previously eliminated by logging to create a helicopter pad. The butterfly has not been detected in this unit since construction of the helicopter pad, which was constructed for helicopters that transport people and supplies to fight forest fires. The helicopter pad is no longer there, and there is open meadow habitat. This unit has been somewhat revegetated, and New Mexico beardtongue and nectar sources now exist in this area. Additional habitat restoration techniques could be used to restore butterfly habitat in this area. Forest Service is planning to actively manage this former habitat to encourage species recovery.

Unit 6: Sleepygrass Canyon

Unit 6 consists of approximately 223.5 ac (90.5 ha) and is located in the central portion of the butterfly's historical range, east of the village of Cloudcroft. This unit is unoccupied; 55.3 percent of the unit is located on the Lincoln National Forest in the Sacramento Ranger District, and 44.7 percent is located on privately owned land. This unit contains all of the physical or biological features described above under *Summary of Essential Physical or Biological Features.* This unit is essential for the conservation of the species because it contains all of the physical or biological features and would increase species redundancy by serving as a separate population from other meadows proposed for designation as critical habitat should a population be reestablished in this area in the future, while enhancing connectivity between meadows with recently detected butterflies and meadows that contain suitable habitat. Because this unit would contribute to metapopulation dynamics should a population be reestablished, is located partially on Federal land, and abuts two other areas that contain several of the essential physical or biological features for the Sacramento Mountains checkerspot butterfly, we are reasonably certain that the unit will contribute to the conservation of the species.

Threats that are occurring in this area include incompatible grazing by large ungulates, recreation, invasive and nonnative plants, climate change, and altered fire regime. Forest Service is surveying areas on the Lincoln National Forest in this unit annually for adult butterflies.

Unit 7: Pumphouse Canyon

Unit 7 consists of a total of approximately 136.6 ac (55.3 ha) and is located in the southern portion of the butterfly's range, southeast of the village of Cloudcroft. The unit is unoccupied and contains physical or biological features (1) through (3) and (5), as described above under *Summary of Essential Physical or Biological Features.* This unit is essential for the conservation of the species because it contains several of the physical or biological features essential to the conservation of the species and would increase species redundancy and representation by, while enhancing connectivity between meadows with recently detected butterflies and meadows that contain suitable habitat, and serving as a separate population from other meadows proposed for designation as critical habitat should a population be reestablished in this area in the future. Because this unit abuts an area that contains several of the essential physical or biological features for the Sacramento Mountains checkerspot butterfly, and is located mostly on Federal lands, we are reasonably certain that the unit will contribute to the conservation of the species.

A portion of this unit is part of an active grazing allotment. The Forest Service consults on active grazing allotment permits every 5 years. Threats that are occurring in this area include incompatible grazing by large ungulates (including livestock), recreation, invasive and nonnative plants, climate change, and altered fire regime. The Forest Service restored this area using invasive species management, and native habitat has already been established. The Forest Service is also surveying the portions of this unit located on the Lincoln National Forest for adult butterflies annually.

Unit 8: Deerhead Canyon

Unit 8 consists of approximately 33.1 ac (13.4 ha) and is southeast of the village of Cloudcroft in the southern portion of the butterfly's historical range. This unit is unoccupied and contains physical or biological features (1) through (3) and (5), as described above under *Summary of Essential Physical or Biological Features.* This unit is essential for the conservation of the species because it contains most of the physical or biological features essential to the conservation of the species, and would increase species redundancy and representation by serving as a separate source population should any catastrophic events impact the other meadows proposed for designation as critical habitat should a population be reestablished in this area in the future, while enhancing connectivity between meadows with suitable habitat. Because this unit is mostly located on Federal land and would contribute to metapopulation dynamics and genetic rescue if a population were to be reestablished in this area, we are reasonably certain that the unit will contribute to the conservation of the species.

Threats that are occurring in this area include incompatible grazing by large ungulates, recreation, invasive and nonnative plants, climate change, and altered fire regime. The Forest Service is surveying the portions of this unit on the Lincoln National Forest for adult butterflies annually.

Unit 9: Cox Canyon

Unit 9 consists of approximately 417.8 ac (169.0 ha) and is located in the southern portion of the butterfly's historical range, south of the village of Cloudcroft. This unit is unoccupied; 31.62 percent is located on the Lincoln National Forest, and 68.38 percent is located on privately owned land. This unit contains physical or biological features (1) through (3) and (5), as described above under *Summary of Essential Physical or Biological Features.* This unit is essential for the conservation of the species because it contains most of the physical or biological features essential to the conservation of the species and would increase species redundancy and representation by serving as a separate source population from other meadows proposed for designation as critical habitat if a population were to be reestablished here, while enhancing connectivity between meadows with recently detected butterflies and meadows that contain suitable habitat. Because this unit would contribute to metapopulation dynamics should a population be reestablished, we are reasonably certain that the unit will contribute to the conservation of the species.

Threats that are occurring in this area include incompatible grazing by large ungulates, recreation, invasive and

nonnative plants, climate change, and altered fire regime. Forest Service is surveying the portions of this unit on the Lincoln National Forest for adult butterflies annually.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

We published a final rule revising the definition of destruction or adverse modification on August 27, 2019 (84 FR 44976). Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation.

Compliance with the requirements of section 7(a)(2) is documented through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Service Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 set forth requirements for Federal agencies to reinitiate consultation on previously reviewed actions. These requirements apply when the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law) and, subsequent to the previous consultation: (a) if the amount or extent of taking specified in the incidental take statement is exceeded; (b) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (c) if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or (d) if a new species is listed or critical habitat designated that may be affected by the identified action. The reinitiation requirement applies only to actions that remain subject to some discretionary Federal involvement or control. As provided in 50 CFR 402.16, the requirement to reinitiate consultations for new species listings or critical habitat designation does not apply to certain agency actions (*e.g.,* land management plans issued by the Bureau of Land Management in certain circumstances.

Application of the ''Destruction or Adverse Modification'' Standard

The key factor related to the destruction or adverse modification determination is whether implementation of the proposed Federal action directly or indirectly alters the designated critical habitat in a way that appreciably diminishes the value of the critical habitat for the conservation of the listed species. As discussed above, the role of critical habitat is to support the physical or biological features essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may violate section 7(a)(2) of the Act by destroying or adversely modifying such habitat, or that may be affected by such designation.

Activities that we may, during a consultation under section 7(a)(2) of the Act, consider likely to destroy or adversely modify critical habitat include, but are not limited to:

(1) Actions that would remove or alter Sacramento Mountains checkerspot butterfly's native food plants (New Mexico beardtongue, orange sneezeweed, and other native nectar sources), or tobacco root. Such activities could include, but are not limited to, grading, leveling, plowing, mowing, burning, herbicide or pesticide spraying, incompatible grazing, or otherwise disturbing non-forested openings that result in the death of or injury to eggs, larvae, or adult Sacramento Mountains checkerspot butterflies. These activities could significantly impair or eliminate the habitat necessary for the taxon's breeding, foraging, sheltering, or other essential life functions.

(2) Actions that would alter the soil structure on which native food plants are dependent. Such activities could include, but are not limited to, erosion control activities, such as the installation of structures or vegetation and grading for construction purposes. These activities could significantly impair or eliminate the habitat that is essential for the survival and reproduction of Sacramento Mountains checkerspot butterfly's native food plants.

Exemptions

Application of Section 4(a)(3) of the Act

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that the Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense (DoD), or designated for its use, that are subject to an integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act Improvement Act of 1997 (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. No DoD lands with a completed INRMP are within the proposed critical habitat designation.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. Exclusion decisions are governed by the regulations at 50 CFR 424.19 and the Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (hereafter, the ''2016 Policy''; 81 FR 7226, February 11, 2016), both of which were developed jointly with the National Marine Fisheries Service (NMFS). We also refer to a 2008 Department of the Interior Solicitor's opinion entitled, ''The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act'' (M–37016).

In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise discretion to exclude the area only if such exclusion would not result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor. In our final rules, we explain any decision to exclude areas, as well as decisions not to exclude, to demonstrate that the decision is reasonable. We describe below the process that we use for taking into consideration each category of impacts and any initial analyses of the relevant impacts.

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact of a proposed critical habitat designation is analyzed by comparing scenarios both ''with critical habitat'' and ''without critical habitat.''

The ''without critical habitat'' scenario represents the baseline for the analysis, which includes the existing regulatory and socio-economic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (*e.g.,* under the Federal listing as well as other Federal, State, and local regulations). Therefore, the baseline represents the costs of all efforts attributable to the listing of the species under the Act (*i.e.,* conservation of the species and its habitat incurred regardless of whether critical habitat is designated). The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts would not be expected without the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct a discretionary 4(b)(2) exclusion analysis.

Executive Orders (E.O.s) 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with the E.O. regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly affected entities, where practicable and reasonable. If sufficient data are available, we assess to the extent practicable the probable impacts to both directly and indirectly affected entities Section 3(f) of E.O. 12866 identifies four criteria when a regulation is considered a ''significant regulatory action'' and requires additional analysis, review, and approval if met. The criterion relevant here is whether the designation of critical habitat may have an economic effect of $200 million or more in any given year (section 3(f)(1)). Therefore, our consideration of economic impacts uses a screening analysis to assess whether a designation of critical habitat for Sacramento Mountains checkerspot butterfly is likely to exceed the economically significant threshold.

For this particular designation, we developed an incremental effects memorandum (IEM) considering the probable incremental economic impacts that may result from this proposed designation of critical habitat. The information contained in our IEM was then used to develop a screening analysis of the probable effects of the designation of critical habitat for the Sacramento Mountains checkerspot butterfly (IEc 2023, entire). We began by conducting a screening analysis of the proposed designation of critical habitat in order to focus our analysis on the key factors that are likely to result in incremental economic impacts. The purpose of the screening analysis is to filter out particular geographical areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. In particular, the screening analysis considers baseline costs (*i.e.,* absent critical habitat designation) and includes any probable incremental economic impacts where land and water use may already be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species. Ultimately, the screening analysis allows us to focus our analysis on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation.

The presence of the listed species in occupied areas of critical habitat means that any destruction or adverse modification of those areas is also likely to jeopardize the continued existence of the species. Therefore, designating occupied areas as critical habitat typically causes little if any incremental impact above and beyond the impact of listing the species. As a result, we generally focus the screening analysis on areas of unoccupied critical habitat (unoccupied units or unoccupied areas within occupied units). Overall, the screening analysis assesses whether designation of critical habitat is likely to result in any additional management or conservation efforts that may incur incremental economic impacts. This screening analysis combined with the information contained in our IEM constitute what we consider to be our draft economic analysis (DEA) of the proposed critical habitat designation for the Sacramento Mountains checkerspot butterfly; our DEA is summarized in the narrative below.

As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from the proposed designation of critical habitat for the Sacramento Mountains checkerspot butterfly, first we identified, in the IEM dated November 3, 2022, probable incremental economic impacts associated with the following categories of activities: (1) Fire management (*i.e.,* fuels reduction projects, controlled burns); (2) habitat restoration (*i.e.,* growing and planting native plants, building and maintaining exclosures, selective watering); (3) erosion control; (4) invasive plant management; (5) recreation management; (6) road construction and maintenance; and (7) grazing. We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement. Critical habitat designation generally will not affect activities that do not have any Federal involvement; under the Act, designation of critical habitat affects only activities conducted, funded, permitted, or authorized by Federal agencies. In areas where the Sacramento Mountains checkerspot butterfly is present, Federal agencies are already required to consult with the Service under section 7 of the Act on activities they fund, permit, or implement that may affect the species. If we finalize this proposed critical habitat designation, Federal agencies would be required to consider the effects of their actions on the designated habitat, and if the Federal action may affect critical habitat, our consultations will include an evaluation of measures to avoid the destruction or adverse modification of critical habitat.

In our IEM, we attempted to clarify the distinction between the effects that would result from the species being listed and those attributable to the critical habitat designation (*i.e.,* difference between the jeopardy and adverse modification standards) for the Sacramento Mountains checkerspot butterfly's critical habitat. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this proposed designation of critical habitat.

The proposed critical habitat designation for the Sacramento Mountains checkerspot butterfly includes approximately 1,636.9 acres (662.4 hectares) in nine units in Otero County, New Mexico. Two of the units are occupied, and seven of the units are unoccupied, by the Sacramento Mountains checkerspot butterfly. The unoccupied areas comprise 84 percent of the total proposed critical habitat area. Approximately 32 percent of the total proposed designation is located on private lands, 67 percent on Federal lands, and 1 percent on Tribal lands.

For the areas that are occupied by the species (16 percent of the proposed critical habitat designation), the economic impacts of designating critical habitat under section 7 of the Act are likely limited to additional administrative efforts to consider adverse modification under section 7. This is because any activities occurring in these areas and that require Federal approval or funding will be subject to section 7 consultation requirements regardless of critical habitat designation because the species may be present and any recommended project modifications to avoid adversely modifying critical habitat are the same as those needed to avoid jeopardizing the species.

For the areas unoccupied by the species (84 percent of the proposed critical habitat designation), incremental section 7 costs may include the administrative costs of consultation, as well as the costs of developing and implementing conservation measures for the species. This may include invasive species management activities, feral horse/large ungulate management activities (including fencing), and other land management activities by the Forest Service on the Lincoln National Forest. On private lands, consultation activities and related conservation actions are anticipated to be limited. Because a portion of Unit 3 (Spud Patch Canyon) is on Mescalero Apache Tribal land, we are considering that area for exclusion. Therefore, the probable economic impact may be less than anticipated for this unit.

The overall incremental costs of critical habitat designation for the Sacramento Mountains checkerspot butterfly are anticipated to be less than $117,000 per year during the next 10 years. In total, fewer than one programmatic consultation, one formal consultation, two informal consultations, and six technical assistance efforts are anticipated to occur annually in proposed critical habitat areas. The incremental administrative costs of consultations are approximately $32,000 per year (2022 dollars). Project modifications in unoccupied habitat for the Sacramento Mountains checkerspot butterfly have the potential to increase conservation in these areas, resulting in an incremental benefit. Data limitations preclude our ability to monetize these benefits; however, project modifications are unlikely to exceed $200 million in a given year. Data limitations impede our ability to confidently estimate the total incremental costs of establishing critical habitat for the Sacramento Mountains checkerspot butterfly. However, available information suggests it is unlikely that the incremental costs will reach $200 million in a given year based on the estimated annual number of consultations and per-unit consultation costs. The designation is unlikely to trigger additional requirements under State or local regulations and is not expected to affect property values.

We are soliciting data and comments from the public on the DEA discussed above. During the development of a final designation, we will consider the information presented in the DEA and any additional information on economic impacts we receive during the public comment period to determine whether any specific areas should be excluded from the final critical habitat designation under the authority of section 4(b)(2) of the Act, our implementing regulations at 50 CFR 424.19, and the 2016 Policy. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

Consideration of National Security Impacts

Section 4(a)(3)(B)(i) of the Act may not cover all DoD lands or areas that pose potential national-security concerns (*e.g.,* a DoD installation that is in the process of revising its INRMP for a newly listed species or a species previously not covered). If a particular area is not covered under section 4(a)(3)(B)(i), then national-security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of ''critical habitat.'' However, the Service must still consider impacts on national security, including homeland security, on those lands or areas not covered by section 4(a)(3)(B)(i) because section 4(b)(2) requires the Service to consider those impacts whenever it designates critical habitat. Accordingly, if DoD, Department of Homeland Security (DHS), or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns, or we have otherwise identified national-security or homeland-security impacts from designating particular areas as critical habitat, we generally have reason to consider excluding those areas.

However, we cannot automatically exclude requested areas. When DoD, DHS, or another Federal agency requests exclusion from critical habitat on the basis of national-security or homeland-security impacts, we must conduct an exclusion analysis if the Federal requester provides information, including a reasonably specific justification of an incremental impact on national security that would result from the designation of that specific area as critical habitat. That justification could include demonstration of probable impacts, such as impacts to ongoing border-security patrols and surveillance activities, or a delay in training or facility construction, as a result of compliance with section 7(a)(2) of the Act. If the agency requesting the exclusion does not provide us with a reasonably specific justification, we will contact the agency to recommend that it provide a specific justification or clarification of its concerns relative to the probable incremental impact that could result from the designation. If we conduct an exclusion analysis because the agency provides a reasonably specific justification or because we decide to exercise the discretion to conduct an exclusion analysis, we will defer to the expert judgment of DoD, DHS, or another Federal agency as to: (1) Whether activities on its lands or waters, or its activities on other lands or waters, have national-security or homeland-security implications; (2) the importance of those implications; and (3) the degree to which the cited implications would be adversely affected in the absence of an exclusion. In that circumstance, in conducting a discretionary section 4(b)(2) exclusion analysis, we will give great weight to national-security and homeland-security concerns in analyzing the benefits of exclusion.

In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for the Sacramento Mountains checkerspot butterfly are not owned or managed by the DoD or DHS, and, therefore, we anticipate no impact on national security or homeland security.

Consideration of Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security discussed above. To identify other relevant impacts that may affect the exclusion analysis, we consider a number of factors, including whether there are permitted conservation plans covering the species in the area—such as HCPs, safe harbor agreements (SHAs), or candidate conservation agreements with assurances (CCAAs)—or whether there are non-permitted conservation agreements and partnerships that may be impaired by designation of, or exclusion from, critical habitat. In addition, we look at whether Tribal conservation plans or partnerships, Tribal resources, or government-to-government relationships of the United States with Tribal entities may be affected by the designation. We also consider any State, local, social, or other impacts that might occur because of the designation.

When analyzing other relevant impacts of including a particular area in a designation of critical habitat, we weigh those impacts relative to the conservation value of the particular area. To determine the conservation value of designating a particular area, we consider a number of factors, including, but not limited to, the additional regulatory benefits that the area would receive due to the protection from destruction or adverse modification as a result of actions with a Federal nexus, the educational benefits of mapping essential habitat for recovery of the listed species, and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat.

In the case of the Sacramento Mountains checkerspot butterfly, the benefits of critical habitat include public awareness of the presence of the Sacramento Mountains checkerspot butterfly and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for the Sacramento Mountains checkerspot butterfly due to protection from destruction or adverse modification of critical habitat. Continued implementation of an ongoing management plan that provides conservation equal to or more than the protections that result from a critical habitat designation would reduce those benefits of including that specific area in the critical habitat designation.

After identifying the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to evaluate whether the benefits of exclusion outweigh those of inclusion. If our analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, we then determine whether exclusion would result in extinction of the species. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the designation.

Tribal Lands

Several Executive Orders, Secretary's Orders, and policies concern working with Tribes. These guidance documents generally confirm our trust responsibilities to Tribes, recognize that Tribes have sovereign authority to control Tribal lands, emphasize the importance of developing partnerships with Tribal governments, and direct the Service to consult with Tribes on a government-to-government basis.

A joint Secretary's Order that applies to both the Service and NMFS—Secretary's Order 3206, *American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the Endangered Species Act* (June 5, 1997) (S.O. 3206)—is the most comprehensive of the various guidance documents related to Tribal relationships and Act implementation, and it provides the most detail directly relevant to the designation of critical habitat. In addition to the general direction discussed above, the appendix to S.O. 3206 explicitly recognizes the right of Tribes to participate fully in any listing process that may affect Tribal rights or Tribal trust resources; this includes the designation of critical habitat. Section 3(B)(4) of the appendix requires the Service to consult with affected Tribes, ''when considering the designation of critical habitat in an area that may impact Tribal trust resources, Tribally-

owned fee lands, or the exercise of Tribal rights.'' That provision also instructs the Service to avoid including Tribal lands within a critical habitat designation unless the area is essential to conserve a listed species, and it requires the Service to ''evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.''

Our implementing regulations at 50 CFR 424.19 and the 2016 Policy are consistent with S.O. 3206. When we undertake a discretionary exclusion analysis under section 4(b)(2) of the Act, in accordance with S.O. 3206, we consult with any Tribe whose Tribal trust resources, tribally owned fee lands, or Tribal rights may be affected by including any particular areas in the designation. We evaluate the extent to which the conservation needs of the species can be achieved by limiting the designation to other areas and give great weight to Tribal concerns in analyzing the benefits of exclusion.

However, S.O. 3206 does not override the Act's statutory requirement of designation of critical habitat. As stated above, we must consult with any Tribe when a designation of critical habitat may affect Tribal lands or resources. The Act requires us to identify areas that meet the definition of ''critical habitat'' (*i.e.,* areas occupied at the time of listing that contain the essential physical or biological features that may require special management considerations or protection and unoccupied areas that are essential to the conservation of a species), without regard to land ownership. While S.O. 3206 provides important direction, it expressly states that it does not modify the Secretary's statutory authority under the Act or other statutes. The proposed critical habitat designation includes Mescalero Apache Tribal lands.

Mescalero Apache Tribal Resources— The Mescalero Apache Tribe owns 22.4 ac (9.1 ha) of land in the Spud Patch Canyon Unit (Unit 3). The Mescalero Apache Tribe does not have any conservation plans regarding the Sacramento Mountains checkerspot butterfly. We solicited information from the Mescalero Apache Tribe within the range of the Sacramento Mountains checkerspot butterfly to inform the development of the current condition assessment report, but we did not receive a response. We also provided the Mescalero Apache Tribe the opportunity to review a draft of the current condition assessment report and provide input prior to making our final determination on the status of the Sacramento Mountains checkerspot butterfly. The Mescalero Apache Tribe is a valued partner in endangered species conservation within the State of New Mexico. We have recently invited the Mescalero Apache Tribe to participate in conducting surveys for the Sacramento Mountains checkerspot butterfly on Forest Service land. We recognize and endorse their fundamental right to provide for Tribal resource management activities and we will continue to coordinate with the Mescalero Apache Tribe on this rulemaking.

Summary of Exclusions Considered Under 4(b)(2) of the Act

We are considering excluding the following areas under section 4(b)(2) of the Act from the final critical habitat designation for the Sacramento Mountains checkerspot butterfly: 22.4 ac (9.1 ha) of land owned by the Mescalero Apache Tribe in Unit 3 of the Spud Patch Canyon Unit based on Tribal resources and government-to-government relationships of the United States with Tribal entities. We specifically solicit comments on the inclusion or exclusion of such areas. If through this proposed rule's public comment period (see **DATES**, above) we receive information that we determine indicates that there are potential economic, national security, or other relevant impacts from designating particular areas as critical habitat, then as part of developing the final designation of critical habitat, we will evaluate that information and may conduct a discretionary exclusion analysis to determine whether to exclude those areas under authority of section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19. If we receive a request for exclusion of a particular area and after evaluation of supporting information we do not exclude, we will fully describe our decision in the final rule for this action.

Required Determinations

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 feel 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 are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Regulatory Planning and Review—Executive Orders 12866, 13563, and 14094

Executive Order 14094 reaffirms the principles of E.O. 12866 and E.O. 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and are consistent with E.O. 12866, E.O. 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law. 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 final rule in a manner consistent with these requirements.

E.O. 12866, as reaffirmed by E.O. 13563 and E.O. 14094, provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is not significant.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an 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 effects 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 the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not

have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine whether potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

Under the RFA, as amended, and as understood in light of recent court decisions, Federal agencies are required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself; in other words, the RFA does not require agencies to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies would be directly regulated if we adopt the proposed critical habitat designation. The RFA does not require evaluation of the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities would be directly regulated by this rulemaking, the Service certifies that, if made final as proposed, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if made final, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare statements of energy effects when undertaking certain actions. In our economic analysis, we did not find that this proposed critical habitat designation would significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no statement of energy effects is required.

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.*), we make the following finding:

(1) This proposed rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or Tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions are not likely to destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule would significantly or uniquely affect small governments because it will not produce a Federal mandate of $100 million or greater in any year, that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments. Therefore, a small government agency plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the Sacramento Mountains checkerspot butterfly in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical

habitat does not affect land ownership, or establish any closures, or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed for the proposed designation of critical habitat for the Sacramento Mountains checkerspot butterfly, and it concludes that, if adopted, this designation of critical habitat does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this proposed critical habitat designation with, appropriate State resource agencies. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the proposed rule does not have substantial direct effects either on the States, or on the relationship between the Federal government and the States, or on the distribution of powers and responsibilities among the various levels of government. The proposed designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical or biological features of the habitat necessary for the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist State and local governments in long-range planning because they no longer have to wait for case-by-case section 7 consultations to occur.

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) of the Act would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, this proposed rule identifies the physical or biological features essential to the conservation of the species. The proposed areas of critical habitat are presented on maps, and the proposed rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain information collection requirements, and a submission to OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is not required. 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 (42 U.S.C. 4321 et seq.)

Regulations adopted pursuant to section 4(a) of the Act are exempt from the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) and do not require an environmental analysis under NEPA. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This includes listing, delisting, and reclassification rules, as well as critical habitat designations. In a line of cases starting with *Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), the courts have upheld this position.

However, when any of the areas that meet the definition of ''critical habitat'' for the species are in States within the Tenth Circuit, such as that of the Sacramento Mountains checkerspot butterfly, we undertake a NEPA analysis for that critical habitat designation consistent with the Tenth Circuit ruling in *Catron County Board of Commissioners* v. *U.S. Fish and Wildlife Service,* 75 F.3d 1429 (10th Cir. 1996). We invite the public to comment on the extent to which this proposed critical habitat designation may have a significant impact on the human environment or fall within one of the categorical exclusions for actions that have no individual or cumulative effect on the quality of the human environment. We will complete our analysis, in compliance with NEPA, before finalizing this proposed rule.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), E.O. 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes on a government-to-government basis. In accordance with Secretary's Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We solicited information from the Mescalero Apache Nation within the range of the Sacramento Mountains checkerspot butterfly to inform the development of the current condition assessment report, but we did not receive a response. We will continue to work with Tribal entities during the development of a final rule for the designation of critical habitat for the Sacramento Mountains checkerspot butterfly.

References Cited

A complete list of references cited in this rulemaking is available on the internet at *https://www.regulations.gov* and upon request from the New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the Fish

and Wildlife Service's Species Assessment Team and the New Mexico Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B 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.

■ 2. In § 17.95, amend paragraph (i) by adding an entry for ''Sacramento Mountains Checkerspot Butterfly (*Euphydryas anicia cloudcrofti*)'' following the entry for ''Quino Checkerspot Butterfly (*Euphydryas editha quino*)'' to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(i) *Insects.*

* * * * *

Sacramento Mountains Checkerspot Butterfly (*Euphydryas anicia cloudcrofti*)

(1) Critical habitat units are depicted for Otero County, New Mexico, on the maps in this entry.

(2) Within these areas, the physical or biological features essential to the conservation of the Sacramento Mountains checkerspot butterfly consist of the following components:

(i) Open meadow, grassland habitat within the larger mixed-conifer forest in high-altitude areas within the upper-montane and subalpine zones at elevations between 2,380 and 2,750 meters (m) (7,800 and 9,000 feet (ft)) within the Sacramento Mountains of southern New Mexico.

(ii) The larval food plant (host plant), primarily New Mexico beardtongue (*Penstemon neomexicanus*), or other potential host plants such as other *Penstemon* species and tobacco root (*Valeriana edulis*), is present as:

(A) Patches of plants clustered together;

(B) Large, robust individual plants; and/or

(C) Stands of plants adjacent to other tobacco root plants.

(iii) Access to nectar sources, primarily orange sneezeweed (*Hymenoxis hoopesii*), native Asteraceae species, and other native flowering plants.

(iv) Habitat connectivity consisting of less than 890 m (2,920 ft) between populations or areas of suitable habitat to allow for dispersal and gene flow.

(v) Less than 5 percent canopy cover.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of the final rule.

(4) Data layers defining map units were created using U.S. Department of Agriculture, Forest Service shapefiles delimiting the known range of the species based on surveys. Then additional areas were mapped using satellite imagery of meadow habitat within the appropriate elevation (2,380 to 2,750 m (7,800 to 9,000 feet)). The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet site at *https://www.fws.gov/about/region/southwest,* at *https://www.regulations.gov* at Docket No. FWS–R2–ES–2023–0023, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Index map follows:

Figure 1 to Sacramento Mountains Checkerspot Butterfly (*Euphydryas anicia cloudcrofti*) paragraph (5)

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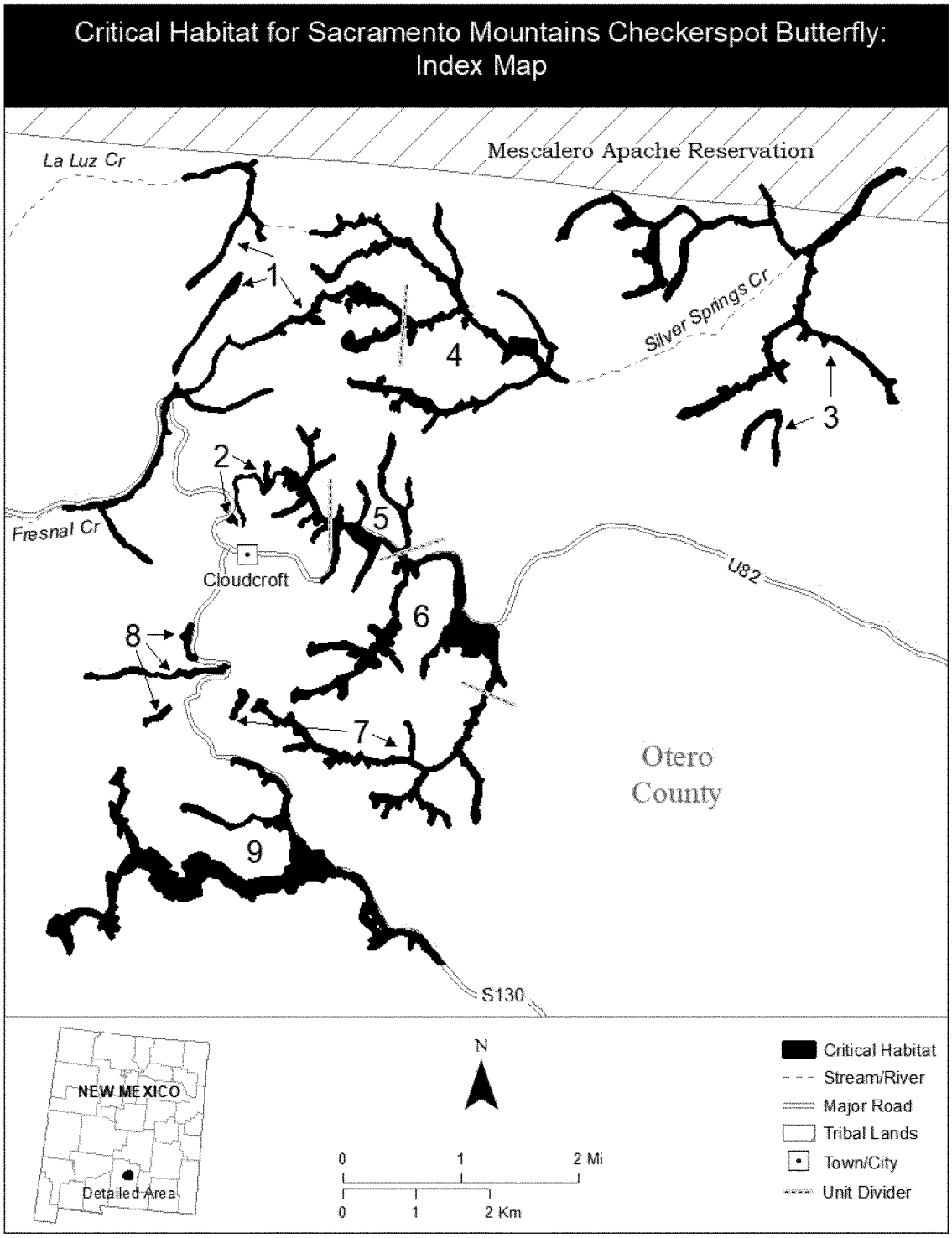
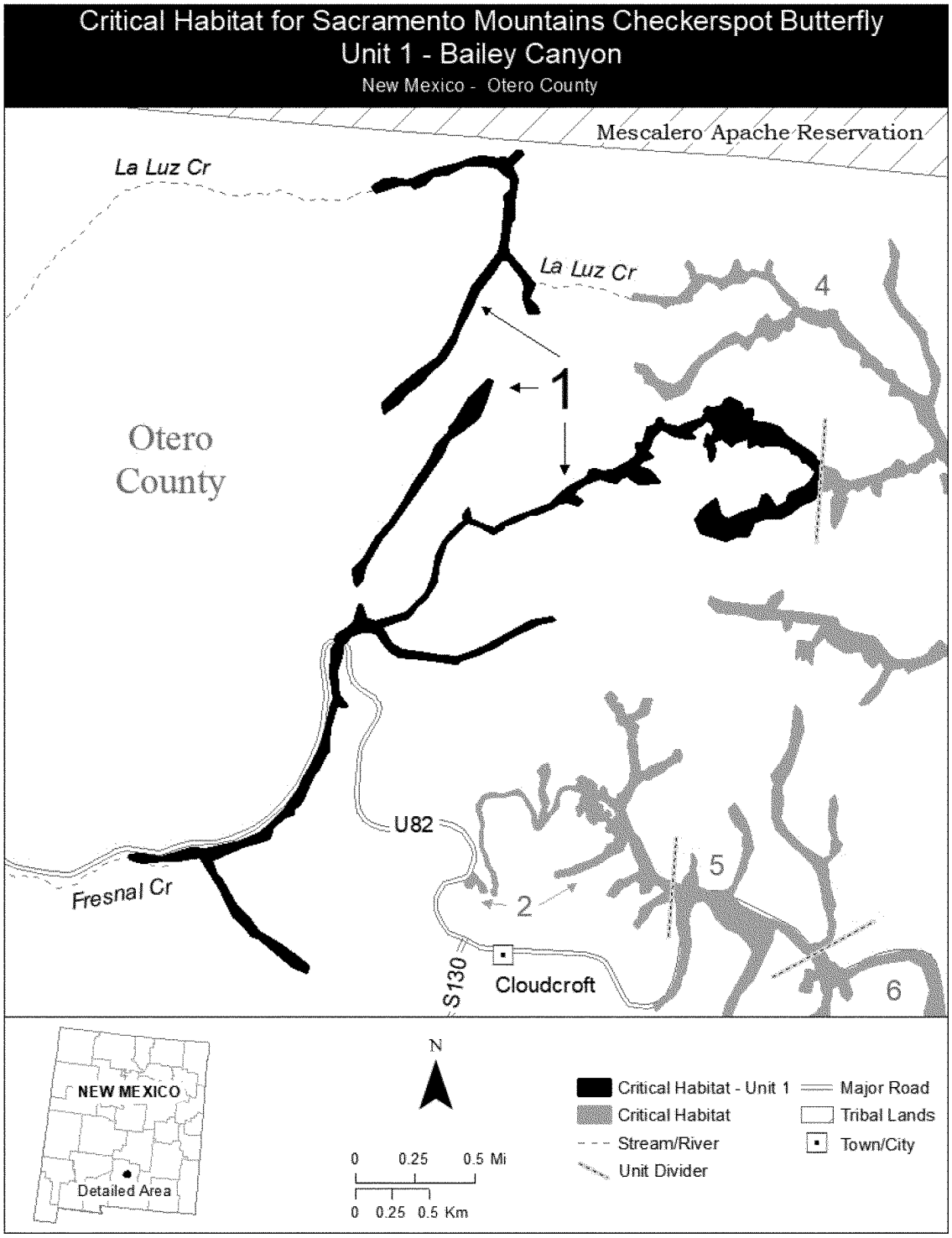


Figure 2 to Sacramento Mountains Checkerspot Butterfly (*Euphydryas anicia cloudcrofti*) paragraph (6)(ii)

(6) Unit 1: Bailey Canyon; Otero County, New Mexico.

(i) Unit 1 consists of 200.5 ac (81.1 ha) in Otero County and is composed of lands entirely in Federal ownership.

(ii) Map of Unit 1 follows:

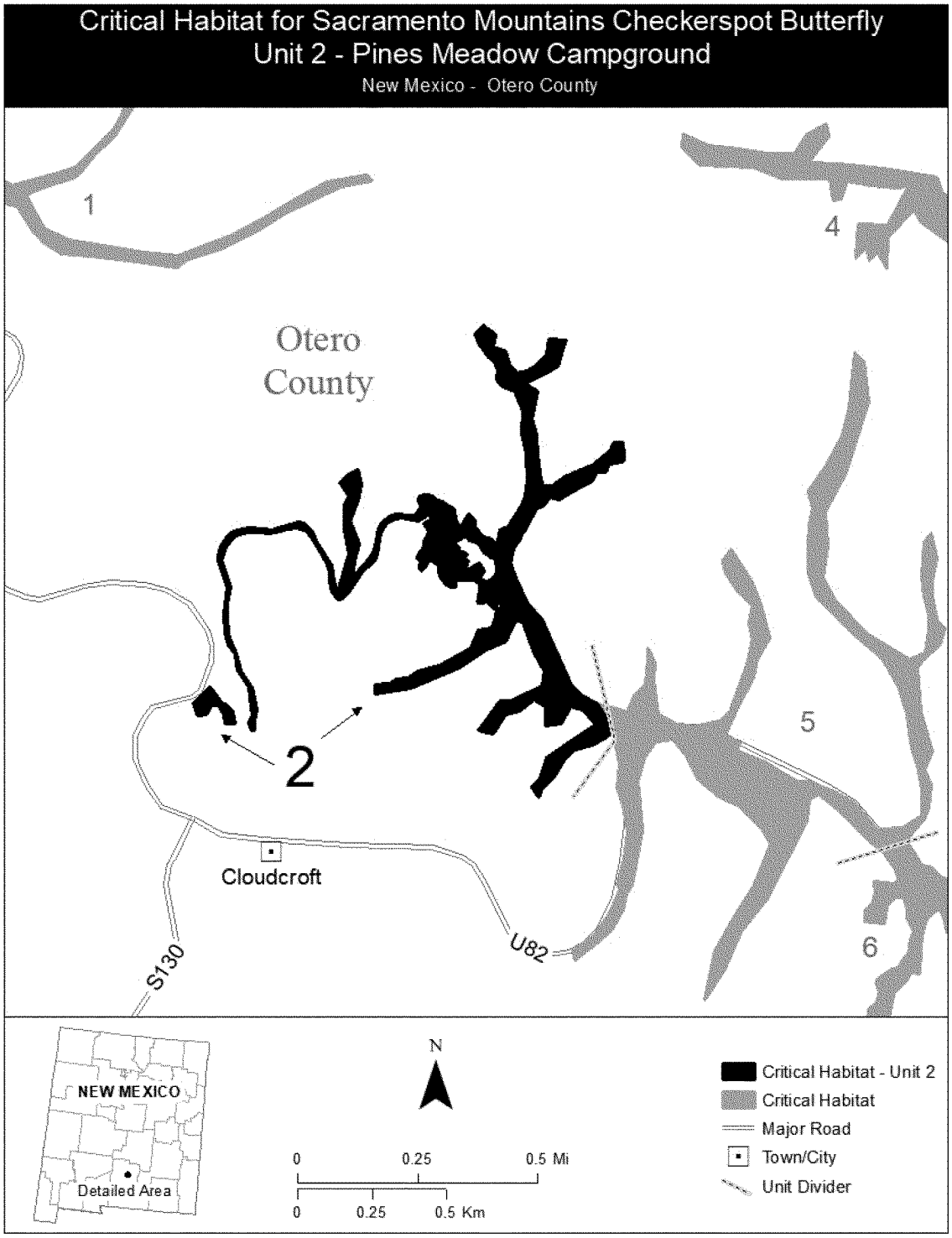


(7) Unit 2: Pines Meadow Campground; Otero County, New Mexico.

(i) Unit 2 consists of 62.4 ac (25.2 ha) in Otero County and is composed of lands in Federal (62.2 ac (25.2 ha)) and private (0.2 ac (0.08 ha)) ownership.

(ii) Map of Unit 2 follows:

Figure 3 to Sacramento Mountains Checkerspot Butterfly (*Euphydryas anicia cloudcrofti*) paragraph (7)(ii)

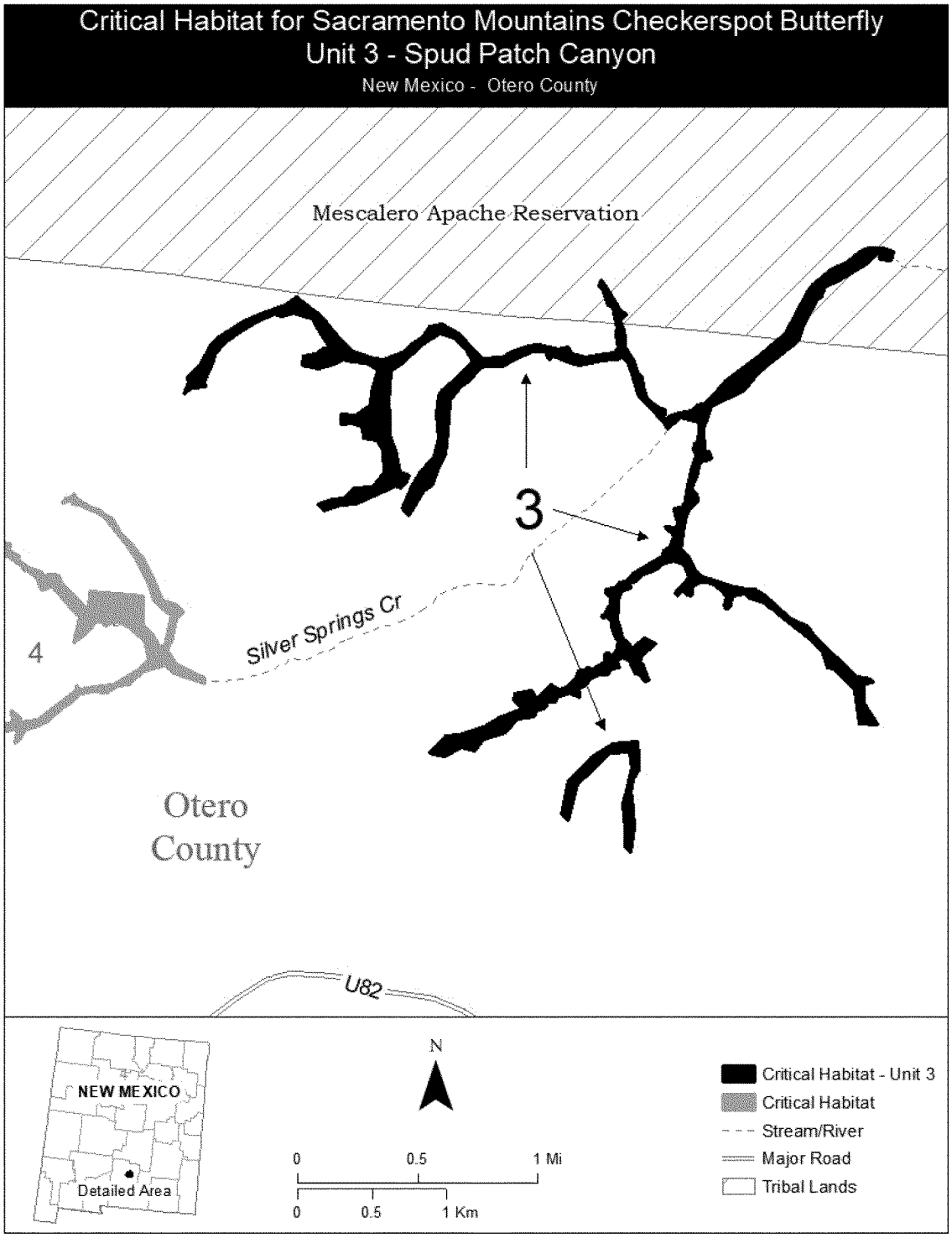


(8) Unit 3: Spud Patch Canyon; Otero County, New Mexico.

(i) Unit 3 consists of 277.2 ac (112.2 ha) in Otero County and is composed of lands in Federal (203.9 ac (82.5 ha)), Tribal (22.4 ac (9.1 ha)), and private (50.9 ac (20.6 ha)) ownership.

(ii) Map of Unit 3 follows:

Figure 4 to Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) paragraph (8)(ii)



(9) Unit 4: Silver Springs Canyon; Otero County, New Mexico.

(i) Unit 4 consists of 203.4 ac (82.3 ha) in Otero County and is composed of lands in Federal (132.9 ac (53.8 ha)) and private (70.5 ac (28.5 ha)) ownership.

(ii) Map of Unit 4 follows:

Figure 5 to Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) paragraph (9)(ii)

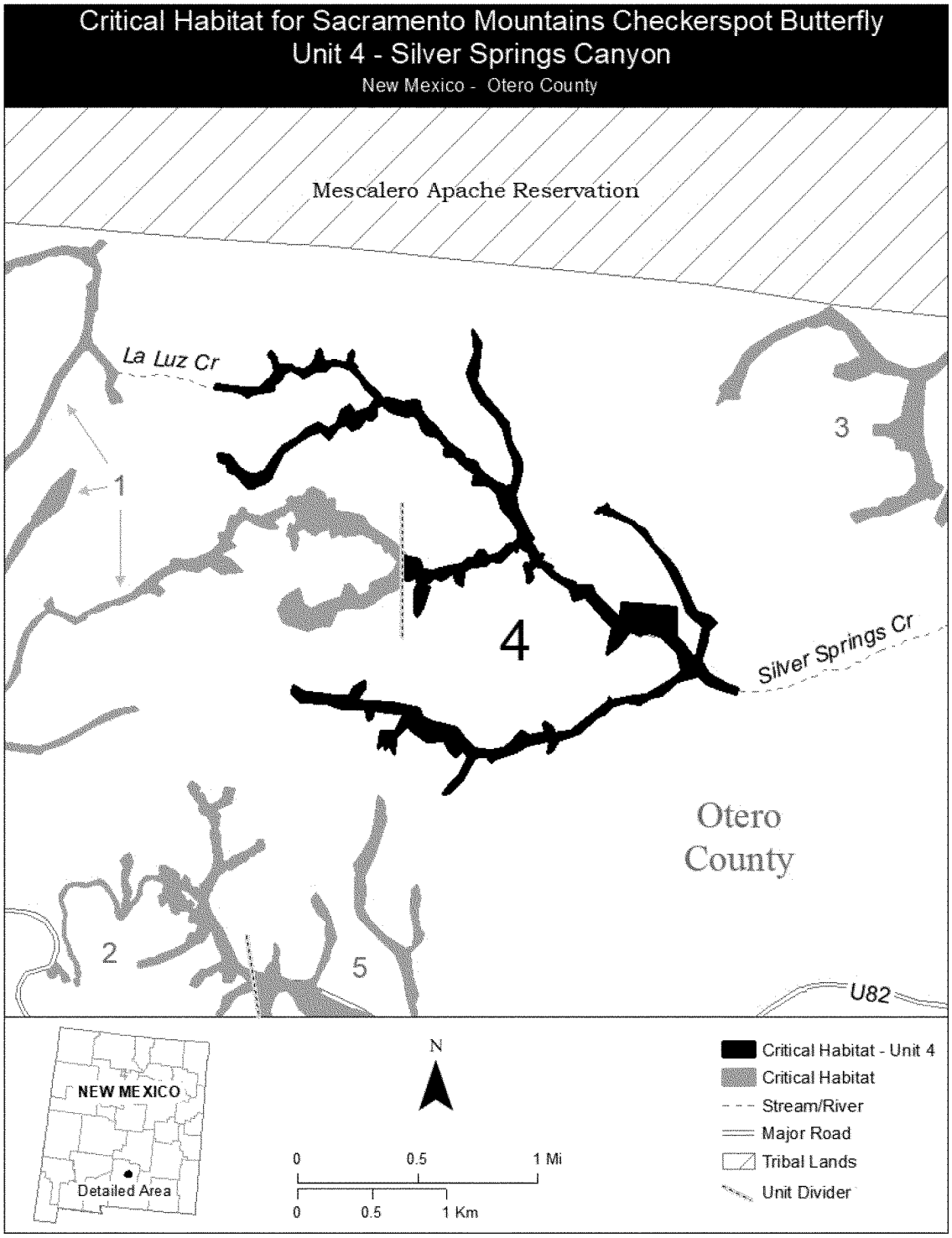
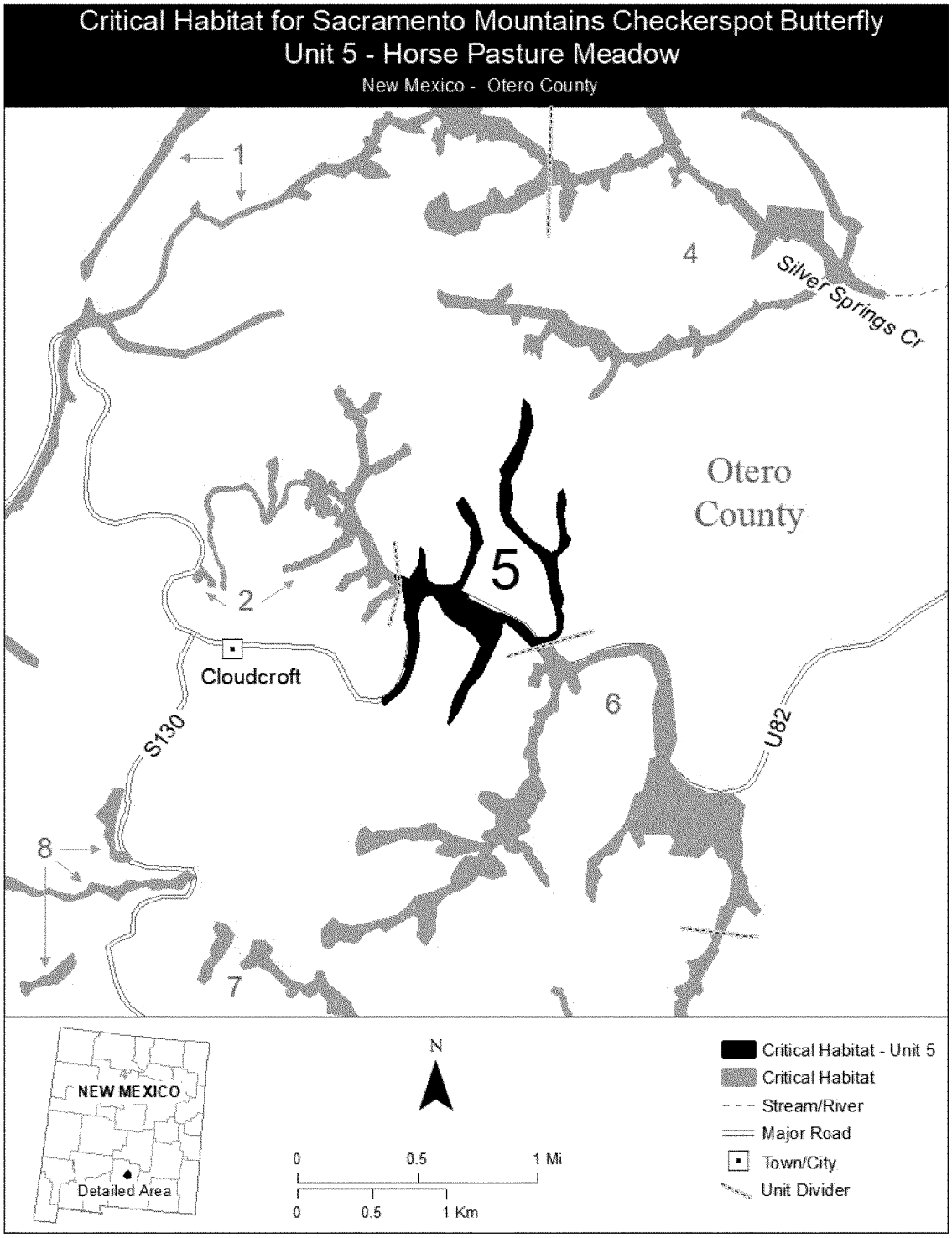


Figure 6 to Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) paragraph (10)(ii)

(10) Unit 5: Horse Pasture Meadow; Otero County, New Mexico.

(i) Unit 5 consists of 82.4 ac (33.4 ha) in Otero County and is composed of lands entirely in Federal ownership.

(ii) Map of Unit 5 follows:

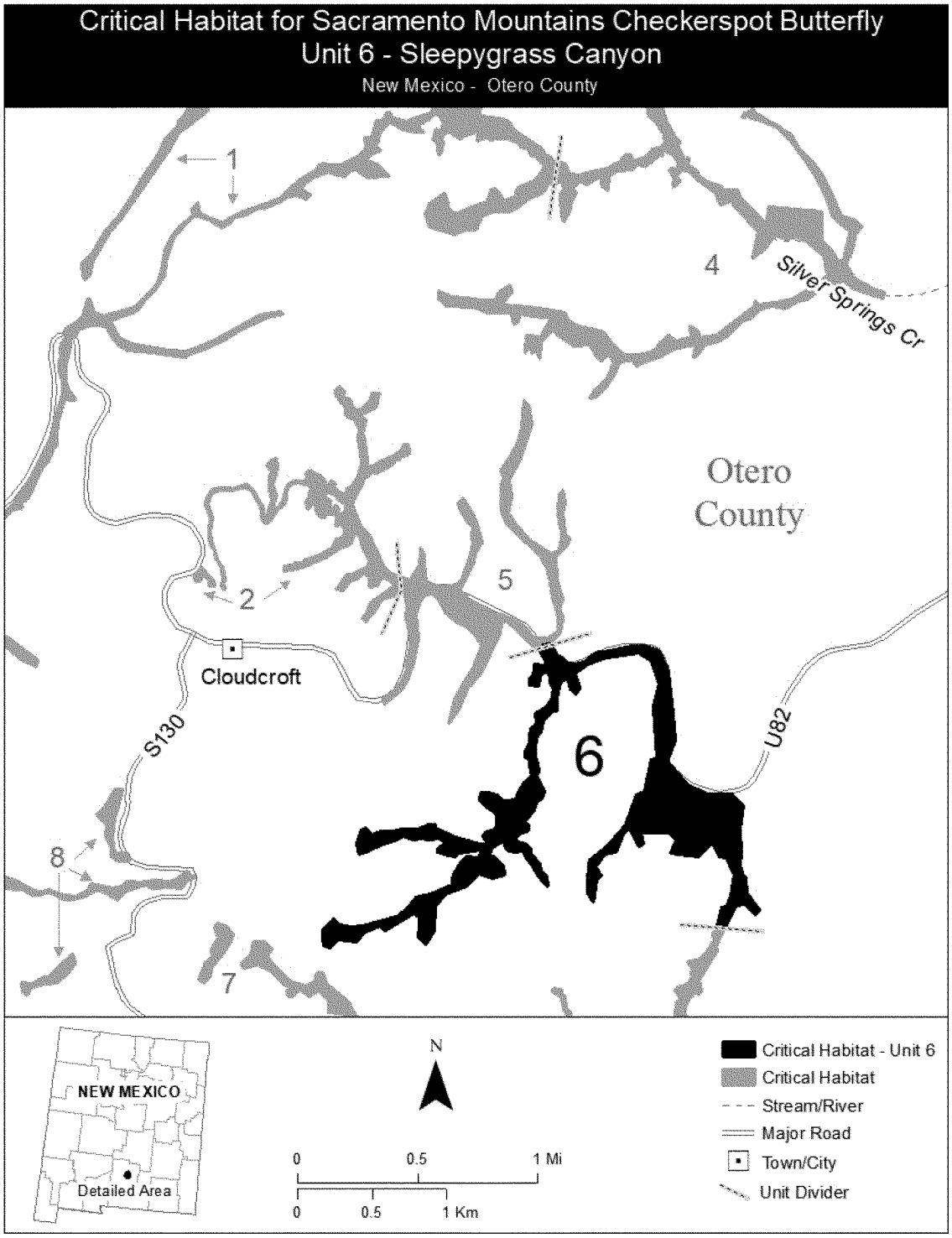


(11) Unit 6: Sleepygrass Canyon; Otero County, New Mexico.

(i) Unit 6 consists of 223.5 ac (90.5 ha) in Otero County and is composed of lands in Federal (123.5 ac (50.0 ha)) and private (100.0 ac (40.5 ha)) ownership.

(ii) Map of Unit 6 follows:

Figure 7 to Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) paragraph (11)(ii)

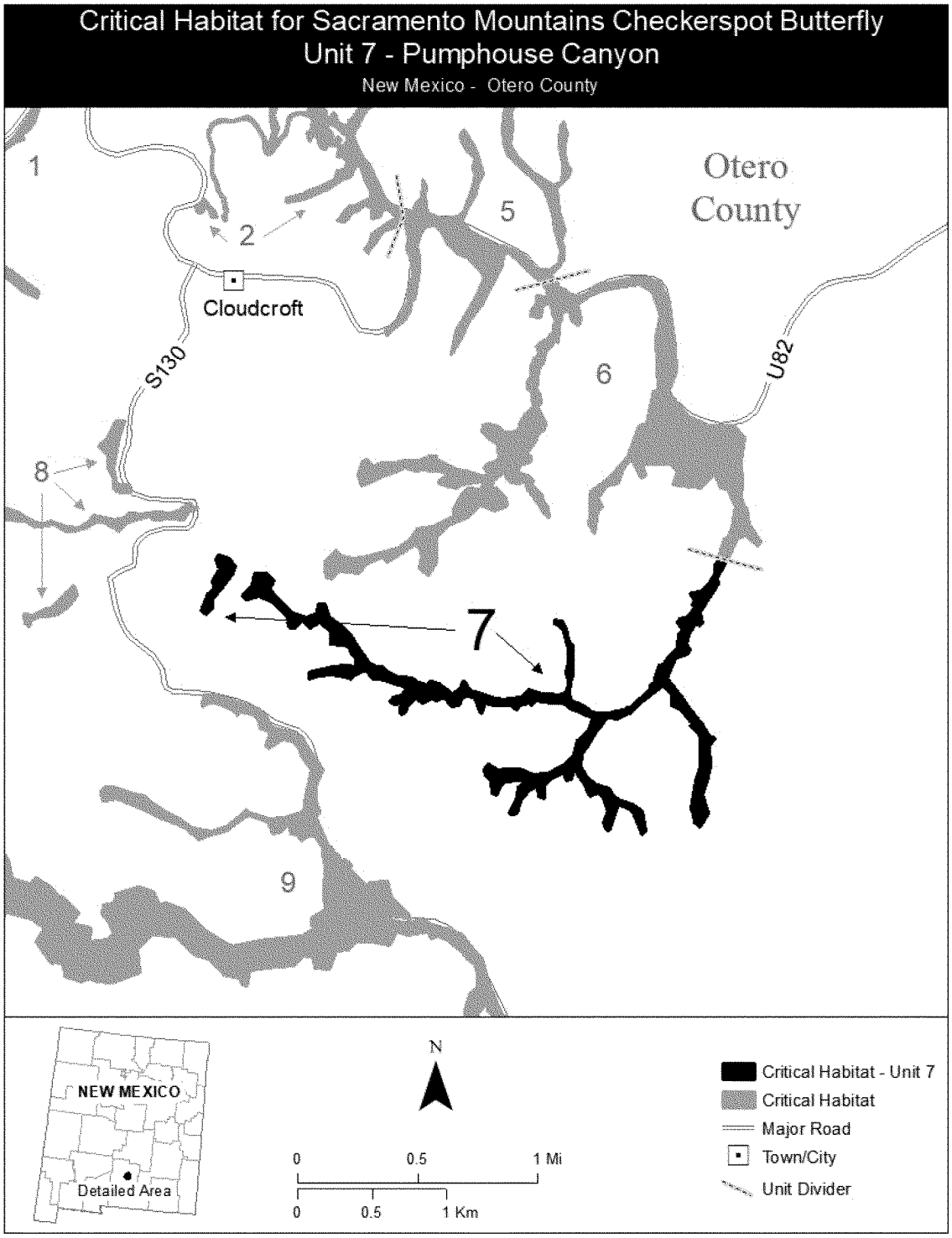


(12) Unit 7: Pumphouse Canyon; Otero County, New Mexico.

(i) Unit 7 consists of 136.6 ac (55.3 ha) in Otero County and is composed of lands in Federal (134.4 ac (54.4 ha)) and private (2.2 ac (0.9 ha)) ownership.

(ii) Map of Unit 7 follows:

Figure 8 to Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) paragraph (12)(ii)



(13) Unit 8: Deerhead Canyon; Otero County, New Mexico.

(i) Unit 8 consists of 33.1 ac (13.4 ha) in Otero County and is composed of lands in Federal (22.1 ac (8.9 ha)) and private (11.0 ac (4.5 ha)) ownership.

(ii) Map of Unit 8 follows:

Figure 9 to Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) paragraph (13)(ii)

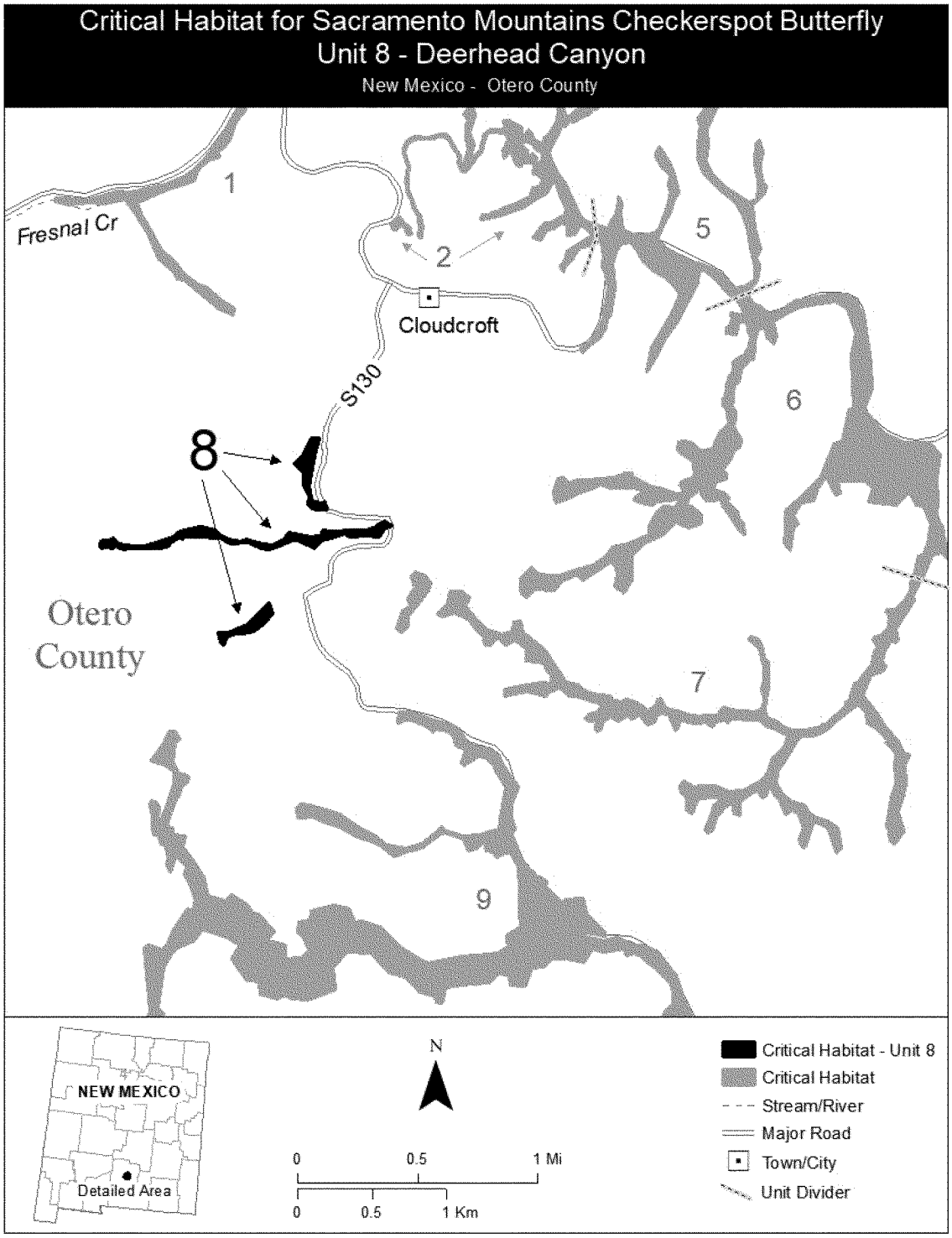
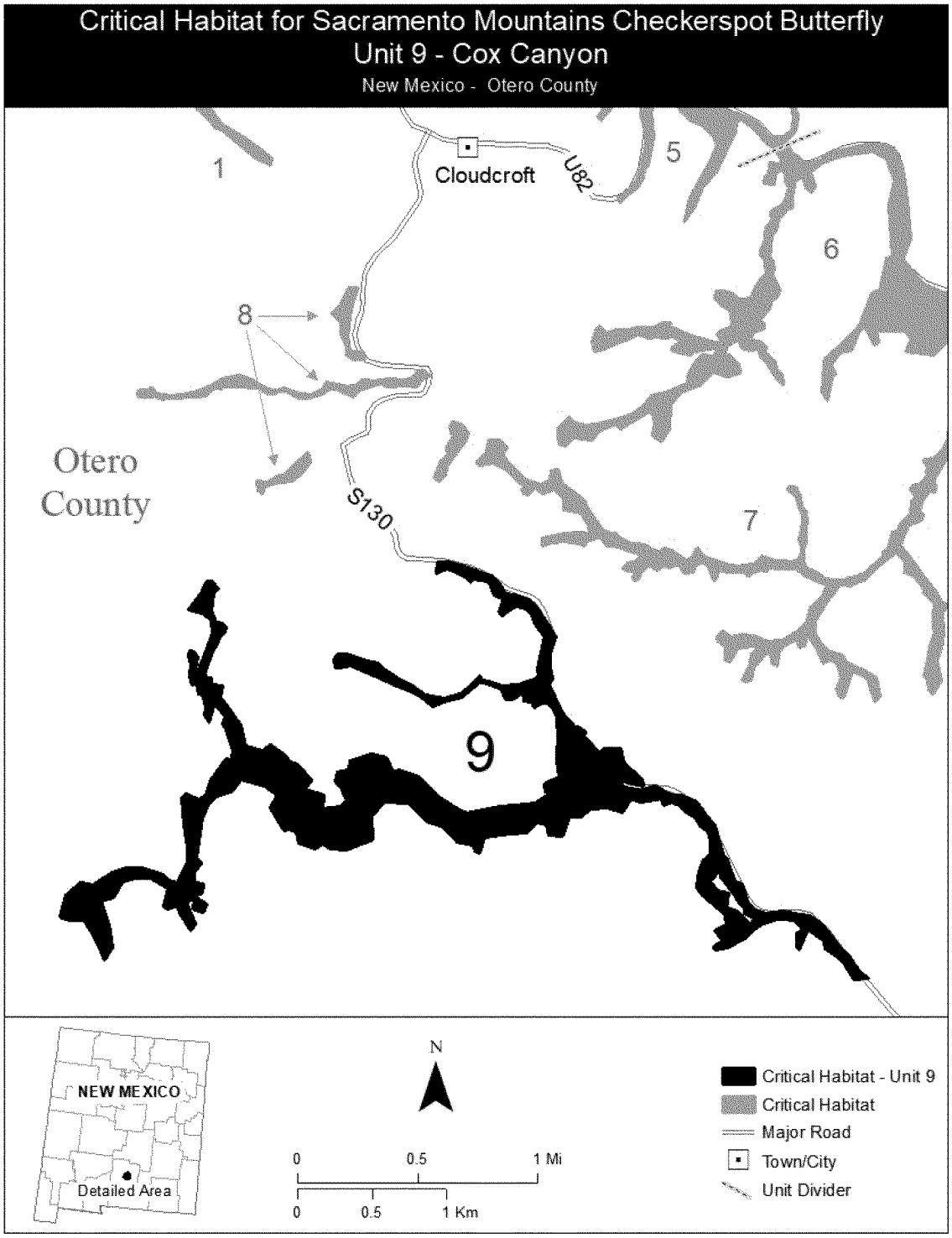


Figure 10 to Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) paragraph (14)(ii)

(14) Unit 9: Cox Canyon; Otero County, New Mexico.

(i) Unit 9 consists of 417.8 ac (169.0 ha) in Otero County and is composed of lands in Federal (132.1 ac (53.5 ha)) and private (285.7 ac (115.6 ha)) ownership.

(ii) Map of Unit 9 follows:



* * * * *

Martha Williams,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2023–16967 Filed 8–9–23; 8:45 am]

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Notices

Federal Register
Vol. 88, No. 153
Thursday, August 10, 2023

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding: whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by September 11, 2023 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *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.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Rural Housing Service

Title: 7 CFR 4280—Common Forms Package for Financial Assistance Forms for Loans/Grants.

OMB Control Number: 0575–NEW.

Summary of Collection: The Rural Housing Service (RHS), Rural Business and Cooperative Service (RBCS) and Rural Utilities service (RUS) agencies within the Rural Development mission area, hereinafter referred to as Agency, is the credit Agency for agriculture and rural development for the United States Department of Agriculture. The Agency offers loans, grants and loan guarantees to help create jobs and support economic development and essential services such as housing; health care; first responder services and equipment; and water, electric and communications infrastructure.

The Authorities that allow the Rural Housing Service (RHS), Rural Business and Cooperative Service (RBCS) and Rural Utilities service (RUS), Agencies within Rural Development (RD) are as follows:

The RHS is authorized under various sections of Title V of the Housing Act of 1949, as amended, to provide financial assistance to construct, improve, alter, repair, replace, or rehabilitate dwellings, which will provide modest, decent, safe, and sanitary housing to eligible individuals in rural areas. The Consolidated Farm and Rural Development Act, as amended, authorizes the credit programs of the RHS, RBCS and RUS to provide financial assistance for essential community facilities such as construction of community facilities and water and waste systems; and the improvement, development, and financing of businesses, industries, and employment.

Need and Use of the Information: The information will be collected through the use of forms that can be accessed electronically (or in hard copy) for use as attachments to financial assistance applications. The information is collected once and is not typically shared, unless by a FOIA request. (USDA agencies and staff offices will have the option of adding the forms to their individual application packages on the *Grants.gov* website that is managed by the U.S. Department of Health and Human Services. The formal process of having the forms added to *Grants.gov* will occur after they are approved by the Office of Management and Budget (OMB)).

Description of Respondents: Businesses or other for-profits; farms; not-for-profit institutions.

Number of Respondents: 1.

Frequency of Responses: Annually.

Total Burden Hours: 1.

Rural Housing Service

Title: 7 CFR 1910–B and C, Federal Debt and Employment Verification Compliance Requirements.

OMB Control Number: 0575–NEW.

Summary of Collection: The Rural Housing Service (RHS), Rural Business and Cooperative Service (RBCS) and Rural Utilities service (RUS) agencies within the Rural Development mission area, hereinafter referred to as Agency, is the credit Agency for agriculture and rural development for the United States Department of Agriculture. The Agency offers offer loans, grants and loan guarantees to help create jobs and support economic development and essential services such as housing; health care; first responder services and equipment; and water, electric and communications infrastructure on an equal opportunity basis.

The information collection under OMB Number 0575-New will enable the Agencies to effectively monitor a recipient's compliance with the federal debt reporting and to determine employment verification and eligibility for Federal financial assistance.

The Agencies offer supervised credit programs to build modest housing and essential community facilities in rural areas. Section 517 (d) of Title V of the Housing Act of 1949, as amended, provides the authority for the Secretary of Agriculture to issue loan guarantees for the acquisition of new or existing dwellings and related facilities to provide decent, safe, and sanitary living conditions and other structures in rural areas.

Need and Use of the Information: This information collection will be utilized by the Rural Housing Service (RHS), Rural Business and Cooperative Service (RBCS) and Rural Utilities service (RUS), Agencies within Rural Development (RD) for various loan and grant making activities. Information requested can include financial documents such as confirmation of household income, assets and liabilities,

a credit record, evidence the borrower has adequate repayment ability for the loan amount requested and if the condition and location of the property meet program guidelines. All information is necessary to confirm the borrower qualifies for all assistance for which they are eligible.

Description of Respondents: Businesses or other for-profits; Not-for-profit institutions.

Number of Respondents: 1.

Frequency of Responses: Annually.

Total Burden Hours: 4.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–17181 Filed 8–9–23; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF AGRICULTURE

U.S. Codex Office

[Docket No. USDA–2023–0011]

International Standard-Setting Activities

AGENCY: Trade and Foreign Agricultural Affairs (TFAA), USDA.

ACTION: Notice.

SUMMARY: This notice informs the public of the sanitary and phytosanitary (SPS) standard-setting activities of the Codex Alimentarius (Codex), in accordance with section 491 of the Trade Agreements Act of 1979, as amended, and the Uruguay Round Agreements Act. This notice also provides a list of other standard-setting activities of Codex, including commodity standards, guidelines, codes of practice, and revised texts. This notice, which covers Codex activities during the time periods of June 1, 2022 to May 31, 2023 and June 1, 2023 to May 31, 2024, seeks comments on standards under consideration and recommendations for new standards.

DATES: Comments must be received on or before October 13, 2023.

ADDRESSES: The U.S. Codex Office (USCO) invites interested persons to submit their comments on this notice. Comments may be submitted by one of the following methods:

- *Federal e-Rulemaking Portal:* This website provides the ability to type short comments directly into the comment field on this web page or attach a file for lengthier comments. Go to *http://www.regulations.gov.* Follow the on-line instructions at the website for submitting comments.
- *Mail:* Send to Docket Clerk, U.S. Department of Agriculture, Trade and Foreign Agricultural Affairs, U.S. Codex Office, 1400 Independence Avenue SW, Mailstop S4861, Washington, DC 20250–3700.
- *Hand- or courier-delivered submittals:* Deliver to 1400 Independence Avenue SW, Room 4861, Washington, DC 20250–3700.

Instructions: All items submitted by mail or email are to include the Agency name (*i.e.,* USCO) and docket number USDA–2023–0011. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information to *http://www.regulations.gov.*

Please state that your comments refer to Codex. If your comments relate to specific Codex committees, please identify the committee(s) in your comments and submit a copy of your comments to the U.S. delegate to the committee.

Docket: For access to background documents or comments received, email *uscodex@usda.gov* to schedule an appointment.

FOR FURTHER INFORMATION CONTACT: Ms. Mary Frances Lowe, United States Manager for Codex Alimentarius, U.S. Department of Agriculture, Office of the Under Secretary for Trade and Foreign Agricultural Affairs, U.S. Codex Office, 1400 Independence Avenue SW, Room 4861, Washington, DC 20250–3700, Email: *uscodex@usda.gov,* Telephone: 202–205–7760.

For information pertaining to committees, contact the U.S. delegate for that committee. A complete list of delegates and alternate delegates is accessible via the internet at: *https://www.usda.gov/sites/default/files/documents/us-codex-program-officials.pdf.* Documents pertaining to Codex and specific committee agendas are accessible via the internet at *http://www.fao.org/fao-who-codexalimentarius/meetings/en/.* The U.S. Codex Office also maintains a website at *http://www.usda.gov/codex,* a link that offers an email subscription service providing access to information related to Codex. Customers can add or delete their subscription themselves and have the option to password protect their accounts.

SUPPLEMENTARY INFORMATION:

Background

The World Trade Organization (WTO) was established on January 1, 1995, as the common international institutional framework for the conduct of trade relations among its members in matters related to the Uruguay Round Trade Agreements. The WTO is the successor organization to the General Agreement on Tariffs and Trade (GATT). United States membership in the WTO was approved and the Uruguay Round Agreements Act (Uruguay Round Agreements) was signed into law by the President on December 8, 1994, Public Law 103–465, 108 Stat. 4809. The Uruguay Round Agreements became effective with respect to the United States on January 1, 1995. The Uruguay Round Agreements amended the Trade Agreements Act of 1979. Pursuant to section 491 of the Trade Agreements Act of 1979, as amended, the President is required to designate an agency to be ''responsible for informing the public of the sanitary and phytosanitary (SPS) standard-setting activities of each international standard-setting organization'' (19 U.S.C. 2578). The main international standard-setting organizations are the Codex Alimentarius (Codex), the World Organisation for Animal Health (WOAH, founded as OIE), and the International Plant Protection Convention (IPPC). The President, pursuant to Proclamation No. 6780 of March 23, 1995, (60 FR 15845), designated the U.S. Department of Agriculture as the agency responsible for informing the public of the SPS standard-setting activities of each international standard-setting organization. The Secretary of Agriculture has delegated to the Trade and Foreign Agricultural Affairs Mission Area the responsibility to inform the public of the SPS standard-setting activities of Codex. The Trade and Foreign Agricultural Affairs Mission Area has, in turn, assigned the responsibility for informing the public of the SPS standard-setting activities of Codex to the U.S. Codex Office (USCO).

Codex was created in 1963 by two United Nations organizations, the Food and Agriculture Organization (FAO) and the World Health Organization (WHO). Codex is the principal international organization for establishing standards for food. Through adoption of food standards, codes of practice, and other guidelines developed by its committees, and by promoting their adoption and implementation by governments, Codex seeks to protect the health of consumers, ensure fair practices in the food trade, and promote coordination of food standards work undertaken by international governmental and nongovernmental organizations. In the United States, U.S. Codex activities are managed and carried out by the United States Department of Agriculture (USDA); the Food and Drug Administration (FDA), Department of

Health and Human Services (HHS); the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC); and the Environmental Protection Agency (EPA).

As the agency responsible for informing the public of the SPS standard-setting activities of Codex, the USCO publishes this notice in the **Federal Register** annually. *Attachment 1: Sanitary and Phytosanitary Activities of Codex* sets forth the following information:

1. The SPS standards under consideration or planned for consideration; and

2. For each SPS standard specified:

a. A description of the consideration or planned consideration of the standard

b. Whether the United States is participating or plans to participate in the consideration of the standard

c. The agenda for United States participation, if any; and

d. The agency responsible for representing the United States with respect to the standard.

To obtain copies of the standards listed in *Attachment 1: Sanitary and Phytosanitary Activities of Codex,* please contact the U.S. delegate or the U.S. Codex Office.

This notice also solicits public comment on standards that are currently under consideration or planned for consideration and recommendations for new standards. The U.S. delegate, in conjunction with the responsible agency, will take the comments received into account in participating in the consideration of the standards and in proposing matters to be considered by Codex.

The U.S. delegate will facilitate public participation in the United States Government's activities relating to Codex. The U.S. delegate will maintain a list of individuals, groups, and organizations that have expressed an interest in the activities of the Codex committees and will disseminate information regarding U.S. delegation activities to interested parties. This information will include the status of each agenda item; the U.S. Government's position or preliminary position on each agenda item; and the time and place of planning meetings and debriefing meetings following the Codex committee sessions. In addition, the USCO makes much of the same information available through its web page at *http://www.usda.gov/codex.* If you would like to access or receive information about specific committees, please visit the web page or notify the appropriate U.S. delegate or the U.S. Codex Office, Room 4861, 1400 Independence Avenue SW, Washington, DC 20250–3700, Email: *uscodex@usda.gov.*

The information provided in *Attachment 1: Sanitary and Phytosanitary Activities of Codex* describes the status of Codex standard-setting activities by the Codex committees for the time periods from June 1, 2022 to May 31, 2023 and June 1, 2023 to May 31, 2024. A list of forthcoming Codex sessions may be found at: *https://www.fao.org/fao-who-codexalimentarius/meetings/en/.*

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, the USCO will announce this **Federal Register** publication on-line through the U.S. Codex web page located at: *https://www.federalregister.gov/agencies/us-codex-office.*

Done at Washington, DC.

Mary Frances Lowe,

U.S. Manager for Codex Alimentarius.

Attachment 1: Sanitary and Phytosanitary Activities of Codex

Codex Alimentarius Commission and Executive Committee

The Codex Alimentarius Commission (Commission or CAC) convened its 45th Session (CAC45) from November 21–25, 2022, in Rome, Italy, with report adoption taking place virtually on December 12–13, 2022 and continued by written procedure. The relevant document is REP22/CAC. The actions taken by the Commission at CAC45 (*e.g.,* adoption and revocation of standards, approval of new work, discontinuation of work, amendments, etc.) are described below under the respective Codex committees.

The Commission is scheduled to convene its 46th Session (CAC46) from November 27 to December 2, 2023. At its 46th Session, the Commission will consider adopting standards recommended by committees at Step 8 or 5/8 (final adoption) and advance the work of committees by adopting draft standards at Step 5 (interim adoption, for further comment and consideration by the relevant committee). The Commission will also consider revocation of Codex texts; proposals for new work; discontinuation of work; amendments to Codex standards and related texts; and matters arising from the Reports of the Commission, the Executive Committee, and subsidiary bodies. Although the agenda for the 46th Session is not yet available, it is expected that the Commission will also consider Codex budgetary and financial matters; FAO/WHO scientific support to Codex (activities, budgetary and financial matters); matters arising from FAO/WHO; reports of side events; election of the chairperson and vice-chairpersons and members of the Executive Committee elected on a geographical basis; designation of countries responsible for appointing the chairpersons of Codex subsidiary bodies; any other business; and adoption of the report.

The Executive Committee (CCEXEC) is composed of the Commission chairperson; vice-chairpersons; seven members elected by the Commission from each of the following geographic regions: Africa, Asia, Europe, Latin America and the Caribbean, Near East, North America, and the South West Pacific; and regional coordinators from the six regional coordinating committees. The United States currently participates as an advisor to Canada, the member elected on a geographical basis from North America.

CCEXEC convened its 82nd Session (CCEXEC82) virtually June 20–24, 2022, with virtual report adoption on June 30, 2022. The relevant document is REP22/EXEC1. CCEXEC82 conducted Critical Review of the standards development work of the Codex Committees on Fats and Oils (CCFO), Nutrition and Foods for Special Dietary Uses (CCNFSDU), Food Hygiene (CCFH), and Residues of Veterinary Drugs in Foods (CCRVDF). CCEXEC82 also considered the progress of three Sub-Committees concerned with (1) the development of practical guidance on the application of the *Statements of Principle concerning the Role of Science in the Codex decision-making process and the extent to which other factors are taken into account,* (2) new food sources and production systems, and (3) a model for future Codex work; reviewed and made recommendations to the Directors General of FAO and WHO on applications from international non-governmental organizations for observer status in Codex; and discussed the status of work under the Codex Strategic Plan 2020–2025 and plans for commemorating the 60th Anniversary of the CAC in 2023. The report and recommendations of CCEXEC82 were considered by the Codex Alimentarius Commission at its 45th Session (CAC45, November 2022).

CCEXEC convened its 83rd Session (CCEXEC83) from November 14 to 18, 2022, in Rome, Italy. The relevant document is REP22/EXEC2. In addition to making recommendations to CAC45 on the work of Codex committees, CCEXEC83 discussed practical guidance

on the application of the *Statements of Principle concerning the Role of Science in the Codex decision-making process and the extent to which other factors are taken into account;* new food sources and production systems; the Future of Codex; the Codex Strategic Plan 2020–2025; and the 60th anniversary of the Commission.

CCEXEC convened its 84th Session (CCEXEC84) from July 10–14, 2023, in Geneva, Switzerland. The relevant document is REP23/EXEC1. In addition to discussing recommendations to CAC46 on the work of Codex committees, CCEXEC84 discussed the Blueprint on the Future of Codex; recommendations on the Future of Codex in the context of 60th anniversary celebrations; monitoring the implementation of the Codex Strategic Plan 2020–2023; and plans for the development of the Codex Strategic Plan for 2026–2031. The Executive Committee also considered the following agenda items: applications from international non-governmental organizations for observer status in Codex; and regional standards. The Executive Committee agenda for the 85th Session (CCEXEC85, November 2023) is not yet available.

Responsible Agency: USDA/TFAA/USCO.

U.S. Participation: Yes, as advisor to Canada (current CCEXEC member elected on a geographical basis from North America).

Codex Committee on Contaminants in Foods

The Codex Committee on Contaminants in Foods (CCCF) establishes or endorses permitted maximum levels (MLs) and guideline levels (GLs) for contaminants and naturally occurring toxicants in food and feed; prepares priority lists of contaminants and naturally occurring toxicants for risk assessment by the Joint FAO/WHO Expert Committee on Food Additives (JECFA); considers and elaborates methods of analysis and sampling for the determination of contaminants and naturally occurring toxicants in food and feed; considers and elaborates standards or codes of practice for related subjects; and considers other matters assigned to it by the Commission in relation to contaminants and naturally occurring toxicants in food and feed.

The Committee had the following items which were considered and approved by the 45th Session of the Codex Alimentarius Commission (CAC45) in November 2022:

Final Adoption at Step 8 or Step 5/8

- *Code of Practice for the Prevention and Reduction of Cadmium Contamination in Cocoa Beans* (CXC 81–2022)
- ML for cadmium in cocoa powder (100% cocoa solids on a dry matter basis)
- MLs for lead in cereal-based foods for infants and young children, white and refined sugar, corn and maple syrups, honey and sugar-based candies
- MLs for methylmercury in orange roughy and pink cusk eel
- MLs for total aflatoxins (AFT) in maize grain, destined for further processing; flour meal, semolina and flakes derived from maize; husked rice; polished rice; sorghum grain, destined for further processing; cereal-based food for infants and young children (excluding foods for food aid programs); and cereal-based food for infants and young children for food aid programs

Interim Adoption at Step 5

- ML for lead in ready-to-eat meals for infants and young children
- Draft Code of Practice for Prevention and Reduction of Mycotoxin Contamination in Cassava and Cassava-Based Products

Discontinuation

- Work on MLs for lead in fresh eggs, dried garlic, and molasses

The CCCF convened its 16th Session (CCCF16) from April 17–21, 2023, in Utrecht, Netherlands, with report adoption taking place virtually on April 26, 2023. The relevant document is REP23/CF16. CCCF16 advanced the following items for consideration by the CAC46 in November 2023:

For final adoption at Step 8 and Step 5/8

- MLs for lead for soft brown, raw, and non-centrifugal sugars
- MLs for lead for ready-to-eat meals for infants and young children
- Code of Practice for Prevention and Reduction of Mycotoxin Contamination in Cassava and Cassava-Based Products
- Sampling plans for total aflatoxins in certain cereals and cereal-based products including foods for infants and young children
- MLs for Ochratoxin A (OTA) in chili pepper, paprika and nutmeg; and
- MLs for total aflatoxins (AFT) in chili pepper and nutmeg

For Approval as New Work

- Code of Practice/Guidelines for the Prevention or Reduction of Ciguatera Poisoning

For Discontinuation

- Work on AFT in ginger, paprika, black and white pepper, and turmeric.

The CCCF is scheduled to convene its 17th session (CCCF17) from April 15–19, 2024. The CCCF17 location and agenda are currently unavailable.

The Committee is expected to continue working on:

- ML for total aflatoxins in ready to-eat (RTE) peanuts and associated sampling plan (definition of RTE peanuts)
- Sampling plans for OTA and AFT (chili pepper, paprika, and nutmeg)
- New work on a Code of Practice/Guidelines for the prevention or reduction of ciguatera poisoning
- Discussion paper on pyrrolizidine alkaloids
- Discussion paper on new measures supporting the revision of the *Code of Practice for the Prevention and Reduction of Aflatoxin Contamination in Peanuts* (CXC 55–2004)
- Discussion paper on new measures supporting the revision of the *Code of Practice for the Reduction of Aflatoxin B1 in Raw Materials and Supplemental Feeding Stuffs for Milk-Producing Animals* (CXC 45–1997)
- Discussion paper on the need and feasibility of possible follow up actions on tropane alkaloids
- Discussion paper on possible risk management measure(s) for acrylamide in foods, taking into account the most recent JECFA evaluations
- Discussion paper on the development of a Code of Practice for the Prevention and Reduction of Cadmium Contamination in Foods
- General guidance on data analysis for development of maximum levels and improved data collection
- Review of Codex standards for contaminants
- Follow-up work to the outcomes of JECFA evaluations and FAO/WHO expert consultations
- Reconsider the opportunity to develop discussion papers on the need and feasibility of possible follow-up actions on ergot alkaloids and trichothecenes (T–2, HT–2 and DAS)
- Priority list of contaminants for evaluation by JECFA

Responsible Agencies: HHS/FDA; USDA/Food Safety and Inspection Service (FSIS).

U.S. Participation: Yes.

Codex Committee on Fats and Oils

The Codex Committee on Fats and Oils (CCFO) is responsible for elaborating worldwide standards for fats

and oils of animal, vegetable, and marine origin, including margarine and olive oil.

The Committee had the following items which were considered and approved by CAC45 in November 2022:

Final Adoption at Step 8 and Step 5/8

- Revision to the *Standard for Named Vegetable Oils* (CXS 210–1999): Essential composition of sunflower seed oils

Interim Adoption at Step 5

- Draft revision to the *Standard for Named Vegetable Oils* (CXS 210–1999): Inclusion of avocado oil

Approved as New Work

- Amendment/revision to the *Standard for Named Vegetable Oils* (CXS 210–1999) to include camellia seed oil; sacha inchi oil; and high oleic acid soya bean oil
- Amendment/revision to the *Standard for Fish Oils* (CXS 329–2017) to include Calanus oil

The CCFO is scheduled to convene for its 23rd Session (CCFO23) from February 19–23, 2024, in Kuala Lumpur, Malaysia. The CCFO23 agenda is currently unavailable.

The Committee is expected to continue work on:

- Amendment/Revision of the *Standard for Named Vegetable Oils* (CXS 210–1999): inclusion of avocado oil
- Revision of the *Standard for Olive Oils and Pomace Olive Oils* (CXS 33–1981)
- Amendment/Revision of the *Standard for Named Vegetable Oils* (CXS 210–1999): inclusion of camellia seed oil
- Amendment/Revision of the *Standard for Named Vegetable Oils* (CXS 210–1999): inclusion of sacha inchi oil
- Amendment/Revision of the *Standard for Named Vegetable Oils* (CXS 210–1999): inclusion of high oleic acid soya bean oil
- Amendment/Revision of the *Standard for Fish Oils* (CXS 329–2017): inclusion of Calanus oil
- Consideration of proposals on new substances to be added to the List of Acceptable Previous Cargoes

Responsible Agencies: HHS/FDA/Center for Food Safety and Applied Nutrition (CFSAN); USDA/Agricultural Research Service (ARS).

U.S. Participation: Yes.

Codex Committee on Fish and Fishery Products

The Committee on Fish and Fishery Products (CCFFP) is responsible for elaborating standards for fresh, frozen, and otherwise processed fish, crustaceans, and mollusks. The CCFFP is working by correspondence and is expected to complete its pending work by October 1, 2023.

The Committee is working on:

- The *Standard for Canned Sardines and Sardine-Type Products* (CXS 94–1981), inclusion of the fish species *S. lemuru* (Bali Sardinella) in the list of *Sardinella* species under Section 2.1

Responsible Agencies: HHS/FDA; DOC/NOAA/National Marine Fisheries Service (NMFS).

U.S. Participation: Yes.

Codex Committee on Food Additives

The Codex Committee on Food Additives (CCFA) establishes or endorses acceptable MLs for individual food additives; prepares a priority list of food additives for risk assessment by the JECFA; assigns functional classes to individual food additives; recommends specifications of identity and purity for food additives for adoption by the Codex Alimentarius Commission; considers methods of analysis for the determination of additives in food; and considers and elaborates standards or codes of practice for related subjects such as the labeling of food additives when sold as such.

The CCFA convened its 53rd Session (CCFA53) from March 27–31, 2023, in Hong Kong, China. The relevant document is REP23/FA. CCFA53 advanced the following items for consideration by the CAC46 in November 2023:

For Final Adoption at Step 8 and Step 5/8

- Inclusion of the provision for trisodium citrate (INS 331(iii)) in FC 01.1.1 in the *General Standard for Food Additives (GSFA)* (CXS 192–1995)
- Inclusion of the provisions for food additives in FC 14.2.3 (CXS 192–1995)
- Inclusion of the provisions for riboflavin, synthetic (INS 101(i)), riboflavin 5′-phosphate sodium (INS 101(ii)), riboflavin from Bacillus subtilis (INS 101(iii)), riboflavin from Ashbya gossypii (INS 101(iv)) and spirulina extract (INS 134) in Table 3 (CXS 192–1995)
- Proposed draft revision of the *Class Names and the International Numbering System for Food Additives* (CXG 36–1989)
- Proposed draft *Specifications for the Identity and Purity of Food Additives* (CXA 6–2021)

The CCFA is scheduled to convene its 54th Session (CCFA54) from April 22–26, 2024. The CCFA54 agenda is currently unavailable.

The Committee is expected to continue work on:

- The alignment and the endorsement of food-additive provisions referred by commodity committees
- New or revised provisions of the GSFA
- Revision of the *Class Names and the International Numbering System for Food Additives* (CXG 36–1989)
- Proposal for additions and changes to the Priority List of Substances proposed for evaluation by JECFA
- Mapping food categories of the GFSA to the FoodEx2 Database
- Discussion paper on the development of a standard for yeast
- Discussion paper to identify the outstanding issues with respect to avoiding future divergence between the GSFA, commodity standards and other texts

Responsible Agency: HHS/FDA/CFSAN.

U.S. Participation: Yes.

Codex Committee on Food Hygiene

The Codex Committee on Food Hygiene (CCFH) is responsible for developing basic provisions on food hygiene applicable to all food; considering and amending or endorsing provisions on food hygiene contained in Codex commodity standards and Codex codes of practice developed by other committees; considering specific food hygiene problems assigned to it by the Commission; suggesting and prioritizing areas where there is a need for microbiological risk assessment at the international level and developing questions to be addressed by the risk assessors; and considering microbiological risk management matters in relation to food hygiene and in relation to the FAO/WHO risk assessments.

The Committee had the following items which were considered and approved by the CAC45 in November 2022:

Final Adoption at Step 8

- *Guidelines on the Management of Biological Foodborne Outbreaks* (CXG 96–2022)
- Proposed draft Decision Tree as an Annex to the *General Principles of Food Hygiene* (CXC 1–1969)

The CCFH convened its 53rd Session (CCFH53) from November 27–December 2, 2022, in San Diego, California, with report adoption taking place virtually on December 8, 2022. The relevant document is REP 23/FH. CCFH53 advanced the following items for consideration by the CAC46 in November 2023:

For Final Adoption at Step 5/8

- Draft Guidelines for the Control of Shiga Toxin-Producing *Escherichia coli* (STEC) in Raw Beef, Fresh Leafy Vegetables, Raw Milk and Raw Milk Cheeses, and Sprouts (General Section, Annex I on Raw Beef, and Annex III on Raw Milk and Raw Milk Cheeses)
- Draft Guidelines for the Safe Use and Reuse of Water in Food Production and Processing (General Section and Annex I on Fresh Produce)

For Approval as New Work

- Revision of the *Guidelines on the Application of General Principles of Food Hygiene to the Control of Pathogenic Vibrio Species in Seafood* (CXG–73–2010)
- Guidelines for Food Hygiene Control Measures in Traditional Markets for Food

The CCFH is scheduled to convene its 54th Session (CCFH54) from March 11–15, 2024, in Nairobi, Kenya. The CCFH54 agenda is currently unavailable.

The Committee is expected to continue work on:

- Proposed Draft Guidelines for the Control of Shiga Toxin-Producing *Escherichia coli* (STEC) in Raw Beef, Raw Milk and Raw Milk Cheeses, Fresh Leafy Vegetables, and Sprouts: (Annex II on Fresh Leafy Vegetables and Annex IV on Sprouts)
- Proposed Draft Guidelines for the Safe Use and Reuse of Water in Food Production: Annex II on Fisheries and Annex III on Dairy Products)
- Proposed Draft Guidelines for Food Hygiene Control Measures in Traditional Markets for Food
- Revision of the *Guidelines on the Application of General Principles of Food Hygiene to the Control of Pathogenic Vibrio Species in Seafood* (CXG 73–2010)
- Alignment of other CCFH documents with the revised *General Principles of Food Hygiene* (CXC 1–1969)
- Discussion paper on revision of the *Guidelines on the Application of General Principles of Food Hygiene to the Control of Viruses in Food* (CXG 79–2012)
- Discussion paper on revision of the *Guidelines for the Control of Campylobacter and Salmonella in Chicken Meat* (CXG 78–2011)
- Discussion paper on revision of the *Guidelines on the Application of General Principles of Food Hygiene to the Control of Listeria monocytogenes in Foods* (CXG 61–2007)
- New work proposals/forward workplan

Responsible Agencies: HHS/FDA/CFSAN; USDA/FSIS.

U.S. Participation: Yes.

Codex Committee on Food Import and Export Inspection and Certification Systems

The Codex Committee on Food Import and Export Inspection and Certification Systems (CCFICS) is responsible for developing principles and guidelines for food import and export inspection and certification systems, with a view to harmonizing methods and procedures that protect the health of consumers, ensure fair trading practices, and facilitate international trade in foodstuffs; developing principles and guidelines for the application of measures by the competent authorities of exporting and importing countries to provide assurance, where necessary, that foodstuffs comply with requirements, especially statutory health requirements; developing guidelines for the utilization, as and when appropriate, of quality assurance systems to ensure that foodstuffs conform with requirements and promote the recognition of these systems in facilitating trade in food products under bilateral/multilateral arrangements by countries; developing guidelines and criteria with respect to format, declarations, and language of such official certificates as countries may require with a view towards international harmonization; making recommendations for information exchange in relation to food import/export control; consulting as necessary with other international groups working on matters related to food inspection and certification systems; and considering other matters assigned to it by the Commission in relation to food inspection and certification systems.

The Committee had the following item which was considered and approved by the CAC45 in November 2022:

Approved as New Work

- Development of principles and guidelines on the use of remote audit and verification in regulatory frameworks

The CCFICS convened its 26th Session from May 1–5, 2023, in Hobart, Tasmania, Australia. The relevant document is REP 23/FICS. The Committee advanced the following items for consideration by the CAC46 in November 2023:

For Final Adoption at Step 8 and Step 5/8

- Proposed draft guidelines on recognition and maintenance of equivalence of national food control systems (NFCS)
- Proposed draft principles and guidelines on the use of remote audit and inspection in regulatory frameworks

For Approval as New Work

- Project document for the on review and update of the *Principles for Traceability/Product Tracing as a Tool within a Food Inspection and Certification System* (CXG 60–2006)

The CCFICS is scheduled to convene its 27th Session (CCFICS27) from September 16–20, 2024, in Australia. The CCFICS27 agenda is currently unavailable.

The Committee is expected to continue work on:

- Development of guidance on the prevention and control of food fraud
- Proposed draft consolidated Codex guidelines related to equivalence
- Reviewing and updating the list of emerging global issues
- Review and update of the *Principles for Traceability/Product Tracing as a Tool Within a Food Inspection and Certification System* (CXG 60–2006)
- Discussion paper and project document on guidance on appeals mechanisms in the context of rejection of imported food
- Discussion paper and project document on the standardization of sanitary requirements

Responsible Agencies: USDA/FSIS; HHS/FDA/CFSAN.

U.S. Participation: Yes.

Codex Committee on Food Labelling

The Codex Committee on Food Labelling (CCFL) drafts provisions on labeling applicable to all foods; considers, amends, and endorses draft specific provisions on labeling prepared by the Codex committees drafting standards, codes of practice, and guidelines; and studies specific labeling problems assigned to it by the Codex Alimentarius Commission. The Committee also studies problems associated with the advertisement of food with particular reference to claims and misleading descriptions.

The CCFL convened its 47th Session (CCFL47) from May 15–19, 2023, in Gatineau (Ottawa), Canada. The relevant document is REP23/FL. CCCFL47 advanced the following items for consideration by the CAC46 in November 2023:

For Interim Adoption at Step 5

- Proposed draft revision to the *General Standard for the Labelling of Prepackaged Foods* (CXS 1–1985): provisions relevant to allergen labelling
- Proposed draft Guidelines on the Provision of Food Information for Prepackaged Foods to be Offered Via E-Commerce
- Proposed draft Guidelines on the Use of Technology to Provide Food Information

For approval as new work:

- Amendments to the *General Standard for the Labelling of Prepackaged Foods* (CXS 1–1985): labelling of prepackaged foods in joint presentation and multipack formats

In addition, CCFL47 endorsed labeling provisions in standards developed by other Codex committees, including the Codex Committee on Fresh Fruits and Vegetables (CCFFV); the Codex Committee on Spices and Culinary Herbs (CCSCH); and the Codex Coordinating Committee for Asia (CCASIA). For the Standard for Dried Floral Parts—Saffron, CCFL47 agreed to endorse all labeling provisions except those on country of origin and country of harvest, referring these two provisions back to the CCSCH for reconsideration.

The CCFL is scheduled to convene its 48th session (CCFL48) from October 28 to November 1, 2024, in Ottawa, Canada. The CCFL48 agenda is currently unavailable.

The Committee is expected to continue work on:

- Proposed draft Guidelines on the Provision of Food Information for Prepackaged Foods to be Offered via E-Commerce
- Proposed draft revision to the *General Standard for the Labelling of Prepackaged Foods* (CXS 1–1985): Provisions relevant to allergen labeling and guidelines on precautionary allergen labeling
- Proposed draft Guidelines on the Use of Technology to Provide Food Information
- Discussion Paper on the Labelling of alcoholic beverages
- Redrafting of the Discussion Paper on the Application of food labelling provisions in emergencies
- Discussion Paper on Trans Fatty Acids (TFA)
- Redrafted Discussion Paper on Sustainability Labelling Claims: Revision to the *General Guidelines on Claims* (CXG 1–1979)
- Discussion Paper on the Definition for Added Sugars
- Update to the Discussion Paper on Future work and Direction of CCFL and Criteria for the evaluation and prioritization of work of CCFL

Responsible Agencies: HHS/FDA/CFSAN; USDA/FSIS.

U.S. Participation: Yes.

Codex Committee on Fresh Fruits and Vegetables

The Codex Committee on Fresh Fruits and Vegetables (CCFFV) is responsible for elaborating worldwide standards and codes of practice, as may be appropriate, for fresh fruits and vegetables, consulting as necessary, with other international organizations in the standards development process to avoid duplication.

The Committee had the following items which were considered and approved by the CAC45 in November 2022:

Final Adoption at Step 5/8

- *Standard for onions and shallots* (CXS 348–2022)
- *Standard for berry fruits* (not yet published; document number not yet assigned) *Interim adoption at Step 5*
- Proposed draft standard for fresh dates

Approved as New Work

- New regional standard for *Castilla lulo* (approved to be undertaken as a regional standard by the Regional Coordinating Committee for Latin America and the Caribbean)
- New standard for fresh curry leaves

In addition, the Committee agreed to the following item for internal use by the Committee:

- Glossary of terms used in the layout for Codex standards for fresh fruits and vegetables

The date and location of the 23rd Session of the CCFFV (CCFFV23) have not yet been determined. The CCFFV23 agenda is currently unavailable.

The Committee is expected to continue work on:

- New work proposals
- Draft standard for fresh dates
- Draft standard for fresh curry leaves

Responsible Agencies: USDA/Agricultural Marketing Service (AMS), HHS/FDA/CFSAN.

U.S. Participation: Yes.

Codex Committee on General Principles

The Codex Committee on General Principles (CCGP) is responsible for procedural and general matters referred to it by the Codex Alimentarius Commission, including: (a) The review or endorsement of procedural provisions/texts forwarded by other subsidiary bodies for inclusion in the *Procedural Manual* of the Codex Alimentarius Commission; and (b) The consideration and recommendation of other amendments to the Procedural Manual.

The 33rd Session of the CCGP (CCGP33) is scheduled for October 2–6, 2023, in Bordeaux, France.

The Committee is expected to discuss:

- Revisions/amendments to Codex texts
- Format and structure of the Codex *Procedural Manual*
- Review and possible amendments to the rules of procedure on Sessions of the Commission
- Review and possible amendment of the Principles concerning the participation of international non-governmental organizations in the work of the Codex Alimentarius Commission

Responsible Agencies: USDA/TFAA/USCO

U.S. Participation: Yes.

Codex Committee on Methods of Analysis and Sampling

The Codex Committee on Methods of Analysis and Sampling (CCMAS) defines the criteria appropriate to Codex Methods of Analysis and Sampling; serves as a coordinating body for Codex with other international groups working on methods of analysis and sampling and quality assurance systems for laboratories; specifies, on the basis of final recommendations submitted to it by the bodies referred to above, reference methods of analysis and sampling appropriate to Codex standards which are generally applicable to a number of foods; considers, amends if necessary, and endorses as appropriate, methods of analysis and sampling proposed by Codex (commodity) committees, except for those methods of analysis and sampling for residues of pesticides or veterinary drugs in food, the assessment of microbiological quality and safety in food, and the assessment of specifications for food additives; elaborates sampling plans and procedures, as may be required; considers specific sampling and analysis problems submitted to it by the Commission or any committees; and defines procedures, protocols, guidelines or related texts for the assessment of food laboratory proficiency, as well as quality assurance systems for laboratories.

The CCMAS convened its 42nd Session (CCMAS42) from June 12–16, 2023, in Budapest, Hungary, with virtual report adoption on June 20, 2023. The relevant document is REP23/

MAS. The Committee advanced the following items for consideration at the CAC46 in November 2023:

For Final Adoption at Step 8

- Revised *Guideline on Measurement Uncertainty* (CXG 54–2004)

For Revocation

- *General Standard for Methods for Contaminants* (CXS 228–2001)

The CCMAS is scheduled to convene its 43rd Session CCMAS43 from May 13–17, 2024, in Budapest, Hungary. The CCMAS43 agenda is currently unavailable.

The Committee is expected to continue work on:

- Amendments to certain provisions in *Recommended Methods of Analysis and Sampling* (CXS 234–1999)
- Review of methods for fish and fishery products and fruit juices

Responsible Agencies: HHS/FDA/CFSAN; USDA/AMS.

U.S. Participation: Yes.

Codex Committee on Nutrition and Foods for Special Dietary Uses

The Codex Committee on Nutrition and Foods for Special Dietary Uses (CCNFSDU) is responsible for studying nutrition issues referred to it by the Codex Alimentarius Commission. The Committee also drafts general provisions, as appropriate, on nutritional aspects of all foods and develops standards, guidelines, or related texts for foods for special dietary uses in cooperation with other committees where necessary; considers, amends if necessary, and endorses provisions on nutritional aspects proposed for inclusion in Codex standards, guidelines, and related texts.

The Committee had the following item which was considered and approved by the CAC45 in November 2022:

Final Adoption at Step 8

- Guidelines for Ready-to-Use Therapeutic Foods (RUTF)

The CCNFSDU convened its 43rd Session (CCNFSDU43) from March 7–10, 2023, in Dusseldorf, Germany, with virtual report adoption on March 15, 2023. The relevant document is REP23/NFSDU. CCNFSDU43 advanced the following items for consideration by the CAC46 in November 2023:

For Final Adoption at Step 8 and Step 5/8

- Revised *Standard for Follow-up Formula* (renamed as the Standard for Follow-up Formula for Older Infants and Product for Young Children) (CXS156–1987)

For Interim Adoption at Step 5

- General Principles for establishing Nutrient Reference Values (NRVs–R) for persons aged 6 to 36 month*s*

The CCNFSDU is scheduled to convene its 44th Session (CCNFSDU44) from October 2–6, 2024. The CCNFSDU44 location and agenda are currently unavailable.

The Committee is expected to continue work on:

- General Principles for the Establishment of Nutrient Reference Values–Requirements (NRVs–R) for persons aged 6–36 months
- Collection and review of information on the use and use levels for five identified additives and their technological justification
- Redrafting of the prioritization mechanism/emerging issues for new work proposals
- Redrafting a revised Discussion Paper on harmonized probiotic guidelines
- Redrafting the Discussion Paper on Guidelines including General Principles for the Nutritional Composition of Foods and Beverages made from Plant-based and other Alternative Protein Sources

Responsible Agencies: HHS/FDA/CFSAN; USDA/ARS.

U.S. Participation: Yes.

Codex Committee on Pesticide Residues

The Codex Committee on Pesticide Residues (CCPR) is responsible for establishing maximum residue limits (MRLs) for pesticide residues in specific food items or in groups of food; establishing MRLs for pesticide residues in certain animal feeding stuffs moving in international trade where this is justified for reasons of protection of human health; preparing priority lists of pesticides for evaluation by the Joint FAO/WHO Meeting on Pesticide Residues (JMPR); considering methods of sampling and analysis for the determination of pesticide residues in food and feed; considering other matters in relation to the safety of food and feed containing pesticide residues; and establishing maximum limits for environmental and industrial contaminants showing chemical or other similarity to pesticides in specific food items or groups of food.

The Committee had the following items which were considered and approved by the CAC45 in November 2022:

Final Adoption at Step 8 and 5/8

- Over 300 Maximum Residue Limits (MRLs) for different combinations of pesticides/commodities
- Guidelines for the recognition of active substances or authorized uses of active substances of low public health concern that are considered exempted from the establishment of Codex maximum residue limits (MRLs) or do not give rise to residues
- Revision of *Classification of Food and Feed* (CXA 4–1989): definitions for edible offal, fat, meat, and muscle, including the definitions for the portion of the commodity to which MRLs apply and which is analyzed for fat and muscle; consequential amendment to Class D, Processed Food of Plant Origin; inclusion of additional commodities for citrus fruits pulps (dried) and oils (edible) and soya flour

The CAC45 also discontinued work, approved new work, and revoked existing MRLs as recommended by CCPR53, and noted the discontinuation of discussion of review of the international estimated short-term intake (IESTI) equations.

The CCPR convened its 54th Session (CCPR54) in Beijing, China from June 26–July 1, 2023. The relevant document is REP23/PR. CCPR54 advanced the following items for consideration by the CAC46 in November 2023:

For final adoption at Step 8 and 5/8

- Over 400 Maximum Residue Limits (MRLs) for different combinations of pesticides/commodities
- Revision of the *Classification of Food and Feed* (CXA 4–1989):
  - the revised Class B- Primary food commodities of animal origin and Class E -Processed Foods of Animal Origin (All Types) and their respective table of representative commodities;
  - the consequential amendment to Table 2, Subgroup 12C Eggplant and eggplant-like commodities to the *Principles and Guidance on the Selection of Representative Commodities for the Extrapolation of MRLs for Pesticides to Commodity Groups* (CXG 84–2012);
  - the consequential amendment to the revised definition for the portion of the commodity to which MRLs apply and which is analyzed for Group 006—Tropical Fruits of Inedible Peel and 023—Oil fruits; and
  - the consequential amendments to the inclusion of new commodities/commodity codes in Class A—Primary food commodities of plant

origin and Class D—Processed commodities of plant origin

For Revocation

- The *Guidelines on Portion of Commodities to which MRLs Apply and which is Analyzed* (CXG 41–1993), noting that the *Classification of Food and Animal Feeds* (CXA 4–1989) should be the single, authoritative reference of food and feed for the establishment of MRLs for pesticides

For Approval as New Work

- Guidance for monitoring the purity and stability of reference materials of multi-class pesticides during prolonged storage

The CAC46 will also consider discontinuation of work and revocation of existing MRLs as recommended by CCPR54.

The CCPR is scheduled to convene its 55th Session (CCPR55) from June 3–8, 2024, in China. The CCPR55 agenda is currently unavailable.

The Committee is expected to continue work on:

- Coordination of work between CCPR and CCRVDF: Joint CCPR/CCRVDF Working Group on Compounds for Dual Use
- National registration of pesticides
- Management of unsupported compounds without public health concern scheduled for periodic review
- Establishment of Codex schedules and priority lists of pesticides for evaluation/re-evaluation by JMPR
- Enhancement of the operational procedures of CCPR and JMPR

Responsible Agencies: EPA/Office of Chemical Safety and Pollution Prevention (OCSPP)/Office of Pesticide Programs (OPP); USDA/FSIS.

U.S. Participation: Yes.

Codex Committee on Residues of Veterinary Drugs in Foods

The Codex Committee on Residues of Veterinary Drugs in Foods (CCRVDF) determines priorities for the consideration of residues of veterinary drugs in foods and recommends MRLs for veterinary drugs. The Committee also develops codes of practice, as may be required, and considers methods of sampling and analysis for the determination of veterinary drug residues in food.

The Committee had the following item which was considered and approved by the CAC45 in November 2022:

Interim Adoption at Step 5

- MRLs for zilpaterol hydrochloride (cattle kidney, liver, muscle)

The CCRVDF convened its 26th Session (CCRVDF26) from February 13–17, 2023, in Portland, Oregon. The relevant document is REP23/RVDF. CCRVDF26 advanced the following items for consideration at the CAC46 in November 2023:

For Final Adoption at Step 8 and 5/8

- 57 maximum residue limits (MRLs) for 13 veterinary drugs

For Approval

- Priority List of veterinary drugs requiring evaluation or re-evaluation by JECFA

The CCRVDF is scheduled to convene its 27th Session (CCRVDF27) from October 21–25, 2024. The CCRVDF27 location, and agenda are currently unavailable.

The Committee is expected to continue work on:

- Extrapolation of MRLs between species and to edible offal tissues
- Establishment of action levels for residues of veterinary drugs in edible tissues caused by unavoidable and unintended carryover of veterinary drug residues in animal feed
- Coordination between CCRVDF and CCPR on issues affecting both committees (*e.g.,* harmonization of MRLs for similar edible commodities of animal origin; harmonization of risk assessment methodologies; data-sharing for dual-use compounds)
- Priority List of veterinary drugs requiring evaluation or re-evaluation by JECFA

Responsible Agencies: HHS/FDA/Center for Veterinary Medicine (CVM); USDA/FSIS.

U.S. Participation: Yes.

Codex Committee on Spices and Culinary Herbs

The Codex Committee on Spices and Culinary Herbs (CCSCH) is responsible for elaborating worldwide standards for spices and culinary herbs in their dried and dehydrated state in whole, ground, and cracked or crushed form. CCSCH also consults, as necessary, with other international organizations in the standards development process to avoid duplication.

The CCSCH convened its 6th Session (CCSCH6) virtually from September 26 to October 10, 2022. The relevant document is REP22/SCH. The Committee had the following items which were considered and approved by the CAC45 in November 2022:

Final Adoption at Step 8

- Standard for Dried Floral Parts—Saffron (not yet published)
- *Standard for Dried Seeds—Nutmeg* (CXS 352–202)
- Standard for Dried or Dehydrated Chili Pepper and Paprika (not yet published)
- Amendments to the labelling provisions for non-retail containers in the eight existing spices and culinary herb (SCH) standards, for consistency with the new *General Standard for the Labelling of Non-Retail Containers of Foods* (CXS 346–2021)

Interim Adoption at Step 5

- Proposed draft standard for dried small cardamom
- Proposed draft group standard for spices in the form of dried fruits and berries (allspice, juniper berry, star anise and vanilla)

The CCSCH is scheduled to convene its 7th Session (CCSCH7) from January 29–February 2, 2024, in India. The CCSCH7 agenda is currently unavailable.

The committee is expected to continue work on:

- Proposed draft standard for turmeric
- Proposed draft standard for spices in dried fruits and berries—vanilla
- Update to the SCH Grouping Template

Responsible Agencies: USDA/AMS; HHS/FDA/CFSAN.

U.S. Participation: Yes.

Adjourned Codex Commodity Committees

Several Codex Alimentarius Commodity Committees have adjourned *sine die.* The following Committees fall into this category:

Cereals, Pulses and Legumes—adjourned sine die 2020

Responsible Agency: HHS/FDA/CFSAN.

U.S. Participation: Yes.

Cocoa Products and Chocolate—adjourned sine die 2001

Responsible Agency: HHS/FDA/CFSAN.

U.S. Participation: Yes.

Meat Hygiene—adjourned sine die 2003

Responsible Agency: USDA/FSIS.

U.S. Participation: Yes.

Milk and Milk Products—adjourned sine die 2017

Responsible Agency: USDA/AMS; HHS/FDA/CFSAN.

U.S. Participation: Yes.

Natural Mineral Waters—adjourned sine die 2008

Responsible Agency: HHS/FDA/CFSAN.
U.S. Participation: Yes.

Processed Fruits and Vegetables—adjourned sine die 2020

Responsible Agency: USDA/AMS; HHS/FDA/CFSAN.
U.S. Participation: Yes.

Sugars—adjourned sine die 2019

Responsible Agency: HHS/FDA/CFSAN.
U.S. Participation: Yes.

Vegetable Proteins—adjourned sine die 1989

Responsible Agency: USDA/ARS.
U.S. Participation: Yes.

FAO/WHO Regional Coordinating Committees

The FAO/WHO Regional Coordinating Committees define the problems and needs of the regions concerning food standards and food control; promote within the Committee contacts for the mutual exchange of information on proposed regulatory initiatives and problems arising from food control and stimulate the strengthening of food control infrastructures; recommend to the Commission the development of worldwide standards for products of interest to the region, including products considered by the Committees to have an international market potential in the future; develop regional standards for food products moving exclusively or almost exclusively in intra-regional trade; draw the attention of the Commission to any aspects of the Commission's work of particular significance to the region; promote coordination of all regional food standards work undertaken by international governmental and non-governmental organizations within each region; exercise a general coordinating role for the region and such other functions as may be entrusted to them by the Commission; and promote the use of Codex standards and related texts by members.

There are six regional coordinating committees:

- Coordinating Committee for Africa
- Coordinating Committee for Asia
- Coordinating Committee for Europe
- Coordinating Committee for Latin America and the Caribbean
- Coordinating Committee for the Near East
- Coordinating Committee for North America and the South West Pacific

Coordinating Committee for Africa

The Coordinating Committee for Africa (CCAFRICA) convened its 24th Session (CCAFRICA24) virtually from September 5–9, 2022, with report adoption taking place on September 13, 2022.

The CCAFRICA had the following items which were considered and adopted by the CAC45 in November 2022:

Final Adoption at Step 8

- Regional standard for dried meat (not yet published)

Final Adoption at Step 5/8

- *Guidelines for Developing Harmonized Food Safety Legislation for the CCAFRICA Region* (CXG 98–2022)

The CCAFRICA plans to convene its 25th Session (CCAFRICA25) in approximately two years' time. The CCAFRICA25 date, location, and agenda are currently unavailable.

Responsible Party: USDA/TFAA/USCO.
U.S. Participation: Yes (as an observer).

Coordinating Committee for Asia

The Coordinating Committee for Asia (CCASIA) convened its 22nd Session (CCASIA22) virtually from October 12–18, 2022, with report adoption taking place on October 21, 2022.

The CCASIA advanced the following items for consideration at the CAC46 in November 2023:

For Final Adoption at Step 8 or Step 5/8

- Proposed draft regional standard for soybean products fermented with *Bacillus* species
- Proposed draft regional standard for cooked rice wrapped in plant leaves
- Proposed draft regional standard for quick frozen dumpling
- Amendment to the labelling provisions for non-retail containers in relevant CCASIA regional standards

The CCASIA plans to convene its 23rd Session (CCASIA23) in 2024. The CCASIA23 date, location, and agenda are currently unavailable.

Responsible Party: USDA/TFAA/USCO.
U.S. Participation: Yes (as an observer).

Coordinating Committee for Europe

The Coordinating Committee for Europe (CCEURO) did not meet during the time period covered by this notice and has not announced the date or location of its next session (CCEURO33). The CCEURO33 agenda is currently unavailable.

Responsible Party: USDA/TFAA/USCO.
U.S. Participation: Yes (as an observer).

Coordinating Committee for Latin America and the Caribbean

The Coordinating Committee for Latin America and the Caribbean (CCLAC) convened its 22nd Session (CCLAC22) virtually from October 24–28, 2022.

The CCLAC plans to convene its 23rd Session (CCLAC23) in approximately two years' time from CCLAC22. The CCLAC23 date, location, and agenda are currently unavailable.

Responsible Party: USDA/TFAA/USCO.
U.S. Participation: Yes (as an observer).

Coordinating Committee for North America and the South West Pacific

The Coordinating Committee for North America and the South West Pacific (CCNASWP) convened its 16th Session (CCNASWP16) in Nadi, Fiji, from January 30 to February 3, 2023.

The CCNASWP advanced the following item for consideration by the CAC46 in November 2023:

For Final Adoption at Step 8

- Draft regional standard for fermented noni fruit juice

The CCNASWP will convene its 17th Session in approximately two years' time from CCNASWP16. The CCNASWP17 date, location, and agenda are currently unavailable.

Responsible Party: USDA/TFAA/USCO.
U.S. Participation: Yes (as an observer).

Coordinating Committee for the Near East

The Coordinating Committee for the Near East (CCNE) did not meet in 2022. The CCNE plans to convene its 11th Session (CCNE11) at FAO headquarters in Rome, Italy, September 18–22, 2023. The agenda for CCNE 11 includes discussion of the following topics: alignment of regional standards, proposed draft regional standard for maamoul, Codex work relevant to the region, food safety and quality in the region including current and emerging issues—country updates, implementation of the Codex Strategic Plan 2020–2025, Discussion Paper on the development of a standard for halal products, and Nomination of the regional coordinator.

Responsible Party: USDA/TFAA/USCO.

U.S. Participation: Yes (as an observer).

Contact Information

U.S. Codex Office, United States Department of Agriculture, Room 4861, 1400 Independence Avenue SW, Washington, DC 20250–3700, Email: *uscodex@usda.gov.*

[FR Doc. 2023–17128 Filed 8–9–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Nebraska Advisory Committee; Cancellation

AGENCY: Commission on Civil Rights.

ACTION: Notice; cancellation of community forum meeting.

SUMMARY: The Commission on Civil Rights published a notice in the **Federal Register** concerning a community forum meeting of the Nebraska Advisory Committee. The meeting scheduled for Wednesday, August 9, 2023, at 1:00 p.m. (CST) is cancelled.

FOR FURTHER INFORMATION CONTACT: Victoria Moreno, *vmoreno@usccr.gov,* (434) 515–0204.

SUPPLEMENTARY INFORMATION: The meeting notice was originally published in the **Federal Register** of Thursday, July 27, 2023, in FR Doc. 2023–15886 in the second columns of page 48431 (88 FR 48431).

Dated: August 7, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–17161 Filed 8–9–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the U.S. Virgin Islands Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Notice of public 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 U.S. Virgin Islands Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a public meeting via Zoom. The purpose of the meeting is to discuss and plan on matters related to the Committee's inaugural civil rights project.

DATES: Tuesday, September 5, 2023, from 11:00 a.m.–12:30 p.m. Atlantic Time.

ADDRESSES: The meeting will be held via Zoom.

Meeting Link (Audio/Visual): https://www.zoomgov.com/j/1603920110.

Join by Phone (Audio Only): 1–833–435–1820 USA Toll-Free; Meeting ID: 160 392 0110#.

FOR FURTHER INFORMATION CONTACT: David Barreras, Designated Federal Officer, at *dbarreras@usccr.gov* or 1–202–656–8937.

SUPPLEMENTARY INFORMATION: This Committee meeting is available to the public through the Zoom meeting link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, 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. Closed captioning is available by selecting ''CC'' in the meeting platform. To request additional accommodations, please email *svillanueva@usccr.gov* at least 10 business days prior to the meeting.

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 David Barreras at *dbarreras@usccr.gov.* Persons who desire additional information may contact the Regional Programs Coordination Unit at 1–202–656–8937.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via *www.facadatabase.gov* under the Commission on Civil Rights, U.S. Virgin Islands 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 Coordination Unit at *svillanueva@usccr.gov.*

Agenda

I. Welcome & Roll Call
II. Discussion: Committee's Inaugural Civil Rights Project
III. Public Comment
IV. Next Steps
V. Adjournment

Dated: August 7, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–17163 Filed 8–9–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Puerto Rico Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a meeting of the Puerto Rico Advisory Committee to the Commission will convene by virtual web conference on Monday, August 28, 2023, at 3:30 p.m. Atlantic Time/Eastern Time. The purpose is to continue discussion on their project on the civil rights impacts of the Insular Cases in Puerto Rico.

DATES: August 28, 2023, Monday, at 3:30 p.m. (AT and ET):

ADDRESSES: Meeting will be held via Zoom.

Registration Link (Audio/Visual): https://tinyurl.com/yvabtunr.

Join by Phone (Audio Only): 1–833 435 1820 USA Toll Free; Meeting ID: 160 718 7790#.

FOR FURTHER INFORMATION CONTACT: Email Victoria Moreno, Designated Federal Officer at *vmoreno@usccr.gov,* or by phone at 434–515–0204.

SUPPLEMENTARY INFORMATION: This meeting will take place in Spanish with English interpretation. This committee meeting is available to the public through the registration link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, 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. Closed captioning will be available for individuals who are deaf, hard of hearing, or who have certain cognitive or learning impairments. To request additional accommodations, please email *ebohor@usccr.gov* at least 10 business days prior to the meeting.

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 Victoria Moreno at *vmoreno@usccr.gov.* Persons who desire additional information may contact the Regional Programs Coordination Unit at 1–312–353–8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Puerto Rico 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 Coordination Unit at *ebohor@usccr.gov.*

Agenda

1. Welcome & Roll Call
2. Committee Discussion on Project Regarding the Civil Rights Impacts of the Insular Cases in Puerto Rico
3. Next Steps
4. Public Comment
5. Other Business
6. Adjourn

Dated: August 7, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–17160 Filed 8–9–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Additional Protocol to the U.S.—International Atomic Energy Agency Safeguards

AGENCY: Bureau of Industry and Security, Department of Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before October 10, 2023.

ADDRESSES: Interested persons are invited to submit comments by email to Mark Crace, IC Liaison, Bureau of Industry and Security, at *mark.crace@bis.doc.gov* or to *PRAcomments@doc.gov.* Please reference OMB Control Number 0694–0135 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Mark Crace, IC Liaison, Bureau of Industry and Security, phone 202–482–8093 or by email at *mark.crace@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The Additional Protocol requires the United States to submit declaration forms to the International Atomic Energy Agency (IAEA) on a number of commercial nuclear and nuclear-related items, materials, and activities that may be used for peaceful nuclear purposes, but also would be necessary elements for a nuclear weapons program. These forms provides the IAEA with information about additional aspects of the U.S. commercial nuclear fuel cycle, including: mining and milling of nuclear materials; buildings on sites of facilities selected by the IAEA from the U.S. Eligible Facilities List; nuclear-related equipment manufacturing, assembly, or construction; import and export of nuclear and nuclear-related items and materials; and research and development. The Protocol also expands IAEA access to locations where these activities occur in order to verify the form data.

II. Method of Collection

Submitted electronically or in paper form.

III. Data

OMB Control Number: 0694–0135.

Form Number(s): AP–1 through AP–17, and AP–A through AP–Q.

Type of Review: Regular submission, extension of a current information collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 500.

Estimated Time per Response: 23 minutes to 6 hours.

Estimated Total Annual Burden Hours: 920.

Estimated Total Annual Cost to Public: 5,400.

Respondent's Obligation: Mandatory.

Legal Authority: Additional Protocol Implementation Act (Title II of Pub. L. 109–401), Executive Order (E.O.) 13458.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. 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 may 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.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–17117 Filed 8–9–23; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD203]

Endangered and Threatened Species; Notice of Intent To Prepare a Programmatic Environmental Impact Statement for NOAA's Expenditure of Funds To Increase Prey Availability for Southern Resident Killer Whales

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

ACTION: Notice of intent to prepare an environmental impact statement, request for comments.

SUMMARY: This notice announces an Environmental Impact Statement (EIS) will be prepared in accordance with the National Environmental Policy Act (NEPA) to analyze the impacts to the environment of alternatives related to a funding program addressing species affected by fisheries managed under the Pacific Salmon Treaty (PST). NMFS intends to make funding decisions related to increasing the availability of prey to Southern Resident Killer Whales (SRKWs). This notice is necessary to inform the public of NMFS's intent to prepare this EIS and to provide the public with an opportunity to provide input for NMFS's consideration.

DATES: The NMFS requests comments concerning the scope of the analysis, and identification of relevant information, studies, and analyses. All comments must be received by 11:59 p.m. Eastern Time on September 25, 2023.

ADDRESSES: Send written comments to NOAA Fisheries, 2900 NW Stewart Parkway, Roseburg, OR 97471. Comments may also be sent via email to *hatcheries.public.comment@noaa.gov.* For further information, please see the following website: *https://www.fisheries.noaa.gov/action/review-prey-increase-program-southern-resident-killer-whales.*

Instructions: It is important that reviewers provide their comments at such times and in such manner that they are useful to the agency's preparation of the EIS. Therefore, comments should be provided prior to the close of the comment period and should help NMFS identify potential alternatives, information, and analyses relevant to the proposed action. Comments must be submitted by one of the above methods to ensure they are received, documented, and considered by NMFS. 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. All comments received are a part of the public record. All personal identifying information (*e.g.,* name, address, *etc.*) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments.

FOR FURTHER INFORMATION CONTACT: Lance Kruzic, NMFS, 541–802–3728, *hatcheries.public.comment@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Purpose and Need for the Proposed Action

The purpose and need of the proposed action is to provide for additional prey (food) for the benefit of SRKWs, which are listed as endangered under the Endangered Species Act (ESA) consistent with applicable laws and treaties.

Preliminary Proposed Action and Alternatives

The United States and Canada have an agreement for the management of Chinook salmon and the fisheries that affect Chinook stocks that is part of the PST. This agreement was renewed in 2019 and is currently in effect through 2028. In association with the renewed agreement, the U.S. section of the Pacific Salmon Commission, the international body that implements the PST, agreed to seek Federal funding for activities to conserve certain species listed under the ESA that are affected by fisheries managed under the PST. Congress has appropriated annual funding for these activities in 2020 through 2023. A portion of the funding has been awarded to hatchery operators in the Pacific Northwest to increase production of Chinook salmon for the purpose of increasing prey for SRKWs.

NMFS is proposing to continue implementation of the funding program to increase prey for the benefit of SRKWs. Beginning in 2020, NMFS funded the production of additional hatchery Chinook salmon in existing hatchery programs in Washington, Oregon, and Idaho. Specific criteria were developed to guide these funding decisions to maximize the benefits to SRKWs, while mitigating potential adverse effects to salmon and steelhead listed under the ESA. NMFS conducted site-specific NEPA analyses for each funding decision or otherwise ensured that effects from funding specific hatcheries were evaluated within existing NEPA analyses. However, in a recent court ruling (*Wild Fish Conservancy* v. *Rumsey,* W.D. Wash., Order Adopting Report and Recommendation, August 8, 2022), the court found that NMFS failed to conduct adequate NEPA analysis for the adoption of the prey increase program. This EIS responds to the court's decision.

We will also be evaluating the effects of a No Action alternative, in which no Federal funding would be used to increase available Chinook prey for the benefit of SRKWs. NMFS is also planning to evaluate other possibilities. For example, instead of funding additional prey for SRKWs in the form of hatchery fish, funding could instead be used to improve the productivity of natural-origin salmon through habitat restoration/enhancement. Another alternative could reduce fishing impacts on select salmon stocks instead of producing additional hatchery fish. Through this notice, we are seeking input on these potential alternatives to help shape the development of our EIS consistent with our purpose and need for the proposed action.

Summary of Expected Impacts

The EIS will evaluate a range of alternatives, and the effects of these alternatives, on the human environment. Key resources to be considered include, but are not limited to, SRKWs and other wildlife species, salmon and steelhead, socioeconomics, and aquatic habitats. Considering a range of alternatives means there is a range of impacts to the key resources specified above that would be evaluated in the EIS, such as different abundances of hatchery salmon available as prey for SRKWs, reduced fishery impacts and corresponding salmon abundances, and effects of additional hatchery salmon production on ESA-listed salmon and steelhead.

Anticipated Permits and Authorizations

The following consultations, permits, and/or other authorizations may be required as part of NMFS' continued funding to increase the availability of prey (food) for SRKWs: ESA Section 7 consultations, ESA Section 4(d) authorizations or Section 10 permits, Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat consultation; and consultation with Indian Tribes.

Schedule for the Decision-Making Process

The draft environmental impact statement is scheduled to be made available for public review in the fall of

2023, and issuance of the final environmental impact statement is scheduled for spring of 2024, with a Record of Decision issued soon thereafter.

Public Scoping Process

This notice of intent initiates the scoping process, which helps guide the development of the EIS. NMFS is hosting public webinars for informational purposes within the scoping period. Information on the webinar dates and times, and instructions for connecting or calling into the webinar will be posted at: *https://www.fisheries.noaa.gov/action/review-prey-increase-program-southern-resident-killer-whales.* Accommodations for persons with disabilities are available; accommodation requests should be directed to Lance Kruzic (see **FOR FURTHER INFORMATION CONTACT**) at least 10 working days prior to the webinar.

Public comments will not be accepted during the webinars.

Request for Identification of Potential Alternatives, Information, and Analyses Relevant to the Proposed Action

The primary purpose of the scoping process is for the public to assist NMFS in developing the EIS. NMFS requests that the comments be specific. In particular, we request information regarding: any science that would be relevant in this assessment; significant issues; identification of impacts of concern; review and input regarding monitoring; possible alternatives that meet the purpose and need; effects or impacts to the human environment from the proposed action or alternatives.

Decision Maker

Regional Administrator for the West Coast Region, NMFS.

Nature of Decision To Be Made

If after publication of the Record of Decision, we determine that all requirements are met for NMFS' NEPA and ESA responsibilities, we may continue to provide funding for the production of additional prey for SRKWs.

Authority: 42 U.S.C. 4321 *et seq.;* 40 CFR parts 1500–1508; and Companion Manual for NOAA Administrative Order 216–6A, 82 FR 4306.

Dated: August 7, 2023.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023–17184 Filed 8–9–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD232]

Request for Information; Data for Marine Spatial Studies in Puerto Rico and the U.S. Virgin Islands

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

ACTION: Notice; request for information.

SUMMARY: NOAA's National Ocean Service (NOS), National Centers for Coastal Ocean Science (NCCOS) in partnership with the NOAA National Marine Fisheries Service (NMFS), Southeast Fisheries Science Center (SEFSC) and Southeast Regional Office (SERO), hereafter NOAA, are working to build spatial science capacity in the U.S. Caribbean Region. Through this Request for Information, we are seeking public input to identify coastal and marine spatial data or other critical information to inform marine spatial analyses. Additionally, we are seeking feedback on data shortcomings and gaps that should be addressed prior to commencing marine spatial studies. The input we receive from meetings, as well as the responses to the items listed in the **SUPPLEMENTARY INFORMATION** section of this document, will be used to inform potential coastal and ocean development activities in Puerto Rico and the U.S. Virgin Islands (USVI), such as development of renewable energy facilities, aquaculture, and other blue economy sectors.

DATES: Interested persons are invited to provide input in response to this Request for Information through September 30, 2023. Late-filed input will be considered to the extent practicable.

Verbal input will be accepted during two public meetings to be held in St. Croix, USVI on August 28–29 and in San Juan, Puerto Rico on August 31–September 1.

ADDRESSES: Interested persons are invited to provide input using one of the following methods:

Electronic Submission: Submit electronic written public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter NOAA–NMFS–2023–0097 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments. All comments received are a part of the public record and will generally be posted for public viewing on *https://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. NOAA will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

Verbal submission: NOAA will accept verbal input at two meetings. The first meeting will be held at The Buccaneer Resort in St. Croix, USVI on Monday August 28, 2023 from 8:30am to 5:00pm (AST) and Tuesday, August 29, 2023 from 8:30am to 12:00pm (AST). There will be a registration window from 8:30am to 9:00am (AST) each day before the start of the meeting. The second meeting will be held at the Courtyard Marriott Isla Verde Beach Resort in San Juan, Puerto Rico on Thursday, August 31, 2023 from 8:30am to 5:00pm (AST) and Friday, September 1, 2023 from 8:30am to 12:00pm (AST). There will be a registration window from 8:30am to 9:00am (AST) each day before the start of the meeting. Simultaneous language interpretation in English and Spanish will be provided in the Puerto Rico meetings. Advanced registration is requested for the meetings by completing the registration form at *https://docs.google.com/forms/d/e/1FAIpQLSf1B1QOXhd7EJEDflyok-ATW4ZGLHRloJLSzcntmopDjhd86A/viewform?usp=sf* link or by providing an RSVP to Erica Rule at *erica.rule@noaa.gov*. The registration deadline is Monday, August 21, 2023.

Reports of meeting results will also be published and made available to the public in the weeks following the meetings. If you are unable to provide electronic written comments or participate in the meetings, please contact Jennifer Wright at *jennifer.wright@noaa.gov* or (252)418–1308 for alternative submission methods.

FOR FURTHER INFORMATION CONTACT: James Morris (*james.morris@noaa.gov*), (252)666–7433.

SUPPLEMENTARY INFORMATION:

Background

NOAA is an agency of the United States Federal government that works to conserve and manage coastal and marine ecosystems and resources. We work to make fisheries sustainable and productive, provide safe seafood to consumers, conserve threatened and endangered species and other protected resources, and maintain healthy ecosystems. NOAA has jurisdiction and

responsibility for its trust marine resources in the U.S. Caribbean as well as significant interest in supporting the resilience of coastal and marine-dependent communities in the Territories, and promoting equity and environmental justice. For these reasons, is it important for NOAA to invest in research that informs marine spatial studies in the Caribbean region, including socioeconomic research that ensures meaningful participation of Caribbean communities and supports equitable processes for planning and siting of new and existing marine industries and conservation areas.

NOAA has recently been involved in planning for the expansion of offshore aquaculture in U.S. Federal waters through the development of Aquaculture Opportunity Areas (*https://www.fisheries.noaa.gov/national/aquaculture/aquaculture-opportunity-areas*). NOAA has also been engaged with the Bureau of Ocean Energy Management (BOEM) to support siting and environmental review for offshore wind energy areas in U.S. Federal waters (*https://www.boem.gov/renewable-energy*) to ensure protection of trust resources in any offshore development activities.

Purpose of This Request for Information

The purpose of this Request for Information is to promote data development to inform marine spatial studies in Puerto Rico and the USVI, with an emphasis on data needs for offshore wind energy and aquaculture development. In addition to input received from the public through the electronic and verbal submissions, NOAA aims to inform the public about its coastal and ocean planning processes and capabilities, discuss the current data available for each ocean sector (e.g., military, fisheries, industry, natural resources), and gather ideas for other data sources. NOAA hopes to come out of the meetings with a strengthened relationship with the public and a list of data gaps and needs to pursue going forward.

Specific Information Requested To Inform Marine Spatial Studies in Puerto Rico and USVI

Through this Request for Information, NOAA seeks written public input to inform the marine spatial studies in Puerto Rico and USVI. NOAA is particularly interested in receiving input concerning the items listed below. Responses to this Request for Information are voluntary, and respondents need not reply to items listed. When providing input, please specify if you are providing general feedback on marine spatial studies and/or if you are responding to one of the specific item number(s) below:

(1) Specific datasets related to ocean sectors, natural resources, and/or human activities you recommend NOAA use in marine spatial studies.

(2) Major concerns you have related to use of any specific datasets that may be used in marine spatial studies.

(3) Major concerns you have related to the impacts of new marine industries on ecological systems in Puerto Rico and/or the USVI.

(4) Major concerns you have related to the impact of new marine industries on other ocean industries in Puerto Rico and/or the USVI.

(5) Major concerns you have related to gaps in scientific knowledge or data that could impact marine spatial study efforts.

(6) Specific data or information you recommend NOAA or other partners collect, if it is not currently available or has not been previously collected.

(7) Ways in which NOAA can better engage and collaborate with the public and Territorial communities to promote economic, social, and ecological resilience as well as protect trust resources.

Dated: August 4, 2023.

Samuel D Rauch, III,

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

[FR Doc. 2023–17119 Filed 8–9–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[0648–XD226]

Notice of Availability of Draft Environmental Assessment on the Effects of Issuing an Incidental Take Permit No. 27106

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

ACTION: Notice; availability of a Draft Environmental Assessment; request for comments.

SUMMARY: NMFS announces the availability of the Draft Environmental Assessment (EA) on the effects of issuing an Incidental Take Permit (ITP) (No. 27106) to North Carolina Department of Environment and Natural Resources, Division of Marine Fisheries (NCDMF), pursuant to the Endangered Species Act (ESA) of 1973, as amended, for the incidental take of ESA-listed sea turtles and sturgeon associated with the otherwise lawful gill net fisheries operating in the inshore waters of North Carolina. The duration of the requested permit is 10 years. NMFS is requesting comment on the draft EA.

DATES: Written comments must be received at the appropriate address or fax number (see **ADDRESSES**) on or before September 11, 2023.

ADDRESSES: The EA is available for download and review at *https://www.fisheries.noaa.gov/national/endangered-species-conservation/incidental-take-permits* under the section heading Related Documents for the Incidental Take Permit to North Carolina Division of Marine Fisheries (Sea Turtles and Sturgeon). The draft EA is also available upon written request (see **FOR FURTHER INFORMATION CONTACT**).

You may submit comments on this document, identified by NOAA–NMFS–2023–0098, by any 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–2023–0098 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.

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).

FOR FURTHER INFORMATION CONTACT: Celeste Stout, NMFS, Office of Protected Resources at *celeste.stout@noaa.gov,* 301–427–8403; Wendy Piniak, NMFS, Office of Protected Resources at *wendy.piniak@noaa.gov,* 301–427–8402.

SUPPLEMENTARY INFORMATION: Publication of this notice begins the official public comment period for this draft EA. Per the National Environmental Policy Act (NEPA), the purpose of the draft EA is to evaluate the potential direct, indirect, and cumulative impacts caused by the issuance of Permit No. 27106 to NCDMF for the incidental take of ESA-listed sea

turtles and sturgeon associated with the otherwise lawful anchored small and large-mesh gill net fisheries operating in the inshore waters of North Carolina. All comments received will become part of the public record and will be available for review.

Section 9 of the ESA and Federal regulations prohibit the 'taking' of a species listed as endangered or threatened. The ESA defines ''take'' to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. NMFS may issue permits, under limited circumstances to take listed species incidental to, and not the purpose of, otherwise lawful activities. Section 10(a)(1)(B) of the ESA provides a mechanism for authorizing incidental take of listed species. NMFS regulations governing permits for threatened and endangered species are promulgated at 50 CFR 222.307.

Species Covered in This Notice

The following species are included in the EA: North Atlantic and South Atlantic Distinct Population Segments (DPSs) of green (*Chelonia mydas*), Kemp's ridley (*Lepidochelys kempii*), hawksbill (*Eretmochelys imbricata*), leatherback (*Dermochelys coriacea*), and Northwest Atlantic Ocean DPS of loggerhead (*Caretta caretta*) sea turtles, Gulf of Maine, New York Bight, Chesapeake, Carolina, and South Atlantic DPSs of Atlantic sturgeon (*Acipenser oxyrinchus oxyrinchus*), and shortnose sturgeon (*Acipenser brevirostrum*).

Background

NMFS received a draft permit application and conservation plan from NCDMF on June 22, 2022. Based on our review of the draft application, we requested further information and clarification on their mitigation measures and take requests. After several draft submissions and reviews, on December 2, 2022, NCDMF submitted a complete revised application for the incidental take of ESA-listed sea turtles and sturgeon. On December 22, 2022, we published a notice of receipt (87 FR 78659) of application and conservation plan from NCDMF for an incidental take permit. In that notice, we made the ITP application and associated conservation plan available for public comment. Subsequently, we received a request to extend the public comment period. NMFS provided a 30-day extension (88 FR 3971) to the comment period which closed on February 22, 2023. We received 231 comments on the application and conservation plan and responses to these comments are available in the draft EA.

National Environmental Policy Act

This notice is provided pursuant to section 10(c) of the ESA and the National Environmental Policy Act (NEPA) regulations (40 CFR 1506.6). The draft EA was prepared in accordance with NEPA (42 U.S.C. 4321, *et seq.*), 40 CFR 1500–1508 and NOAA policy and procedures (NOAA Administrative Order [NAO] 216–6A and the Companion Manual for the NAO 216–6A).

Alternatives Considered

NMFS' proposed action is issuance of an ITP to NCDMF, which would authorize take of threatened and endangered sea turtle and sturgeon species associated with the otherwise lawful operation of NC commercial inshore large and small-mesh anchored gill net fisheries and require implementation of a conservation plan, in accordance with the requirements of the ESA. In preparing the draft EA, NMFS considered the following two alternatives for the proposed action.

Alternative 1: No Action. In accordance with the NOAA Companion Manual (CM) for NAO 216–6A, Section 6.B.i, NMFS is defining the no action alternative as not authorizing the requested incidental take of ESA-listed sea turtles and sturgeon. This is consistent with our statutory obligation under section 10(a)(1)(B) of the ESA to either: (1) deny the requested ITP or (2) grant the requested ITP and prescribe mitigation, monitoring, and reporting requirements. Under the no action alternative, NMFS would not issue the ITP, in which case, we assume NCDMF would continue to operate the fishery as described in the application without implementing the full suite of specific mitigation measures, monitoring, reporting explained in the Conservation Plan. The Council on Environmental Quality (CEQ) Regulations and the Companion Manual for NAO 216–6A require consideration and analysis of a no action alternative for the purposes of presenting a comparative analysis to the action alternatives. The no action alternative, serves as a baseline against which the impacts of the action alternatives will be compared and contrasted.

Alternative 2: Issue Permit as Requested in Application (Preferred alternative): Under Alternative 2, an ITP would be issued to exempt NCDMF from the ESA prohibition on taking sturgeon and sea turtles during operation of the otherwise lawful NC commercial inshore anchored gill net fisheries. As required under Section 10(a)(1)(B), the ITP would require NCDMF to operate as described in the application and conservation plan to avoid, minimize, and mitigate take of ESA-listed sea turtles and sturgeon.

Final permit determinations will not be completed until after the end of the 30-day comment period and will fully consider all public comments received during the comment period. NMFS will publish a record of its final action in the **Federal Register**.

Dated: August 7, 2023.

Angela Somma,

Chief, Endangered Species Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023–17170 Filed 8–9–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Application for Appointment in the NOAA Commissioned Officer Corps

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before October 10, 2023.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *NOAA.PRA@noaa.gov.* Please reference OMB Control Number 0648–0047 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or

specific questions related to collection activities should be directed to LT Dustin Picard, Chief, NOAA Corps Recruiting Branch, (301) 713–7717, or *chief.noaacorps.recruiting@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This is a request for revision and extension of an existing information collection.

The NOAA Commissioned Officer Corps is the uniformed service of the National Oceanic and Atmospheric Administration (NOAA), a bureau of the United States Department of Commerce. Officers serve under Senate-confirmed appointments and Presidential commissions (33 U.S.C. chapter 17, subchapter 1, sections 853 and 854). The NOAA Corps provides a cadre of professionals trained in engineering, earth sciences, oceanography, meteorology, fisheries science, and other related disciplines who serve their country by supporting NOAA's mission of surveying the Earth's oceans, coasts, and atmosphere to ensure the economic and physical well-being of the Nation.

NOAA Corps officers operate vessels and aircraft engaged in scientific missions and serve in leadership positions throughout NOAA. Persons wishing to apply for an appointment in the NOAA Commissioned Officer Corps must complete an application package, including NOAA Form 56–42, at least three letters of recommendation, and official transcripts. A personal interview must also be conducted. Eligibility requirements include a bachelor's degree with at least 48 credit hours of science, engineering, or other disciplines related to NOAA's mission, excellent health, and normal color vision with uncorrected visual acuity no worse than 20/400 in each eye (correctable to 20/20).

The revision includes updates which reflect the current status of the NOAA Corps. This includes amending the essay questions and updating the instructions to reflect a new direct-to-aviation recruitment model.

II. Method of Collection

Applicants must utilize the online E-recruit electronic application to complete and digitally submit the form. An in-person interview is also required.

III. Data

OMB Control Number: 0648–0047.

Form Number(s): NOAA 56–42 and NOAA 56–42A.

Type of Review: Regular submission [revision and extension of an existing information collection.]

Affected Public: Individuals or households.

Estimated Number of Respondents: 300.

Estimated Time per Response: Written applications, 2 hours; interviews, 5 hours; references, 15 minutes.

Estimated Total Annual Burden Hours: 2,475.

Estimated Total Annual Cost to Public: $21,750.

Respondent's Obligation: Required to Obtain or Retain Benefits.

Legal Authority: 33 U.S.C. chapter 17, subchapter 1, sections 853 and 854.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. 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 may 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.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–17169 Filed 8–9–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. PTO–T–2023–0028]

Changes to Duration of Attorney Recognition; Notice of Public Listening Session and Request for Comments

AGENCY: United States Patent and Trademark Office, U.S. Department of Commerce.

ACTION: Notice of public listening session; request for comments.

SUMMARY: The United States Patent and Trademark Office (USPTO or Office) seeks public comments on changes to the trademark rule regarding the duration of attorney recognition. In addition, the USPTO is announcing a public listening session on September 26, 2023, titled ''Changes to Duration of Attorney Recognition,'' to offer further opportunity for the public to provide input on this topic.

DATES: The public listening session will take place on September 26, 2023, from 2–3:30 p.m. ET. Anyone wishing to present oral testimony at the hearing, either in person or virtually, must submit a written request for an opportunity to do so no later than September 15, 2023. Persons seeking to attend, either in person or virtually, but not to speak at the event must register by September 18, 2023. Seating is limited for in-person attendance. The USPTO will accept written comments until October 6, 2023.

ADDRESSES:

Public Listening Session

The public listening session will take place in person in the Clara Barton Auditorium at the USPTO, 600 Dulany Street, Alexandria, VA 22314. The session will also be available via live feed for those wishing to attend remotely. Registration is required for both in-person and virtual attendance. Information on registration is available on the USPTO's website at *www.uspto.gov/about-us/events/trademark-public-listening-session-changes-duration-attorney-recognition.*

Request for Comments

For reasons of Government efficiency, commenters must submit their comments through the Federal eRulemaking Portal at *www.regulations.gov.* To submit comments via the portal, enter docket number PTO–T–2023–0028 on the homepage and click ''search.'' The site will provide a search results page listing all documents associated with this docket. Find a reference to this request

for comments and click on the ''Comment'' icon, complete the required fields, and enter or attach your comments. Attachments to electronic comments will be accepted in ADOBE® portable document format (PDF) or MICROSOFT WORD® format. Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

Visit the Federal eRulemaking Portal for additional instructions on providing comments via the portal. If electronic submission of comments is not feasible due to a lack of access to a computer and/or the internet, please contact the USPTO using the contact information below for special instructions regarding how to submit comments by mail or by hand delivery.

FOR FURTHER INFORMATION CONTACT: Catherine Cain, Office of the Deputy Commissioner for Trademark Examination Policy, at 571–272–8946 or *TMPolicy@uspto.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

Under the Trademark Rules of Practice, the USPTO will recognize an attorney qualified under 37 CFR 11.14 as an applicant's or registrant's representative if that attorney files a power of attorney, signs a document on behalf of an applicant or registrant who is not already represented, or is otherwise identified in a document submitted on behalf of an applicant or registrant who is not already represented. 37 CFR 2.17(b). Once an attorney is recognized, the USPTO will correspond only with that attorney until recognition ends. 37 CFR 2.18(a)(2). Recognition as to a pending application ends when the mark registers, when ownership changes, or when the application is abandoned. 37 CFR 2.17(g)(1). Recognition as to a registration ends when the registration is canceled or expired, when ownership changes, or upon acceptance or final rejection of a post registration maintenance filing. 37 CFR 2.17(g)(2). The USPTO does not inquire into any engagement agreement between the attorney and the applicant or registrant to determine whether representation continues after the events that trigger the end of recognition under § 2.17(g). Therefore, following such an event, the trademark rules dictate that the USPTO correspond only with the applicant or registrant. 37 CFR 2.18(a). However, past customer feedback indicated that, in most cases, even after the occurrence of an event listed in the current § 2.17(g), representation continued, and the attorney should be the only recipient of the trademark registration certificate, maintenance and renewal reminders, and any other correspondence. For this reason, the USPTO currently sends, as a courtesy, correspondence to the attorney of record, except in connection with petitions to cancel filed with the Trademark Trial and Appeal Board, which are served on the registrant.

For several years, some outside practitioners have expressed concern that the current recognition rule, when read in conjunction with the correspondence rule, is problematic for practitioners whose recognition before the Office ends even though their representation of the applicant or registrant continues based on engagement agreements. These practitioners are concerned about missing response deadlines when representation continues, if they are removed from the record when recognition ends and will no longer receive correspondence from the USPTO regarding their clients' matters following abandonment or registration. Many of these practitioners have instructed their clients to disregard anything sent directly to them about their trademark application or registration to avoid having the clients subjected to a misleading solicitation, which is a growing problem for the USPTO and its customers. If their clients disregard all communications, including USPTO correspondence sent to them pursuant to § 2.18(a), and the practitioner is no longer receiving correspondence from the USPTO, deadlines for taking action would likely be missed. This group would like the USPTO to presume that representation, and therefore recognition, continues until the attorney withdraws or is revoked so that they, and not their clients, will continue to receive correspondence from the USPTO.

Other practitioners have expressed that they did not have any concerns with the current recognition rule because they do not wish to be subject to continuing legal and ethical obligations to the client after a listed event occurs. The current rule works to their advantage because they have no obligation to file a withdrawal form with the USPTO if recognition ends automatically. However, these practitioners have expressed concern as to whether there is an ethical obligation to contact their former clients about correspondence sent to them as a courtesy by the USPTO. As noted above, the USPTO continues to list all practitioners as the attorney of record and to send correspondence to them, even after recognition ended under the rule, because of the concerns over missed response deadlines.

In response to practitioner requests, the USPTO sends the courtesy email reminder that goes out in advance of the due date for a post registration maintenance document to both the owner and the last attorney of record (who is no longer recognized under the current rule and should not receive correspondence). The USPTO implemented this courtesy practice by sending the email reminders to both the applicant/registrant and the attorney as well as the notice of registration, the notice of abandonment, and the notice that an expungement or reexamination petition had been filed against the registration.

However, the practice has caused confusion among practitioners and has created some uncertainty for the USPTO in implementing its regulations. Sending email reminders and notices to attorneys who are no longer recognized under § 2.17(g) constitutes an unofficial waiver of § 2.18(a), which governs the parties with whom the USPTO will correspond in trademark matters. Moreover, despite the obligation under § 2.18(c) to maintain current and accurate correspondence addresses, the USPTO cannot be certain that the correspondence information in its records is still accurate, particularly regarding post registration reminders and notices that are sent 5–10 years or more after registration.

II. Trademark Modernization Act Notice of Proposed Rulemaking

In a notice of proposed rulemaking (NPRM) to implement provisions of the Trademark Modernization Act (TMA), published in the **Federal Register** on May 18, 2021, the USPTO proposed to revise 37 CFR 2.17(g) (86 FR 26862). The suggested revisions indicated that, for purposes of an application or registration, recognition of a qualified attorney as the applicant's or registrant's representative would continue until the owner revoked the appointment or the attorney withdrew from representation, even when there was a change of ownership. Therefore, owners and/or attorneys would be required to proactively file an appropriate revocation or withdrawal document under 37 CFR 2.19 before a new attorney could be recognized. The amendment was proposed to address the issues discussed above.

As noted in the final rule published on November 17, 2021, the USPTO received mixed comments regarding the

proposed revisions to § 2.17(g) (86 FR 64300). While several commenters were generally in favor of ongoing attorney recognition, others preferred the current practice, citing burdens associated with the new rules.

The USPTO also proposed to remove the name of any attorney whose recognition had ended under existing § 2.17(g) from the current attorney-of-record field in the USPTO's database, along with the attorney's bar information and any docketing information. However, the attorney's correspondence information, including any correspondence email address, would be retained so the USPTO could continue to send relevant correspondence and notices to both the formerly recognized attorney and the owner. Most commenters were opposed to removing the attorney information during the transition period, stating that this would cause unnecessary burdens to reappear in records.

Based on the public comments to the TMA NPRM, the USPTO determined that additional time was needed to address the concerns expressed. Therefore, the changes proposed in the TMA NPRM were not included in the TMA final rule. The USPTO now seeks additional input on whether § 2.17(g): (1) should be amended as discussed below, or (2) should not be amended, and all attorney information be removed when recognition ends following a listed event in § 2.17(g).

III. Changes to Duration of Recognition for Representation

The USPTO now seeks additional feedback regarding possible changes to the provisions addressing the duration of recognition for representation in § 2.17(g). The changes under consideration would allow recognition as to a pending application or registration to continue until the applicant, registrant, or party to a proceeding revokes the power of attorney or the representative withdraws from representation.

As noted above, such a rule change would require an attorney who no longer represents an applicant to affirmatively withdraw or be revoked for recognition to end. Shifting the burden to the attorney to withdraw, or to the owner to file a revocation, would give the USPTO greater assurance that it is communicating with the correct party. If stakeholders support the rule change, there are at least two challenges to address:

(1) How to make withdrawal easier.

(2) How to implement the transition in the USPTO database.

Although withdrawal is relatively easy, it is worth exploring whether the USPTO can make it even easier. In addition, the USPTO must ensure that if an attorney is deceased, it can efficiently remove that practitioner from its records. Moreover, the process must be consistent with the Rules of Professional Conduct, which dictate the terms of withdrawal.

The other area of concern is the transition of the USPTO's electronic records from recognition for a set duration to continued recognition following any rule change. Two categories of attorneys would be immediately affected by any rule change: (1) attorneys who are recognized at the time the rule goes into effect, and (2) attorneys whose information remains in the record but who are not currently recognized by virtue of the previous recognition rule. The revisions under consideration would have limited effect on the first set of attorneys because their existing recognition would continue. There would be some impact on attorneys whose representation does not continue past a certain event or date and who no longer wish to be recognized by the Office as the attorney of record because they would have to proactively withdraw to avoid any ambiguity.

The attorneys in the second group for whom recognition has ended under the current rule, even though their information remains of record, cannot be retroactively recognized by implementation of the revisions under consideration even if they prefer recognition to continue. *See Bowen* v. *Georgetown Univ. Hosp.,* 488 U.S. 204, 208, 109 S. Ct. 468, 471–472, 102 L. Ed. 2d 493, 500 (1988). On the date the USPTO recognized these attorneys, the current rule was in effect, and they had no notice that recognition would continue beyond the events listed in § 2.17(g). To avoid this retroactive effect, the USPTO proposed in the TMA NPRM that all attorney information would be removed from the database if a recognition-ending event had already occurred. To be recognized again, these attorneys would need to: (1) reappear by filing a document, and (2) reenter bar and docket information. Some public comments filed in response to this proposal demonstrated a concern with this approach because of the burden this would place on trademark owners and attorneys. However, removal of attorney information comports with the current recognition rule and the attorneys subject to it.

The USPTO is now considering deleting all attorney information, after a listed event, from the records of all applications filed or registrations issued prior to the date of implementation of a change to § 2.17(g) stating that recognition continues until there is a revocation or withdrawal of the recognized attorney of record. The USPTO has considered requests that attorneys be given the opportunity to opt in to remaining of record in such situations. However, the USPTO has neither the staff nor the technological resources to implement an opt-in alternative as to the affected applications and registrations. In addition, such a provision would not reconcile inaccuracies in older records.

IV. Retaining the Current Provisions on Recognition for Representation

If the USPTO does not amend § 2.17(g) to allow continued recognition until there is a revocation or withdrawal of the recognized attorney of record, the USPTO would not continue the courtesy practice of sending notices or reminders to the listed attorney in addition to the applicant or registrant. Pursuant to the plain language of § 2.17(g) that recognition ends when a listed event occurs, all attorney information would be removed when such an event occurs or if it has already occurred. Thus, correspondence and relevant notices would no longer be sent to both the formerly recognized attorney and the owner. Following § 2.18(a), correspondence and notices would be sent to the applicant or registrant or to a newly recognized attorney. This option would also require a transition period during which attorney information would be removed for attorneys whose information remains in the record but who are not currently recognized by virtue of the rule.

V. Listening Session and Questions for Comments

The USPTO is holding a listening session on September 26, 2023, and is requesting public comments on the questions listed below. The USPTO will use a portion of the listening session to provide an overview of the changes under consideration. An agenda will be available approximately five days before the listening session on the USPTO website at *www.uspto.gov/about-us/events/trademark-public-listening-session-changes-duration-attorney-recognition,* which is the same link for registration.

The USPTO poses the following questions for public comment. These questions are not meant to be exhaustive. We encourage interested stakeholders to address these and/or other related issues and to submit research and data that inform and

support their comments on these topics. Commenters are welcome to respond to any or all of the questions, and are encouraged to indicate which questions their comments address.

1. Do you think the current rule should remain unchanged, or are you in favor of the revisions under consideration?

2. Do you have suggestions for handling the transition period during which attorney information is removed from the record whether the current rule is retained or revised?

3. Do you have any suggestions for making withdrawal or re-recognition easier if the rule is revised to continue recognition?

Anyone wishing to participate as a speaker, either in person or virtually, must submit a request in writing no later than September 15, 2023. Requests to participate as a speaker must be submitted to *TMPolicy@uspto.gov* and must include:

1. The name of the person desiring to participate;

2. The organization(s) that person represents, if any; and

3. The person's contact information (address, telephone number, and email).

Speaking slots are limited; the USPTO will give preference to speakers wishing to address one of the questions raised in this request for comments. Speakers will be announced a few days prior to the public listening session. The USPTO will inform each speaker in advance of their assigned time slot. If the USPTO receives more requests to speak than time allows and is unable to assign a time slot as requested, the agency will invite the requestor to submit written comments. Time slots will be at least three minutes and may be longer, depending on the number of speakers registered. A panel of USPTO personnel may reserve time to ask questions of particular speakers after the delivery of a speaker's remarks.

The public listening session will be physically accessible to people with disabilities. Individuals requiring accommodation, such as sign language interpretation or other ancillary aids, should communicate their needs to the individuals listed under the **FOR FURTHER INFORMATION CONTACT** section of this notice at least seven business days prior to the session.

Katherine K. Vidal,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2023–17144 Filed 8–9–23; 8:45 am]

BILLING CODE 3510–16–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; President's Volunteer Service Awards

AGENCY: Corporation for National and Community Service.

ACTION: Notice of information collection; request for comment.

SUMMARY: The Corporation for National and Community Service, operating as AmeriCorps, has submitted a public information collection request (ICR) entitled President's Volunteer Service Awards for review and approval in accordance with the Paperwork Reduction Act.

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by September 11, 2023.

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.

FOR FURTHER INFORMATION CONTACT: Copies of this ICR, with applicable supporting documentation, may be obtained by calling AmeriCorps, Rhonda Taylor, at 202–606–6721 or by email to *rtaylor@cns.gov.*

SUPPLEMENTARY INFORMATION: The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of CNCS, 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;
- Propose ways to enhance the quality, utility, and clarity of the information to be collected; and
- Propose ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments

A 60-day Notice requesting public comment was published in the **Federal Register** on June 2, 2023 at 88 FR 36284. This comment period ended August 1, 2023. One public comment, from the Iowa Commission on Volunteer Service, was received from this Notice. The comment was positive, mentioning the form is simple to use, and they were in favor of continuing the award option.

Title of Collection: President's Volunteer Service Award.

OMB Control Number: 3045–0086.

Type of Review: Reinstatement.

Respondents/Affected Public: Individuals.

Total Estimated Number of Annual Responses: 200,000.

Total Estimated Number of Annual Burden Hours: 66,666.

Abstract: AmeriCorps is soliciting comments concerning its proposed renewal of the President's Volunteer Service Awards (PVSA), parts A, B, C, D and E. AmeriCorps seeks to renew the current information collection with without revisions. The information collection will be used in the same manner as the existing application. AmeriCorps also seeks to continue using the current application until the revised application is approved by OMB. The current application was discontinued on July 31, 2023.

Rhonda Taylor,

Director, Partnerships & Program Engagement.

[FR Doc. 2023–17177 Filed 8–9–23; 8:45 am]

BILLING CODE 6050–28–P

U.S. INTERNATIONAL DEVELOPMENT FINANCE CORPORATION

[DFC–0016]

Submission for OMB Review; Comments Request

AGENCY: U.S. International Development Finance Corporation (DFC).

ACTION: Notice of information collection; request for comment

SUMMARY: Under the provisions of the Paperwork Reduction Act, agencies are required to publish a Notice in the **Federal Register** notifying the public that the agency is renewing an existing information collection for OMB review and approval and requests public review and comment on the submission. Comments are being solicited on the need for the information; the accuracy of the burden estimate; the quality, practical utility, and clarity of the information to be collected; and ways to

minimize reporting the burden, including automated collected techniques and uses of other forms of technology.

DATES: Comments must be received by October 10, 2023.

ADDRESSES: Comments and requests for copies of the subject information collection may be sent by any of the following methods:

- *Mail:* Deborah Papadopoulos, Records Management Specialist, U.S. International Development Finance Corporation, 1100 New York Avenue NW, Washington, DC 20527.
- *Email: fedreg@dfc.gov*.

Instructions: All submissions received must include the agency name and agency form number or OMB form number for this information collection. Electronic submissions must include the agency form number in the subject line to ensure proper routing. Please note that all written comments received in response to this notice will be considered public records.

FOR FURTHER INFORMATION CONTACT: Agency Submitting Officer: Deborah Papadopoulos, (202) 357–3979.

SUPPLEMENTARY INFORMATION: This notice informs the public that DFC will submit to OMB a request for approval of the following information collection.

Summary Form Under Review

Title of Collection: Application for Technical Assistance.

Type of Review: New form.

Agency Form Number: DFC–0017.

OMB Form Number: XXXX–XXXX.

Frequency: Once per applicant per project.

Affected Public: Business or other for-profit; not-for-profit institutions; individuals.

Total Estimated Number of Annual Number of Respondents: 250.

Estimated Time per Respondent: 1.5 hours.

Total Estimated Number of Annual Burden Hours: 375 hours.

Abstract: The Application for Technical Assistance will be the principal document used by DFC to determine the proposed transaction's eligibility for technical assistance grants from the TA unit.

Deborah Papadopoulos,

Records Management Specialist.

[FR Doc. 2023–17137 Filed 8–9–23; 8:45 am]

BILLING CODE 3210–02–P

DEPARTMENT OF DEFENSE

Department of the Army

Board of Visitors for the U.S. Army Command and General Staff College Meeting Notice

AGENCY: Department of the Army, DoD.

ACTION: Notice of open meeting.

SUMMARY: The Department of the Army is publishing this notice to announce the following Federal advisory committee meeting of the Board of Visitors for the U.S. Army Command and General Staff College (CGSC). This meeting is open to the public.

DATES: The Board of Visitors will meet from 8:30 a.m. to 3:00 p.m. on Tuesday, September 12, 2023, and from 8:30 a.m. to 10:45 a.m. on Wednesday, September 13, 2023.

ADDRESSES: Lewis and Clark Center, Arnold Conference Room, 120 Stovall St., Building 127, Fort Leavenworth, KS 66048.

FOR FURTHER INFORMATION CONTACT: Dr. Dale Spurlin, Alternate Designated Federal Officer for the Committee, by email at *dale.f.spurlin.civ@army.mil,* or by telephone at (913) 684–2742.

SUPPLEMENTARY INFORMATION: The committee meeting is being held under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), 41 CFR 102–3.140(c), and 41 CFR 102–3.150.

Purpose of the Meeting: The Board of Visitors for the U.S. Army Command and General Staff College is a non-discretionary Federal Advisory Committee chartered to provide the Secretary of Defense, through the Secretary of the Army, independent advice and recommendations on matters pertaining to the Command and General Staff College's mission, specifically academic policies, staff and faculty development, student success indicators, curricula, educational methodology and objectives; other matters relating to the CGSC that the board decides to consider; and other items that the Secretary of Defense determines appropriate. The board provides expert and continuous advice on ways to improve the Command and General Staff College (CGSC) educational program, especially with regard to is master's degree programs and the maintenance of regional academic accreditation by the Higher Learning Commission of the North Central Association of Colleges and Schools. The Secretary of Defense may act on the committee's advice and recommendations.

Agenda: Overview briefing from the CGSC Dean of Academics; updates on CGSC operations, curricula, and educational initiatives; briefing and discussion on current challenges within the CGSC; and presentation of other information appropriate to the board's interests.

Public Accessibility to the Meeting: Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.140 through 102–3.165, and subject to the availability of space, this meeting is open to the public. A 30-minute period between 2:30 p.m. to 3:00 p.m. on September 12, 2023, will be available for verbal public comments. Seating is on a first to arrive basis. Attendees are requested to submit their name, affiliation, and daytime phone number seven business days prior to the meeting to Dr. Spurlin, via electronic mail at the address listed in the **FOR FURTHER INFORMATION CONTACT** section. Because the meeting of the committee will be held in a Federal Government facility on a military base, security screening is required. A photo ID is required to enter the base. Please note that security and gate guards have the right to inspect vehicles and persons seeking to enter and exit the installation. The Lewis and Clark Center is fully handicap accessible. Wheelchair access is available in front at the main entrance of the building. For additional information about public access procedures, contact Dr. Spurlin at the email address or telephone number listed in the **FOR FURTHER INFORMATION CONTACT** section.

Written Comments and Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140, and section 10(a)(3) of the Federal Advisory Committee Act, the public or interested organizations may submit written comments or statements to the committee, in response to the stated agenda of the open meeting or regarding the committee's mission in general. Written comments or statements should be submitted to Dr. Spurlin via electronic mail at the address listed in the **FOR FURTHER INFORMATION CONTACT** section. Written comments or statements being submitted in response to the agenda set forth in this notice must be received at least five business days prior to the meeting to be considered by the committee. The Designated Federal Officer will review all timely submitted written comments or statements with the committee chairperson, and ensure the comments are provided to all members of the committee before the meeting. Written comments or statements received after this date will

be filed and presented to the committee during its next meeting.

James W. Satterwhite, Jr.,

Army Federal Register Liaison Officer.

[FR Doc. 2023–17188 Filed 8–9–23; 8:45 am]

BILLING CODE 3711–02–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0147]

Agency Information Collection Activities; Comment Request; Consolidated State Plan

AGENCY: Office of Elementary and Secondary Education (OESE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing an extension without change of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before October 10, 2023.

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–2023–SCC–0147. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, the Department will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Melissa Siry, 202–260–0926.

SUPPLEMENTARY INFORMATION: The Department, 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. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department 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: Consolidated State Plan.

OMB Control Number: 1810–0576.

Type of Review: An extension without change of a currently approved ICR.

Respondents/Affected Public: State, local, and Tribal governments.

Total Estimated Number of Annual Responses: 52.

Total Estimated Number of Annual Burden Hours: 108,155.

Abstract: This collection, currently approved by OMB under control number 1810–0576, covers the consolidated State plan (previously known as the consolidated State application), as well as assessment peer review guidance. Section 8302 of the ESEA, as amended by the ESSA, permits each SEA, in consultation with the Governor, to apply for program funds through submission of a consolidated State plan (in lieu of individual program State plans). The purpose of consolidated State plans as defined in ESEA is to improve teaching and learning by encouraging greater cross-program coordination, planning, and service delivery; to enhance program integration; and to provide greater flexibility and less burden for State educational agencies. This is a request for extension without change for this collection.

Dated: August 7, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–17165 Filed 8–9–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas and Oil Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP23–958–000.

Applicants: Green Plains Atkinson LLC, Sandhill Renewable Energy, LLC.

Description: Joint Petition for Limited Waiver of Capacity Release Regulations, et al. of Green Plains Atkinson LLC, et al.

Filed Date: 8/3/23.

Accession Number: 20230803–5084.

Comment Date: 5 p.m. ET 8/15/23.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) 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.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

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: August 4, 2023.

For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659. The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access

publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: August 4, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–17152 Filed 8–9–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG23–246–000.

Applicants: Shamrock Wind, LLC.

Description: Shamrock Wind, LLC submits Notice of Self—Certification of Exempt Wholesale Generator Status.

Filed Date: 8/4/23.

Accession Number: 20230804–5038.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: EG23–247–000.

Applicants: Pioneer Hutt Wind Energy LLC.

Description: Pioneer Hutt Wind Energy LLC submits Notice of Self—Certification of Exempt Wholesale Generator Status.

Filed Date: 8/4/23.

Accession Number: 20230804–5065.

Comment Date: 5 p.m. ET 8/25/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1529–006; ER10–2472–009; ER10–2473–009; ER10–2502–010; ER11–2724–010; ER11–4436–008; ER18–2518–005; ER19–645–004.

Applicants: Black Hills Colorado Wind, LLC, Black Hills Electric Generation, LLC, Black Hills Power, Inc., Black Hills Colorado IPP, LLC, Black Hills Colorado Electric, LLC, Cheyenne Light, Fuel and Power Company, Black Hills Wyoming, LLC, Northern Iowa Windpower, LLC.

Description: Supplement to January 31, 2023, Notice of Non-Material Change in Status of Northern Iowa Windpower, LLC, et al.

Filed Date: 8/1/23.

Accession Number: 20230801–5224.

Comment Date: 5 p.m. ET 8/22/23.

Docket Numbers: ER23–1832–000.

Applicants: Homer City Generation, L.P.

Description: Refund Report: Refund Notice in ER23–1832 to be effective N/A.

Filed Date: 8/4/23.

Accession Number: 20230804–5101.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2436–001.

Applicants: Energy Harbor LLC.

Description: Tariff Amendment: Amendment to Requested Effective Date for Notice of Cancellation of Market-Based to be effective 8/1/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5094.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2560–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 7020; Queue Nos. AE1–209/AE1–210 to be effective 7/5/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5003.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2561–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Amendment to ISA, SA No. 6189; Queue No. AD2–009 (amend) to be effective 10/4/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5009.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2562–000.

Applicants: Merelec USA LLC.

Description: Baseline eTariff Filing: Petition for Blanket MBR Authorization with Waivers to be effective 10/3/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5035.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2563–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: WMPA, Service Agreement No. 7005; Queue No. AG1–099 to be effective 10/2/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5037.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2564–000.

Applicants: Virginia Electric and Power Company, PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Virginia Electric and Power Company submits tariff filing per 35.13(a)(2)(iii: VEPCO submits one WDSA, SA No. 7018 to be effective 7/6/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5064.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2565–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original NSA, Service Agreement No. 7045; Queue No. AD2–093 to be effective 10/3/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5066.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2566–000.

Applicants: Pleasants LLC.

Description: Tariff Amendment: Notice of Cancellation of Market-Based Rate Tariff to be effective 8/7/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5069.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2567–000.

Applicants: EnerSmart Los Coches BESS LLC.

Description: Baseline eTariff Filing: Application for Market-Based Rate Authorization and Request for Waivers to be effective 10/4/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5080.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2568–000.

Applicants: Duke Energy Carolinas, LLC.

Description: § 205(d) Rate Filing: DEC–CPRE Wholesale Contract Revisions to Rate Schedule No. 336 to be effective 1/1/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5081.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2569–000.

Applicants: Pacific Gas and Electric Company.

Description: Tariff Amendment: Termination of PG&E Southern Oaks and Mission Ranch UOGs (SA Nos. 448 and 449) to be effective 10/4/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5086.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2570–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original ISA/CSA, Service Agreement Nos. 5564 and 5565; Queue No AA2–161/AE2–137 to be effective 10/4/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5103.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2571–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 7008; Queue No. AG1–191 to be effective 7/5/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5130.

Comment Date: 5 p.m. ET 8/25/23.

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, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) 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.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202)502–6595 or *OPP@ferc.gov.*

Dated: August 4, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–17153 Filed 8–9–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 7274–035]

Town of Wells; Notice of Application Tendered for Filing With the Commission and Soliciting Additional Study Requests and Establishing Procedural Schedule for Relicensing and a Deadline for Submission of Final Amendments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Subsequent License.

b. *Project No.:* 7274–035.

c. *Date filed:* July 31, 2023.

d. *Applicant:* Town of Wells.

e. *Name of Project:* Lake Algonquin Hydroelectric Project.

f. *Location:* On the Sacandaga River in the town of Wells, Hamilton County, New York.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Matthew Taylor, Principle-in-Charge, GZA GeoEnvironmental of New York, 104 West 29th Street, 10th Floor, New York 10001; Phone at (781) 278–5803 or email at *matthew.taylor@gza.com;* or Rebekah Crewell, Supervisor, Town of Wells, P.O. Box 205, Wells, New York 12190; Phone at (518) 924–7912 or email at *supervisor-rebekah-crewell@townofwells.org.*

i. *FERC Contact:* Samantha Pollak at (202) 502–6419, or *samantha.pollak@ferc.gov.*

j. *Cooperating agencies:* Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See,* 94 FERC ¶ 61,076 (2001).

k. Pursuant to section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.

l. *Deadline for filing additional study requests and requests for cooperating agency status:* September 29, 2023.

The Commission strongly encourages electronic filing. Please file additional study requests and requests for cooperating agency status using the Commission's eFiling system at *https://www.ferc.gov/docs-filing/efiling.asp.* For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY).

m. The application is not ready for environmental analysis at this time.

n. *The Lake Algonquin Hydroelectric Project consists of the following facilities:* (1) a 239-foot-long, 26.5-foot-high concrete gravity dam composed of an ogee spillway section at each end and a gated spillway section in the middle with three steel 19-foot-wide by 12-foot-high vertical lift roller gates; (2) an impoundment with a surface area of 275 acres and a storage capacity of 2,557 acre-feet at an elevation of 986.84 feet National Geodetic Vertical Datum of 1929; (3) a 27-foot-high, 21-foot-wide, 52-foot-long intake structure; (4) a 10-foot-diameter, 113-foot-long steel penstock; (5) a 25-foot-wide, 63-foot-long concrete, steel, and masonry powerhouse containing one Kaplan turbine unit with a rated capacity of 740 kilowatts; (6) a 480-volt/4.8-kilovolt (kV) step-up transformer; (7) a 4.8-kV, approximately 50-foot-long overhead transmission line; and (8) appurtenant facilities.

The project operates in a run-of-river mode with a minimum flow of 20 cubic feet per second, or reservoir inflow, whichever is less. The project has an average annual generation of 1.363 megawatt-hours between 2015 and 2020.

o. Copies of the application may be viewed on the Commission's website at *https://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 (P–7274). For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or call tollfree, (866) 208–3676 or (202) 502–8659 (TTY).

You may also register online at *https://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

p. *Procedural schedule and final amendments:* The application will be processed according to the following preliminary schedule. Revisions to the schedule will be made as appropriate.

Issue Deficiency Letter (if necessary)	September 2023.
Request Additional Information	October 2023.
Issue Acceptance Letter	December 2023.
Issue Scoping Document 1 for comments	December 2023.
Request Additional Information (if necessary)	January 2024.
Issue Scoping Document 2 (if necessary)	February 2024.
Issue Notice of Ready for Environmental Analysis	February 2024.

Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: August 4, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–17155 Filed 8–9–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2444–042]

Northern States Power Corporation—Wisconsin; Notice of Application Tendered for Filing With the Commission and Soliciting Additional Study Requests and Establishing Procedural Schedule for Relicensing and a Deadline for Submission of Final Amendments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Subsequent Minor License.

b. *Project No.:* 2444–042.

c. *Date Filed:* July 21, 2023.

d. *Applicant:* Northern States Power Corporation—Wisconsin.

e. *Name of Project:* White River Hydroelectric Project (project).

f. *Location:* On the White River in Ashland and Bayfield Counties, Wisconsin.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Matthew Miller, Northern States Power Company—Wisconsin, 1414 W. Hamilton Avenue, P.O. Box 8, Eau Claire, WI 54702; Phone at (715) 737–1353, or email at *matthew.j.miller@xcelenergy.com.*

i. *FERC Contact:* Taconya D. Goar at (202) 502–8394, or *Taconya.Goar@ferc.gov.*

j. *Cooperating agencies:* Federal, State, local, and Tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See* 94 FERC ¶ 61,076 (2001).

k. Pursuant to section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.

l. *Deadline for filing additional study requests and requests for cooperating agency status:* September 19, 2023.

The Commission strongly encourages electronic filing. Please file additional study requests and requests for cooperating agency status using the Commission's eFiling system at *https://ferconline.ferc.gov/FERCOnline.aspx.* For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, 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, MD 20852. All filings must clearly identify the project name and docket number on the first page: White River Hydroelectric Project (P–2444–042).

m. The application is not ready for environmental analysis at this time.

n. *Project Description:* The existing project consists of: (1) an earthen and concrete dam that includes: (a) a 400-foot-long, 37-foot-high north earthen embankment; (b) a concrete section that includes: (i) a north abutment; (ii) a 20-foot-long, 36.5-foot-high intake structure equipped with a trashrack; (iii) a 35-foot-high gated spillway with two 25-foot-long bays that each contain a Tainter gate; and (iv) a south abutment; (c) a 300-foot-long, 37-foot-high south earthen embankment; (2) an impoundment with a surface area of 39.9 acres at an elevation of 711.6 feet National Geodetic Vertical Datum of 1929 (NGVD 29); (3) a 7-foot-diameter, 1,345-foot-long concrete pipe that conveys flows from the intake structure to a 16-foot-diameter, 62-foot-high steel surge tank; (4) two 30-foot-long steel penstocks; (5) a 69-foot-long, 39-foot-wide concrete and brick masonry powerhouse that contains one 700-kilowatt (kW) horizontal Francis turbine-generator unit and one 500-kW horizontal Francis turbine-generator unit, for a total installed capacity of 1,200 kW; and (6) a 220-foot-long, 2.4-kilovolt (kV) electric line that connects the generators to a 2.4/69-kV step-up transformer. The project creates an approximately 1,400-foot-long bypassed reach of the White River. A 1-foot-diameter steel pipe conveys flow from the intake structure to the bypassed reach.

Project recreation facilities include: (1) a boat access site and canoe portage take-out site at the north embankment of the dam; (2) an approximately 2,260 feet canoe portage trail; (3) a canoe put-in site approximately 90 feet downstream of the powerhouse; and (4) a tailrace fishing area.

The current license requires the project to operate in a run-of-river mode, such that outflow from the project approximates inflow to protect aquatic resources in the White River. The current license requires the impoundment to be maintained at an elevation between 710.4 and 711.6 feet NGVD 29. The current license also requires a minimum bypassed reach flow of 16 cubic feet per second (cfs) or inflow to the impoundment, whichever is less, to protect aquatic resources. The minimum and maximum hydraulic capacities of the powerhouse are 50 and 350 cfs, respectively. The average annual generation of the project was 4,927 megawatt-hours from 2017 through 2022.

The applicant proposes the following changes to the project boundary: (1)

revise the project boundary around the impoundment to follow a contour elevation of 711.6 NGVD 29, which would result in a reduction in the total acreage of the project boundary upstream of the dam from 76.5 to 41.2 acres; (2) revise the project boundary downstream of the dam to remove approximately 38.8 acres of land north of the access road to the powerhouse and non-project substation and approximately 12 acres of land northeast of the powerhouse; and (3) revise the project boundary downstream of the dam to include approximately 0.3 acre of land associated with a non-project substation, approximately 0.6 acre of land associated with an access road, approximately 1.3 acres of water downstream of the project, and approximately 0.3 acre east of the south earthen embankment.

The applicant proposes to: (1) continue to operate the project in a run-of-river mode to protect aquatic resources; (2) continue to maintain the impoundment elevation between 710.4 and 711.6 feet NGVD 29; (3) continue to release a minimum flow of 16 cfs or inflow, whichever is less, to the bypassed reach at all times; (4) develop an operation compliance monitoring plan; (5) consult with resource agencies and the Bad River Band of Lake Superior Tribe of Chippewa Indians prior to temporary modifications of project operation, including non-emergency impoundment drawdowns, and file a report with the Commission within 14 days after the planned deviation; (6) conduct shoreline erosion surveys every ten years; (7) develop an invasive species monitoring plan; (8) pass woody debris from the impoundment to the bypassed reach; (9) replace recreational signage; (10) maintain project recreation facilities; (11) implement the State of Wisconsin's broad incidental take permits/authorizations for Wisconsin cave bats and wood turtles; (12) avoid vegetation management and construction activities within 660 feet of bald eagle nests during the nesting season; and (13) develop a historic properties management plan.

o. At this time, the Commission has suspended access to the Commission's Public Reference Room. Copies of the application can be viewed on the Commission's website at *https://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 (P–2444). In addition to publishing the full text of this notice in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this notice, as well as other documents in the proceeding (*e.g.,* license application) via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or (202) 502–8659 (TTY).

You may also register online at *https://ferconline.ferc.gov/FERCOnline.aspx* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

p. The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

q. *Procedural Schedule:* The application will be processed according to the following preliminary schedule. Revisions to the schedule will be made as appropriate.

Issue Deficiency Letter	August 2023.
Request Additional Information	August 2023.
Issue Scoping Document 1	November 2023.
Request Additional Information (if necessary)	November 2023.
Issue Acceptance Letter	December 2023.
Issue Scoping Document 2	January 2024.
Issue Notice of Ready for Environmental Analysis	January 2024.

r. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: August 4, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–17158 Filed 8–9–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2336–101]

Georgia Power Company; Notice of Waiver of Water Quality Certification

On January 3, 2022, Georgia Power Company (Georgia Power) filed an application for a new license for the Lloyd Shoals Hydroelectric Project (project) in the above captioned docket. On June 24, 2022, Georgia Power filed with the Georgia Department of Natural Resources, Environmental Protection Division (Georgia EPD), a request for water quality certification for the project under section 401(a)(1) of the Clean Water Act.

On July 19, 2022, staff provided the certifying authority with written notice pursuant to 40 CFR 121.6(b) that the applicable reasonable period of time for the state to act on the certification request was one (1) year from the date of receipt of the request, and that the certification requirement for the license would be waived if the certifying authority failed to act by June 24, 2023. Because the state did not act by June 24, 2023, we are notifying you pursuant to 40 CFR 121.9(c), and section 401(a)(1) of the Clean Water Act, 33 U.S.C. 1341(a)(1), that waiver of the certification requirement has occurred.

Dated: August 4, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–17159 Filed 8–9–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–R08–SFUND–2023–0366; FRL–11165–01–R8]

Proposed CERCLA Administrative Cashout Settlement for Peripheral Parties, Colorado Smelter Site, Pueblo, Colorado

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed settlement; request for public comment.

SUMMARY: In accordance with the requirements of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (''CERLCA''), notice is hereby given that a proposed CERCLA Cashout Settlement Agreement for Peripheral Parties (''Proposed Agreement'') associated with the Colorado Smelter Superfund Site, Pueblo, Colorado (''Site'') was executed by the U.S. Environmental Protection Agency (''EPA''), Region 8 and is now subject to public comment, after which EPA may modify or withdraw its consent if comments received disclose facts or considerations that indicate that the Proposed Agreement is inappropriate, improper, or inadequate.

DATES: Comments must be submitted on or before September 11, 2023.

ADDRESSES: The Proposed Agreement and additional background information relating to the agreement will be available upon request. Any comments or requests or for a copy of the Proposed Agreement should be addressed to Julie Nicholson, Enforcement Specialist, Superfund and Emergency Management Division, Environmental Protection Agency—Region 8, Mail Code 8SEM–PAC, 1595 Wynkoop Street, Denver, Colorado 80202, telephone number: (401) 714–6143, email address: *nicholson.julie@epa.gov,* and should reference the Colorado Smelter Superfund Site.

You may also send comments, identified by Docket ID No. EPA–R08–SFUND–2023–0366, to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Sarah Rae, Senior Assistant Regional Counsel, Office of Regional Counsel, Environmental Protection Agency, Region 8, Mail Code 8ORC–LEC, 1595 Wynkoop, Denver, Colorado 80202, telephone number: (303) 312–6839, email address: *rae.sarah@epa.gov.*

SUPPLEMENTARY INFORMATION: The Proposed Agreement would resolve potential EPA claims under section 107(a) of CERCLA, against 1000 South Santa Fe LLC and 1100 South Santa Fe LLC(''Settling Parties'') for EPA response costs at or in connection with the property located at 1101–1109 Santa Fe Avenue and 1045–1049 South Santa Fe Avenue, in Pueblo, Colorado (the ''Property''), which is part of the Colorado Smelter Superfund Site. The settlement is estimated to be $646,100, plus an additional sum for interest on that amount calculated from the effective date through the date of payment (''Payment Amount''). Settling Parties will remit the Payment Amount to EPA upon the transfer of the Property or within three years of the effective date, whichever occurs earlier. The Proposed Settlement Agreement also provides a covenant not to sue or to take administrative action from the United States to the Settling Parties pursuant to sections 106 and 107(a) of CERCLA, 42 U.S.C. 9606 and 9607(a) with regard to Operable Unit 02 (OU2).

For thirty (30) days following the date of publication of this document, EPA will receive electronic comments relating to the Proposed Agreement. EPA's response to any comments received will be available for public inspection by request. Please see the **ADDRESSES** section of this document for instructions.

Ben Bielenberg,

Acting Division Director, Superfund and Emergency Management Division, Region 8.

[FR Doc. 2023–17174 Filed 8–9–23; 8:45 am]

BILLING CODE 6560–50–P

EXECUTIVE OFFICE OF THE PRESIDENT

Office of the National Cyber Director

[Docket ID: ONCD–2023–0002]

RIN 0301–AA01

Request for Information on Open-Source Software Security: Areas of Long-Term Focus and Prioritization

AGENCY: Office of the National Cyber Director, Executive Office of the President, Cybersecurity and Infrastructure Security Agency, DHS, National Science Foundation, Defense Advanced Research Projects Agency, and Office of Management and Budget, Executive Office of the President.

ACTION: Request for information (RFI).

SUMMARY: The Office of the National Cyber Director (ONCD), the Cybersecurity Infrastructure Security Agency (CISA), the National Science Foundation (NSF), the Defense Advanced Research Projects Agency (DARPA), and the Office of Management and Budget (OMB) invite public comments on areas of long-term focus and prioritization on open-source software security.

DATES: Comments must be received in writing by 5 p.m. ET October 9, 2023.

ADDRESSES: Interested parties may submit comments through *www.regulations.gov.* For detailed instructions on submitting comments and additional information on this process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Requests for additional information may be sent to: *OS3IRFI@ncd.eop.gov,* Nasreen Djouini, telephone: 202–881–4697.

SUPPLEMENTARY INFORMATION: As highlighted in the National Cybersecurity Strategy (*https://www.whitehouse.gov/wp-content/uploads/2023/03/National-Cybersecurity-Strategy-2023.pdf*), and its Implementation Plan Initiative 4.2.1, the ONCD has established an Open-Source Software Security Initiative (OS3I) to champion the adoption of memory safe programming languages and open-source software security. The security and resiliency of open-source software is a national security, economic, and a technology innovation imperative. Because open-source software plays a vital and ubiquitous role across the Federal Government and critical infrastructure,[1] vulnerabilities in open-source software components may cause widespread downstream detrimental effects. The Federal Government recognizes the immense benefits of open-source software, which enables software development at an incredible pace and fosters significant innovation and collaboration. In light of these factors, as well as the status of open-source software as a free public good, it may be appropriate to make open-source software a national public priority to help ensure the security, sustainability, and health of the open-source software ecosystem.

In 2021, following the aftermath of the Log4Shell vulnerability, ONCD in collaboration with the Office of Management and Budget's (OMB) Office of the Federal Chief Information Officer (OFCIO), established the Open-Source Software Security Initiative (OS3I) interagency working group with the goal of channeling government resources to foster greater open-source software security. Since then, OS3I has welcomed many other interagency partners, including the Cybersecurity Infrastructure Security Agency (CISA), the National Science Foundation (NSF), Defense Advanced Research Projects Agency (DARPA), National Institute of Standards and Technology (NIST),

[1] ''2023 Open-Source Security and Risk Analysis Report,'' Synopsys, February 22, 2023, (*https://www.synopsys.com/software-integrity/resources/analyst-reports/open-source-security-risk-analysis.html?utm_source=bing&utm_medium=cpc&utm_term=&utm_campaign=B_S_OSSRA_BMM&cmp=ps-SIG-B_S_OSSRA_BMM&msclkid=15e8216ad16511c8b01945c7b683c395*).

Center for Medicare & Medicaid Services (CMS), and Lawrence Livermore National Laboratory (LLNL) in order to identify open-source software security priorities and implement policy solutions.

Over the past year, OS3I identified several focus areas, including: (1) reducing the proliferation of memory unsafe programming languages; (2) designing implementation requirements for secure and privacy-preserving security attestations; and (3) identifying new focus areas for prioritization.

This Request for Information (RFI) aims to further the work of OS3I by identifying areas most appropriate to focus government priorities, and addressing critical questions such as:

- How should the Federal Government contribute to driving down the most important systemic risks in open-source software?
- How can the Federal Government help foster the long-term sustainability of open-source software communities?
- How should open-source software security solutions be implemented from a technical and resourcing perspective?

This RFI represents a continuation of OS3I's efforts to gather input from a broad array of stakeholders.

Three-Phase RFI Approach

For this RFI, the Government intends to engage with interested parties in three phases:

Phase I—Addressing Respondent Questions About this RFI

- If you have any questions about the context of the Government's RFI, the processes described, or the numbered topics below, you may send them to *OS3IRFI@ncd.eop.gov* by August 18, 2023.
- By August 28, 2023, the Government will post responses to select questions on *www.regulations.gov,* as appropriate.

Phase II—Submittal of Responses to the RFI by Interested Respondents

- By October 9, 2023, all interested respondents should submit a written RFI response, in MS Word or PDF format, focusing on questions for which they have expertise and insights for the Government (no longer than 10 pages typed, size eleven font) to *OS3IRFI@ncd.eop.gov* with the email subject header ''Open-Source Software Security RFI Response'' and your organization's name.
- Title page, cover letter, table of contents, and appendix are not included within the 10-page limit. In the body of the email, also include contact information for your organization (POC Name, Title, Phone, Email, Organization Name, and Organization Address).

Phase III—Government Review

- The Government reviews and publishes the RFI responses submitted during Phase II. The Government may select respondents to engage with the RFI project team to elaborate on their response to the RFI.

Participation, or lack thereof, in this RFI process has no bearing on a party's ability or option to choose to participate in or receive an award for any future solicitation or procurement resulting from this or any other activity.

Questions for Respondents

We are seeking insights and recommendations as to how the Federal Government can lead, assist, or encourage other key stakeholders to advance progress in the potential areas of focus described below.

Please consider providing input on these areas by addressing the questions below:

- Which of the potential areas and sub-areas of focus described below should be prioritized for any potential action? Please describe specific policy solutions and estimated budget and timeline required for implementation.
- What areas of focus are the most time-sensitive or should be developed first?
- What technical, policy or economic challenges must the Government consider when implementing these solutions?
- Which of the potential areas and sub-areas of focus described below should be applied to other domains? How might your policy solutions differ?

Respondents are not required to respond to every topic and are encouraged to focus on specific areas that meet their specialized expertise.

Potential Areas of Focus

- *Area:* Secure Open-Source Software Foundations
  - *Sub-area:* Fostering the adoption of memory safe programming languages
    - Supporting rewrites of critical open-source software components in memory safe languages
    - Addressing software, hardware, and database interdependencies when refactoring open-source software to memory safe languages
    - Developing tools to automate and accelerate the refactoring of open-source software components to memory safe languages, including code verification techniques
    - Other solutions to support this sub-area
  - *Sub-Area:* Reducing entire classes of vulnerabilities at scale
    - Increasing secure by default configurations for open-source software development
    - Fostering open-source software development best practices, including but not limited to input validation practices
    - Identifying methods to incentivize scalable monitoring and verification efforts of open-source software by voluntary communities and/or public-private partnerships
    - Other solutions to support this sub-area
  - Sub-Area: Strengthening the software supply chain
    - Designing tools to enable secure, privacy-preserving security attestations from software vendors, including their suppliers and open-source software maintainers
    - Detection and mitigation of vulnerable and malicious software development operations and behaviors
    - Incorporating automated tracking and updates of complex code dependencies
    - Incorporating zero trust architecture into the open-source software ecosystem
    - Other solutions to support this sub-area
  - *Sub-Area:* Developer education
    - Integrating security and open-source software education into computer science and software development curricula
    - Training software developers on security best practices
    - Training software developers on memory safe programming languages
    - Other solutions to support this sub-area
- *Area:* Sustaining Open-Source Software Communities and Governance
  - Sustaining the open-source software ecosystem (including developer communities, non-profit investors, and academia) to ensure that critical open-source software components have robust maintenance plans and governance structures
  - Other solutions to support this sub-area
- *Area:* Behavioral and Economic Incentives to Secure the Open-Source Software cosystem
  - Frameworks and models for software developer compensation that incentivize secure software development practices
  - Applications of cybersecurity insurance and appropriately-tailored software liability as mechanisms to incentivize secure software development and operational environment practices
  - Other solutions to support this sub-area

- *Area:* R&D/Innovation
  - Application of artificial intelligence and machine learning techniques to enhance and accelerate cybersecurity best practices with respect to secure software development
  - Other solutions to support this sub-area
- *Area:* International Collaboration
  - Methods for identifying and harmonizing shared international priorities and dependencies
  - Structures for intergovernmental collaboration and collaboration with various open-source software communities
  - Other solutions to support this sub-area

This RFI seeks public input as the Federal Government develops its strategy and action plan to strengthen the open-source software ecosystem. We hope that potential respondents will view this RFI as a civic opportunity to help shape the government's thinking about open-source software security.

Comments must be received no later than 5:00 p.m. ET October 9, 2023.

By October 9, 2023, all interested respondents should submit a written RFI response, in MS Word or PDF format, with their answers to questions on which they have expertise and insights for the Government through *www.regulations.gov.*

The written RFI response should address ONLY the topics for which the respondent has expertise. Inputs that meet most of the following criteria will be considered most valuable:

- Easy for executives to review and understand: Content that is modularly organized and presented in such a fashion that it can be readily lifted (by topic area) and shared with relevant executive stakeholders in an easily consumable format.
- *Expert:* The Government, through this effort, is seeking insights to understand current best practices and approaches applicable to the above topics, as well as new and emerging solutions. The written RFI response should address ONLY the topics for which the respondent has knowledge or expertise.
- *Clearly worded/not vague:* Clear, descriptive, and concise language is appreciated. Please avoid generalities and vague statements.
- *Actionable:* Please provide enough high-level detail so that we can understand how to apply the information you provide. Wherever possible, please provide credible data and specific examples to support your views. If you cite academic or other studies, they should be publicly available to be considered.
- *Cost effective & impactful:* Respondents should consider whether their suggestions have a clear return on investment that can be articulated to secure funding and support.
- ''*Gordian Knot*'' *solutions and ideas:* Occasionally, challenges that seem to be intractable and overwhelmingly complex can be resolved with a change in perspective that unlocks hidden opportunities and aligns stakeholder interests. We welcome these ideas as well.
- All submissions are public records and may be published on *www.regulations.gov.* Do NOT submit sensitive, confidential, or personally identifiable information.

An additional appendix of no more than 5 pages long may also be included. This section should only include additional context about you or your organization.

Privacy Act Statement

Submission of comments is voluntary. The information will be used to determine focus and priority areas for open-source software security and memory-safety. Please note that all comments received in response to this notice will be posted in their entirety to *http://www.regulations.gov,* including any personal and business confidential information provided. Do not include any information you would not like to be made publicly available.

Kemba E. Walden,

Acting National Cyber Director.

[FR Doc. 2023–17239 Filed 8–9–23; 8:45 am]

BILLING CODE 3340–D3–P

EXPORT-IMPORT BANK

[Public Notice: 2023–6040]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Annual Competitiveness Report Survey of Exporters and Lenders

AGENCY: Export-Import Bank of the United States.

ACTION: Notice of information collection; request for comment.

SUMMARY: The Export-Import Bank of the United States (EXIM), invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995. As required by Export-Import Bank Act of 1945 (see section 8A(a)(1) of EXIM's charter), EXIM will survey U.S. exporters and commercial lending institutions to understand their experience with EXIM ''meeting financial competition from other countries whose exporters compete with United States exporters.'' EXIM plans to survey exporters and lenders that have engaged with EXIM on medium- and long-term support over the previous calendar year or responded to at least one of EXIM's last two surveys. The potential respondents will be sent an electronic invitation to participate in the online survey.

DATES: Comments should be received on or before October 10, 2023 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *WWW.REGULATIONS.GOV* (EIB 00–02) or by email *Jessica.Ernst@exim.gov* or by mail to Jessica Ernst, Export-Import Bank of the United States, 811 Vermont Ave. NW, Washington, DC 20571 Attn: OMB 3048–14–01.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Jessica Ernst, *Jessica.Ernst@exim.gov,* 202–565–3711.

SUPPLEMENTARY INFORMATION: The proposed survey will ask participants about their potential or completed deals involving EXIM, their opinion of EXIM's policies and procedures, their interaction and perceptions of other export credit agencies, and impacts of overall market conditions on their businesses.

The survey can be reviewed at: *https://img.exim.gov/s3fs-public/EXIM+Competitiveness+Report+Exporter+and+Lender+Survey+2023.pdf.*

Titles and Form Number: EIB 00–02 Annual Competitiveness Report Survey of Exporters and Lenders.

OMB Number: 3048–0004.

Type of Review: Renewal.

Need and Use: The information requested is required by the Export-Import Bank Act of 1945, as amended, 12 U.S.C. 635g–1 (see section 8A(a)(1) of EXIM's charter) and enables EXIM to evaluate and assess its competitiveness with the programs and activities of official export credit agencies and to report on the Bank's status in this regard.

Affected Public:

The number of respondents: 100.

Estimated time per respondent: 15 minutes.

The frequency of response: Annually.

Annual hour burden: 25 total hours.

Dated: August 4, 2023.

Kalesha Malloy,

IT Specialist.

[FR Doc. 2023–17115 Filed 8–9–23; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1222; FR ID 162067]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

DATES: Written PRA comments should be submitted on or before October 10, 2023. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *nicole.ongele@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele, (202) 418–2991.

SUPPLEMENTARY INFORMATION: The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

OMB Control Number: 3060–1222.

Title: Inmate Calling Services (ICS) Provider Annual Reporting, Certification, and Other Requirements, WC Docket Nos. 23–62, 12–375, DA 23–656.

Form Number(s): FCC Form 2301(a) and FCC Form 2301(b).

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents and Responses: 30 respondents; 33 responses.

Estimated Time per Response: 5 hours–220 hours.

Frequency of Response: Annual reporting and certification requirements, third party disclosure and waiver request requirements.

Obligation to Respond: Mandatory. Statutory authority for this collection of information is contained in sections 1, 2, 4(i)–(j), 5(c), 201(b), 218, 220, 225, 255, 276, 403, and 716 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i)–(j), 155(c), 201(b), 218, 220, 225, 255, 276, 403, and 617, and the Martha Wright-Reed Just and Reasonable Communications Act of 2022, Pub. L. 117–338, 136 Stat. 6156

Total Annual Burden: 9,690 hours.

Total Annual Cost: No cost.

Needs and Uses: In 2015, the Commission released the Second Report and Order and Third Notice of Further Proposed Rulemaking, WC Docket No. 12–375, 30 FCC Rcd 12763 (*2015 ICS Order*), in which it required that ICS providers file Annual Reports providing data and other information on their ICS operations, as well as Annual Certifications that reported data are complete and accurate and comply with the Commission's ICS rules. Pursuant to the authority delegated it by the Commission in the *2015 ICS Order,* the Wireline Competition Bureau (WCB) created a standardized reporting template (FCC Form No. 2301(a)) and a related certification of accuracy (FCC Form No. 2301(b)), as well as instructions to guide providers through the reporting process. *See* ICS Annual Reporting Form Word Template (Current), WC Docket No. 12–375 *https://www.fcc.gov/general/ics-data-collections* (last visited August 4, 2023) (Word Template); ICS Annual Reporting Form Excel Template (Current), WC Docket No. 12–375, *https://www.fcc.gov/general/ics-data-collections* (last visited August 4, 2023) (Excel Template); ICS Annual Reporting and Certification Instructions (Current), WC Docket No. 12–375 *https://www.fcc.gov/general/ics-data-collections* (last visited August 4, 2023) (Instructions) (Certification Instructions); ICS Annual Report Certification Form (Current), WC Docket No. 12–375, *https://www.fcc.gov/general/ics-data-collections* (last visited August 4, 2023) (Certification Form).

In 2021, the Commission released the Third Report and Order, Order on Reconsideration, and Fifth Further Notice of Proposed Rulemaking WC Docket No. 12–375, 36 FCC Rcd 9519 (2021). The Commission revised its rules by adopting, among other things, lower interim rate caps for interstate calls, new interim rate caps for international calls, and a new rate cap structure that requires ICS providers to differentiate between legally mandated and contractually required site commissions. The revisions also included expanded consumer disclosure requirements, as well as new reporting requirements for providers seeking waivers of the Commission's interstate and international rates.

In 2022, the Commission released the Fourth Report and Order and Sixth Further Notice of Proposed Rulemaking, WC Docket No. 12–375, FCC 22–76 (Sept. 30, 2022). The Commission adopted numerous requirements to improve access to communications services for incarcerated people with communication disabilities and expanded the scope of the Annual Reports to reflect these new requirements. Specifically, the Commission required ICS providers to report, at a minimum, for each facility served, the types of telecommunications relay services (TRS) that can be accessed from the facility and the number of completed calls and complaints for TTY-to-TTY calls, ASL point-to-point video calls, and each type of TRS for which access is provided. The Commission also eliminated the safe harbor, adopted in 2015, that had exempted ICS providers from any TRS-related reporting requirements if they either (1) operated in a facility that allowed the offering of additional forms of TRS beyond those mandated by the Commission or (2) had not received any complaints related to TRS calls. The Commission found that the safe harbor was no longer appropriate given the expanded reporting requirement for additional forms of TRS, and the importance of transparency regarding the state of accessible communications in incarceration settings.

The Commission also specified a number of provider obligations relating to access to and the provision of TRS. For instance, the Commission required, among other things, that an ICS provider must work with correctional authorities, equipment vendors, and TRS providers to ensure that screen-equipped communications devices such as tablets,

smartphones, or videophones are available to incarcerated people who need to use TRS for effective communication, and all necessary TRS provider software applications are included, with any adjustments needed to meet the security needs of the institution. The Commission required that providers ensure compatibility with institutional communication systems and allow operability over the inmate calling services provider's network.

On January 5, 2023, the President signed into law the Martha Wright-Reed Just and Reasonable Communications Act of 2022, Public Law 117–338, 136 Stat. 6156 (the Martha Wright-Reed Act or the Act), expanding the Commission's statutory authority over communications services between incarcerated people and the non-incarcerated to include ''any audio or video communications service used by inmates . . . regardless of the technology used.'' The new Act also amends section 2(b) of the Communications Act of 1934, as amended (the Communications Act) to make clear that the Commission's authority extends to intrastate as well as interstate and international communications services used by incarcerated people.

The Act directs the Commission to ''promulgate any regulations necessary to implement'' the statutory provisions, including its mandate that the Commission establish a ''compensation plan'' ensuring that all rates and charges for IPCS ''are just and reasonable,'' not earlier than 18 months and not later than 24 months after its January 5, 2023 enactment. The Act also requires the Commission to consider, as part of its implementation, the costs of ''necessary'' safety and security measures, as well as ''differences in costs'' based on facility size, or ''other characteristics.'' It also allows the Commission to ''use industry-wide average costs of telephone service and advanced communications services and the average costs of service a communications service provider'' in determining just and reasonable rates.

On March 17, 2023, pursuant to the directive that the Commission implement the new Act and establish just and reasonable rates for IPCS services, the Commission released *Incarcerated People's Communications Services; Implementation of the Martha Wright-Reed Act; Rates for Interstate Inmate Calling Services,* WC Docket Nos. 23–62, 12–375, Notice of Proposed Rulemaking and Order, FCC 23–19, 88 FR 20804 (*2023 IPCS Notice*) and 88 FR 19001 (Order) (*2023 IPCS Order*). The Commission sought comment on how to interpret the Act's language to ensure that the Commission implements the statute in a manner that fulfills Congress's intent. Because the Commission is now required or allowed to consider certain types of costs, the Act contemplates that it would undertake an additional data collection. To ensure that it has the data necessary to meet its substantive and procedural responsibilities under the Act, the Commission adopted the *2023 IPCS Order* delegating authority to WCB and the Office of Economics and Analytics (OEA) to modify the template and instructions for the most recent data collection to the extent appropriate to timely collect such information to cover the additional services and providers now subject to the Commission's authority. On April 28, 2023, WCB and OEA issued a Public Notice seeking comment on all aspects of the proposed data collection. *WCB and OEA Seek Comment on Proposed 2023 Mandatory Data Collection for Incarcerated People's Communication Services,* WC Docket Nos. 23–62, 12–375, Public Notice, DA 23–355 (WCB/OEA Apr. 28, 2023). On July 26, 2023, WCB and OEA released an Order adopting instructions, a reporting template, and a certification form to implement the 2023 Mandatory Data Collection. *Incarcerated People's Communications Services; Implementation of the Martha Wright-Reed Act, Rates for Interstate Inmate Calling Services,* WC Docket Nos. 23–62, 12–375, Order, DA 23–638 (July 26, 2023).

In the *2023 IPCS Order,* the Commission also reaffirmed and updated its prior delegation of authority to WCB and the Consumer and Governmental Affairs Bureau (CGB) (collectively, the Bureaus) to revise the instructions and reporting templates for the Annual Reports. Specifically, the Commission delegated to the Bureaus the authority to modify, supplement, and update the instructions and templates for the Annual Reports, as appropriate, to supplement the information the Commission will receive in response to the 2023 Mandatory Data Collection.

On August 3, 2023, the Bureaus issued a Public Notice seeking comment on proposed revisions to the instructions, template, and certification form for the Annual Reports, *https://www.fcc.gov/proposed-2023-ipcs-annual-reports,* which are necessary to reflect the revised rules improving access to communications services for incarcerated people with communication disabilities adopted in the *2022 ICS Order* and to help implement the Martha Wright-Reed Act to ensure just and reasonable rates for consumers and fair compensation for providers. *Wireline Competition Bureau and Consumer and Governmental Affairs Bureau Seek Comment on Revisions to IPCS Providers' Annual Reporting and Certification Requirements,* Public Notice, WC Docket Nos. 23–62, 12–375, DA 23–656 (Aug. 3, 2023). *https://www.fcc.gov/document/2023-incarcerated-peoples-communications-services-annual-reports-pn.*

Notice of this document will be published in the **Federal Register**. The Bureaus will consider comments submitted in response to the Public Notice in addition to comments submitted in response to this 60-Day Notice in finalizing this information collection prior to submitting the documents to the Office of Management and Budget.

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer.

[FR Doc. 2023–17257 Filed 8–9–23; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket Number CDC–2023–0057, NIOSH–156–F]

Request for Public Comment on the Draft Immediately Dangerous to Life or Health (IDLH) Value Document for Hydrogen Chloride

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Request for comment.

SUMMARY: The National Institute for Occupational Safety and Health (NIOSH) in the Centers for Disease Control and Prevention (CDC), an Operating Division of the Department of Health and Human Services (HHS), requests public comment and technical review on the draft Immediately Dangerous to Life or Health (IDLH) Value Profile document for the chemical hydrogen chloride (CAS# 7647–01–0).

DATES: Electronic or written comments must be received by October 10, 2023.

ADDRESSES: You may submit comments, identified by docket number CDC–2023–0057 and docket number NIOSH–156–F, by either of the following methods:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.

• *Mail:* National Institute for Occupational Safety and Health, NIOSH Docket Office, 1090 Tusculum Avenue, MS C–34, Cincinnati, Ohio 45226–1998.

Instructions: All information received in response to this notice must include the agency name and docket number (CDC–2023–0057; NIOSH–156–F). All relevant comments, including any personal information provided, will be posted without change to *https://www.regulations.gov.* Do not submit comments by email. CDC does not accept comments by email. For access to the docket to read background documents or comments received, go to *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: R. Todd Niemeier, Ph.D., National Institute for Occupational Safety and Health, MS–C15, 1090 Tusculum Avenue, Cincinnati, OH 45226. Telephone: (513) 533–8166.

SUPPLEMENTARY INFORMATION: NIOSH is requesting public comment and technical review on a draft IDLH Value Profile document for the chemical hydrogen chloride. To facilitate the review of this document, NIOSH requests comment on the following specific questions for the draft Profile document:

1. Does this document clearly outline the health hazards associated with acute (or short-term) exposures to the chemical? If not, what specific information is missing from the document?

2. Are the rationale and logic behind the derivation of an IDLH value for a specific chemical clearly explained? If not, what specific information is needed to clarify the basis of the IDLH value?

3. Are the conclusions supported by the data?

4. Are the tables clear and appropriate?

5. Is the document organized appropriately? If not, what improvements are needed?

6. Are you aware of any scientific data reported in government publications, databases, peer-reviewed journals, or other sources that should be included within this document?

The draft IDLH Value Profile was developed to provide the scientific rationale behind derivation of IDLH values for the following chemical:

Document #	Chemical	CAS #
X–XX	Hydrogen Chloride	(#7647–01–0)

The IDLH Value Profile provides a detailed summary of the health hazards of acute exposures to high airborne concentrations of the chemical and the rationale for the IDLH value.

Background: In 2013, NIOSH published Current Intelligence Bulletin (CIB) 66: Derivation of Immediately Dangerous to Life or Health (IDLH) Values [*http://www.cdc.gov/niosh/docs/2014-100/pdfs/2014-100.pdf*] [NIOSH 2013]. The information presented in this CIB represents the scientific rationale and the current methodology used to derive IDLH values. Since the establishment of the IDLH values in the 1970s, NIOSH has continued to review available scientific data to improve the protocol used to derive acute exposure guidelines, in addition to the chemical specific IDLH values.

IDLH values are based on health effects considerations determined through a critical assessment of the toxicology and human health effects data. This approach ensures that the IDLH values reflect an airborne concentration of a substance that represents a high-risk situation that may endanger workers' lives or health.

The primary steps applied in the establishment of an IDLH value include the following:

1. Critical review of human and animal toxicity data to identify potentially relevant studies and characterize the various lines of evidence that can support the derivation of the IDLH value;

2. Determination of a chemical's mode of action or description of how a chemical exerts its toxic effects;

3. Application of duration adjustments (time scaling) to determine 30-minute-equivalent exposure concentrations and the conduct of other dosimetry adjustments, as needed;

4. Experimental or other data to establish a point of departure (POD) such as lethal concentrations (*e.g.,* LC50), lowest observed adverse effect level (LOAEL), or no observed adverse effect level (NOAEL);

5. Selection and application of an uncertainty factor (UF) for POD or critical adverse effect concentration, identified from the available studies to account for issues associated with interspecies and intraspecies differences, severity of the observed effects, data quality, or data insufficiencies; and

6. Development of the final recommendation for the IDLH value from the various alternative lines of evidence, with use of a weight-of-evidence approach to all the data.

Reference

NIOSH [2013]. Current intelligence bulletin 66: derivation of immediately dangerous to life or health (IDLH) values. Cincinnati, OH: US Department of Health and Human Services, Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health, DHHS (NIOSH) Publication 2014–100.

Dated: August 4, 2023.

John J. Howard,

Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention.

[FR Doc. 2023–17129 Filed 8–9–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–3103]

Development of Small Dispensers Assessment Under the Drug Supply Chain Security Act; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; request for comments.

SUMMARY: The Food and Drug Administration (FDA or Agency) is seeking stakeholder comments on the development of a technology and software assessment that examines the feasibility of dispensers with 25 or fewer full-time employees conducting interoperable, electronic tracing of products at the package level. FDA would like to obtain information regarding issues to be addressed in the assessment related to the accessibility of the necessary software and hardware to such dispensers; whether the necessary software and hardware is prohibitively expensive to obtain, install, and maintain for such dispensers; and if the necessary hardware and software can be integrated into business practices.

DATES: Either electronic or written comments on the notice must be submitted by September 11, 2023.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of September 11, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received 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–2023–N–3103 for ''Development of Small Dispensers Assessment under the Drug Supply Chain Security Act; 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.'' 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: Daniel Bellingham, Office of Compliance, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 301–796–3130, *daniel.bellingham@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On November 27, 2013, the Drug Supply Chain Security Act (DSCSA) (Title II of Pub. L. 113–54) was signed into law. The DSCSA outlines steps to achieve interoperable, electronic tracing of products at the package level to identify and trace certain prescription drugs as they are distributed in the United States. Section 202 of the DSCSA added the new sections 581 and 582 to the Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360eee and 360eee–1). Under section 582(g)(3), FDA is required to enter into a contract with a private, independent consulting firm with expertise to conduct a technology and software assessment that looks at the feasibility of dispensers with 25 or fewer full-time employees conducting interoperable, electronic tracing of products at the package level. Under section 582(g)(1), dispensers and other trading partners will be required to, amongst other requirements, exchange transaction information and transaction statements in a secure, interoperable, electronic manner for each package; implement systems and processes for package-level verification, including the standardized numerical identifier; and implement systems and processes to facilitate the gathering of information necessary to produce the transaction information and statement for each transaction going back to the manufacturer if FDA or a trading partner requests an investigation in the event of a recall or for purposes of investigating a suspect or illegitimate product. These enhanced drug distribution security requirements are also referred to as ''enhanced product tracing'' or ''enhanced verification.''

II. Purpose of the Request for Comments

FDA is issuing this request for public comments prior to beginning the assessment, in accordance with section 582(g)(3)(D). The statement of work requires the selected firm to conduct an assessment that will address the proposed questions articulated below. In addition to commenting on the proposed questions below, stakeholders may provide comments on any aspect of the small dispenser assessment under the DSCSA.

Stakeholders that may be interested in responding to this request for information include manufacturers, repackagers, wholesale distributors, dispensers, State and Federal authorities, solution providers, and standards organizations, among others. FDA is particularly interested in receiving comments from the various sectors of the dispenser community, particularly pharmacies. FDA is seeking comments on the following proposed questions for small dispensers (*i.e.,* dispensers with 25 or fewer full-time employees). We are interested in receiving feedback on the questions themselves and whether or not they should be edited to be more useful for the assessment. FDA is also interested in any new questions that stakeholders may recommend.

• Have you begun preparations for DSCSA requirements regarding the interoperable, electronic tracing of products at the package level required under section 582(g)(1) of the FD&C Act (*i.e.,* enhanced product tracing or enhanced verification)?

• How are you currently exchanging data with your trading partners (*e.g.,* by

paper-based methods, electronic methods, or both)?

- If not currently exchanging data with trading partners in a fully electronic manner, will you be able to in the near future? If not, what are the barriers? Elaborate on why or how, as appropriate. Please specify issues related to:
- accessibility of necessary software and hardware;
- cost to obtain, install, and maintain necessary software and hardware, particularly if it is prohibitively expensive;
- integration of necessary software and hardware into business practices, such as with wholesale distributors;
- other relevant information related to feasibility of dispensers with 25 or fewer full-time employees to conduct interoperable, electronic tracing of product at the package level.
- What type of software systems and hardware do you currently utilize to facilitate the electronic exchange of DSCSA-related data for transactions of products?
- What new or modified software systems and hardware do you anticipate putting in place to comply with the interoperable, electronic tracing requirements?
- How likely are you to change and upgrade your existing software systems that are already in use so that you can comply with the interoperable, electronic tracing requirements?
- Have you or do you plan to connect your system(s) with your trading partner(s) (*e.g.,* manufacturer(s), repackager(s), or wholesale distributor(s)) in order to facilitate electronic DSCSA-related data exchange? If so, have you experienced technical issues when attempting to establish connectivity? If not, how do you or how do you plan to manage electronic DSCSA-related data received from an upstream trading partner (*e.g.,* maintain the data in your dispenser system or use a third-party agreement for another entity to confidentially maintain the DSCSA-related data on your behalf (*e.g.,* use of a secure web portal provided by your wholesale distributor))?
- Have you considered data integrity and security concerns when establishing agreements with third-party entities (*e.g.,* solution providers or wholesale distributors) for electronic data exchange and maintenance?
- Have you ever received transaction information from a trading partner, such as your wholesale distributor, that does not match the product that you received? If so, how long did it take to resolve the discrepancy on average? What if any unique challenges arose from these situations? How often does this happen?
- If you currently routinely scan a 2D data matrix barcode, how often do you receive a 2D data matrix barcode of the product identifier that cannot be scanned or read? Why are you unable to scan or read the 2D data matrix barcode (*e.g.,* barcode quality, scanner performance, software issue) and what is your process for handling these situations, including when manual steps are taken by your staff when an automated process was inadequate or failed?
- If you currently routinely scan the 2D data matrix barcode, how often you encounter a 2D data matrix barcode with missing or inaccurate data? What are the reasons for this and what is your process for handling these situations, including when manual steps are taken by your staff when an automated process was inadequate or failed?
- What new demands do you expect the DSCSA requirements in section 582(g)(1) of the FD&C Act to have on your current staff resources?
- How long do you expect it will take to train staff on the new requirements, how to use any new software or hardware, and any process changes? What additional resources do you anticipate needing to comply with the interoperable, electronic tracing requirements?
- Are there additional challenges not already identified when operationalizing new systems and processes for interoperable, electronic tracing of products at the package level required under section 582(g)(1) of the FD&C Act (*i.e.,* enhanced product tracing or enhanced verification)?

Stakeholders may provide other relevant information that may inform the development of the small dispenser assessment under the DSCSA.

Dated: August 7, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–17140 Filed 8–9–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–1529]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Voluntary Qualified Importer Program

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) 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 September 11, 2023.

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 0910–0840. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Rachel Showalter, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 240–994–7399, *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.

Voluntary Qualified Importer Program

OMB Control Number 0910–0840—Extension

This information collection supports implementation of FDA's Voluntary Qualified Importer Program (VQIP), a voluntary fee-based program that provides expedited review and import entry of human and animal foods into the United States. Program participants may import products to the United States with greater speed and predictability, avoiding unexpected

delays at the point of import entry. Importers interested in applying can start their application (Form FDA 4041) by submitting a notice of intent to participate after setting up an account through the FDA Industry Systems (FIS) website at *https://www.access.fda.gov,* which includes a VQIP Portal User Guide. To participate, importers must meet eligibility criteria and pay a user fee that covers costs associated with FDA's administration of the program. Consistent with section 743(b)(1) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 379j–31(b)(1)), FDA annually publishes a schedule of fees applicable to VQIP in the **Federal Register**.

Respondents to the information collection are persons that bring food, or cause food to be brought, from a foreign country into the customs territory of the United States (section 806 of the FD&C Act (21 U.S.C. 384b)) as a VQIP importer. A VQIP importer can be located outside the United States. Persons who may be a VQIP importer include the manufacturer, owner, consignee, and importer of record of a food, provided that the importer can meet all the criteria for participation.

To assist respondents with the information collection, we developed the guidance document entitled ''FDA's Voluntary Qualified Importer Program'' (issued November 2016, updated July 2023 to change the Paperwork Reduction Act burden statement address), available at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-fdas-voluntary-qualified-importer-program.* The guidance document is prepared in a question-and-answer format and discusses eligibility criteria; includes instruction for completing a VQIP application; explains conditions that may result in revocation of participation as well as criteria for reinstatement; and communicates benefits VQIP importers can expect to receive under the program. The guidance also discusses preparation of the ''Quality Assurance Program (QAP),'' a compilation of written policies and procedures used to ensure adequate control over the safety and security of foods being imported. The guidance document was developed and issued consistent with FDA good guidance practice regulations in 21 CFR 10.115, which provides for public comment at any time.

In the **Federal Register** of May 11, 2023 (88 FR 30315), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Reporting using FIS VQIP portal/form FDA 4041	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Initial VQIP application	5	1	5	180	900
Application Renewals—subsequent year	6	1	6	20	120
Requests for reinstatement	2	1	2	10	20
Total					1,040

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

VQIP participant records consistent with implementing guidance	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
Quality Assurance Program (QAP) preparation	5	1	5	160	800
QAP maintenance and updates	6	1	6	16	96
Total					896

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Our estimated burden for the information collection reflects an overall adjustment decrease of 1,844 hours and a corresponding decrease of 18 responses. Since our last request for OMB approval of the information collection, we have adjusted our estimate of the number of respondents based on actual participation in the program. We assume the average burden required for the respective reporting and recordkeeping activities for both initial and continued participation in the program remain constant.

Dated: August 7, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–17150 Filed 8–9–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–N–2186]

Request for Nominations on the Tobacco Products Scientific Advisory Committee—Small Business Pool

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is requesting that any small business tobacco manufacturing industry organizations interested in participating in the selection of a nonvoting industry representative to serve on the Tobacco Products Scientific Advisory Committee for the Center for Tobacco Products notify FDA in writing. FDA is also requesting nominations for nonvoting industry representatives to be included in a pool of individuals to represent the interests of the small business tobacco manufacturing industry on the Tobacco Products Scientific Advisory Committee. A nominee may either be

self-nominated or nominated by an organization to serve as a nonvoting industry representative. This position may be filled on a rotating, sequential basis by representatives of different small business tobacco manufacturers based on areas of expertise relevant to the topics being considered by the Advisory Committee. Nominations will be accepted for current vacancies effective with this notice.

DATES: Any small business tobacco manufacturing industry organization interested in participating in the selection of appropriate nonvoting members to represent industry interests must send a letter stating that interest to the FDA by September 11, 2023, (see sections I and II of this document for further details). Concurrently, nomination materials for prospective candidates should be sent to FDA by September 11, 2023.

ADDRESSES: All statements of interest from small business tobacco manufacturing industry organizations interested in participating in the selection process of nonvoting industry representative nominations should be sent to CAPT Serina Hunter-Thomas (see **FOR FURTHER INFORMATION CONTACT**). All nominations for nonvoting industry representatives may be submitted electronically by accessing the FDA Advisory Committee Membership Nomination Portal: *https://www.accessdata.fda.gov/scripts/FACTRSPortal/FACTRS/index.cfm.* Information about becoming a member of an FDA advisory committee can also be obtained by visiting FDA's website *http://www.fda.gov/AdvisoryCommittees/default.htm.*

FOR FURTHER INFORMATION CONTACT: Serina Hunter-Thomas, Office of Science, Center for Tobacco Products, Food and Drug Administration, Center for Tobacco Products Document Control Center, Bldg. 71, Rm. G335, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 1–877–287–1373 (choose Option 5), or by email: *TPSAC@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: The Agency intends to add nonvoting industry representative(s) to the following advisory committee:

I. Tobacco Products Scientific Advisory Committee

The Tobacco Products Scientific Advisory Committee (the Committee) advises the Commissioner of FDA (the Commissioner) or designee in discharging responsibilities related to the regulation of tobacco products. The Committee reviews and evaluates safety, dependence, and health issues relating to tobacco products and provides appropriate advice, information, and recommendations to the Commissioner.

The Committee includes three nonvoting members who represent industry interests. These members include one representative representing the interests of the tobacco manufacturing industry, one representative representing the interests of tobacco growers, and one representative representing the interests of the small business tobacco manufacturing industry, which may be filled on a rotating, sequential basis by representatives of different small business tobacco manufacturers based on areas of expertise relevant to the topics being considered by the Advisory Committee.

With this notice, nominations are sought for the following positions: A pool of individuals, with varying areas of expertise, to represent the interests of the small business tobacco manufacturing industry on a rotating, sequential basis.

II. Selection Procedure

Any industry organization interested in participating in the selection of an appropriate nonvoting member to represent industry interests should send a letter stating that interest to the FDA contact (see **FOR FURTHER INFORMATION CONTACT**) within 30 days of publication of this document (see **DATES**). Within the subsequent 30 days, FDA will send a letter to each organization that has expressed an interest, attaching a complete list of all such organizations and a list of all nominees along with their current resumes. The letter will also state that it is the responsibility of the interested organizations to confer with one another and to select a candidate, within 60 days after the receipt of the FDA letter, to serve as the nonvoting member to represent industry interests for the committee. The interested organizations are not bound by the list of nominees in selecting a candidate. However, if no individual is selected within 60 days, the Commissioner will select the nonvoting member to represent industry interests.

III. Application Procedure

Individuals may self-nominate and/or an organization may nominate one or more individuals to serve as a nonvoting industry representative. Contact information, a current curriculum vitae, and the name of the committee of interest should be sent to the FDA Advisory Committee Membership Nomination Portal (see **ADDRESSES**) within 30 days of publication of this document (see **DATES**). FDA will forward all nominations to the organizations expressing interest in participating in the selection process for the committee. (Persons who nominate themselves as nonvoting industry representatives will not participate in the selection process).

FDA seeks to include the views of women, and men, members of all racial and ethnic groups and individuals with and without disabilities on its advisory committees and, therefore encourages nominations of appropriately qualified candidates from these groups.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to advisory committees.

Dated: August 7, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–17149 Filed 8–9–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0583]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Radioactive Drug Research Committees

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, 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 September 11, 2023.

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 0910–0053. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Rachel Showalter, Office of Operations, Food and Drug Administration, Three

White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 240–994–7399, *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.

Radioactive Drug Research Committees

OMB Control Number 0910–0053—Extension

This information collection request supports the implementation of statutory and regulatory requirements and associated Agency forms. Sections 201, 505, and 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 355, and 371) establish provisions under which FDA issues regulations governing the use of radioactive drugs for basic scientific research. Specifically, § 361.1 (21 CFR 361.1) sets forth specific regulations about establishing and composing radioactive drug research committees (RDRCs) and their role in approving and monitoring basic research studies using radiopharmaceuticals, including reporting, recordkeeping, and labeling requirements. No basic research study involving any administration of a radioactive drug to research subjects is permitted without the authorization of an FDA-approved RDRC (§ 361.1(d)(7)). The type of research that may be undertaken with a radiopharmaceutical drug must be intended to obtain basic information and not to carry out a clinical trial for safety or efficacy. The types of basic research permitted are specified in the regulations and include studies of metabolism, human physiology, pathophysiology, or biochemistry.

To assist respondents with the applicable reporting requirements, we developed Form FDA 2914 entitled, ''Report on Research Use of Radioactive Drugs: Membership Summary,'' available at *https://www.fda.gov/media/73820/download;* and Form FDA 2915, entitled, ''Report on Research Use of Radioactive Drugs: Study Summary,'' available at *https://www.fda.gov/media/71805/download.*

We also developed the guidance document entitled, ''Radioactive Drug Research Committee: Human Research Without An Investigational New Drug Application'' (August 2010), available at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/radioactive-drug-research-committee-human-research-without-investigational-new-drug-application,* which provides information to help determine whether research studies may be conducted under an FDA-approved RDRC, or whether research studies must be conducted under an investigational new drug application (IND). It also offers answers to frequently asked questions on conducting research with radioactive drugs, and provides information on the membership, functions, and reporting requirements of an RDRC approved by FDA. All Agency guidance documents are issued consistent with our good guidance practice regulations at 21 CFR 10.115.

Types of research studies not permitted under the regulations are also specified and include those intended for immediate therapeutic, diagnostic, or similar purposes or to determine the safety or effectiveness of the drug in humans for such purposes (*i.e.,* to carry out a clinical trial for safety or efficacy). These studies require filing of an IND under 21 CFR part 312, and the associated information collections, are covered in OMB control number 0910–0014.

The primary purpose of this collection of information is to determine whether the research studies are being conducted in accordance with required regulations and that human subject safety is assured. If these studies were not reviewed, human subjects could be subjected to inappropriate radiation or pharmacologic risks. Respondents to this information collection are the chairperson or chairpersons of each individual RDRC, investigators, and participants in the studies.

In the **Federal Register** of March 16, 2023 (88 FR 16272), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section; FDA form or activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
§ 361.1(c)(3) reports and (c)(4) approval; Form FDA 2914 (Membership Summary).	56	1	56	1	56
§ 361.1(c)(3) reports; Form FDA 2915 (Study Summary)	37	10	370	3	1,110
§ 361.1(d)(8); adverse events	10	1	10	0.5 (30 mins)	5
Total					1,171

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

21 CFR section; and activity	Number of recordkeepers	Number of records per recordkeepers	Total annual records	Average burden per recordkeeping	Total Hours
§ 361.1(c)(2); RDRC maintains meeting minutes involving use in human research subjects. § 361.1(d)(5); RDRC obtains consent of human research subjects.	56	10.61	594	4.239	2,518
Total					2,518

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The burden attributed to recordkeeping activities is assumed to be distributed among the individual elements and averaged among respondents. In the burden estimate, we assume an average burden per record of 10 hours for the RDRC respondents to maintain meeting minutes and 0.75 hours (45 minutes) for a subset of the respondents (37 RDRCs) to obtain consent of human research subjects.

Section 361.1(f) sets forth labeling requirements for radioactive drugs. These requirements are not in the burden estimate because they are information supplied by the Federal Government to the recipient for the purposes of disclosure to the public (5 CFR 1320.3(c)(2)).

Our estimated burden for the information collection reflects an overall decrease of 703 hours and a corresponding decrease of 158 responses. We attribute this adjustment to a decrease in the average burden per response, from 3.5 hours to 3 hours per response, associated with the public reporting burden for Form FDA 2915. The decrease is based on our program experience and matches the burden hours reflected on the form. In addition, this adjustment is also attributable to the Agency receiving fewer submissions over the last few years.

Dated: August 7, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–17154 Filed 8–9–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–0918]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Food Labeling Requirements

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) 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 September 11, 2023.

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 0910–0381. 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, 10 a.m.–12 p.m., 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.

Food Labeling Requirements

OMB Control Number 0910–0381—Revision

This information collection supports statutory and regulatory requirements that govern food labeling, and information collection recommendations discussed in associated Agency guidance. Sections 4, 5, and 6 of the Fair Packaging and Labeling Act (FPLA) (15 U.S.C. 1453, 1454, and 1455) and sections 201, 301, 402, 403, 409, 411, 701, and 721 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 321, 331, 342, 343, 348, 350, 371, and 379e), establish provisions under which a food product shall be deemed to be misbranded if, among other things, its label or labeling fails to bear certain required information concerning the food product, is false or misleading in any particular, or bears certain types of unauthorized claims. Implementing regulations are codified in parts 101, 102, 104, and 105 (21 CFR parts 101, 102, 104, and 105). While regulations in part 101 set forth general food labeling provisions, requirements pertaining to the common or usual name for nonstandardized foods; guidelines for nutritional quality to prescribe the minimum level or range of nutrient composition appropriate for a given class of food; and requirements for foods for special dietary use are found in parts 102, 104, and 105, respectively. The requirements are intended to ensure the safety of food products produced or sold in the United States and enable consumers to be knowledgeable about the foods they purchase and include corresponding information disclosure requirements, along with the reporting and recordkeeping provisions, subject to enforcement by FDA.

We provide information resources regarding food labeling under the FD&C Act and its amendments on our website at *https://www.fda.gov/food/food-labeling-nutrition.* Food labeling is required for most prepared foods, such as breads, cereals, canned and frozen foods, snacks, desserts, drinks, etc. Nutrition labeling for raw produce (fruits and vegetables) and fish is voluntary. We refer to these products as ''conventional'' foods. For detailed information on dietary supplement labeling requirements visit our website at *https://www.fda.gov/food/dietary-supplements.* Nutrition labeling provides information for use by consumers in selecting a nutritious diet. Other information enables consumers to comparison shop. Ingredient information also enables consumers to avoid substances to which they may be sensitive. Petitions or other requests submitted to us provide the basis for us to permit new labeling statements or to grant exemptions from certain labeling requirements. Recordkeeping requirements enable us to monitor the basis upon which certain label statements are made for food products and whether those statements are in compliance with the requirements of the FD&C Act or the FPLA. Requirements include general content and format for the labeling of food packaging, including nutrition and ingredient information. Additional regulations provide for specific nutrient content claims.

The information collection includes Form FDA 3570 entitled, ''Small Business Nutrition Labeling Exemption Notice,'' for use as applicable and available for download from our website at *https://www.fda.gov/food/labeling-nutrition-guidance-documents-regulatory-information/small-business-nutrition-labeling-exemption-notice-model-form.* We have also developed the following guidance documents to assist respondents with various aspects of the information collection:

- ''*Guidance for Industry:* Notification of a Health Claim or Nutrient Content Claim Based on an Authoritative Statement of a Scientific Body'' (June 1998). The guidance document is available from our website at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-notification-health-claim-or-nutrient-content-claim-based-authoritative-statement.* The guidance document

discusses section 403(r)(2) and (r)(3) (21 U.S.C. 343(r)(2) and (3)) of the FD&C Act and was issued to provide instruction on the submission of information to FDA during the initial phase of implementing these new provisions.

- ''*Questions and Answers:* Labeling of Dietary Supplements as Required by the Dietary Supplement and Nonprescription Drug Consumer Protection Act'' (September 2009). The guidance document is available from our website at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-questions-and-answers-regarding-labeling-dietary-supplements-required-dietary.* The guidance document communicates content elements and FDA enforcement of labeling requirements in section 403(y) of the FD&C Act.
- ''Substantiation for Dietary Supplement Claims Made Under Section 403(r)(6) of the Federal Food, Drug, and Cosmetic Act'' (January 2009). The guidance document is available from our website at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-substantiation-dietary-supplement-claims-made-under-section-403r-6-federal-food.* The guidance document discusses FDA recommendations regarding claims under section 403(r)(6) of the FD&C Act.

For operational efficiency, we are revising the information collection to account for burden that may result from activities associated with the labeling of certain beers, currently approved in OMB Control No. 0910–0728. The Tobacco Tax and Trade Bureau is responsible for the dissemination and enforcement of regulations with respect to the labeling of distilled spirits, certain wines, and malt beverages issued in the Federal Alcohol Administration Act. However, and as discussed in the guidance document ''Labeling of Certain Beers Subject to the Labeling Jurisdiction of the Food and Drug Administration'' (December 2014), certain bottled or otherwise packaged beers are subject to section 403 of the FD&C Act. The guidance document is available for download from our website at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-labeling-certain-beers-subject-labeling-jurisdiction-food-and-drug-administration* and provides recommendations regarding applicable labeling requirements for products under FDA's jurisdiction.

We are also revising the information collection to include new requirements applicable to the gluten-free labeling of fermented or hydrolyzed foods established through rulemaking (RIN 0910–AH00) and approved in OMB Control No. 0910–0817.

Description of Respondents: Respondents to this information collection are manufacturers, packers, and distributors of food products, as well as certain food retailers, such as supermarkets and restaurants, subject to statutory and regulatory food labeling requirements.

In the **Federal Register** of April 12, 2023 (88 FR 22045), we published a 60-day notice soliciting comment on the proposed collection of information. No comments were received.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section; activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
101.9(c)(6)(i); dietary fiber	28	1	28	1	28
101.9(j)(18) and 101.36(h)(2); procedure for small business nutrition labeling exemption notice using Form FDA 3570	10,000	1	10,000	8	80,000
101.12(h); petitions to establish or amend referenced amounts customarily consumed (RACC)	1	1	1	80	80
101.69; petitions for nutrient content claims	3	1	3	25	75
101.70; petitions for health claims	5	1	5	80	400
101.108; written proposal for requesting temporary exemptions from certain regulations for the purpose of conducting food labeling experiments	1	1	1	40	40
Total			10,038		80,623

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR section; activity	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
101.9(c)(6)(iii); added sugars [2]	31,283	1	31,283	1	31,283
101.9(c)(6)(i); dietary fiber [2]	31,283	1	31,283	1	31,283
101.9(c)(6)(i)(A) [2]; soluble fiber	31,283	1	31,283	1	31,283
101.9(c)(6)(i)(B); insoluble fiber [2]	31,283	1	31,283	1	31,283
101.9(c)(8); vitamin E [3]	31,283	1	31,283	1	31,283
101.9(c)(8); folate/folic acid [3]	31,283	1	31,283	1	31,283
New Products	216	1	216	1	216
101.12(e); recordkeeping to document the basis for density-adjusted RACC.	25	1	25	1	25
101.13(q)(5); recordkeeping to document the basis for nutrient content claims.	300,000	1.5	450,000	0.75 (45 minutes)	337,500
101.14(d)(2); recordkeeping to document nutrition information related to health claims for food products.	300,000	1.5	450,000	0.75 (45 minutes)	337,500
101.22(i)(4); recordkeeping to document supplier certifications for flavors designated as containing no artificial flavors.	25	1	25	1	25
101.100(d)(2); recordkeeping pertaining to agreements that form the basis for an exemption from the labeling requirements of section 403(c), (e), (g)–(i), (k), and (q) of the FD&C Act.	1,000	1	1,000	1	1,000
101.7(t); recordkeeping pertaining to disclosure requirements for food not accurately labeled for quality of contents.	100	1	100	1	100

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]—Continued

21 CFR section; activity	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
101.91; Documentation necessary to verify compliance with gluten free labeling.	5,000	56	280,000	0.45 (~27 minutes)	126,000
Total	.....	.....	1,369,064	.....	990,064

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Our estimate reflects the cumulative average burden we attribute to the reporting and recordkeeping requirements found in the applicable regulations; individual collection activities may not be evenly distributed among respondents and/or the corresponding requirements.

TABLE 3—ESTIMATED ANNUAL THIRD-PARTY DISCLOSURE BURDEN [1]

21 CFR section; activity	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure	Total hours
101.3, 101.22, parts 102 and 104; statement of identity labeling requirements.	25,000	1.03	25,750	0.5 (30 minutes)	12,875
101.4, 101.22, 101.100, parts 102, 104 and 105; ingredient labeling requirements.	25,000	1.03	25,750	1	25,750
101.5; requirement to specify the name and place of business of the manufacturer, packer, or distributor and, if the food producer is not the manufacturer of the food product, its connection with the food product.	25,000	1.03	25,750	0.25 (15 minutes)	6,438
101.9, 101.13(n), 101.14(d)(3), 101.62, and part 104; labeling requirements for disclosure of nutrition information.	25,000	1.03	25,750	4	103,000
101.9(g)(9) and 101.36(f)(2); alternative means of compliance permitted	12	1	12	4	48
101.10; requirements for nutrition labeling of restaurant foods	300,000	1.5	450,000	0.25 (15 minutes)	112,500
101.12(b); RACC for baking powder, baking soda, and pectin	29	2.3	67	1	67
101.12(e); adjustment to the RACC of an aerated food permitted	25	1	25	1	25
101.12(g); requirement to disclose the serving size that is the basis for a claim made for the product if the serving size on which the claim is based differs from the RACC.	5,000	1	5,000	1	5,000
101.13(d)(1) and 101.67; requirements to disclose nutrition information for any food product for which a nutrient content claim is made.	200	1	200	1	200
101.13(j)(2) and (k), 101.54, 101.56, 101.60, 101.61, and 101.62; additional disclosure required if the nutrient content claim compares the level of a nutrient in one food with the level of the same nutrient in another food..	5,000	1	5,000	1	5,000
101.13(q)(5); requirement that restaurants disclose the basis for nutrient content claims made for their food.	300,000	1.5	450,000	0.75 (45 minutes)	337,500
101.14(d)(2); general requirements for disclosure of nutrition information related to health claims for food products.	300,000	1.5	450,000	0.75 (45 minutes)	337,500
101.15; requirements pertaining to prominence of required statements and use of foreign language.	160	10	1,600	8	12,800
101.22(i)(4); supplier certifications for flavors designated as containing no artificial flavors.	25	1	25	1	25
101.30 and 102.33; labeling requirements for fruit or vegetable juice beverages.	1,500	5	7,500	1	7,500
101.36; nutrition labeling of dietary supplements	300	40	12,000	4.025	48,300
101.42 and 101.45; nutrition labeling of raw fruits, vegetables, and fish ..	1,000	1	1,000	0.5 (30 minutes)	500
101.45(c); databases of nutrient values for raw fruits, vegetables, and fish.	5	4	20	4	80
101.79(c)(2)(i)(D); disclosure requirements for food labels that contain a folate/neural tube defect health claim.	1,000	1	1,000	0.25 (15 minutes)	250
101.79(c)(2)(iv); disclosure of amount of folate for food labels that contain a folate/neural tube defect health claim.	100	1	100	0.25 (15 minutes)	25
101.100(d); disclosure of agreements that form the basis for exemption from the labeling requirements of section 403(c), (e), (g), (h), (i), (k), and (q) of the FD&C Act.	1,000	1	1,000	1	1,000
101.7 and 101.100(h); disclosure requirements for food not accurately labeled for quantity of contents and for claiming certain labeling exemptions.	25,000	1.03	25,750	0.5 (30 minutes)	12,875
Nutritional labeling for new products	500	1	500	2	1,000
''Labeling of Certain Beers Subject to the Labeling Jurisdiction of the Food and Drug Administration''.	12	1	12	1	12
Total	.....	.....	.....	.....	1,030,270

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

These estimates reflect our continued experience with the information collection. We have made nominal adjustments to reflect the addition of burden associated with gluten and certain bottled or otherwise packaged beer; petition submissions received since our last evaluation of the information collection; and informal communications with industry regarding food product labeling.

Dated: August 7, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–17145 Filed 8–9–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–2986]

Agency Information Collection Activities; Proposed Collection; Comment Request; Color Additive Certification

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection provisions of FDA's regulations governing batch certification of color additives manufactured for use in foods, drugs, cosmetics, or medical devices in the United States.

DATES: Either electronic or written comments on the collection of information must be submitted by October 10, 2023.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of October 10, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received 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–2023–N–2986 for ''Agency Information Collection Activities; Proposed Collection; Comment Request; Color Additive Certification.'' 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: Rachel Showalter, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 240–994–7399, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3521), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical

utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Color Additive Certification—21 CFR Part 80

OMB Control Number 0910–0216—Extension

This information collection helps support FDA regulations governing certification for color additives used in foods, drugs, cosmetics, and medical devices. All color additives must have FDA-approval for their intended use and be listed in the color additive regulations before they are permitted for use in food, drugs, cosmetics, and many medical devices. Some color additives have an additional requirement: they are permitted only if they are from batches that FDA has certified under section 721(a) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 379e(a)). This means that FDA chemists have analyzed a sample from the batch and have found that it meets the requirements for composition and purity stated in the regulation, called a ''listing regulation,'' for that color additive. We list color additives that have been shown to be safe for their intended uses in Title 21 of the Code of Federal Regulations (CFR). We require batch certification for all color additives listed in 21 CFR part 74 and for all color additives provisionally listed in 21 CFR part 82. Color additives listed in 21 CFR part 73 are exempted from certification.

The requirements for color additive certification are established in part 80 (21 CFR part 80). Procedures for color additive certification are set forth in part 80, subpart B (§§ 80.21 through 80.39) and communicate required data elements for requests for certification, limitations of certificates, exemptions from certification for color additive mixtures, treatment of batches pending and after certification, and recordkeeping requirements for respondents to whom a certificate is issued. During the batch certification procedure, a manufacturer of color additives must submit a ''request for certification'' that provides information about the batch, accompanied by a representative sample of a new batch of color additive, to us. FDA personnel perform chemical and other analyses of the representative sample and, providing the sample satisfies all certification requirements, issue a certificate that contains a certification lot number for the batch. The batch can then be used in FDA-regulated products marketed in the United States, in compliance with the uses and restrictions in that color additive's listing regulation. If the sample does not meet the requirements, the batch will be rejected. We require manufacturers to keep complete records showing disposal of all of the color additive covered by the certification.

FDA's web-based color certification information system is available for respondents to request color certification online, track their submissions, and obtain account status information. Prior to submitting a request for certification, the manufacturer must open a color certification account by sending a letter, as an email attachment, signed by responsible company representative, to FDA's Office of Cosmetics and Colors at *color.cert@fda.hhs.gov.* System certification results are returned electronically, allowing submitters to sell their certified color before receiving hard copy certificates.

We charge a fee for certification based on the batch weight and require manufacturers to keep records of the batch pending and after certification. The user fees support FDA's color certification program. Additional information about color additive certification is available at: *https://www.fda.gov/industry/color-additives/color-certification.*

The purpose for collecting this information is to help the Agency assure that only safe color additives will be used in foods, drugs, cosmetics, and medical devices sold in the United States.

Description of Respondents: The respondents include businesses engaged in the manufacture of color additives used in FDA-regulated foods, drugs, cosmetics, and medical devices. Respondents are from the private sector (for-profit businesses).

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR Section; activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
80.21 and 80.22; Request for certification accompanied by sample.	67	112	7,504	0.22 (13 minutes)	1,651

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

21 CFR Section; activity	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
80.39; Record of distribution	67	112	7,504	0.25 (15 minutes)	1,876

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

We base our estimate on our review of the certification requests received over the past 3 years. Using information from industry personnel, we estimate that an average of 0.22 hour per response is required for reporting (preparing certification requests and accompanying samples) and an average of 0.25 hour per response is required for recordkeeping.

Based on a review of the information collection since our last request for OMB approval, we have slightly decreased our burden estimate based on our experience with this program. As a result, although the number of respondents increased, the number of responses per respondent decreased.

Dated: August 7, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–17173 Filed 8–9–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Advisory Committee on Seniors and Disasters and National Advisory Committee on Individuals With Disabilities and Disasters Joint Public Meeting

AGENCY: Administration for Strategic Preparedness and Response (ASPR), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The National Advisory Committee on Seniors and Disasters (NACSD) and the National Advisory Committee on Individuals with Disabilities and Disasters (NACIDD) will hold a joint public meeting using an online format on Tuesday, September 19, 2023 (1:00 p.m. to 3:00 p.m. ET). Notice of the meeting is required under section 10 (a) (2) of the Federal Advisory Committee Act (FACA). The NACSD and NACIDD provide expert advice and guidance to the U.S. Department of Health and Human Services (HHS) regarding the specific needs of older adults and people with disabilities, respectively, related to disaster preparedness and response. The Administration for Strategic Preparedness and Response (ASPR) manages and convenes the NACSD and the NACIDD on behalf of the Secretary of HHS.

FOR FURTHER INFORMATION CONTACT: Dr. Maxine Kellman, NACSD and NACIDD Designated Federal Official, (202) 260–0447; *NACSD@hhs.gov* and *NACIDD@hhs.gov.*

SUPPLEMENTARY INFORMATION:

Procedures for Public Participation: The public and expert stakeholders are invited to observe the meeting. Registration for the Zoom meeting is required. The meeting link to register will be posted on the NACSD and NACIDD websites. Anyone may submit questions and comments to the NACSD and the NACIDD by email (*NACSD@hhs.gov* and *NACIDD@hhs.gov*) at least 15 days prior to the meeting. American Sign Language translation and Communication Access Real-Time Translation will be provided. A meeting summary will be available on the NACSD and NACSD websites post meeting.

Dawn O'Connell,

Assistant Secretary for Preparedness and Response.

[FR Doc. 2023–17142 Filed 8–9–23; 8:45 am]

BILLING CODE 4150–37–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Cancellation of Meeting

Notice is hereby given of the cancellation of the National Cancer Institute Special Emphasis Panel, National Cancer Institute Special Emphasis Panel; SEP–9: NCI Clinical and Translational Cancer Research, October 26, 2023, 12:00 p.m. to October 26, 2023, 4:00 p.m., National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W104, Rockville, Maryland 20850 which was published in the **Federal Register** on July 28, 2023, FR Doc 2023–15995, 88 FR 48898.

This meeting is cancelled and will be rescheduled.

Dated: August 7, 2023.

Melanie Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–17186 Filed 8–9–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 1009 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: National Cancer Institute Special Emphasis Panel; Integrating Health Disparities into Immuno-Oncology (HDIO).

Date: September 27, 2023.

Time: 10:00 a.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W248, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Shree Ram Singh, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W248, Rockville, Maryland 20850, 240–672–6175, *singhshr@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–1: NCI Clinical and Translational Cancer Research.

Date: September 28, 2023.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W108, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Clifford W. Schweinfest, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W108, Rockville, Maryland 20850, 240–276–6343, *schweinfestcw@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Pancreatic Cancer Detection Consortium U01.

Date: October 17, 2023.

Time: 12:30 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W618, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: E. Tian, Ph.D., Scientific Review Officer, Research Program Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W618, Rockville, Maryland 20850, 240–276–6611, *tiane@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Research Specialist Award (R50) Clinical.

Date: October 19, 2023.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W242, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Zhiqiang Zou, M.D., Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W242, Rockville, Maryland 20850, 240–276–6372, *zouzhiq@mail.nih.gov,*

Name of Committee: National Cancer Institute Special Emphasis Panel; Primary Care Needs of Cancer Survivors (U01).

Date: October 19, 2023.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W108, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Clifford W. Schweinfest, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W108, Rockville, Maryland 20850, 240–276–6343, *schweinfestcw@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–7: NCI Clinical and Translational Cancer Research.

Date: October 19, 2023.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W640, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Saejeong J. Kim, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W640, Rockville, Maryland 20850, 240–276–7684, *saejeong.kim@nih.gov,*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–10: NCI Clinical and Translational Cancer Research.

Date: October 24, 2023.

Time: 10:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W606, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Bruce Daniel Hissong, Ph.D., Scientific Review Officer, Resource and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W606, Rockville, Maryland 20850, 240–276–7752, *bruce.hissong@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Assay Validation of Biomarkers (UH2/UH3).

Date: October 26, 2023.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W120, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Majed M. Hamawy, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W120, Rockville, Maryland 20850. 240–276–6457, *mh101v@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–2: NCI Clinical and Translational Cancer Research.

Date: November 2, 2023.

Time: 10:30 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W242, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Zhiqiang Zou, M.D., Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W242, Rockville, Maryland 20850, 240–276–6372, *zouzhiq@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Metastasis Research Network (U01).

Date: November 16, 2023.

Time: 11:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W624, Rockville, Maryland 20850 (Telephone Conference Call)

Contact Person: Tushar Deb, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W624, Rockville, Maryland 20850, 240–276–6132, *tushar.deb@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: August 7, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–17185 Filed 8–9–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; The Connection between Neuroendocrine Processes and Alzheimer's Disease.

Date: August 24, 2023.

Time: 12:00 p.m. to 1:00 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: Mei Qin, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5213, Bethesda, MD 20892, 301–875–2215, *qinmei@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(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: August 4, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–17122 Filed 8–9–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institutes of Health (NIH) Office of Science Policy (OSP): Proposed Changes to the NIH Guidelines for Research Involving Recombinant or Synthetic Nucleic Acid Molecules (NIH Guidelines)

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The National Institutes of Health (NIH) seeks input on a proposal to revise the NIH Guidelines for Research Involving Recombinant or Synthetic Nucleic Acid Molecules (NIH Guidelines) to include specific considerations and requirements for conducting research involving gene drive modified organisms (GDMO) in contained research settings. NIH is proposing to update the NIH Guidelines to clarify minimum containment requirements, propose considerations for performing risk assessments, and define additional institutional responsibilities regarding Institutional Biosafety Committees (IBCs) and Biosafety Officers (BSOs). The proposed revisions are specific to GDMO research subject to the NIH Guidelines, conducted in contained settings and are consistent with the recommendations of

the NIH Novel and Exceptional Technology Research Advisory Committee report, Gene Drives in Biomedical Research (NExTRAC Report). NIH does not currently support research involving potential field release of GDMOs and the NIH Guidelines pertain to contained research; accordingly, no changes regarding potential field release are being proposed in this Notice. NIH is also proposing revisions to the NIH Guidelines to harmonize with the Biosafety in Microbiological and Biomedical Laboratories (BMBL), 6th edition regarding the Risk Group (RG) categorization of West Nile Virus (WNV) and Saint Louis Encephalitis Virus (SLEV).

DATES: To ensure consideration, comments must be submitted in writing by October 10, 2023.

ADDRESSES: Comments may be submitted electronically to *https://osp.od.nih.gov/proposed-amendments-to-the-nih-guidelines-for-research-involving-recombinant-or-synthetic-nucleic-acid-molecules-nih-guidelines/.* Comments are voluntary and may be submitted anonymously. You may also voluntarily include your name and contact information with your response. Other than your name and contact information, please do not include in the response any personally identifiable information or any information that you do not wish to make public. Proprietary, classified, confidential, or sensitive information should not be included in your response. After the Office of Science Policy (OSP) has finished reviewing the responses, the responses may be posted to the OSP website without redaction.

FOR FURTHER INFORMATION CONTACT: Caroline Young, ScM, Acting Director of the Division of Biosafety, Biosecurity, and Emerging Biotechnology Policy, Office of Science Policy, at (301) 496–9838 or *SciencePolicy@od.nih.gov.*

SUPPLEMENTARY INFORMATION: The NIH currently supports basic gene drive research in contained laboratory settings as the technology holds great promise for advancing public health, particularly through the potential to reduce transmission of vector-borne human diseases such as malaria, dengue, or Zika. Under certain conditions, gene drive technology enables researchers to promote the spread of certain genetic traits that has the potential to mitigate disease by driving traits through a specific species population at a faster rate with fewer reproductive cycles.

Gene drive technology presents opportunities for many life sciences applications with potential benefits to public health, agriculture, and the environment but also raise biosafety, ethical, and social concerns. To help consider issues associated with conducting research involving GDMOs safely and responsibly, the NIH charged an advisory committee to the NIH Director, the Novel and Exceptional Technology and Research Advisory Committee (NExTRAC), to consider whether existing biosafety guidance is adequate for contained laboratory research utilizing GDMOs. The NExTRAC made multiple recommendations for strengthening NIH's existing policies and guidance, which were shared for public input and ultimately accepted by the NIH Director. These proposed changes only address the NExTRAC's recommendations pertaining to contained research. NIH does not currently support research involving potential field release of GDMOs and the NIH Guidelines pertain to contained research; as such, no changes are being proposed in this notice regarding field release research of GDMOs.

NIH is seeking input on its proposal to amend the NIH Guidelines to ensure the continued responsible research involving GDMOs in contained research settings. Specifically, NIH proposes to:

(1) clarify minimum containment requirements for research involving GDMOs;

(2) propose considerations for risk assessment;

(3) define additional institutional responsibilities for Institutional Biosafety Committees (IBCs) and Biosafety Officers (BSOs).

In addition to the amendments proposed related to contained research involving GDMOs, the NIH is seeking input on its proposal to:

1. replace the term ''helper viruses'' with the broader term ''helper systems''; and

2. reclassify WNV and SLEV as risk group 2 agents for consistency with containment guidance provided in the Biosafety in Microbiological and Biomedical Laboratories (BMBL), 6th edition.

Current Language and Proposed Amendments to the NIH Guidelines

A definition for gene drive is proposed to be added to Section I–E, specifically:

Section I–E. General Definitions

Section I–E–7. ''Gene drive'' is defined as a technology whereby a particular heritable element biases inheritance in its favor, resulting in the heritable element becoming more prevalent than predicted by Mendelian laws of inheritance in a population over successive generations.

Section II–A–3, which provides guidance for conducting a comprehensive risk assessment, has been updated in the past to provide additional guidance regarding issues that should be considered for research involving emerging technologies (*e.g.,* guidance for research with organisms involving synthetic nucleic acids when the parent organism is not obvious). Robust risk assessment for research with GDMOs may present challenges due to different or increased risks associated with the potential to persist and spread in the environment. To address some of these challenges, Section II–A–3 is proposed to be amended to include considerations for risk assessment.

Section II–A–3 currently states:

Section II–A–3. Comprehensive Risk Assessment

In deciding on the appropriate containment for an experiment, the first step is to assess the risk of the agent itself. Appendix B, Classification of Human Etiologic Agents on the Basis of Hazard, classifies agents into Risk Groups based on an assessment of their ability to cause disease in humans and the available treatments for such disease. Once the Risk Group of the agent is identified, this should be followed by a thorough consideration of how the agent is to be manipulated. Factors to be considered in determining the level of containment include agent factors such as: virulence, pathogenicity, infectious dose, environmental stability, route of spread, communicability, operations, quantity, availability of vaccine or treatment, and gene product effects such as toxicity, physiological activity, and allergenicity. Any strain that is known to be more hazardous than the parent (wild-type) strain should be considered for handling at a higher containment level. Certain attenuated strains or strains that have been demonstrated to have irreversibly lost known virulence factors may qualify for a reduction of the containment level compared to the Risk Group assigned to the parent strain (see Section V–B, Footnotes and References of Sections I–IV).

While the starting point for the risk assessment is based on the identification of the Risk Group of the parent agent, as technology moves forward, it may be possible to develop an organism containing genetic sequences from multiple sources such that the parent agent may not be obvious. In such cases, the risk assessment should include at least two levels of analysis. The first involves a

consideration of the Risk Groups of the source(s) of the sequences and the second involves an assessment of the functions that may be encoded by these sequences (*e.g.,* virulence or transmissibility). It may be prudent to first consider the highest Risk Group classification of all agents that are the source of sequences included in the construct. Other factors to be considered include the percentage of the genome contributed by each parent agent and the predicted function or intended purpose of each contributing sequence. The initial assumption should be that all sequences will function as they did in the original host context.

The Principal Investigator and Institutional Biosafety Committee must also be cognizant that the combination of certain sequences in a new biological context may result in an organism whose risk profile could be higher than that of the contributing organisms or sequences. The synergistic function of these sequences may be one of the key attributes to consider in deciding whether a higher containment level is warranted, at least until further assessments can be carried out. A new biosafety risk may occur with an organism formed through combination of sequences from a number of organisms or due to the synergistic effect of combining transgenes that results in a new phenotype.

A final assessment of risk based on these considerations is then used to set the appropriate containment conditions for the experiment (see Section II–B, Containment). The appropriate containment level may be equivalent to the Risk Group classification of the agent, or it may be raised or lowered as a result of the above considerations. The Institutional Biosafety Committee must approve the risk assessment and the biosafety containment level for recombinant or synthetic nucleic acid experiments described in Sections III–A, Experiments that Require NIH Director Approval and Institutional Biosafety Committee Approval, Before Initiation; III–B, Experiments that Require NIH OSP and Institutional Biosafety Committee Approval Before Initiation; III–C, Experiments Involving Human Gene Transfer that Require Institutional Biosafety Committee Approval Prior to Initiation; III–D, Experiments that Require Institutional Biosafety Committee Approval Before Initiation.

Careful consideration should be given to the types of manipulation planned for some higher Risk Group agents. For example, the RG2 dengue viruses may be cultured under the Biosafety Level (BL) 2 containment (see Section II–B); however, when such agents are used for animal inoculation or transmission studies, a higher containment level is recommended. Similarly, RG3 agents such as Venezuelan equine encephalomyelitis and yellow fever viruses should be handled at a higher containment level for animal inoculation and transmission experiments.

Individuals working with human immunodeficiency virus (HIV), hepatitis B virus (HBV) or other bloodborne pathogens should consult the applicable Occupational Safety and Health Administration (OSHA) (*https://www.osha.gov/*) (regulation, 29 CFR 1910.1030, and OSHA publication 3127 (1996 revised). BL2 containment is recommended for activities involving all blood-contaminated clinical specimens, body fluids, and tissues from all humans, or from HIV- or HBV-infected or inoculated laboratory animals. Activities such as the production of research-laboratory scale quantities of HIV or other bloodborne pathogens, manipulating concentrated virus preparations, or conducting procedures that may produce droplets or aerosols, are performed in a BL2 facility using the additional practices and containment equipment recommended for BL3. Activities involving industrial scale volumes or preparations of concentrated HIV are conducted in a BL3 facility, or BL3 Large Scale if appropriate, using BL3 practices and containment equipment.

Exotic plant pathogens and animal pathogens of domestic livestock and poultry are restricted and may require special laboratory design, operation and containment features not addressed in Biosafety in Microbiological and Biomedical Laboratories (see Section V–C, Footnotes and References of Sections I through IV). For information regarding the importation, possession, or use of these agents see Sections V–G and V–H, Footnotes and References of Sections I through IV.

Risk mitigation strategies employed in contained settings are not likely to differ for GDMOs compared to other gene modified organisms in the laboratory. However, given the relative newness of GDMO technology and its use in biomedical research, any risk assessment is likely to have greater uncertainty regarding potential risks. Section II–A–3 is proposed to be amended to provide additional guidance for conducting these assessments by insertion of new paragraphs five and six:

Section II–A–3 is proposed to be amended to:

In deciding on the appropriate containment for an experiment, the first step is to assess the risk of the agent itself. Appendix B, Classification of Human Etiologic Agents on the Basis of Hazard, classifies agents into Risk Groups based on an assessment of their ability to cause disease in humans and the available treatments for such disease. Once the Risk Group of the agent is identified, this should be followed by a thorough consideration of how the agent is to be manipulated. Factors to be considered in determining the level of containment include agent factors such as: virulence, pathogenicity, infectious dose, environmental stability, route of spread, communicability, operations, quantity, availability of vaccine or treatment, and gene product effects such as toxicity, physiological activity, and allergenicity. Any strain that is known to be more hazardous than the parent (wild-type) strain should be considered for handling at a higher containment level. Certain attenuated strains or strains that have been demonstrated to have irreversibly lost known virulence factors may qualify for a reduction of the containment level compared to the Risk Group assigned to the parent strain (see Section V–B, Footnotes and References of Sections I–IV).

While the starting point for the risk assessment is based on the identification of the Risk Group of the parent agent, as technology moves forward, it may be possible to develop an organism containing genetic sequences from multiple sources such that the parent agent may not be obvious. In such cases, the risk assessment should include at least two levels of analysis. The first involves a consideration of the Risk Groups of the source(s) of the sequences and the second involves an assessment of the functions that may be encoded by these sequences (*e.g.,* virulence or transmissibility). It may be prudent to first consider the highest Risk Group classification of all agents that are the source of sequences included in the construct. Other factors to be considered include the percentage of the genome contributed by each parent agent and the predicted function or intended purpose of each contributing sequence. The initial assumption should be that all sequences will function as they did in the original host context.

The Principal Investigator and Institutional Biosafety Committee must also be cognizant that the combination of certain sequences in a new biological context may result in an organism whose risk profile could be higher than that of the contributing organisms or sequences. The synergistic function of these sequences may be one of the key

attributes to consider in deciding whether a higher containment level is warranted, at least until further assessments can be carried out. A new biosafety risk may occur with an organism formed through combination of sequences from a number of organisms or due to the synergistic effect of combining transgenes that results in a new phenotype.

A final assessment of risk based on these considerations is then used to set the appropriate containment conditions for the experiment (see Section II–B, Containment). The appropriate containment level may be equivalent to the Risk Group classification of the agent or it may be raised or lowered as a result of the above considerations. The Institutional Biosafety Committee must approve the risk assessment and the biosafety containment level for recombinant or synthetic nucleic acid experiments described in Sections III–A, Experiments that Require NIH Director Approval and Institutional Biosafety Committee Approval, Before Initiation; III–B, Experiments that Require NIH OSP and Institutional Biosafety Committee Approval Before Initiation; III–C, Experiments Involving Human Gene Transfer that Require Institutional Biosafety Committee Approval Prior to Initiation; III–D, Experiments that Require Institutional Biosafety Committee Approval Before Initiation.

Research involving gene drive modified organisms may require risk assessments that incorporate a broader scope of considerations because of greater uncertainty of the technology and potential uncertainty of the impact of the newly modified organism. Specific attention must be paid to risks of an unintended release from the laboratory and the potential impact on humans, other populations of organisms, and the environment.

Considerations for conducting risk assessments for research involving gene drive modified organisms might include:

1. The specific types of manipulations based on:

a. Function or intended function of the genetic/gene drive construct (*i.e.,* a designed or engineered assembly of sequences);

b. Source of the genetic material (*e.g.,* sequences of transgenes) in the construct;

c. The modifications to the construct;

d. Whether it is possible to predict the consequences of a construct, including the recognition of an unintended gene drive (*i.e.,* construct not specifically designed as a gene drive but nonetheless having properties of a gene drive) and the possible consequences of escape into the environment;

e. The potential ability of the gene drive to spread or persist in local populations;

2. Options for approaches to risk mitigation for specific types of risks in experiments or when dealing with a high degree of uncertainty about risks;

3. Considerations for implementing more stringent containment measures until biosafety data are accrued to support lowering containment.

Careful consideration should be given to the types of manipulation planned for some higher Risk Group agents. For example, the RG2 dengue viruses may be cultured under the Biosafety Level (BL) 2 containment (see Section II–B); however, when such agents are used for animal inoculation or transmission studies, a higher containment level is recommended. Similarly, RG3 agents such as Venezuelan equine encephalomyelitis and yellow fever viruses should be handled at a higher containment level for animal inoculation and transmission experiments.

Individuals working with human immunodeficiency virus (HIV), hepatitis B virus (HBV) or other bloodborne pathogens should consult the applicable Occupational Safety and Health Administration (OSHA) regulation, 29 CFR 1910.1030, and OSHA publication 3127 (1996 revised). BL2 containment is recommended for activities involving all blood-contaminated clinical specimens, body fluids, and tissues from all humans, or from HIV- or HBV-infected or inoculated laboratory animals. Activities such as the production of research-laboratory scale quantities of HIV or other bloodborne pathogens, manipulating concentrated virus preparations, or conducting procedures that may produce droplets or aerosols, are performed in a BL2 facility using the additional practices and containment equipment recommended for BL3. Activities involving industrial scale volumes or preparations of concentrated HIV are conducted in a BL3 facility, or BL3 Large Scale if appropriate, using BL3 practices and containment equipment.

Exotic plant pathogens and animal pathogens of domestic livestock and poultry are restricted and may require special laboratory design, operation and containment features not addressed in Biosafety in Microbiological and Biomedical Laboratories (see Section V–C, Footnotes and References of Sections I through IV). For information regarding the importation, possession, or use of these agents see Sections V–G and V–H, Footnotes and References of Sections I through IV.

In 2012 when the NIH Guidelines were updated to expand the scope to cover synthetic nucleic acid molecules, Section III–C and Section III–F–1 were amended to exempt research with certain oligonucleotides based on the lower risk posed by their transient nature. These sections also outlined criteria for higher risk nucleic acids that would not be exempt (*e.g.,* nucleic acids that replicated, were transcribed, translated, or integrated etc.). At that time, much research with oligonucleotides was likely to involve a delivery method using a recombinant nucleic acid molecule (*e.g.,* viral vector or plasmid), and thus would still be subject to the NIH Guidelines. Since then, gene editing using CRISPR/Cas systems and non-recombinant delivery methods (*e.g.,* lipid nanoparticles) has come into more common use. Currently, transgenic organisms with the same genetic modification may or may not be subject to the NIH Guidelines depending on the method of generation (*e.g.,* recombinant viral vector delivery and expression of Cas9 and guide RNAs vs. lipid nanoparticle delivery of protein Cas9 and guide RNAs). Because of the higher risks associated with stable genetic modifications to viruses, cells, or organisms, Sections III–C and III–F–1 each have a criterion that precludes the exemption of nucleic acids that integrate, the main method to introduce such changes in 2012. To avoid exempting certain gene editing approaches or GDMOs, the language in Sections III–C and III–F–1 is proposed to be amended to replace the criterion involving integration with a broader criterion covering the introduction of a stable genetic modification.

Section III–C–1 currently states in part:

Section III–C–1. Experiments Involving the Deliberate Transfer of Recombinant or Synthetic Nucleic Acid Molecules, or DNA or RNA Derived From Recombinant or Synthetic Nucleic Acid Molecules, Into One or More Human Research Participants

Human gene transfer is the deliberate transfer into human research participants of either:

1. Recombinant nucleic acid molecules, or DNA or RNA derived from recombinant nucleic acid molecules, or

2. Synthetic nucleic acid molecules, or DNA or RNA derived from synthetic nucleic acid molecules, that meet any one of the following criteria:

a. Contain more than 100 nucleotides; or

b. Possess biological properties that enable integration into the genome (*e.g., cis* elements involved in integration); or

c. Have the potential to replicate in a cell; or

d. Can be translated or transcribed.

This portion of Section III–C–1 1 is proposed to be amended to:

Section III–C–1. Experiments Involving the Deliberate Transfer of Recombinant or Synthetic Nucleic Acid Molecules, or DNA or RNA Derived From Recombinant or Synthetic Nucleic Acid Molecules, Into One or More Human Research Participants

Human gene transfer is the deliberate transfer into human research participants of either:

1. Recombinant nucleic acid molecules, or DNA or RNA derived from recombinant nucleic acid molecules, or

2. Synthetic nucleic acid molecules, or DNA or RNA derived from synthetic nucleic acid molecules, that meet any one of the following criteria:

a. Contain more than 100 nucleotides; or

b. Possess biological properties that enable introduction of stable genetic modifications into the genome (*e.g.,* cis elements involved in integration, gene editing); or

c. Have the potential to replicate in a cell; or

d. Can be translated or transcribed.

Section III–F–1 currently states:

Section III–F–1. Those synthetic nucleic acids that: (1) can neither replicate nor generate nucleic acids that can replicate in any living cell (*e.g.,* oligonucleotides or other synthetic nucleic acids that do not contain an origin of replication or contain elements known to interact with either DNA or RNA polymerase), and (2) are not designed to integrate into DNA, and (3) do not produce a toxin that is lethal for vertebrates at an LD50 of less than 100 nanograms per kilogram body weight. If a synthetic nucleic acid is deliberately transferred into one or more human research participants and meets the criteria of Section III–C, it is not exempt under this Section.

Section III–F–1 is proposed to be amended to:

Section III–F–1. Those synthetic nucleic acids that: (1) can neither replicate nor generate nucleic acids that can replicate in any living cell (*e.g.,* oligonucleotides or other synthetic nucleic acids that do not contain an origin of replication or contain elements known to interact with either DNA or RNA polymerase), and (2) are not designed to introduce a stable genetic modification, and (3) do not produce a toxin that is lethal for vertebrates at an LD50 of less than 100 nanograms per kilogram body weight. If a synthetic nucleic acid is deliberately transferred into one or more human research participants and meets the criteria of Section III–C, it is not exempt under this Section.

To provide guidance on physical containment for research involving GDMOs, Section III–D is proposed to be amended in multiple subsections to require that experiments involving GDMOs be conducted at a minimum of BL2 containment to provide the appropriate laboratory practices, containment equipment, and special laboratory design to protect laboratory workers, the public, and local ecosystems. A section specific to experiments involving GDMOs is proposed to be added as Section III–D–8. Sections III–D–4, III–D–5, and III–E–3, which cover experiments with whole animals, plants, and transgenic rodents, are also proposed to be amended to reference Section III–D–8.

Section III–D–4, which is part of Section III–D, Experiments that Require Institutional Biosafety Committee Approval Before Initiation, currently states:

Section III–D–4. Experiments Involving Whole Animals

This section covers experiments involving whole animals in which the animal's genome has been altered by stable introduction of recombinant or synthetic nucleic acid molecules, or nucleic acids derived therefrom, into the germ-line (transgenic animals) and experiments involving viable recombinant or synthetic nucleic acid molecule-modified microorganisms tested on whole animals. For the latter, other than viruses which are only vertically transmitted, the experiments may *not* be conducted at BL1–N containment. A minimum containment of BL2 or BL2–N is required.

Caution—Special care should be used in the evaluation of containment conditions for some experiments with transgenic animals. For example, such experiments might lead to the creation of novel mechanisms or increased transmission of a recombinant pathogen or production of undesirable traits in the host animal. In such cases, serious consideration should be given to increasing the containment conditions.

Section III–D–4–a. Recombinant or synthetic nucleic acid molecules, or DNA or RNA molecules derived therefrom, from any source except for greater than two-thirds of eukaryotic viral genome may be transferred to any non-human vertebrate or any invertebrate organism and propagated under conditions of physical containment comparable to BL1 or BL1–N and appropriate to the organism under study (see Section V–B, Footnotes and References of Sections I–IV). Animals that contain sequences from viral vectors, which do not lead to transmissible infection either directly or indirectly as a result of complementation or recombination in animals, may be propagated under conditions of physical containment comparable to BL1 or BL1–N and appropriate to the organism under study. Experiments involving the introduction of other sequences from eukaryotic viral genomes into animals are covered under Section III–D–4–b, Experiments Involving Whole Animals. For experiments involving recombinant or synthetic nucleic acid molecule-modified Risk Groups 2, 3, 4, or restricted organisms, see Sections V–A, V–G, and V–L, Footnotes and References of Sections I–IV. It is important that the investigator demonstrate that the fraction of the viral genome being utilized does not lead to productive infection. A U.S. Department of Agriculture permit is required for work with plant or animal pathogens (see Section V–G, Footnotes and References of Sections I–IV).

Section III–D–4–b. For experiments involving recombinant or synthetic nucleic acid molecules, or DNA or RNA derived therefrom, involving whole animals, including transgenic animals, and not covered by Section III–D–1, Experiments Using Human or Animal Pathogens (Risk Group 2, Risk Group 3, Risk Group 4, or Restricted Agents as Host-Vector Systems), or Section III–D–4–a, the appropriate containment shall be determined by the Institutional Biosafety Committee.

Section III–D–4–c. Exceptions under Section III–D–4, Experiments Involving Whole Animals

Section III–D–4–c–(1). Experiments involving the generation of transgenic rodents that require BL1 containment are described under Section III–E–3, Experiments Involving Transgenic Rodents.

Section III–D–4–c–(2). The purchase or transfer of transgenic rodents is exempt from the NIH Guidelines under Section III–F, Exempt Experiments (see Appendix C–VII, The Purchase or Transfer of Transgenic Rodents).

Section III–D–4 is proposed to be amended to state:

Section III–D–4. Experiments Involving Whole Animals

This section covers experiments involving deliberate transfer of recombinant or synthetic nucleic acid

molecules, DNA or RNA derived from recombinant or synthetic nucleic acid molecules, or recombinant or synthetic nucleic acid molecule-modified microorganisms into whole animals and experiments involving whole animals in which the animal's genome has been altered by recombinant or synthetic nucleic acid molecules, or nucleic acids derived therefrom, into the germ-line (transgenic animals). Experiments involving gene drive modified animals or experiments involving viable recombinant or synthetic nucleic acid molecule-modified microorganisms, except for viruses that are only vertically transmitted, may *not* be conducted at BL1–N containment. A minimum containment of BL2 or BL2–N is required (see Section III–D–8).

Caution—Special care should be used in the evaluation of containment conditions for some experiments with transgenic animals. For example, such experiments might lead to the creation of novel mechanisms (*e.g.,* a gene drive; refer to Section III–D–8) or increased transmission of a recombinant pathogen or production of undesirable traits in the host animal. In such cases, serious consideration should be given to increasing the containment conditions.

Section III–D–4–a. Recombinant or synthetic nucleic acid molecules, or DNA or RNA molecules derived therefrom, from any source except for greater than two-thirds of eukaryotic viral genome may be transferred to any non-human vertebrate or any invertebrate organism and propagated under conditions of physical containment comparable to BL1 or BL1–N and appropriate to the organism under study (see Section V–B, Footnotes and References of Sections I–IV). Animals that contain sequences from viral vectors, which do not lead to transmissible infection either directly or indirectly as a result of complementation or recombination in animals, may be propagated under conditions of physical containment comparable to BL1 or BL1–N and appropriate to the organism under study. Experiments involving the introduction of other sequences from eukaryotic viral genomes into animals are covered under Section III–D–4–b, Experiments Involving Whole Animals. For experiments involving recombinant or synthetic nucleic acid molecule-modified Risk Groups 2, 3, 4, or restricted organisms, see Sections V–A, V–G, and V–L, Footnotes and References of Sections I–IV. It is important that the investigator demonstrate that the fraction of the viral genome being utilized does not lead to productive infection. A U.S. Department of Agriculture permit is required for work with plant or animal pathogens (see Section V–G, Footnotes and References of Sections I–IV).

Section III–D–4–b. For experiments involving recombinant or synthetic nucleic acid molecules, or DNA or RNA derived therefrom, involving whole animals, including transgenic animals, and not covered by Section III–D–1, Experiments Using Human or Animal Pathogens (Risk Group 2, Risk Group 3, Risk Group 4, or Restricted Agents as Host-Vector Systems), or Section III–D–4–a, the appropriate containment shall be determined by the Institutional Biosafety Committee. Experiments involving gene drive modified animals generated by recombinant or synthetic nucleic acid molecules shall be conducted at a minimum of BL2 or BL2–N (see Section III–D–8).

Section III–D–4–c. Exceptions under Section III–D–4, Experiments Involving Whole Animals

Section III–D–4–c–(1). Experiments involving the generation of transgenic rodents that require BL1 containment are described under Section III–E–3, Experiments Involving Transgenic Rodents.

Section III–D–4–c–(2). The purchase or transfer of BL1 transgenic rodents is exempt from the *NIH Guidelines* under Section III–F, Exempt Experiments (see Appendix C–VII, The Purchase or Transfer of Transgenic Rodents).

Section III–D–4–c–(3). Experiments involving the generation or use of gene drive modified animals require a minimum of BL2 containment and are covered under III–D–8, Experiments Involving Gene Drive Modified Organisms.

Section III–D–5 currently states in part:

Section III–D–5. Experiments Involving Whole Plants

Experiments to genetically engineer plants by recombinant or synthetic nucleic acid molecule methods, to use such plants for other experimental purposes (*e.g.,* response to stress), to propagate such plants, or to use plants together with microorganisms or insects containing recombinant or synthetic nucleic acid molecules, may be conducted under the containment conditions described in Sections III–D–5–a through III–D–5–e. If experiments involving whole plants are not described in Section III–D–5 and do not fall under Sections III–A, III–B, III–D or III–F, they are included in Section III–E.

This portion of Section III–D–5 is proposed to be amended to:

Section III–D–5. Experiments Involving Whole Plants

Experiments to genetically engineer plants by recombinant or synthetic nucleic acid molecule methods, to use such plants for other experimental purposes (*e.g.,* response to stress), to propagate such plants, or to use plants together with microorganisms or insects containing recombinant or synthetic nucleic acid molecules, may be conducted under the containment conditions described in Sections III–D–5–a through III–D–5–e. If experiments involving whole plants are not described in Section III–D–5 and do not fall under Sections III–A, III–B, III–D or III–F, they are included in Section III–E. Experiments involving the generation or use of gene drive modified organisms require a minimum of BL2 containment and are described under Section III–D–8, Experiments Involving Gene Drive Modified Organisms.

Section III–D–8 is proposed to be added to state:

Section III–D–8. Experiments Involving Gene Drive Modified Organisms

Experiments involving gene drive modified organisms generated by recombinant or synthetic nucleic acid molecules shall be conducted at a minimum of Biosafety Level (BL) 2, BL2–N (Animals) or BL2–P (plant) containment.

Only transgenic rodents that may be contained under BL1 are covered under Section III–E–3. Section III–E–3 is proposed to be amended to reference the new Section III–D–8 to reinforce that research with GDMOs shall be conducted at a minimum of BL2. Section III–E–3, which is part of Section III–E, Experiments that Require Institutional Biosafety Committee Notice Simultaneous with Initiation, states in part:

Section III–E–3. Experiments Involving Transgenic Rodents

This section covers experiments involving the generation of rodents in which the animal's genome has been altered by stable introduction of recombinant or synthetic nucleic acid molecules, or nucleic acids derived therefrom, into the germ-line (transgenic rodents). Only experiments that require BL1 containment are covered under this section; experiments that require BL2, BL3, or BL4 containment are covered under Section III–D–4, Experiments Involving Whole Animals.

This portion of Section III–E–3 is proposed to be amended to:

Section III–E–3. Experiments Involving Transgenic Rodents

This section covers experiments involving the generation or use of rodents in which the animal's genome has been altered by stable introduction of recombinant or synthetic nucleic acid molecules, or nucleic acids derived therefrom, into the germ-line (transgenic rodents). Only experiments that require BL1 containment are covered under this section; experiments that require BL2, BL3, or BL4 containment are covered under Section III–D–4, Experiments Involving Whole Animals or Section III–D–8, Experiments Involving Gene Drive Modified Organisms.

In the NExTRAC report, the committee recommended that NIH should require appropriate expertise in the review of gene drive research by IBC members and BSO. Portions of Section IV–B are proposed to be amended regarding institutional responsibilities for the establishment of IBCs and requirements for BSOs.

Section IV–B–1–c currently states:

Section IV–B–1–c. Appoint a Biological Safety Officer (who is also a member of the Institutional Biosafety Committee) if the institution: (i) conducts recombinant or synthetic nucleic acid molecule research at Biosafety Level (BL) 3 or BL4, or (ii) engages in large-scale (greater than 10 liters) research. The Biological Safety Officer carries out the duties specified in Section IV–B–3.

Section IV–B–1–c is proposed to be amended to:

Section IV–B–1–c. Appoint a Biological Safety Officer (who is also a member of the Institutional Biosafety Committee) if the institution: (i) conducts recombinant or synthetic nucleic acid molecule research at Biosafety Level (BL) 3 or BL4, (ii) engages in large-scale (greater than 10 liters) research or (iii) conducts research involving gene drive modified organisms. The Biological Safety Officer carries out the duties specified in Section IV–B–3.

Section IV–B–2–a, Membership and Procedures of IBCs currently states in part:

Section IV–B–2–a–(1). The Institutional Biosafety Committee must comprise no fewer than five members so selected that they collectively have experience and expertise in recombinant or synthetic nucleic acid molecule technology and the capability to assess the safety of recombinant or synthetic nucleic acid molecule research and to identify any potential risk to public health or the environment. At least two members shall not be affiliated with the institution (apart from their membership on the Institutional Biosafety Committee) and who represent the interest of the surrounding community with respect to health and protection of the environment (*e.g.,* officials of state or local public health or environmental protection agencies, members of other local governmental bodies, or persons active in medical, occupational health, or environmental concerns in the community). The Institutional Biosafety Committee shall include at least one individual with expertise in plant, plant pathogen, or plant pest containment principles when experiments utilizing Appendix L, Physical and Biological Containment for Recombinant or Synthetic Nucleic Acid Molecule Research Involving Plants, require prior approval by the Institutional Biosafety Committee. The Institutional Biosafety Committee shall include at least one scientist with expertise in animal containment principles when experiments utilizing Appendix M, Physical and Biological Containment for Recombinant or Synthetic Nucleic Acid Molecule Research Involving Animals, require Institutional Biosafety Committee prior approval. When the institution conducts recombinant or synthetic nucleic acid molecule research at BL3, BL4, or Large Scale (greater than 10 liters), a Biological Safety Officer is mandatory and shall be a member of the Institutional Biosafety Committee (see Section IV–B–3, Biological Safety Officer). When the institution participates in or sponsors recombinant or synthetic nucleic acid molecule research involving human research participants, the institution must ensure that the Institutional Biosafety Committee has adequate expertise and training (using ad hoc consultants as deemed necessary). Institutional Biosafety Committee approval must be obtained from the clinical trial site.

Section IV–B–2–a–(1) is proposed to be amended to read:

Section IV–B–2–a–(1). The Institutional Biosafety Committee must comprise no fewer than five members so selected that they collectively have experience and expertise in recombinant or synthetic nucleic acid molecule technology and the capability to assess the safety of recombinant or synthetic nucleic acid molecule research and to identify any potential risk to public health or the environment. At least two members shall not be affiliated with the institution (apart from their membership on the Institutional Biosafety Committee) and who represent the interest of the surrounding community with respect to health and protection of the environment (*e.g.,* officials of state or local public health or environmental protection agencies, members of other local governmental bodies, or persons active in medical, occupational health, or environmental concerns in the community). The Institutional Biosafety Committee shall include at least one individual with expertise in plant, plant pathogen, or plant pest containment principles when experiments utilizing Appendix L, Physical and Biological Containment for Recombinant or Synthetic Nucleic Acid Molecule Research Involving Plants, require prior approval by the Institutional Biosafety Committee. The Institutional Biosafety Committee shall include at least one scientist with expertise in animal containment principles when experiments utilizing Appendix M, Physical and Biological Containment for Recombinant or Synthetic Nucleic Acid Molecule Research Involving Animals, require Institutional Biosafety Committee prior approval. When the institution conducts research involving gene drive modified organisms the institution must ensure that the Institutional Biosafety Committee has adequate expertise (*e.g.,* specific species containment, ecological or environmental risk assessment) using *ad hoc* consultants if necessary. When the institution conducts recombinant or synthetic nucleic acid molecule research at BL3, BL4, or Large Scale (greater than 10 liters) or research involving gene drive modified organisms, a Biological Safety Officer is mandatory and shall be a member of the Institutional Biosafety Committee (see Section IV–B–3, Biological Safety Officer). When the institution conducts research with gene drive modified organisms, the impact on ecosystems should be assessed by the Institutional Biosafety Committee (see Section V–N, Footnotes and References of Sections I–IV). When the institution participates in or sponsors recombinant or synthetic nucleic acid molecule research involving human research participants, the institution must ensure that the Institutional Biosafety Committee has adequate expertise and training (using ad hoc consultants if necessary). Institutional Biosafety Committee approval must be obtained from the clinical trial site.

Section IV–B–3, Biological Safety Officer (BSO), states in part:

Section IV–B–3–a. The institution shall appoint a Biological Safety Officer if it engages in large-scale research or

production activities involving viable organisms containing recombinant or synthetic nucleic acid molecules.

Section IV–B–3–a is proposed to be amended to clarify the requirement for a BSO to be a member of the IBC. A new Section IV–B–3–c is proposed to be added to require a BSO for research involving GDMOs. The current IV–B–3–c sections will be re-lettered to IV–B–3–d.

Section IV–B–3–a. The institution shall appoint a Biological Safety Officer if it engages in large-scale research or production activities involving viable organisms containing recombinant or synthetic nucleic acid molecules. The Biological Safety Officer shall be a member of the Institutional Biosafety Committee.

Section IV–B–3–c. The institution shall appoint a Biological Safety Officer if it engages in recombinant or synthetic nucleic acid molecule research that involves gene drive modified organisms. The Biological Safety Officer shall be a member of the Institutional Biosafety Committee.

To emphasize that GDMOs may have an impact on ecosystems, a new footnote and reference for Sections I through IV is proposed to be added.

Section V–N is proposed to state:

Section V–N Determination of whether a gene drive modified organism has a potential for serious detrimental impact on managed (agricultural, forest, grassland) or natural ecosystems should be made by the Principal Investigator and the Institutional Biosafety Committee, in consultation with scientists knowledgeable of gene drive technology, the environment, and ecosystems in the geographic area of the research.

Since research with GDMOs shall be conducted at a minimum of Biosafety Level 2, research involving host vector system organisms modified by a gene drive will not be exempt. Therefore, the exceptions (Appendices C–III–A and C–IV–A) to Appendices C–III and C–IV, *Saccharomyces* and *Kluyveromyces* Host-Vector Systems, respectively, are proposed to be amended.

Appendices C–III–A Exceptions and C–IV–A Exceptions currently state:

The following categories are not exempt from the NIH Guidelines: (i) experiments described in Section III–B which require NIH OSP and Institutional Biosafety Committee approval before initiation, (ii) experiments involving DNA from Risk Groups 3, 4, or restricted organisms (see Appendix B, Classification of Human Etiologic Agents on the Basis of Hazard, and Sections V–G and V–L, Footnotes and References of Sections I through IV) or cells known to be infected with these agents may be conducted under containment conditions specified in Section III–D–2 with prior Institutional Biosafety Committee review and approval, (iii) large-scale experiments (*e.g.,* more than 10 liters of culture), and (iv) experiments involving the deliberate cloning of genes coding for the biosynthesis of molecules toxic for vertebrates (see Appendix F, Containment Conditions for Cloning of Genes Coding for the Biosynthesis of Molecules Toxic for Vertebrates).

Appendices C–III–A Exceptions and C–IV–A Exceptions are proposed to be amended to state:

The following categories are not exempt from the NIH Guidelines: (i) experiments described in Section III–B, which require NIH OSP and Institutional Biosafety Committee approval before initiation; (ii) experiments involving DNA from Risk Groups 3, 4, or restricted organisms (see Appendix B, Classification of Human Etiologic Agents on the Basis of Hazard, and Sections V–G and V–L, Footnotes and References of Sections I through IV) or cells known to be infected with these agents may be conducted under containment conditions specified in Section III–D–2 with prior Institutional Biosafety Committee review and approval; (iii) large-scale experiments (*e.g.,* more than 10 liters of culture), (iv) experiments involving the deliberate cloning of genes coding for the biosynthesis of molecules toxic for vertebrates (see Appendix F, Containment Conditions for Cloning of Genes Coding for the Biosynthesis of Molecules Toxic for Vertebrates), and (v) experiments involving gene drive modified organisms (Section III–D–8). To provide additional guidance on containment for work with arthropods, Appendices G, L, and M are proposed to reference the Arthropod Containment Guidelines, which specifically outline practices and procedures for arthropod research, and the addendum Arthropod Containment Guidelines, which articulates containment practices for gene drive modified arthropods. Appendix G–III and Footnotes and References of Appendix G will also be modified to reference the current edition of the reference source BMBL and to correct an erroneous second citation of the BMBL.

Appendix G–III–A currently states:

Appendix G–III–A. Biosafety in Microbiological and Biomedical Laboratories, 5th edition, U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, Atlanta, Georgia, and National Institutes of Health, Bethesda, Maryland.

Appendix G–III–A is proposed to be amended to state:

Appendix G–III–A. Biosafety in Microbiological and Biomedical Laboratories, 6th edition, U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, Atlanta, Georgia, and National Institutes of Health, Bethesda, Maryland.

Appendix G–III–B currently states:

Appendix G–III–B. Biosafety in Microbiological and Biomedical Laboratories, 3rd edition, May 1993, U.S. DHHS, Public Health Service, Centers for Disease Control and Prevention, Atlanta, Georgia, and NIH, Bethesda, Maryland.

Appendix G–III–B is proposed to be amended to state:

Appendix G–III–B. Arthropod Containment Guidelines, Version 3.2, 2019, and Addendum 1 Containment Practices for Arthropods Modified with Engineered Transgenes Capable of Gene Drive, 2022, American Committee of Medical Entomology, American Society of Tropical Medicine and Hygiene, Arlington, Virginia. Appendices L and M specify containment conditions and practices for plants and animals, respectively, that preclude the use of containment as specified in Appendix G. Both Appendices L and M will be modified to incorporate the Arthropod Containment Guidelines and cross-reference to Appendix G–III–B.

Appendix L–III–C currently states:

Appendix L–III–C. Biological Containment Practices (Macroorganisms)

Appendix L–III–C–1. Effective dissemination of arthropods and other small animals can be prevented by using one or more of the following procedures: (i) use non-flying, flight-impaired, or sterile arthropods; (ii) use non-motile or sterile strains of small animals; (iii) conduct experiments at a time of year that precludes the survival of escaping organisms; (iv) use animals that have an obligate association with a plant that is not present within the dispersal range of the organism; or (v) prevent the escape of organisms present in run-off water by chemical treatment or evaporation of run-off water.

Appendix L–III–C is proposed to be amended to:

Appendix L–III–C. Biological Containment Practices (Macroorganisms)

Appendix L–III–C–1. Effective dissemination of arthropods and other small animals can be prevented by using

one or more of the following procedures: (i) use non-flying, flight-impaired, or sterile arthropods; (ii) use non-motile or sterile strains of small animals; (iii) conduct experiments at a time of year that precludes the survival of escaping organisms; (iv) use animals that have an obligate association with a plant that is not present within the dispersal range of the organism; or (v) prevent the escape of organisms present in run-off water by chemical treatment or evaporation of run-off water. Containment for arthropods is described in the Arthropod Containment Guidelines and Addendum 1 Containment Practices for Arthropods Modified with Engineered Transgenes Capable of Gene Drive (see Appendix G–III–B).

Appendix M–III–D currently states:

Appendix M–III–D. Other research with non-laboratory animals, which may not appropriately be conducted under conditions described in Appendix M, may be conducted safely by applying practices routinely used for controlled culture of these biota. In aquatic systems, for example, BL1 equivalent conditions could be met by utilizing growth tanks that provide adequate physical means to avoid the escape of the aquatic species, its gametes, and introduced exogenous genetic material. A mechanism shall be provided to ensure that neither the organisms nor their gametes can escape into the supply or discharge system of the rearing container (*e.g.,* tank, aquarium, etc.) Acceptable barriers include appropriate filtration, irradiation, heat treatment, chemical treatment, etc. Moreover, the top of the rearing container shall be covered to avoid escape of the organism and its gametes. In the event of tank rupture, leakage, or overflow, the construction of the room containing these tanks should prevent the organisms and gametes from entering the building's drains before the organism and its gametes have been inactivated.

Other types of non-laboratory animals (*e.g.,* nematodes, arthropods, and certain forms of smaller animals) may be accommodated by using the appropriate BL1 through BL4 or BL1–P through BL4–P containment practices and procedures as specified in Appendices G and L.

Appendix M–III–D is proposed to be amended to:

Appendix M–III–D. Research with animals, which may not appropriately be conducted under conditions described in Appendix M, may be conducted safely by applying practices routinely used for controlled culture of these biota. In aquatic systems, for example, BL1 equivalent conditions could be met by utilizing growth tanks that provide adequate physical means to avoid the escape of the aquatic species, its gametes, and introduced exogenous genetic material. A mechanism shall be provided to ensure that neither the organisms nor their gametes can escape into the supply or discharge system of the rearing container (*e.g.,* tank, aquarium, etc.) Acceptable barriers include appropriate filtration, irradiation, heat treatment, chemical treatment, etc. Moreover, the top of the rearing container shall be covered to avoid escape of the organism and its gametes. In the event of tank rupture, leakage, or overflow, the construction of the room containing these tanks should prevent the organisms and gametes from entering the building's drains before the organism and its gametes have been inactivated.

Other types of animals (*e.g.,* nematodes, arthropods, and certain forms of smaller animals) may be accommodated by using the appropriate BL1 through BL4 or BL1–P through BL4–P containment practices and procedures as specified in Appendices G and L. Containment for arthropods is described in the Arthropod Containment Guidelines and Addendum 1 Containment Practices for Arthropods Modified with Engineered Transgenes Capable of Gene Drive (see Appendix G–III–B).

The term ''helper virus'' is used in multiple sections of the NIH Guidelines to refer to the missing functions provided to a defective virus. However, helper systems (*e.g.,* transient transfection systems, packaging cell lines, replicon systems, etc.) are more commonly used than a helper virus. NIH OSP has interpreted the term ''helper virus'' to extend to the use of helper systems because they are also associated with the risk of generation of replication competent virus. To clarify the language in the NIH Guidelines, the term ''helper virus'' will be replaced in Sections III–D–3, and III–E–1 with the term ''helper systems''.

The risk group classification in Appendix B of two viruses, West Nile virus and St. Louis encephalitis virus, are proposed to be changed from RG3 to RG2 to be consistent with the risk assessment that is articulated in the current edition of the BMBL.

Appendix B–III–D currently states in part:

Appendix B–III–D. Risk Group 3 (RG3)—Viruses and Prions.

Alphaviruses (Togaviruses)—Group A Arboviruses currently states in part:

—St. Louis encephalitis virus.

Flaviviruses—Group B Arboviruses currently states in part:

—West Nile virus (WNV).

Appendix B–II–D is proposed to be amended to state:

Appendix B–II–D. Risk Group 2 (RG2)—Viruses.

Alphaviruses (Togaviruses)—Group A Arboviruses.

—St. Louis encephalitis virus.

Flaviviruses—Group B Arboviruses.

—West Nile virus (WNV).

Dated: August 3, 2023.

Tara A. Schwetz,

Acting Principal Deputy Director, National Institutes of Health.

[FR Doc. 2023–17178 Filed 8–9–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Fogarty International Center; Notice of Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Fogarty International Center Advisory Board.

This will be a hybrid meeting held in-person and virtually and will be open to the public as indicated below. Individuals who plan to attend in-person or view the virtual meeting and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. The open session can be accessed from the Fogarty International Center website (*https://www.fic.nih.gov/About/Advisory/Pages/default.aspx*).

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Fogarty International Center Advisory Board.

Date: September 7–8, 2023.

Closed: September 7, 2023, 2:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate the second level of grant applications.

Place: Fogarty International Center, National Institutes of Health, Lawton

Chiles International House (Stone House), 16 Center Drive, Conference Room, Bethesda, MD 20892.

Open: September 8, 2023, 9:00 a.m. to 3:00 p.m.

Agenda: Update and discussion of current and planned Fogarty International Center activities.

Place: Fogarty International Center, National Institutes of Health, Lawton Chiles International House (Stone House), 16 Center Drive, Conference Room, Bethesda, MD 20892 (Virtual Meeting).

Meeting Access: https://www.fic.nih.gov/About/Advisory/Pages/default.aspx.

Contact Person: Kristen Weymouth, Executive Secretary, Fogarty International Center, 31 Center Drive, Room B2C02, Bethesda, MD 20892, 301–495–1415, *kristen.weymouth@nih.gov*.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Persons listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://www.fic.nih.gov/About/Advisory/Pages/default.aspx,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.106, Minority International Research Training Grant in the Biomedical and Behavioral Sciences; 93.154, Special International Postdoctoral Research Program in Acquired Immunodeficiency Syndrome; 93.168, International Cooperative Biodiversity Groups Program; 93.934, Fogarty International Research Collaboration Award; 93.989, Senior International Fellowship Awards Program, National Institutes of Health, HHS)

Dated: August 4, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–17141 Filed 8–9–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; High Impact, Interdisciplinary Science in NIDDK Research Areas.

Date: October 10, 2023.

Time: 12:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NIDDK, Democracy II, Suite 7000A, 6707 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Michelle L. Barnard, Ph.D., Scientific Review Officer, NIDDK/Scientific Review Branch, National Institutes of Health 6707 Democracy Boulevard, Room 7353, Bethesda, MD 20892–2542 (301) 594–8898 *barnardm@extra.niddk.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: August 4, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–17124 Filed 8–9–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meetings

Pursuant to section 1009 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: National Institute on Alcohol Abuse and Alcoholism Initial Review Group; Biomedical Research Study Section AA–1.

Date: October 17, 2023.

Time: 9:30 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Anna Ghambaryan, M.D., Ph.D., Scientific Review Officer, Extramural Project Review Branch, Office of Extramural Activities, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Room 2120, MSC 6902, Bethesda, MD 20892, (301) 443–4032, *anna.ghambaryan@nih.gov*.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Initial Review Group; Epidemiology, Prevention and Behavior Research Study Section.

Date: October 24, 2023.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Bethesda, MD 20892.

Contact Person: Anna Ghambaryan, M.D., Ph.D., Scientific Review Officer, Extramural Project Review Branch, Office of Extramural Activities, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Room 2120, MSC 6902, Bethesda, MD 20892, 301–443–4032, *anna.ghambaryan@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.273, Alcohol Research Programs, National Institutes of Health, HHS)

Dated: August 7, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–17187 Filed 8–9–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Interagency Coordinating Committee on the Validation of Alternative Methods: Request for Comment on Draft Report on Validation, Qualification, and Acceptance of New Approach Methodologies

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The Interagency Coordinating Committee on the Validation of Alternative Methods (ICCVAM) announces availability of the draft document, ''Validation, Qualification, and Regulatory Acceptance of New Approach Methodologies.'' ICCVAM will accept public comments on the document through September 5, 2023; 5:00 p.m. EDT.

DATES:

Document Availability: The draft document is available at *https://ntp.niehs.nih.gov/go/ICCVAM-submit.*

Written Public Comments Submissions: Submit comments to *amber.daniel@inotivco.com* by September 5, 2023; 5:00 p.m. EDT.

FOR FURTHER INFORMATION CONTACT: Dr. Nicole Kleinstreuer, Director, National Toxicology Program (NTP) Interagency Center for the Evaluation of Alternative Toxicological Methods (NICEATM), email: *nicole.kleinstreuer@nih.gov,* telephone: 984–287–3150.

SUPPLEMENTARY INFORMATION:

Background: ICCVAM, a congressionally mandated committee, promotes the scientific validation and regulatory acceptance or qualification of testing methods that accurately assess the chemical safety and hazards of relevant products in an effort to replace, reduce, or refine (enhance animal well-being and lessen or avoid pain and distress) animal use.

Shortly after its establishment as a standing committee in 1997, ICCVAM published a report, ''Validation and Regulatory Acceptance of Toxicological Test Methods,'' which outlined criteria for the validation and regulatory acceptance for new and alternative test methods (62 FR 11901). This and subsequent related documents described a validation model that, while being initially useful, has lately demonstrated limitations such as being lengthy and resource-intensive and not being compatible with many modern approaches to toxicity testing. Furthermore, for some contexts of use, methods may not need to undergo every step of the validation process described by these documents to yield valuable data for a federal agency.

In 2021, ICCVAM established its Validation Workgroup to update the 1997 document and align it with the principles articulated in the 2018 ICCVAM publication, ''A Strategic Roadmap for Establishing New Approaches to Evaluate the Safety of Chemicals and Medical Products in the United States'' (83 FR 7487). The Strategic Roadmap provides a conceptual framework promoting better communication between agencies and test method developers and more flexibility in how confidence is established, to help ensure the adoption of new methods by federal agencies and regulated industries once validated for a specific purpose or context of use.

A draft version of the new document, ''Validation, Qualification, and Regulatory Acceptance of New Approach Methodologies,'' is now available for public comment.

Requests for Comments: ICCVAM invites public comments from all ICCVAM stakeholders on the draft document. The document can be found on the NICEATM website at *https://ntp.niehs.nih.gov/go/ICCVAM-submit.*

Stakeholders may submit comments via email to Ms. Amber Daniel at *amber.daniel@inotivco.com.* Commenters should include their name, affiliation (if any), mailing address, telephone, email, and sponsoring organization (if any) with their comments. Guidelines for public statements submitted to NTP are available at at *http://ntp.niehs.nih.gov/ntp/about_ntp/guidelines_public_comments_508.pdf.* All comments received will be posted on the NICEATM website and identified by the individual's name, affiliation, and sponsoring organization. Comments should be received by September 5, 2023; 5:00 p.m. EDT, to ensure consideration as the draft document is finalized.

Responses to this notice are voluntary. No proprietary, classified, confidential, or sensitive information should be included in statements submitted in response to this notice. This request for input is for planning purposes only and is not a solicitation for applications or an obligation on the part of the U.S. Government to provide support for any ideas identified in response to the request. Please note that the U.S. Government will not pay for the preparation of any information submitted or for its use of that information.

Background Information on ICCVAM and NICEATM: ICCVAM is an interagency committee composed of representatives from 17 federal regulatory and research agencies that require, use, generate, or disseminate toxicological and safety testing information. ICCVAM conducts technical evaluations of new, revised, and alternative safety testing methods and integrated testing strategies with regulatory applicability. ICCVAM also promotes the scientific validation and regulatory acceptance of testing methods that more accurately assess the safety and hazards of chemicals and products and replace, reduce, or refine animal use.

The ICCVAM Authorization Act of 2000 (42 U.S.C. 285*l*–3) establishes ICCVAM as a permanent interagency committee of NIEHS and provides the authority for ICCVAM involvement in activities relevant to the development of alternative test methods. Additional information about ICCVAM can be found at *https://ntp.niehs.nih.gov/go/iccvam.*

NICEATM administers ICCVAM, provides scientific and operational support for ICCVAM-related activities, and conducts and publishes analyses and evaluations of data from new, revised, and alternative testing approaches. NICEATM and ICCVAM work collaboratively to evaluate new and improved testing approaches applicable to the needs of U.S. federal agencies. NICEATM and ICCVAM welcome the public nomination of new, revised, and alternative test methods and strategies for validation studies and technical evaluations. Additional information about NICEATM can be found at *https://ntp.niehs.nih.gov/go/niceatm.*

Dated: August 4, 2023.

Richard P. Woychik,

Director, National Institute of Environmental Health Sciences and National Toxicology Program, National Institutes of Health.

[FR Doc. 2023–17120 Filed 8–9–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C.,

as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Neurotrauma and dementia.

Date: September 12, 2023.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Birgit Neuhuber, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institutes of Health, National Institute on Aging, 7201 Wisconsin Avenue, RM: 3208, Bethesda, MD 20892, 301–496–3562, *neuhuber@ninds.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: August 4, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–17123 Filed 8–9–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer at *carlos.graham@samhsa.hhs.gov*.

Comments are invited on: (a) whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Project: SAMHSA Generic Clearance for the Collection of Qualitative Research and Assessment

SAMHSA is requesting approval from the Office of Management and Budget (OMB) for their Generic clearance for purposes of conducting qualitative research. SAMHSA conducts qualitative research to gain a better understanding of emerging substance use and mental health policy issues, improve the development and quality of instruments, and to ensure SAMHSA leadership, centers and offices have recent data and information to inform program and policy decision-making. SAMHSA is requesting approval for at least four types of qualitative research: (a) interviews, (b) focus groups, (c) questionnaires, and (d) other qualitative methods.

SAMHSA is the agency within the U.S. Department of Health and Human Services (HHS) that leads public health efforts to advance the behavioral health of the nation and to improve the lives of individuals living with mental and substance use disorders, and their families. It's mission is to lead public health and service delivery efforts that promote mental health, prevent substance misuse, and provide treatments and supports to foster recovery while ensuring equitable access and better outcomes. SAMHSA pursues this mission by providing grant funding opportunities and guidance to states and territories, as well as tribal and local communities; technical assistance to grantees and practitioners; publishing and sharing resources for individuals and family members seeking information on prevention, harm reduction, treatment and recovery; collecting, analyzing, and sharing behavioral health data; collaborating with other Federal agencies to evaluate programs and improve policies; and raising awareness of available resources through educational messaging campaigns and events. Integral to this role, SAMHSA conducts qualitative research and evaluation studies, develops policy analyses, and estimates the cost and benefits of policy alternatives for SAMHSA related programs.

Qualitative research and assessment are the main objectives of the activities included in this clearance. The goal of establishing the SAMHSA Generic Clearance for the Collection of Qualitative Research and Assessment is to help public health officials, policymakers, community practitioners, and the public to understand mental health and substance use trends and how they are evolving; inform the development and implementation of targeted evidence-based interventions; focus resources where they are needed most; and evaluate the success of programs and policies. A key objective is to decrease the burden on stakeholders while expanding and improving data collection, analysis, evaluation, and dissemination. To achieve this objective, SAMHSA is streamlining and modernizing data collection efforts, while also coordinating evaluation across the agency to ensure funding and policies are data driven. Additionally, the agency is utilizing rigorous evaluation and analytical processes that are in alignment with the Foundations for Evidence-Based Policymaking Act of 2018. SAMHSA, using robust methods to collect, analyze, and report valid, reliable, trustworthy, and protected data, is key to improving and impacting behavioral health treatment, prevention, and recovery for communities most in need. By using rigorous methods, and improving the quality and completeness of program data, data can be disaggregated across different population groups to assess disparities within the behavioral health care system. SAMHSA's vision will be accomplished by better leveraging optimal data to inform the agency's policies and programs.

The qualitative research participants will include grant recipients; policy experts; national, state, and local public health representatives; human service, and healthcare providers; and representatives of other health organizations. A variety of instruments and platforms will be used to collect information from respondents. The annual burden hours requested (15,000) are based on the number of collections we expect to conduct over the requested period for this clearance. The burden estimates were calculated based on the amount of IC submissions to the 0930–0393 Fast Track Generic Clearance for the Collection of Qualitative Feedback on the Substance Abuse and Mental Health Services Administration (SAMHSA) Service Delivery that are ineligible for OMB approval under it. This Generic information collection will provide a viable replacement option. Internal assessments of projected IC submission over the next three years estimate the burden hours for this information collection to be

approximately half that of the 0930–0393 Fast Track Generic Clearance for the Collection of Qualitative Feedback on the Substance Abuse and Mental Health Services Administration (SAMHSA) Service Delivery.

ESTIMATED ANNUALIZED BURDEN TABLE

Type of respondent	Form	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
SAMHSA internal and external stakeholders.	Qualitative Research	15,000	1	1	15,000

Send comments Carlos Graham, SAMHSA Reports Clearance Officer, 5600 Fishers Lane, Room 15E57–B, Rockville, Maryland 20857, *OR* email a copy to *Carlos.Graham@samhsa.hhs.gov.* Written comments should be received by October 10, 2023.

Carlos Graham,

Reports Clearance Officer.

[FR Doc. 2023–17095 Filed 8–9–23; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Proposed Information Collection Activity; Data Security Requirements for Accessing Confidential Data

AGENCY: Substance Abuse and Mental Health Services Administration; Center for Behavioral Health Statistics and Quality; Department of Health and Human Services.

ACTION: Submission for OMB review; comment request.

SUMMARY: Substance Abuse and Mental Health Services Administration (SAMHSA) within the Department of Health and Human Services has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995. This is the second notice for public comment; the first was published in the **Federal Register** on November 22, 2022 and no comments were received. SAMHSA is forwarding the proposed Data Security Requirements for Accessing Confidential Data information collection to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice. The full submission may be found at: *http://www.reginfo.gov/public/do/PRAMain.*

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.

FOR FURTHER INFORMATION CONTACT: Carlos Graham, SAMHSA Reports Clearance Officer, 5600 Fishers Lane, Room 15E57–A, Rockville, Maryland 20857, *OR* email a copy to *Carlos.Graham@samhsa.hhs.gov.*

SUPPLEMENTARY INFORMATION: SAMHSA may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Comments: Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of [agency], including whether the information will have practical utility; (b) the accuracy of [agency's] estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, use, and clarity of the information to be collected, including through the use of automated collection techniques or other forms of information technology; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated or other forms of information technology should be addressed to the points of contact in the **FOR FURTHER INFORMATION CONTACT** section.

Title of collection: Data Security Requirements for Accessing Confidential Data.

OMB Control Number: 3145–0271.

Summary of Collection: Title III of the Foundations for Evidence-Based Policymaking Act of 2018 (44 U.S.C. 3583; hereafter referred to as the Evidence Act) mandates that OMB establish a Standard Application Process (SAP) for requesting access to certain confidential data assets. While the adoption of the SAP is required for statistical agencies and units designated under the Confidential Information Protection and Statistical Efficiency Act of 2018 (CIPSEA), it is recognized that other agencies and organizational units within the Executive Branch may benefit from the adoption of the SAP to accept applications for access to confidential data assets. The SAP is to be a process through which agencies, the Congressional Budget Office, State, local, and Tribal governments, researchers, and other individuals, as appropriate, may apply to access confidential data assets held by a federal statistical agency or unit for the purposes of developing evidence. With the Interagency Council on Statistical Policy (ICSP) as advisors, the entities upon whom this requirement is levied are working with the SAP Project Management Office (PMO) and with OMB to implement the SAP.

The SAP Portal is to be a single web-based common application designed to collect information from individuals requesting access to confidential data assets from federal statistical agencies and units. When an application for confidential data is approved through the SAP Portal, SAMHSA will collect information to fulfill its data security requirements. This is a required step before providing the individual with access to restricted use microdata for the purpose of evidence building. SAMHSA's data security agreements and other paperwork, along with the corresponding security protocols, allow SAMHSA to maintain careful controls on confidentiality and privacy, as required by law. SAMHSA's collection of data security information will occur outside of the SAP Portal.

The following bullets outline the major components and processes in and around the SAP Portal, leading up to SAMHSA's collection of security requirements.

- *SAP Policy:* At the recommendation of the ICSP, the SAP Policy establishes the SAP to be implemented by statistical agencies and units and incorporates directives from the Evidence Act. The

SAP Policy may be found in OMB Memorandum 23–04.

• *The SAP Portal:* The SAP Portal is an application interface connecting applicants seeking data with a catalog of metadata for data assets owned by the federal statistical agencies and units. The SAP Portal is not a new data repository or warehouse; confidential data assets will continue to be stored in secure data access facilities owned and hosted by the federal statistical agencies and units. The Portal provides a streamlined application process across agencies, reducing redundancies in the application process.

• *Data Discovery:* Individuals begin the process of accessing restricted use data by discovering confidential data assets through the SAP metadata catalog, maintained by federal statistical agencies at *www.researchdatagov.org.*

• *SAP Portal Application Process:* Individuals who have identified and wish to access confidential data assets apply through the SAP Portal. Applicants must create an account and follow all steps to complete the application. Applicants enter personal, contact, and institutional information for the research team and provide summary information about their proposed project.

• *Submission for Review:* Agencies approve or reject an application within a prompt timeframe. Agencies may also request applicants to revise and resubmit their application.

• *Access to Confidential Data:* Approved applicants are notified through the SAP Portal that their proposal has been accepted. This concludes the SAP Portal process. Agencies will contact approved applicants to initiate completion of their security documents. The completion and submission of the agency's security requirements will take place outside of the SAP Portal.

• *Collection of Information for Data Security Requirements:* In the instance of a positive determination for an application requesting access to an SAMHSA-owned confidential data asset, SAMHSA will contact the applicant(s) to initiate the process of collecting information to fulfill its data security requirements. This process allows SAMHSA to place the applicant(s) in a trusted access category.

Estimate of Burden: The amount of time to complete the agreements and other paperwork that comprise SAMHSA's security requirements will vary based on the confidential data assets requested. To obtain access to SAMHSA confidential data assets, it is estimated that the average time to complete and submit SAMHSA's data security agreements and other paperwork is 40 minutes. This estimate does not include the time needed to complete and submit an application within the SAP Portal. All efforts related to SAP Portal applications occur prior to and separate from SAMHSA's effort to collect information related to data security requirements.

The expected number of applications in the SAP Portal that receive a positive determination from SAMHSA in a given year may vary. Overall, per year, SAMHSA estimates it will collect data security information for 15 application submissions that received a positive determination within the SAP Portal. SAMHSA estimates that the total burden for the collection of information for data security requirements over the course of the three-year OMB clearance will be about 30 hours and, as a result, an average annual burden of 10 hours.

Comments: As required by 5 CFR 1320.8(d), comments on the information collection activities as part of this study were solicited through the publication of a 60-Day Notice in the **Federal Register** at [insert FR citation]. SAMHSA received [number] comments, to which we here respond.

Updates: This section is needed if there have been any major changes since the first FRN was published, for example, if estimates of burden (in terms of hours or respondents), scope, sampling, etc. were changed. Outline what the initial FRN specified, the new information, and the reason(s) why it changed.

Carlos Graham,

Reports Clearance Officer.

[FR Doc. 2023–17176 Filed 8–9–23; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. CISA–2023–0019]

Agency Information Collection Activities: ReadySetCyber Initiative Questionnaire

AGENCY: Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security (DHS).

ACTION: 60-Day notice and request for comments on a new collection.

SUMMARY: CISA will submit the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and clearance.

DATES: Comments are encouraged and will be accepted until October 10, 2023.

ADDRESSES: You may submit comments, identified by docket number Docket # CISA–2023–0019, at:

○ *Federal eRulemaking Portal: http://www.regulations.gov.* Please follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and docket number Docket # CISA–2023–0019. 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.*

SUPPLEMENTARY INFORMATION: Consistent with CISA's authorities to ''carry out comprehensive assessments of the vulnerabilities of the key resources and critical infrastructure of the United States'' at 6 U.S.C. 652(e)(1)(B) and provide federal and non-federal entities with ''operational and timely technical assistance'' at 6 U.S.C. 659(c)(6) and ''recommendation on security and resilience measures'' at 6 U.S.C. 659(c)(7), CISA's ReadySetCyber Initiative will collect information in order to provide tailored technical assistance, services and resources to critical infrastructure (CI) organizations and state, local, tribal, and territorial (SLTT) governments based on the characteristics of their respective cybersecurity programs. CISA seeks to collect this information from US CI and SLTT organizations on a voluntary and fully electronic basis so that each organization can be best supported in receiving tailored cybersecurity recommendations and services.

The overarching goal of CISA's ReadySetCyber Initiative is to help CI and SLTT organizations access information and services that are tailored to their specific cybersecurity needs. In addition, CISA expects this initiative to yield several additional benefits, including:

• Further adoption of CISA's Cybersecurity Performance Goals (CPGs) as the default approach for assessing Organizational progress and identify prioritized cybersecurity gaps;

• Collection of information about organizations' cybersecurity posture and progress, enabling more targeted engagement with sectors, regions, and individual organizations;

• More effective allocation of capacity-constrained services to specific stakeholders;

• Provision of a simplified approach to the guiding stakeholders into enrollment for, scalable services and rapidly expand uptake thereof; and

• Furthering the development of relationships between CI and SLTT organizations and CISA's regional cybersecurity personnel.

CISA's CPGs are a set of voluntary cybersecurity practices which aim to reduce the risk of cybersecurity threats to U.S. CI and SLTT organizations. CISA offers services and resources to aid CI and SLTT organizations in adopting the CPGs and seeks to make accessing appropriate services and resources as efficient as possible, especially for organizations whose cybersecurity programs operate at low levels of capability.

For example, an organization that is unsure of its ability to enumerate all of its internet-facing sites and services could leverage CISA's highly scalable automated testing services to scan its entire network range. Organizations with cybersecurity programs with more advanced characteristics who wish to evaluate their network segmentation controls are better positioned to take advantage of CISA's more resource-intensive architecture assessments. All organizations completing the questionnaire will also be connected with a CISA cybersecurity representative in their jurisdiction to provide direct support and engagement.

To measure adoption of the CPGs and assist CI and SLTT organizations in finding the most impactful services and resources for their cybersecurity programs, CISA is seeking to establish a voluntary information collection that uses respondents' answers to tailor a recommended package of services and resources most applicable to their evaluated level of program capability. Without collecting this information, CISA would be unable to tailor an appropriate suite of services, recommendations, and resources to assist the organization in protecting itself against cybersecurity threats, thereby creating burdens of inefficiency for service requesters and CISA alike.

In addition, receipt of this information is critical to CISA's ability to measure the adoption of CISA's CPGs by CI and SLTT organizations. The information to be collected will address various inquiries, such as: whether an organization keeps a regularly updated inventory of all assets with an internet Protocol address; the types of incident reporting and vulnerability disclosures required by an organizations' contracts with its vendors and suppliers; and whether the entity requires a minimum password strength required for all password-protected assets.

The Office of Management and Budget is particularly interested in comments which:

1. 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;

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 via 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.

Analysis

Agency: Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security (DHS).

Title: ReadySetCyber.

OMB Number:

Frequency: Upon each voluntary request for technical assistance, which CISA expects to occur on an annual basis.

Affected Public: Critical Infrastructure Owners & Operators seeking CISA services.

Number of Respondents: Approximately 2,000 per year.

Estimated Time per Respondent: 20 Minutes.

Total Burden Hours: 666.7 Hours.

Robert J. Costello,

Chief Information Officer, Department of Homeland Security, Cybersecurity and Infrastructure Security Agency.

[FR Doc. 2023–17183 Filed 8–9–23; 8:45 am]

BILLING CODE 9110–09–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036326; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Oberlin College, Oberlin, OH

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), Oberlin College has completed an inventory of human remains and has determined that there is a cultural affiliation between the human remains and Indian Tribes or Native Hawaiian organizations in this notice. The human remains were removed from the Hawaiian Islands, HI.

DATES: Repatriation of the human remains in this notice may occur on or after September 11, 2023.

ADDRESSES: Dr. Amy V. Margaris, Oberlin College, King Building, 10 N. Professor Street, Oberlin, OH 44074, telephone (440) 775–5173, email *amy.margaris@oberlin.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of Oberlin College. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by Oberlin College.

Description

Human remains representing, at minimum, one individual were removed from the Hawaiian Islands, HI. Accession #65 in the accession book of the former Oberlin College Museum records that in August of 1875, Mr. E. P. Church of Greenville, Michigan donated to the Museum one ''Skull of Hawaiian, Cave Burial Place, Hawaiian Islands.'' According to records of the Oberlin College Archives, E. P. Church was an 1863 graduate of Oberlin College who lived on O'ahu from 1865–1875. He served as Professor of Mathematics at Oahu College (now Punahou School) in Honolulu, Hawaii (1865–1871) and as President of Oahu College (1871–1875). The human remains were retained by Oberlin College after the Museum's closure in the 1950s, and they are now in the care of the Oberlin College Department of Anthropology. The human remains consist of a skull belonging to an adult of indeterminate age and sex. No associated funerary remains are present.

Cultural Affiliation

The human remains in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: archeological, biological, cultural, geographical, and historical.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, Oberlin College has determined that:

- The human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- There is a relationship of shared group identity that can be reasonably traced between the human remains described in this notice and the Hui Iwi Kuamo'o.

Requests for Repatriation

Written requests for repatriation of the human remains in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains in this notice to a requestor may occur on or after September 11, 2023. If competing requests for repatriation are received, Oberlin College must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains are considered a single request and not competing requests. Oberlin College is responsible for sending a copy of this notice to the Native Hawaiian organization identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: August 2, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–17132 Filed 8–9–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036328; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Indiana State Museum and Historic Sites Corporation, Indianapolis, IN

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Indiana State Museum and Historic Sites Corporation (ISMHS) has completed an inventory of human remains and associated funerary objects and has determined that there is no cultural affiliation between the human remains and associated funerary objects and any Indian Tribe. The human remains and associated funerary objects were removed from Floyd County, IN.

DATES: Disposition of the human remains and associated funerary objects in this notice may occur on or after September 11, 2023.

ADDRESSES: Michele Greenan, Indiana State Museum and Historic Sites Corporation, 650 West Washington Street, Indianapolis, IN 46204, telephone (317) 473–0836, email *mgreenan@indianamuseum.org.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the ISMHS. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the ISMHS.

Description

Human remains representing, at minimum, 99 individuals were removed from Floyd County, IN. The site, identified as archeological site 12FL0073, is also referred to as the State Road 111 Slide Correction Project (the Indiana Department of Transportation (INDOT) project (DES #1592476) that resulted in the 2021–2022 removal of human remains from the site). Site 12FL0073 is a Middle–Late Archaic period site located along the Ohio River in Southern Indiana. Diagnostic artifacts associated with the site indicate a date range of approximately 4200 BCE through 1000 BCE, with limited evidence that it may extend earlier to 6000 BCE. Two radiocarbon dates taken from the site, 5350+/- 130 BP (3350 BCE) and 4950 +/-40 BP (2950 BCE), further validates a Middle-Late Archaic period association.

Site 12FL0073 was first recorded in 1998, when human remains were found eroding out of the riverbank. In 1998 and 1999, burial remains were removed under Indiana Division of Historic Preservation and Archaeology (DHPA) accidental discovery number AD 980013 (March 1998) and accidental discovery AD 990032 (July 1999). Between 2001 and 2002, an archeological project was carried out through the University of Kentucky (UK) at the site. Researchers from the University of Indianapolis (UINDY) were asked to assist with burial features and human remains found during these projects. Following these projects, the human remains and associated funerary objects were housed at UINDY and UK. In 2015, the Indiana Department of Transportation (INDOT) began assessing site 12FL0073 as they addressed erosion occurring along the bank of the Ohio River. This erosion was undermining State Road 111. During these assessments, the severity of the erosion was understood, and it was clear that other human remains at site 12FL0073 were in immediate danger. In November 2020, INDOT contacted the ISMHS to help facilitate NAGPRA compliance as they (working through outside contractors) removed these burials. INDOT also requested that the ISMHS include the human remains and associated funerary objects from the site that were housed at the UK and UINDY for inclusion in the inventory. The human remains and associated funerary objects housed at UK were transferred to the ISMHS in May 2021. The human remains and associated funerary objects housed at UINDY, which included the human remains removed under the 1998 and 1999 accidental discovery numbers, were transferred to ISMHS in September 2022. The human remains from the INDOT project were transferred to ISMHS in two groups, one in May of 2021 and the second in late January 2023.

The human remains consist of individual burials and single skeletal elements. The 211 associated funerary objects are 21 hafted bifaces, 21 bifaces, four scrapers, four flake tools, 16 cores, two hematite pestles, two granitic axes, one sandstone bannerstone, six cannel coal beads, two crinoid stem column beads, three sandstone pitted stones, one hematite pitted stone, two granitic or quartzite hammerstones, three granitic hammerstones, one core/tested cobble, one hematite chopper, one bone

atlatl hook/spur, one bone atlatl tubular weight, one incised bone drill, two bone pin fragments, one bone awl fragment, one polished bone fragment, one granitic cobble tool, one lot consisting of unmodified chert blocks, three lots consisting of red ochre particles, eight lots consisting of hematite fragments, five lots consisting of slate fragments, 32 lots consisting of flakes/shatter, one lot consisting of siltstone fragments, four hematite manuports, four granite manuports, one fire-cracked quartzite manuport, two rounded cobble manuports, one limestone manuport, one slate manuport, one sandstone manuport, one siltstone manuport, 25 lots consisting of non-human unburned bone fragments, nine lots consisting of non-human burned bone fragments, one lot consisting of indeterminant seeds, two lots consisting of burned nutshell, four lots consisting of unmodified shell fragments, one lot consisting of charcoal, three lots consisting of fire-cracked rocks, and three lots consisting of unmodified pebbles.

Aboriginal Land

The human remains and associated funerary objects in this notice were removed from known geographic locations. These locations are the aboriginal lands of one or more Indian Tribes. The following information was used to identify the aboriginal land: a final judgment of the Indian Claims Commission or the United States Court of Claims, a treaty, an Act of Congress, or an Executive Order.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes, the ISMHS has determined that:

- The human remains described in this notice represent the physical remains of 99 individuals of Native American ancestry.
- The 211 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- No relationship of shared group identity can be reasonably traced between the human remains and associated funerary objects and any Indian Tribe.
- The human remains and associated funerary objects described in this notice were removed from the aboriginal land of the Absentee-Shawnee Tribe of Indians of Oklahoma; Delaware Nation, Oklahoma; Delaware Tribe of Indians; Eastern Shawnee Tribe of Oklahoma; Miami Tribe of Oklahoma; Peoria Tribe of Indians of Oklahoma; Shawnee Tribe; and The Osage Nation.

Requests for Disposition

Written requests for disposition of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for disposition may be submitted by:

1. Any one or more of the Indian Tribes identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization, or who shows that the requestor is an aboriginal land Indian Tribe.

Disposition of the human remains and associated funerary objects described in this notice to a requestor may occur on or after September 11, 2023. If competing requests for disposition are received, the ISMHS must determine the most appropriate requestor prior to disposition. Requests for joint disposition of the human remains and associated funerary objects are considered a single request and not competing requests. The ISMHS is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9 and 10.11.

Dated: August 3, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–17134 Filed 8–9–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036327; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: University of Georgia Laboratory of Archaeology, Athens, GA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the University of Georgia Laboratory of Archaeology has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from Dade County, GA.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after September 11, 2023.

ADDRESSES: Dr. Amanda Roberts Thompson, University of Georgia Laboratory of Archaeology, 1125 E. Whitehall Road, Athens, GA 30605, telephone (706) 542–8373, email *arobthom@uga.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the University of Georgia Laboratory of Archaeology. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the University of Georgia Laboratory of Archaeology.

Description

Ancestral remains representing, at minimum, 13 individuals were removed from 9DD25, the Tunacunnhee site, in Dade County, GA. This site is located near Trenton, GA, a few hundred yards east of Lookout Creek and several miles south of the junction of Lookout Creek and the Tennessee River. In 1973, these human remains were excavated during a University of Georgia (UGA) field school led by Joseph R. Caldwell and Richard W. Jefferies. All eight of the mounds at the Tunacunnhee site were tested during the 1973 field season, with a total surface area of 8,000 feet was excavated. Since being removed, the collection has been housed at the University of Georgia Laboratory of Archaeology. The 304 associated funerary objects consist of indigenous ceramics, lithics, copper plates, mica, copper and silver pan pipes, copper earspools, copper pin, copper and silver fragments, woven materials, burnt clay, faunal remains, drilled bear canines, drilled shark teeth, raptor talons, and bone beads.

Ancestral remains representing, at minimum, three individuals were removed from site 9DD57, Dyar Rockshelter, in Dade County, GA, during a survey conducted by Bruce Smith in 1975. At the time the site was surveyed, a collection was made from the surface of the cave as well as from

test pits and areas just outside the cave. Since being removed, the collection has been housed at the University of Georgia Laboratory of Archaeology. No associated funerary objects are present.

Ancestral remains representing, at minimum, one individual were removed from site 9DD35, Bone Cave, in Dade County, GA, during a survey conducted by Bruce Smith in 1975. At the time the site was surveyed, a collection was made from the surface of the site. Since being removed, the collection has been housed at the University of Georgia Laboratory of Archaeology. The human remains belong to an individual of indeterminate age and sex. No associated funerary objects are present.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: archeological and geographical.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the University of Georgia Laboratory of Archaeology has determined that:

- The human remains described in this notice represent the physical remains of 17 individuals of Native American ancestry.
- The 304 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Cherokee Nation; Eastern Band of Cherokee Indians; Kialegee Tribal Town; Poarch Band of Creek Indians; Shawnee Tribe; The Muscogee (Creek) Nation; Thlopthlocco Tribal Town; and the United Keetoowah Band of Cherokee Indians in Oklahoma.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after September 11, 2023. If competing requests for repatriation are received, the University of Georgia Laboratory of Archaeology must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. The University of Georgia Laboratory of Archaeology is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: August 2, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–17133 Filed 8–9–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036325; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: California Department of Parks and Recreation, Sacramento, CA, and California State University, Chico, Chico, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the California Department of Parks and Recreation and California State University, Chico have completed an inventory of human remains and associated funerary objects and have determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from Butte County, CA.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after September 11, 2023.

ADDRESSES: Leslie Hartzell, Cultural Resources Division at California State Parks 715 P Street, Suite 13, Sacramento, CA 95814, telephone (415) 831–2700, email *leslie.hartzell@parks.ca.gov* and Dawn Rewolinski, California State University, Chico, 400 W. 1st Street, Chico, CA 95929, telephone (530) 898–3090, email *drewolinski@csuchico.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the California Department of Parks and Recreation and California State University, Chico. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the California Department of Parks and Recreation and California State University, Chico.

Description

CA–BUT–3820/H

Human remains representing, at minimum, two individuals were removed from Butte County, CA. In the spring of 1976, Bidwell Adobe (CA–BUT–3820/H) was excavated by M. Kowta and other archeologists affiliated with California State University, Chico. This site is part of the Bidwell Mansion State Historic Park and under the legal control of the California Department of Parks and Recreation. The human remains, funerary objects, and other items from this excavation are in the custody of California State University, Chico. The 3,822 associated funerary objects are 285 organics, 81 lots consisting of debitage, 15 modified stone fragments, two lots of projectile points, two shell fragments, 1,281 samples of charcoal, one sample of soil, 2,055 faunal elements, 72 modified faunal elements, 20 pieces of clay, three modified fragments of clay, one lot of basalt flakes, one lot of cobble core-tools, one lot of flakes, one lot of beads, and one lot of pestles.

In 1987, Bidwell Adobe (CA–BUT–3820/H) was excavated by Keith Johnson and other archeologists affiliated with California State University, Chico under agreement with the California Department of Parks and

Recreation. This site is part of the Bidwell Mansion State Historic Park and under the legal control of California Department of Parks and Recreation. The funerary objects and other items from this excavation are in the custody of the California Department of Parks and Recreation. The five associated funerary objects are one lot of basalt flakes, one lot of flake scrapers, one lot of glass beads, one lot of hammerstone, and one lot of projectiles. There were no human remains recorded.

Human remains representing, at minimum, one individual were removed from Butte County, CA. In 1990, Bidwell Adobe (CA–BUT–3820/H) was excavated by Keith Johnson and other archeologists affiliated with California State University, Chico under agreement with the California Department of Parks and Recreation. This site is part of the Bidwell Mansion State Historic Park and under the legal control of the California Department of Parks and Recreation. The funerary objects and other items from this excavation are in the custody of the California Department of Parks and Recreation. The three associated funerary objects are one lot of basalt flakes, one lot of obsidian flakes, and one lot of projectile points.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological, archeological, historical, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the California Department of Parks and Recreation and California State University, Chico have determined that:

- The human remains described in this notice represent the physical remains of three individuals of Native American ancestry.
- The 3,830 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Mechoopda Indian Tribe of Chico Rancheria, California.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after September 11, 2023. If competing requests for repatriation are received, the California Department of Parks and Recreation and California State University, Chico must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. The California Department of Parks and Recreation and California State University, Chico.is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: August 2, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–17131 Filed 8–9–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036324; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Fowler Museum at University of California Los Angeles, Los Angeles, CA, and California Department of Transportation, Sacramento, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the California Department of Transportation (Caltrans) with the assistance of the Fowler Museum at University of California, Los Angeles (UCLA) and has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from Los Angeles County, CA.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after September 11, 2023.

ADDRESSES: Emily Castano, California Department of Transportation, P.O. Box 942874 MS 27, Sacramento, CA 94271–0001, telephone (916) 956–0098, email *emily.castano@dot.ca.gov.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of Caltrans. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by Caltrans.

Description

In 1997, human remains representing, at minimum, three individuals were removed from site CA–LAN–2233 in Los Angeles County, CA. Caltrans initiated an emergency effort to recover burials located in the path of a construction project to improve State Route 126. Following the recovery, human remains and one associated funerary object were sent to the University of California, Riverside (UCR) radiocarbon dating lab for dating. In August of 2021, UCR sent the human remains and the associated funerary object listed in this notice to the Fowler Museum at UCLA. The one associated funerary object is an elk antler.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes,

peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological, archeological, geographical, historical, oral traditional, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, Caltrans has determined that:

- The human remains described in this notice represent the physical remains of three individuals of Native American ancestry.
- The one object described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after September 11, 2023. If competing requests for repatriation are received, Caltrans must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. Caltrans is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: August 2, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–17130 Filed 8–9–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[OMB Control Number 1010–NEW; Docket ID: BOEM–2023–0004]

Agency Information Collection Activities; North Atlantic Right Whale Research and Management Activities

AGENCY: Bureau of Ocean Energy Management, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Bureau of Ocean Energy Management (BOEM) proposes a new information collection request (ICR).

DATES: Comments must be received by the Office of Management and Budget (OMB) no later than September 11, 2023.

ADDRESSES: Submit your written comments on this ICR to the OMB's desk officer for the Department of the Interior at *www.reginfo.gov/public/do/PRAMain.* From the *www.reginfo.gov/public/do/PRAMain* landing page, find this information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments by parcel delivery service or U.S. mail to the BOEM Information Collection Clearance Officer, Anna Atkinson, Bureau of Ocean Energy Management, 45600 Woodland Road, Sterling, Virginia 20166; or by email to *anna.atkinson@boem.gov.* Please reference OMB Control Number 1010–NEW in the subject line of your comments. You may also comment by searching the docket number ''BOEM–2023–0004'' at *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Anna Atkinson by email at *anna.atkinson@boem.gov* or by telephone at 703–787–1025. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, BOEM provides the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps BOEM assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand BOEM's information collection requirements and provide the requested data in the desired format.

Title of Collection: ''North Atlantic Right Whale Research and Management Activities''

Abstract: BOEM is working on a project to identify and synthesize current North Atlantic right whale (NARW) research and management activities conducted by State and Federal government researchers, academic institutions, and non-governmental organizations (NGOs). This project includes identification of mitigation efforts to avoid or limit impacts on NARWs from offshore wind energy development. This information will provide essential data and stakeholder feedback so that BOEM managers and scientists are better able to predict, mitigate, and monitor any potential conflicts between NARWs and offshore wind energy development.

An important component of this project is the development of the NARW synthesis report, which will include a summary of: (1) existing sources of information related specifically to understanding presence, distribution, and density of NARWs in and around wind energy areas offshore the U.S. Atlantic coast; (2) current approaches for avoiding or limiting impacts to NARWs during construction and operation of offshore wind energy facilities; (3) a listing of mitigation measures recommended by others but not yet adopted; (4) current monitoring requirements and their implementation; and (5) an accounting of emerging technologies that may allow monitoring at project and regional scales.

In order to develop the synthesis report, BOEM seeks OMB approval for a set of standardized questions for NARW stakeholders regarding their activities to understand impacts from offshore wind energy projects on the whales and to ensure effective mitigation monitoring. The questions are designed to learn of recent and ongoing research and management strategies employed by relevant State and Federal governments, academic

institutions, and NGOs, including outcomes of prior workshops and planning bodies. BOEM has partnered with the Blue World Research Institute to implement the questionnaire. The questionnaire comprises approximately 20 questions that ask respondents about: (1) their organization; (2) information on current monitoring and research activities, such as objective, location, scope, methods, timelines, outcomes and challenges, and on contributions to NARW conservation or impact reduction; (3) related ancillary information, such as type of study, next steps, and suggestions for priority topics for future funding ; and (4) additional comments and discussion. The questionnaire avoids sensitive topics or matters that are commonly considered private. The results will be summarized as part of the NARW synthesis report.

Additionally, BOEM plans to conduct directed interviews of participants who indicate their willingness to provide additional feedback on future research priorities and management needs. This feedback will be compiled in a final report.

OMB Control Number: 1010–NEW.

Form Number: None.

Type of Review: New.

Respondents/Affected Public: State (and Federal) government researchers, academic institutions, and NGOs.

Total Estimated Number of Annual Responses: 253 responses (213 questionnaire respondents and 40 interviewees).

Total Estimated Number of Annual Burden Hours: 111 hours (40 annual burden hours for interviews and 71 annual burden hours for questionnaire).

Respondent's Obligation: Voluntary.

Frequency of Collection: On occasion.

Total Estimated Annual Non-hour Burden Cost: There is no non-hour cost burden associated with this collection.

A **Federal Register** notice with a 60-day public comment period on this proposed ICR was published on February 24, 2023 (88 FR 11953). BOEM received one public comment that opposed offshore wind energy projects and the use of sonar due to potential impacts on whales and dolphins. BOEM is committed to assessing and, to the extent possible, reducing the effects of potential environmental impacts on marine life and their habitats. The purpose of this strategy is to protect and promote the recovery of the NARW while responsibly developing offshore wind energy. No change in the burden was required as a result of the comment received.

BOEM is again soliciting comments on the proposed ICR. BOEM is especially interested in public comments addressing the following issues: (1) is the collection necessary to the proper functions of BOEM; (2) what can BOEM do to ensure that this information is processed and used in a timely manner; (3) is the burden estimate accurate; (4) how might BOEM enhance the quality, utility, and clarity of the information to be collected; and (5) how might BOEM minimize the burden of this collection on the respondents, including minimizing the burden through the use of information technology?

Comments submitted in response to this notice are a matter of public record and will be available for public review on *www.reginfo.gov.* You should be aware that your entire comment—including your address, phone number, email address, or other personally identifiable information included in your comment—may be made publicly available. Even if BOEM withholds your information in the context of this ICR, your comment is subject to the Freedom of Information Act (FOIA). If your comment is requested under FOIA, your information will only be withheld if BOEM determines that a FOIA exemption to disclosure applies. BOEM will make such a determination in accordance with the Department of the Interior's (DOI's) FOIA regulations and applicable law.

In order for BOEM to consider withholding from disclosure your personally identifiable information, you must identify, in a cover letter, any information contained in your comments that, if released, would constitute a clearly unwarranted invasion of your personal privacy. You must also briefly describe any possible harmful consequence of the disclosure of information, such as embarrassment, injury, or other harm.

BOEM protects proprietary information in accordance with FOIA (5 U.S.C. 552) and DOI's implementing regulations (43 CFR part 2).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Karen Thundiyil,

Chief, Office of Regulations, Bureau of Ocean Energy Management.

[FR Doc. 2023–17126 Filed 8–9–23; 8:45 am]

BILLING CODE 4340–98–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1243]

Importer of Controlled Substances Application: Caligor Coghlan Pharma Services

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Caligor Coghlan Pharma Services has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to Supplementary Information listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before September 11, 2023. Such persons may also file a written request for a hearing on the application on or before September 11, 2023.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment. All requests for a hearing must be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA **Federal Register** Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on July 11, 2023, Caligor Coghlan Pharma Services, 1500 Business Park Drive, Unit B, Bastrop, Texas 78602, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Lysergic acid diethylamide	7315	I
5-Methoxy-N,N-dimethyltryptamine.	7431	I
Tapentadol	9780	II

The company plans to import the listed controlled substances as finished dosage units for use in clinical trials. No other activities for these drug codes are authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

Claude Redd,

Acting Deputy Assistant Administrator.

[FR Doc. 2023–17138 Filed 8–9–23; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1242]

Bulk Manufacturer of Controlled Substances Application: Continuus Pharmaceuticals

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Continuus Pharmaceuticals has applied to be registered as a bulk manufacturer of basic class(es) of controlled substance(s). Refer to Supplementary Information listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before October 10, 2023. Such persons may also file a written request for a hearing on the application on or before October 10, 2023.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.33(a), this is notice that on July 6, 2023, Continuus Pharmaceuticals, 256 West Cummings Park, Woburn, Massachusetts 01801, applied to be registered as a bulk manufacturer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Fentanyl	9801	II

The company plans to bulk manufacture the above listed controlled substance for research and development purposes only. No other activities for these drug codes are authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

Claude Redd,

Acting Deputy Assistant Administrator.

[FR Doc. 2023–17136 Filed 8–9–23; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1244]

Importer of Controlled Substances Application: Chattem Chemicals

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Chattem Chemicals has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before September 11, 2023. Such persons may also file a written request for a hearing on the application on or before September 11, 2023.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment. All requests for a hearing must be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on July 14, 2023, Chattem Chemicals, 3801 Saint Elmo Avenue, Chattanooga, Tennessee 37409–1237, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Methamphetamine	1105	II
4-Anilino-N-phenethyl-4-piperidine (ANPP).	8333	II
Phenylacetone	8501	II
Cocaine	9041	II
Poppy Straw Concentrate.	9670	II
Tapentadol	9780	II

The company plans to import the listed controlled substances to manufacture bulk controlled substances for sale to its customers. The company plans to import an intermediate of Tapentadol (9780), to bulk manufacture Tapentadol for distribution to its customers. No other activities for these drug codes are authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug

Administration-approved or non-approved finished dosage forms for commercial sale.

Claude Redd,

Acting Deputy Assistant Administrator.

[FR Doc. 2023–17139 Filed 8–9–23; 8:45 am]

BILLING CODE P

NEIGHBORHOOD REINVESTMENT CORPORATION

Sunshine Act Meetings

TIME AND DATE: 2:00 p.m., Thursday, August 17, 2023.

PLACE: 1255 Union Street NE, Fifth Floor, Washington, DC 20002.

STATUS: Parts of this meeting will be open to the public. The rest of the meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Regular Board of Directors meeting.

The General Counsel of the Corporation has certified that in his opinion, one or more of the exemptions set forth in the Government in the Sunshine Act, 5 U.S.C. 552b(c)(2) and (4) permit closure of the following portion(s) of this meeting:

- **Executive Session**

Agenda

I. CALL TO ORDER
II. Sunshine Act Approval of Executive (Closed) Session
III. Executive Session: Report from CEO
IV. Executive Session: Report from CFO
V. Executive Session: GAO Workplan
VI. Executive Session: General Counsel Report
VII. Executive Session: CIO Report
VIII. Executive Session: NeighborWorks Compass Update
IX. Action Item Resolution of Recognition of Service for Chairman Gruenberg
X. Action Item Approval of Meeting Minutes
XI. Action Item FY2024 Preliminary Spend Plan
XII. Discussion Item August 3rd Special Audit Committee Report
XIII. Discussion Item Annual Ethics Review Follow Up
XIV. Discussion Item Professional Learning and Event Management Solution
XV. Discussion Item Atlanta Office Lease
XVI. Management Program Background and Updates
XVII. Adjournment

PORTIONS OPEN TO THE PUBLIC: Everything except the Executive Session.

PORTIONS CLOSED TO THE PUBLIC: Executive Session.

CONTACT PERSON FOR MORE INFORMATION: Lakeyia Thompson, Special Assistant, (202) 524–9940; *Lthompson@nw.org.*

Lakeyia Thompson,

Special Assistant.

[FR Doc. 2023–17215 Filed 8–8–23; 11:15 am]

BILLING CODE 7570–02–P

NUCLEAR REGULATORY COMMISSION

[NRC–2023–0112]

Discontinuation of the State of New York's Sealed Source and Device Evaluation and Approval Authority

AGENCY: Nuclear Regulatory Commission.

ACTION: Discontinuation of the State of New York's regulatory authority and reassumption of U.S. Nuclear Regulatory Commission's authority.

SUMMARY: Notice is hereby given that effective August 9, 2023, the U.S. Nuclear Regulatory Commission (NRC) has assumed regulatory authority to evaluate and approve sealed source and device (SS&D) applications in the State of New York and approved the Governor of the State of New York's request to relinquish this authority.

DATES: The NRC has assumed regulatory authority for evaluating and approving SS&D applications on August 9, 2023.

ADDRESSES: Please refer to Docket ID NRC–2023–0112 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–2023–0112. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *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 ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Robert Johnson, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–7314, email: *Robert.Johnson@nrc.gov.*

SUPPLEMENTARY INFORMATION: Section 274b. of the Atomic Energy Act (AEA) of 1954, as amended, provides the authority for NRC to enter into agreements with States that allow the States to assume, and the NRC to discontinue, regulatory authority over specified AEA radioactive materials and activities. On October 15, 1962, New York entered a section 274b. Agreement with the Atomic Energy Commission (the predecessor regulatory agency to the NRC) to regulate source material, byproduct material, and special nuclear material in quantities not sufficient to form a critical mass. This Agreement also provides the State regulatory authority to evaluate and approve SS&D applications.

On May 9, 2023, the NRC received a letter from New York Governor Kathy Hochul (ADAMS Accession No. ML23131A254) requesting discontinuation of the State's regulatory authority to evaluate and approve SS&D applications and for reassumption of this authority by the NRC. The Commission approved the request and has notified the State of New York that effective August 9, 2023, the NRC has reassumed authority to evaluate and approve SS&D applications within the State (ADAMS Accession No. ML23138A033). The State of New York will retain authority to regulate the manufacture and use of SS&Ds within the State in accordance with its section 274b. Agreement with the NRC.

Dated: August 3, 2023.

For the Nuclear Regulatory Commission.

Brooke P. Clark,

Secretary of the Commission.

[FR Doc. 2023–16932 Filed 8–9–23; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2023–210 and CP2023–214; MC2023–211 and CP2023–215]

New Postal Products

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:* August 14, 2023.

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

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).:* MC2023–210 and CP2023–214; *Filing Title:* USPS Request to Add Priority Mail Express International, Priority Mail International & First-Class Package International Service Contract 24 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* August 4, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Katalin K. Clendenin; *Comments Due:* August 14, 2023.

2. *Docket No(s).:* MC2023–211 and CP2023–215; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 15 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* August 4, 2023; *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:* August 14, 2023.

This Notice will be published in the **Federal Register**.

Mallory Richards,

Attorney-Advisor.

[FR Doc. 2023–17147 Filed 8–9–23; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice: August 10, 2023.*

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on August 1, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 2 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–203, CP2023–207.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–17111 Filed 8–9–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* August 10, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on August 1, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 10 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–202, CP2023–206.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–17116 Filed 8–9–23; 8:45 am]

BILLING CODE 7710–12–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 SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* August 10, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on August 2, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 14 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–208, CP2023–212.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–17113 Filed 8–9–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* August 10, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on August 1, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 11 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–204, CP2023–208.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–17110 Filed 8–9–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* August 10, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on August 2, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 3 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–206, CP2023–210.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–17114 Filed 8–9–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* August 10, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on August 1, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 12 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–205, CP2023–209.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–17112 Filed 8–9–23; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98061; File No. SR–CboeEDGX–2023–048]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Enhance Its Drill-Through Protection Processes for Simple Orders and Make Other Clarifying Changes

August 4, 2023.

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 July 24, 2023, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') 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 Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') proposes to enhance its drill-through protection processes for simple orders and make other clarifying changes. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. *Purpose*

The purpose of this rule filing is to amend Rule 21.17, Additional Price Protection Mechanisms and Risk Controls, to enhance the drill-through protection process for simple orders and make other clarifying changes.

Drill-through price protection is currently described in Exchange Rule 21.17(a)(4). Under Rule 21.17(a)(4)(A), if a buy (sell) order enters the EDGX Options Book [3] at the conclusion of the opening auction process or would execute or post to the EDGX Options Book at the time of order entry, the System [4] executes the order up to a buffer amount (the Exchange determines the buffer amount on a class and premium basis) above (below) the offer (bid) limit of the Opening Collar or the National Best Offer (''NBO'') (National Best Bid (''NBB'')) that existed at the time of order entry, respectively (the ''drill-through price'').[5]

Current Rule 21.17(a)(4)(B) (as amended, proposed Rule 21.17(a)(4)(C)) [6] establishes an iterative drill-through process, whereby the Exchange permits orders to rest in the Book for multiple time periods and at more aggressive displayed prices during each time period.[7] Specifically, the System enters the order in the Book with a displayed price equal to the drill-through price (unless the terms of the order instruct otherwise).[8] The order (or unexecuted portion) will rest in the Book at the drill-through price for the duration of consecutive time periods (the Exchange determines on a class-by-class basis the length of the time period in milliseconds, which may not exceed three seconds).[9] Following the end of each period, the System adds (if a buy order) or subtracts (if a sell order) one buffer amount (the Exchange determines the buffer amount on a class-by-class basis) to the drill-through price displayed during the immediately preceding period (each new price becomes the ''drill-through price'').[10] The order (or unexecuted portion) rests in the Book at that new drill-through price for the duration of the subsequent period. The System applies a timestamp to the order (or unexecuted portion) based on the time it enters or is re-priced in the Book for priority reasons. The order continues through this iterative process until the earliest of the following to occur: (a) the order fully executes; (b) the User [11] cancels the order; and (c) the buy (sell) order's limit price equals or is less (greater) than the drill-through price at any time during application of the drill-through mechanism, in which case the order rests in the Book at its limit price, subject to a User's instructions.

Currently, the above-described iterative drill-through process does not apply to market orders. Specifically, if a buy (sell) market order would execute at the time of order entry, the System executes the order up to the Exchange-determined buffer amount above (below) the NBO (NBB) at the time of order entry and then rejects any remaining amount. For example, suppose a market order to buy two contracts enters the System; assume that the drill-through price buffer for a certain option series is $0.90 and that the following quotes are in the Book: Quote 1 (NBBO): 1 @5.00 × 1 @7.00; Quote 2: 2 @4.00 × 1 @8.00. One contract in the market order will execute against the 7.00 offer quote. The remaining one contract of the market order is cancelled, because the next best offer of 8.00 is 1.00 above the NBO, which is more than the 0.90 buffer amount.

The Exchange proposes for market orders with a Time-in-Force of Day to go through the iterative drill-through process described above.[12] The Exchange also proposes to amend proposed Rule 21.17(a)(4)(C) [13] to clarify that limit orders with a Time-in-Force of Day, GTC, or GTD also go through the iterative drill-through process. In the above example, rather than cancel the remaining one contract, the System would rest the one contract in the Book at the drill-through price of 7.90 (*i.e.* the NBO plus the buffer amount) for the Exchange-determined time period. At the end of that time period, assuming the market has not changed, the remaining one contract would execute against the 8.00 offer, which is within a buffer amount of the subsequent drill-through price of 8.80. As a result, like super-aggressive limit orders (except for those with Time-in-Force of Immediate-or-Cancel (''IOC'') or Fill-or-Kill (''FOK'')) do today, market orders (except for those with Time-in-Force of IOC) will have additional execution opportunities pursuant to the drill-through process. As the proposed rule change only applies to market orders with a Time-in-Force of Day, and the drill through protections described under current Rule 21.17(a)(4)(C) continue to apply only to those limit orders with a Time-in-Force of Day, GTC, or GTD, the Exchange also proposes to adopt proposed Rule 21.17(a)(4)(B) [14] to specify that the System will cancel or reject any market order with Time-in-Force of IOC (or unexecuted portion) or limit order with a Time-in-Force of IOC or FOK (or unexecuted portion) not executed pursuant to 21.17(a)(4)(A).[15] The Exchange believes it is appropriate to not have a market order with a Time-in-Force of IOC to go through the iteration process, because the iteration process would be inconsistent with the IOC instruction (and thus the user's intent). Further, the Exchange proposes to amend Rule 21.17(a)(4)(A) to more

[3] ''EDGX Book'' means the System's electronic file of orders. *See* Rule 1.5 (definition of, ''EDGX Book'').

[4] ''System'' means the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when applicable, routing away. *See* Rule 1.5 (definition of, ''System'').

[5] *See* Rule 21.17(a)(4)(A).

[6] As part of the rule changes described herein, the Exchange proposes to renumber current subparagraph (a)(4)(B) to be proposed subparagraph (a)(4)(C), and to renumber current subparagraph (a)(4)(C) to be proposed subparagraph (a)(4)(D).

[7] The Exchange will announce to Members the buffer amount and the length of the time periods. The Exchange notes that each time period will be the same length (as designated by the Exchange), and the buffer amount applied for each time period will be the same.

[8] Currently, the drill through protections described under current Rule 21.17(a)(4)(B) apply only to a limit order with a Time-in-Force of Day, Good-til-Cancel (''GTC''), or Good-til-Day (''GTD''). This rule proposal also seeks to clarify which orders are subject to the drill-through protections, as describe herein.

[9] *See* current Rule 21.17(a)(4)(B)(i) (as amended, Rule 21.17(a)(4)(C)(i)). The proposed rule change defines this time period as an ''iteration.''

[10] *See* current Rule 21.17(a)(4)(B)(ii) (as amended, Rule 21.17(a)(4)(C)(ii)).

[11] The term ''User'' shall mean any Member or Sponsored Participant who is authorized to obtain access to the System pursuant to Rule 11.3. *See* Rule 1.5.

[12] *See* proposed Rule 21.17(a)(4)(C).

[13] *See* supra note 8.

[14] *See* supra note 8.

[15] There is no change to the handling of market orders with a Time-in-Force of GTC or GTD as a result of this rule change; such orders will continue to be rejected by the Exchange.

generally describe when applicable order types may become subject to drill-through protection. Specifically, the Exchange proposes to specify that the protections described in Rule 21.17(a)(4)(A) become applicable if a buy (sell) order, to which Rule 21.17(a)(4)(A) would apply, (i) enters the Book at the conclusion of opening auction process, or (ii) would execute or post to the Book when it enters the Book.[16]

The Exchange also proposes to amend Rule 21.17(a)(5)(A)(ii) to exclude from the current protections for market orders in no-bid series certain orders that would be otherwise subject to the drill-through protection under the proposed rule changes. Currently, under Rule 21.17(a)(5)(A)(ii), if the System receives a sell market order in a series after it is open for trading with an NBB of zero, and the NBO in the series is greater than $0.50, the System cancels or rejects the market order. The Exchange proposes amending this protection in the event a drill-through process is in progress. Specifically, the Exchange proposes to amend Rule 21.17(a)(5)(A)(ii) to note that in the event the System receives a sell market order in a series after it is open for trading with an NBB of zero and the NBO in the series is greater than $0.50, if the drill-through process is in progress for sell orders and the sell market order would be subject to drill-through protection, then the order would join the on-going drill-through process in the then-current iteration and at the then-current drill-through price, regardless of NBBO. The Exchange believes it is not optimal for these orders to be immediately booked at the minimum tick increment, as under the proposed rule change, such orders would instead, be subject to the drill-through protection mechanism described under Rule 21.17(a)(4), which may allow opportunity for execution at a more beneficial price level than the minimum tick increment.

Further, the Exchange proposes to amend Rule 21.17(a)(1) to specifically exclude orders that would be subject to drill-through protection from the market order NBBO width protections described therein. Currently, under Rule 21.17(a)(1), if a User submits a market order to the System when the NBBO width is greater than x% of the midpoint of the NBBO, subject to a minimum and maximum dollar amount (as determined by the Exchange on a class-by-class basis), the System cancels or rejects the market order. The Exchange proposes amending Rule 21.17(a)(1) to exclude Stop Orders[17] and Market-on-Close orders from this protection. Such orders may intentionally be further away from the NBBO at the time the order is entered, and the protection may cause the orders to be inadvertently rejected pursuant to this check. The Exchange believes it is not optimal for these orders to be subject to the market order NBBO width protection, as the check may inadvertently cause rejections for orders that may otherwise not have an opportunity to execute if they are immediately cancelled due to market width. Under the proposed rule change, such orders would instead, upon entry into the Book (when elected in accordance with their definitions), be subject to the drill-through protection mechanism described under Rule 21.17(a)(4). The Exchange also proposes a clarification to proposed Rule 21.17(a)(4)(D).[18] Currently, under Rule 21.17(a)(4)(D), if multiple Stop (Stop-Loss) or Stop-Limit[19] orders to buy (sell) have the same stop price and are thus triggered by the same trade price or NBBO, and would execute or post to the Book, the System uses the contra-side NBBO that existed at the time the first order in sequence was entered into the Book as the drill-through price for all orders. The Exchange proposes to remove the conditional language noting that such Stop (Stop-Loss) or Stop-Limit orders to buy (sell) must have the same stop price, as it is possible that orders with different stop prices may be triggered by the same trade price or NBBO. Further, the Exchange proposes to add language stating that, where multiple orders are simultaneously re-priced, the orders will be prioritized under proposed Rule 21.17(a)(4)(C)(v)[20] and will be sequenced based on the original time each order was entered into the Book.

For example, assume that the drill-through price buffer for a certain option series is $0.90, and that the following quotes are in the Book: Quote 1 (NBBO): 1 @5.00 × 1 @7.00; Quote 2: 2 @4.00 × 1 @8.00. Additionally, the following Stop orders are being held in the System when Quote 2 is updated to 2 @4.00 × 1 @6.50 (the System received these stop orders in the below sequence):

Order 1: Sell 1 @Market, Stop Price = $6.50

Order 2: Sell 1 @Market, Stop Price = $6.55

Order 3: Sell 1 @$3.95, Stop Price = $6.60

Each of orders 1, 2 and 3 have a stop price less than the NBO, and will therefore be triggered by the 6.50 quote and enter the Book for execution or posting. A drill-through price for all three orders is set at the contra-side NBB of 5.00. Per proposed Rule 21.17(a)(4)(C), the orders will go through the drill-through process as follows:

1. Order 1 will execute against Quote 1 @$5.00.

2. Orders 2 and 3 are posted to sell at $4.10 for the Exchange-determined time period.

3. Drill-through process continues for orders 2 and 3 until they are canceled or executed.

As amended, under Rule 21.17(a)(4)(D), all Stop (Stop-Loss) and Stop-Limit orders elected as a result of the same election trigger (NBBO update or last sale price) will continue to use the same reference price for drill-through (even though they may have different stop prices).

The Exchange proposes to amend Rule 21.17(a)(4)(C)(ii),[21] to specify that if at any time during the drill-through process, the NBO (NBB) changes to be below (above) the current drill-through price, such NBO (NBB) will become the new drill-through price and a new drill-through will immediately begin. As a result, any improvements to the market that occur while the drill-through is in process will be incorporated, thereby providing Users with further opportunity to be priced within the market while still being protected. Under the proposed rule change, any limit order with a price that is less aggressive than the new drill-through price would be entered in the Book at its limit price.

The Exchange also proposes to add Rule 21.17(a)(4)(C)(iv)[22] to provide that if the System receives a market or limit

[16] This includes, for example, when a Stop (Stop-Loss) or Stop-Limit order is elected.

[17] A ''Stop Order'', or Stop (Stop-Loss) Order, is an order that becomes a market order when the stop price is elected. A Stop Order to buy is elected when the consolidated last sale in the security occurs at, or above, the specified stop price. A Stop Order to sell becomes a limit order when the consolidated last sale in the security occurs at, or below, the specified stop price. *See* Rule 21.1(d)(11).

[18] *See* supra note 8.

[19] A ''Stop Limit Order'' is an order that becomes a limit order when the stop price is elected. A Stop Order to buy is elected when the consolidated last sale in the option occurs at or above, or the NBB is equal to or higher than, the specified stop price. A Stop Order to sell is elected when the consolidated last sale in the option occurs at or below, or the NBO is equal to or lower than, the specified stop price. *See* Rule 21.1(d)(12) (definition of ''Stop-Limit'' order).

[20] *See* supra note 8.

[21] *See* supra note 8.

[22] As a result of the additional provisions described herein, the proposed rule change renumbers current subparagraph (iv) to be proposed subparagraph (vi) and current subparagraph (v) to be proposed subparagraph (viii). *See also* supra note 8.

order that would be subject to the drill-through process while a drill-through is in progress in the same series, the order joins the ongoing drill-through process in the then-current iteration and at the then-current drill-through price. Under the proposed rule, orders that come in while a drill-through is in process receive the benefit of joining the drill-through at the NBBO at the time of entry, as opposed to immediately executing or being displayed at a more aggressive price than the drill-through price. By way of illustration, consider the following example:

Assume that the drill-through price buffer for a certain option series is $0.90, and that the following quotes are in the Book: Quote 1 (NBBO): 1 @5.00 × 1 @7.00; Quote 2: 2 @4.00 × 1 @8.00. The System receives the following orders in the below sequence:

Order 1: Sell 1 @Market, Stop Price = $6.50
Order 2: Sell 1 @Market, Stop Price = $6.55
Order 3: Sell 1 @$3.95, Stop Price $6.60
Order 4: Sell 2 @Market, Stop Price = $4.50

During this time, Quote 2 is updated to: 2 @4.00 × 1 @6.50. Orders 1, 2, and 3 are elected, and the drill-through reference price for all three orders is set to contra-side NBB of 5.00.

1. Order 1 executes Quote 1 @$5.00.

2. Orders 2 and 3 are posted to sell @ $4.10 (drill-through price) for the Exchange-determined time period.

3. Order 4 is elected due to updated best offer of $4.10, and joins Orders 2 and 3 at the iterative drill-through price of $4.10. The offer is updated to 4 @ $4.10.

4. Order 5 (Sell 10 @Market (Day)) and Order 6 (Sell 1 @$4.05 Limit (Day)) enter the Book. Per proposed Rule 21.17(a)(4)(C)(iv), Orders 5 and 6 join the drill-through iteration at the drill-through reference price of $4.10, and the best offer is updated to 15 @$4.10.

5. The drill-through process continues for orders 2, 3, 4, 5, and 6 until the contracts are canceled or executed.

Because the proposed rule change may result in multiple orders going through the drill-through process at the same price and at the same time, the proposed rule change also describes how these orders will be prioritized and allocated when executing against resting interest or incoming interest. Specifically, proposed Rule 21.17(a)(4)(C)(v)[23] states the System prioritizes orders that are part of the same drill-through iteration (A) based on the time the System enters or reprices them in the Book (*i.e.,* in time priority) when, after an iteration, the new drill-through price makes the order(s) marketable against resting orders and (B) in accordance with the applicable base allocation algorithm when executing against any incoming interest. The Exchange believes this is appropriate because incoming marketable orders would ultimately execute in time priority today. Additionally, having multiple orders execute in accordance with the applicable base allocation algorithm when executing against incoming interest is consistent with how resting orders execute against incoming interest.

Continuing from the above example, assume the drill-through process iterates to the next drill-through price, which would be $3.20. In doing so, Order 6 posts at its limit price of $4.05, and the rest of the orders are eligible to execute in time sequence against the resting $4.00 bid. Per proposed Rule 21.17(a)(4)(C)(v), the orders will go through the drill-through process as follows:

1. Order 2 (Sell 1 @Market) will execute against Quote 2 @$4.00

2. Order 3 (Sell 1 @$3.95) will execute against Quote 2 @$4.00

3. The Quote 2 is exhausted, and the next best bid is Quote 1 for 5 @$3.00

4. Remaining drill-through is Order 4 (Sell 2 @Market) and Order 5 (Sell 10 @ Market). Market is now 5 @$3.00 × 12 @$3.20, and the drill-through process continues until these contracts are executed or cancelled.

If, prior to the next drill-through iteration, Order 7 (buy 5 @$3.25) is entered and executes against Orders 4 and 5 at $3.20, the allocation will depend on the allocation algorithm for the relevant class, under the amended Rule.

1. If pro-rata, Order 7 trades 1 contract against Order 4 and 4 contracts against Order 5.

2. If price-time, Order 7 trades 2 contracts against Order 4 and 3 contracts against Order 5.

3. Remaining size on Order 4 (if applicable) and Order 5 will continue to drill-through as described in previous examples.

The Exchange also proposes to amend Rule 21.17(a)(4)(C)(vi).[24] Currently, the rule states that an order will continue through the drill-through process until the earliest of the following to occur: (a) the order fully executes; (b) the User cancels the order; and (c) the buy (sell) order's limit price equals or is less (greater) than the drill-through price at any time during application of the drill-through mechanism, in which case the orders rests in the Book at its limit price, subject to a User's instruction. The Exchange proposes to amend part (c) to remove reference to when the order's limit price equals the drill-through price, since under the drill-through process, if a buy (sell) order's limit price equals the drill-through price during the application of the drill-through mechanism it will remain part of the drill-through process, until the order's limit price is less (greater) than the drill-through price, at which point it will rest in the Book at its limit price. The Exchange also proposes to remove reference to a User's instruction, as there is no additional instruction that would allow a User to choose a different order handling option once the buy (sell) order limit price is less (greater) than the drill-through price.

Finally, the Exchange proposes to add Rule 21.17(a)(4)(C)(vii) to specify that the drill-through protection mechanism applies during all trading sessions and to provide clarity as to what happens to orders that are undergoing the drill-through process at the end of a trading session. Under the proposed rule change, if an order(s) (or unexecuted portion(s)) is undergoing the drill-through process at the end of a Global Trading Hours (''GTH'')[25] session, then the drill-through process concludes and the order(s) (or unexecuted portions(s)) enters the Regular Trading Hours (''RTH'')[26] Queuing Book[27] as a market order or limit order (at its limits price) on that same trading day, subject to a User's instructions. If an order(s) (or unexecuted portion(s)) is undergoing the drill-through process at the end of its last eligible trading session for that trading day (*i.e.,* RTH), the drill-through process concludes. Any order (or unexecuted portion) with a Time-in-Force of (i) Day is canceled, and (ii) GTC or GTD enters the Queuing Book for the next eligible trading session (*i.e.,* GTH or RTH) as a market order or limit order (at its limit price).

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of

[23] *Id.*

[24] *Id.*

[25] The Exchange does not currently operate a GTH session. In the event the Exchange were to operate a GTH session, it would begin at 8:30 a.m. and go until 9:15 a.m. ET on Monday through Friday.

[26] *See* Rule 1.5(y) for the definition of Regular Trading Hours.

[27] *See* Rule 21.7 for the definition of Queuing Book.

Section 6(b) of the Act.[28] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [29] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [30] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes the proposed rule change to enhance drill-through protections for simple orders and to make certain market orders eligible for drill-through protection will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors, because it will provide these orders with additional and consistent execution opportunities and protections. The primary purpose of the drill-through price protection is to prevent orders from executing at prices ''too far away'' from the market when they enter the Book for potential execution. The Exchange believes the proposed rule change is consistent with this purpose, because Users who submit market orders with a Time-in-Force of Day will receive the same level of drill-through price protection against execution at potentially erroneous prices that is currently afforded to supermarketable limit orders while receiving the same additional execution opportunities. Supermarketable limit orders currently go through the drill-through process, and market orders with a Time-in-Force of Day are functionally similar to supermarketable limit orders. Therefore, the Exchange believes it is appropriate to provide both types of orders with the same price protection.

Further, the proposed rule change to provide that any new market and limit orders that would be subject to drill-through protection will join any in-progress drill-through iterations and display at the then-current drill-through price (and the corresponding changes regarding allocation and prioritization) allows new orders to receive the same level of price protection as other orders undergoing the drill-through process. The proposed rule change will allow all orders additional execution opportunities while continuing to protect them against execution at potentially erroneous prices. Similarly, the Exchange believes the proposed change to consider changes to the NBO (NBB) during drill-through and to update the drill-through price to such NBO (NBB) should it be lower (higher) than the drill-through price will further provide opportunity for execution at reasonable prices by capturing any market moves that may result in more aggressive prices.

The Exchange believes the proposal will enhance risk protections, the individual firm benefits of which flow downstream to counterparties both at the Exchange and at other options exchanges, which increases systemic protections as well. The Exchange believes enhancing risk protections will allow Users to enter orders and quotes with further reduced fear of inadvertent exposure to excessive risk, which will benefit investors through increased exposure to liquidity for the execution of their orders.

Additionally, the Exchange believes changes to specifically exclude from market order NBBO width and market order in no-bid series protections certain orders that would be subject to drill-through protection will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors. Specifically, the Exchange believes the changes to exclude certain orders that would be subject to drill-through protection from market order NBBO width protections may reduce inadvertent rejection of such orders which may be purposely priced far away from the NBBO at the time of entry and may otherwise miss an opportunity for execution if immediately cancelled. The Exchange also believes the changes to exclude certain orders that would be subject to drill-through protection from market order in no-bid series protections may allow opportunity for execution at a more beneficial price level than if they were immediately booked at the minimum tick increment. This proposed rule change may increase execution opportunities for Users that submit such Stop (Stop-Loss) and Market-on-Close orders (in the case of market order NBBO width protections) and sell market orders with an NBB of zero when the NBO in the series is greater than $0.50 (in the case of market orders in no-bid series protections).

The Exchange believes the proposed change to Rule 21.17(a)(4)(D) will protect investors because it clarifies that if multiple Stop (Stop-Loss) and Stop-Limit orders are triggered by the same trade price or NBBO (even if the orders have different stop prices), and would execute or post to the Book, the System uses the contra-side NBBO that existed at the time the first order in sequence was entered into the Book as the drill-through price for all orders. The Exchange believes that the proposed rule change will bring greater transparency and clarity to the rulebook, thus benefitting investors.

Finally, the Exchange believes the proposed changes to clarify when an order ceases to remain a part of the drill-through process and to specify what happens to orders undergoing drill-through at the end of a trading session will protect investors by adding transparency to the rules regarding the drill-through functionality and provide greater certainty as to the application of the drill-through process.

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 that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the enhanced drill-through protection will apply to all marketable orders in the same manner. Additionally, it will provide the same price protection and execution opportunities to relevant market orders that are currently provided to supermarketable limit orders, which function in a similar manner.

The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed enhancement to the drill-through protection is consistent with the current protection and provides relevant market orders with improved protection against execution at potentially erroneous prices through drill-through price protection in accordance with User instructions. Additionally, the proposed rule change relates specifically to a price protection offered on the Exchange and how the System handles orders as part of this price protection mechanism.

[28] 15 U.S.C. 78f(b).

[29] 15 U.S.C. 78f(b)(5).

[30] *Id.*

The Exchange believes the proposed rule change would ultimately provide all market participants with additional execution opportunities when appropriate while providing protection from erroneous execution. The Exchange believes the proposal will enhance risk protections, the individual firm benefits of which flow downstream to counterparties both at the Exchange and at other options exchanges, which increases systemic protections as well. The Exchange believes enhancing risk protections will allow Users to enter orders and quotes with further reduced fear of inadvertent exposure to excessive risk, which will benefit investors through increased exposure to liquidity for the execution of their orders. Without adequate risk management tools, Members could reduce the amount of order flow and liquidity they provide. Such actions may undermine the quality of the markets available to customers and other market participants. Accordingly, the proposed rule change is designed to encourage Members to submit additional order flow and liquidity to the Exchange. Accordingly, the proposed rule change is designed to encourage Members to submit additional order flow and liquidity to the Exchange. The proposed flexibility may similarly provide additional execution opportunities, which further benefits liquidity in potentially volatile markets. In addition, providing Members with more tools for managing risk will facilitate transactions in securities because, as noted above, Members will have more confidence protections are in place that reduce the risks from potential system errors and market events.

Finally, the proposed clarifying changes are not intended to have any impact on competition, but rather codify current functionality to add transparency to the Rules.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[31] and subparagraph (f)(6) of Rule 19b–4 thereunder.[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 shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeEDGX–2023–048 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–CboeEDGX–2023–048. 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 (*https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeEDGX–2023–048 and should be submitted on or before August 31, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[33]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–17108 Filed 8–9–23; 8:45 am]

BILLING CODE 8011–01–P

[31] 15 U.S.C. 78s(b)(3)(A)(iii).

[32] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[33] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98058; File No. SR–MIAX–2023–22]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To Amend Exchange Rule 404, Series of Option Contracts Open for Trading, To Implement a Low Priced Stock Strike Price Interval Program

August 4, 2023.

On June 5, 2023, Miami International Securities Exchange LLC filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Exchange Rule 404, Series of Option Contracts Open for Trading. The proposed rule change was published for comment in the **Federal Register** on June 22, 2023.[3] The Commission has received one comment on the proposed rule change.[4]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 97733 (June 15, 2023), 88 FR 40887.

[4] The comment is available at: *https://www.sec.gov/comments/sr-miax-2023-22/srmiax202322.htm.*

Section 19(b)(2) of the Act[5] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is August 6, 2023. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[6] designates September 20, 2023 as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–MIAX–2023–22).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–17105 Filed 8–9–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98057; File No. SR–ISE–2023–14]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Reduce ISE's Options Regulatory Fee

August 4, 2023.

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 July 25, 2023, Nasdaq ISE, LLC (''ISE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend ISE's Pricing Schedule at Options 7, Section 9 to reduce the ISE Options Regulatory Fee or ''ORF''.

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments become operative on August 1, 2023.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/ise/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

ISE proposes to lower its ORF from $0.0014 to $0.0013 per contract side on August 1, 2023. Previously, ISE lowered or waived its ORF in 2017, 2021 and 2022.[3] After a review of its regulatory revenues and regulatory costs, the Exchange proposes to reduce the ORF to ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, does not exceed the Exchange's total regulatory costs.

Volumes in the options industry went over 900,000,000 in 2023. ISE has taken measures this year as well as in prior years to lower and waive its ORF to ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. Despite those prior measures, ISE will need to reduce its ORF again to account for trading volumes in the first half of 2023 that were higher than the Exchange forecast for ORF assessment purposes, which resulted in the collection of more ORF revenues than anticipated in the first half of 2023. At this time, ISE believes that the options volume it experienced in the first half of 2023 is likely to persist. The anticipated options volume would continue to impact ISE's ORF collection which, in turn, has caused ISE to propose reducing the ORF to ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, would not exceed the Exchange's total regulatory costs.

Collection of ORF

ISE will continue to assess its ORF for each customer option transaction that is either: (1) executed by a Member on ISE; or (2) cleared by an ISE Member at The Options Clearing Corporation (''OCC'') in the customer range,[4] even if the transaction was executed by a non-Member of ISE, regardless of the exchange on which the transaction occurs.[5] If the OCC clearing member is an ISE Member, ORF is assessed and collected on all cleared customer contracts (after adjustment for CMTA [6]); and (2) if the OCC clearing member is not an ISE Member, ORF is collected only on the cleared customer contracts executed at ISE, taking into account any CMTA instructions which may result in collecting the ORF from a non-Member.[7]

[5] 15 U.S.C. 78s(b)(2).

[6] *Id.*

[7] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release Nos. 81345 (August 8, 2017), 82 FR 37939 (August 14, 2017) (SR–ISE–2017–71) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend ISE's Schedule of Fees With Respect to the Options Regulatory Fee); 92577 (August 5, 2021), 86 FR 44092 (August 11, 2021) (SR–ISE–2021–16) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend ISE's Options Regulatory Fee); and 94070 (January 26, 2022), 87 FR 5524 (February 1, 2022) (SR–ISE–2022–02)(Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Reduce ISE's Options Regulatory Fee).

[4] Participants must record the appropriate account origin code on all orders at the time of entry of the order. The Exchange represents that it has surveillances in place to verify that members mark orders with the correct account origin code.

[5] The Exchange uses reports from OCC when assessing and collecting the ORF.

[6] CMTA or Clearing Member Trade Assignment is a form of ''give-up'' whereby the position will be assigned to a specific clearing firm at OCC.

[7] By way of example, if Broker A, an ISE Member, routes a customer order to CBOE and the transaction executes on CBOE and clears in Broker A's OCC Clearing account, ORF will be collected by ISE from Broker A's clearing account at OCC via direct debit. While this transaction was executed on a market other than ISE, it was cleared by an ISE Member in the member's OCC clearing account in the customer range, therefore there is a regulatory nexus between ISE and the transaction. If Broker A was not an ISE Member, then no ORF should be assessed and collected because there is no nexus;

In the case where a Member both executes a transaction and clears the transaction, the ORF will be assessed to and collected from that Member. In the case where a Member executes a transaction and a different Member clears the transaction, the ORF will be assessed to and collected from the Member who clears the transaction and not the Member who executes the transaction. In the case where a non-Member executes a transaction at an away market and a Member clears the transaction, the ORF will be assessed to and collected from the Member who clears the transaction. In the case where a Member executes a transaction on ISE and a non-Member clears the transaction, the ORF will be assessed to the Member that executed the transaction on ISE and collected from the non-Member who cleared the transaction. In the case where a Member executes a transaction at an away market and a non-Member clears the transaction, the ORF will not be assessed to the Member who executed the transaction or collected from the non-Member who cleared the transaction because the Exchange does not have access to the data to make absolutely certain that ORF should apply. Further, the data does not allow the Exchange to identify the Member executing the trade at an away market.

ORF Revenue and Monitoring of ORF

The Exchange monitors the amount of revenue collected from the ORF to ensure that it, in combination with other regulatory fees and fines, does not exceed regulatory costs. In determining whether an expense is considered a regulatory cost, the Exchange reviews all costs and makes determinations if there is a nexus between the expense and a regulatory function. The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter offset ORF.

Revenue generated from ORF, when combined with all of the Exchange's other regulatory fees and fines, is designed to recover a material portion of the regulatory costs to the Exchange of the supervision and regulation of member customer options business including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. Regulatory costs include direct regulatory expenses and certain indirect expenses in support of the regulatory function. The direct expenses include in-house and third-party service provider costs to support the day-to-day regulatory work such as surveillances, investigations and examinations. The indirect expenses include support from such areas as Office of the General Counsel, technology, and internal audit. Indirect expenses were approximately 39% of the total regulatory costs for 2023. Thus, direct expenses were approximately 61% of total regulatory costs for 2023.[8]

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of its Members, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities.

Proposal

Based on the Exchange's most recent review, the Exchange is proposing to reduce the amount of ORF that will be collected by the Exchange from $0.0014 per contract side to $0.0013 per contract side. The Exchange issued an Options Trader Alert on June 30, 2023 indicating the proposed rate change for August 1, 2023.[9]

The proposed reduction is based on current levels of options volume. The below table displays monthly total volume for 2023.[10]

Month	Total volume	Customer sides
January 2023	919,299,330	802,712,235
February 2023	883,234,837	780,284,838
March 2023	1,052,984,722	915,674991
April 2023	760,808,909	67,3183,772
May 2023	944,534,205	826,490,407
June 2023[11]	909,616,267	801,688,960

Options volumes remained higher in 2023 with March 2023 exceeding 1,000,000,000 total contracts, higher than any month in 2022. With respect to customer options volume, it also remains high in 2023. There can be no assurance that the Exchange's regulatory costs for the remainder of 2023 will not differ materially from the Exchange's budgeted amount, nor can the Exchange predict with certainty whether options volume will remain at the current level going forward. The Exchange notes however, that when combined with regulatory fees and fines, the revenue that may be generated utilizing an ORF rate of $0.0014 per contract side may result in revenue which exceeds the Exchange's estimated regulatory costs for 2023 if options volumes remain at levels higher than forecasted. ISE lowered its ORF in 2022 to account for the options volume in 2022. The Exchange proposes to reduce its ORF to $0.0013 per contract side to ensure that revenue does not exceed the Exchange's estimated regulatory costs in 2023. Particularly, the Exchange believes that reducing the ORF when combined with all of the Exchange's other regulatory fees and fines, would allow the Exchange to continue covering a material portion of its regulatory costs, while lessening the potential for generating excess revenue that may otherwise occur using the rate of $0.0014 per contract side.[12]

The Exchange will continue to monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs. If the Exchange determines regulatory revenues may exceed or are projected to exceed regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission and

the transaction did not execute on ISE nor was it cleared by an ISE Member.

[8] These numbers are taken from the Exchange's 2023 Regulatory Budget.

[9] *See* Options Trader Alert 2023–15.

[10] Volume data in the table represents numbers of contracts; each contract has two sides.

[11] June numbers reflect volumes through June 29, 2023.

[12] The Exchange notes that its regulatory responsibilities with respect to Member compliance with options sales practice rules have largely been allocated to FINRA under a 17d–2 agreement. The ORF is not designed to cover the cost of that options sales practice regulation.

notifying [13] its Members via an Options Trader Alert.[14]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[15] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[16] which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its members, and other persons using its facilities. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [17] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes the proposed fee change is reasonable because customer transactions will be subject to a lower ORF fee as of August 1, 2023 and the amount of the lower fee will fund a reasonable portion of the Exchange's regulatory costs. Moreover, the proposed reduction is necessary for the Exchange to avoid collecting revenue, in combination with other regulatory fees and fines, that would be in excess of its anticipated regulatory costs.

The Exchange designed the ORF to generate revenues that would be less than the amount of the Exchange's regulatory costs to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs, which is consistent with the view of the Commission that regulatory fees be used for regulatory purposes and not to support the Exchange's business operations. As discussed above, however, after review of its regulatory costs and regulatory revenues, which includes revenues from ORF and other regulatory fees and fines, the Exchange determined that absent a reduction in ORF, it may collect revenue which would exceed its regulatory costs. Indeed, the Exchange notes that when taking into account the potential that recent options volume persists, it estimates the ORF may generate revenues that would cover more than the approximated Exchange's projected regulatory costs. As such, the Exchange believes it's reasonable and appropriate to reduce the ORF amount from $0.0014 to $0.0013 per contract side.

The Exchange also believes the proposed fee change is equitable and not unfairly discriminatory in that it is charged to all Members on all their transactions that clear in the customer range at OCC.[18] The Exchange believes the ORF ensures fairness by assessing higher fees to those Members that require more Exchange regulatory services based on the amount of customer options business they conduct. Regulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive. For example, there are costs associated with main office and branch office examinations (*e.g.,* staff expenses), as well as investigations into customer complaints and the terminations of registered persons. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (*e.g.,* Member proprietary transactions) of its regulatory program. Moreover, the Exchange notes that it has broad regulatory responsibilities with respect to activities of its Members, irrespective of where their transactions take place. Many of the Exchange's surveillance programs for customer trading activity may require the Exchange to look at activity across all markets, such as reviews related to position limit violations and manipulation. Indeed, the Exchange cannot effectively review for such conduct without looking at and evaluating activity regardless of where it transpires. In addition to its own surveillance programs, the Exchange also works with other SROs and exchanges on intermarket surveillance related issues. Through its participation in the Intermarket Surveillance Group (''ISG'') [19] the Exchange shares information and coordinates inquiries and investigations with other exchanges designed to address potential intermarket manipulation and trading abuses. Accordingly, there is a strong nexus between the ORF and the Exchange's regulatory activities with respect to customer trading activity of its Members.

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. This proposal does not create an unnecessary or inappropriate intra-market burden on competition because the ORF applies to all customer activity, thereby raising regulatory revenue to offset regulatory expenses. It also supplements the regulatory revenue derived from non-customer activity. The Exchange notes, however, the proposed change is not designed to address any competitive issues. Indeed, this proposal does not create an unnecessary or inappropriate inter-market burden on competition because it is a regulatory fee that supports regulation in furtherance of the purposes of the Act. The Exchange is obligated to ensure that the amount of regulatory revenue collected from the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [20] of the Act and subparagraph (f)(2) of Rule 19b–4 [21] 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

[13] The Exchange provides Members with such notice at least 30 calendar days prior to the operative date of the change. *See* Options Trader Alert 2023–15.

[14] The Exchange notes that in connection with this proposal, it provided the Commission confidential details regarding the Exchange's projected regulatory revenue, including projected revenue from ORF, along with projected regulatory expenses.

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(4).

[17] 15 U.S.C. 78f(b)(5).

[18] If the OCC clearing member is an ISE member, ORF is assessed and collected on all cleared customer contracts (after adjustment for CMTA); and (2) if the OCC clearing member is not an ISE member, ORF is collected only on the cleared customer contracts executed at ISE, taking into account any CMTA instructions which may result in collecting the ORF from a non-member.

[19] ISG is an industry organization formed in 1983 to coordinate intermarket surveillance among the SROs by cooperatively sharing regulatory information pursuant to a written agreement between the parties. The goal of the ISG's information sharing is to coordinate regulatory efforts to address potential intermarket trading abuses and manipulations.

[20] 15 U.S.C. 78s(b)(3)(A).

[21] 17 CFR 240.19b–4(f)(2).

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) [22] 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 (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–ISE–2023–14 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–ISE–2023–14. 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 (*https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–ISE–2023–14 and should be submitted on or before August 31, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–17104 Filed 8–9–23; 8:45 am]

BILLING CODE 8011–01–P

[22] 15 U.S.C. 78s(b)(2)(B).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98064; File No. SR–NSCC–2022–802)]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of No Objection to Advance Notice Related to Certain Enhancements to the Gap Risk Measure and the VaR Charge

August 4, 2023.

I. Introduction

On December 2, 2022, the National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') advance notice SR–NSCC–2022–802 (''Advance Notice'') pursuant to section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, entitled Payment, Clearing and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') [1] and Rule 19b–4(n)(1)(i) [2] under the Securities Exchange Act of 1934 (''Exchange Act'') [3] regarding certain enhancements to its gap risk charge and the volatility component of a member's required margin.[4] The Advance Notice was published for comment in the **Federal Register** on December 21, 2022.[5] On January 10, 2023, the Commission issued an extension of the review period for the Advance Notice.[6] On March 27, 2023, the Commission requested additional information from NSCC pursuant to section 806(e)(1)(D) of the Clearing Supervision Act, which tolled the Commission's period of review of the Advance Notice until 120 days [7] from the date the requested information was received by the Commission.[8] The Commission received NSCC's response to the Commission's request for additional information on April 28, 2023. The Commission has received comments regarding the changes proposed in the Advance Notice.[9] The Commission is hereby providing notice of no objection to the Advance Notice.

II. Background [10]

NSCC provides clearing, settlement, risk management, central counterparty services, and a guarantee of completion for virtually all broker-to-broker trades involving equity securities, corporate and municipal debt securities, and unit investment trust transactions in the U.S. markets. A key tool that NSCC uses to manage its credit exposure to its members is collecting an appropriate amount of margin (*i.e.,* collateral) from each member.[11]

A. Overview Regarding NSCC's Margin Methodology

A member's margin is designed to mitigate potential losses to NSCC associated with the liquidation of the member's portfolio in the event that

[1] 12 U.S.C. 5465(e)(1).

[2] 17 CFR 240.19b–4(n)(1)(i).

[3] 15 U.S.C. 78a *et seq.*

[4] *See* Notice of Filing, *infra* note 5, at 87 FR 78175.

[5] Exchange Act Release No. 96513 (Dec. 15, 2022), 87 FR 78175 (Dec. 21, 2022) (File No. SR–NSCC–2022–802) (''Notice of Filing'').

[6] Exchange Act Release No. 96624 (Jan. 10, 2023), 88 FR 2707 (Jan. 17, 2023).

[7] The Commission may extend the review period for an additional 60 days (to 120 days total) for proposed changes that raise novel or complex issues. *See* 12 U.S.C. 5465(e)(1)(H).

[8] See 12 U.S.C. 5465(e)(1)(E)(ii) and (G)(ii); Memorandum from Office of Clearance and Settlement, Division of Trading and Markets, titled ''Commission's Request for Additional Information'' (dated Mar. 27, 2023), *available at https://www.sec.gov/comments/sr-nscc-2022-802/srnscc2022802-20161718-330589.pdf.*

[9] The Commission received one comment that was not relevant to the proposal in the Advance Notice. *See https://www.sec.gov/comments/sr-nscc-2022-802/srnscc2022802-320764.htm* (commenting on certain aspects of NSCC's operations that are not addressed or changed in this proposal). In addition, the Commission received one comment on the related proposed rule change filed as NSCC–2022–015. *See* Exchange Act Release No. 96511 (Dec. 15, 2022), 87 FR 78157 (Dec. 21, 2022) (''Proposed Rule Change''), with comments at *https://www.sec.gov/comments/sr-nscc-2022-015/srnscc2022015.htm.* Because the proposals contained in the Advance Notice and the Proposed Rule Change are the same, all public comments received on the proposals were considered regardless of whether the comments were submitted with respect to the Advance Notice or the Proposed Rule Change.

[10] Capitalized terms not defined herein are defined in NSCC's Rules & Procedures (''Rules''), *available at https://www.dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf.*

[11] Pursuant to its Rules, NSCC uses the term ''Required Fund Deposit'' to denote margin or collateral collected from its members. *See* Rule 4 (Clearing Fund) and Procedure XV (Clearing Fund Formula and Other Matters) of the Rules, *supra* note 10.

member defaults.[12] The aggregate of all members' margin deposits (together with certain other deposits required under the Rules) constitutes NSCC's clearing fund. NSCC would access its clearing fund should a defaulting member's own margin and resources at NSCC be insufficient to satisfy losses to NSCC caused by the liquidation of that member's portfolio.[13]

NSCC employs daily backtesting to determine the sufficiency of each member's margin, by simulating the liquidation gains or losses using the actual unsettled positions in the member's portfolio, and the actual historical returns for each security held in the portfolio. A backtesting deficiency would result if the liquidation losses were greater than the member's margin. NSCC investigates the causes of any backtesting deficiencies, paying particular attention to members with backtesting deficiencies that bring the results for that member below the 99 percent confidence target (*i.e.,* greater than two backtesting deficiency days in a rolling twelve-month period) to determine if there is an identifiable cause of repeat backtesting deficiencies.[14] NSCC also evaluates whether multiple members may experience backtesting deficiencies for the same underlying reason.[15]

Each member's margin consists of a number of applicable components, each of which is calculated to address specific risks faced by NSCC.[16] Each member's start of day required fund deposit is calculated overnight, based on the member's prior end-of-day net unsettled positions.[17] NSCC notifies members early the following morning, and members are required to make deposits by approximately 10:00 a.m. EST.[18]

Generally, the largest portion of a member's margin is the volatility component. The volatility component is designed to reflect the amount of money that could be lost on a portfolio over a given period within a 99th percentile level of confidence. This component represents the amount assumed necessary to absorb losses while liquidating the member's portfolio.

NSCC's methodology for calculating the volatility component of a member's required fund deposit depends on the type of security and whether the security has sufficient pricing or trading history for NSCC to robustly estimate the volatility component using statistical techniques. Generally, for most securities (*e.g.,* equity securities), NSCC calculates the volatility component using, among other things, a parametric Value at Risk (''VaR'') model, which results in a ''VaR Charge.'' [19] The VaR Charge usually comprises the largest portion of a member's required fund deposit.

B. Current Treatment of Gap Risk in NSCC's Margin Methodology

Under NSCC's current Rules, one of the potential methods of calculating the VaR Charge relies on a measure of gap risk. It does not accrue for all portfolios, but instead only serves as the VaR Charge if it is the largest of three potential calculations.[20]

Gap risk events have been generally understood as idiosyncratic issuer events (for example, earning reports, management changes, merger announcements, insolvency, or other unexpected, issuer-specific events) that cause a rapid shift in price volatility levels. The gap risk charge was designed to address the risk presented by a portfolio that is more susceptible to the effects of gap risk events, *i.e.,* those portfolios holding positions that represent more than a certain percent of the entire portfolio's value, such that the event could impact the entire portfolio's value.[21]

The current gap risk charge applies only if a member's overall net unsettled non-index position with the largest absolute market value in the portfolio represents more than a certain percent of the entire portfolio's value, that is, if the net unsettled position exceeds a specified ''concentration threshold.'' The concentration threshold can be set no higher than 30 percent and is evaluated periodically based on members' backtesting results over a twelve month look-back period, and it is currently set at 5%.[22] NSCC's Rules currently calculate a gap risk charge only for ''non-index'' positions, meaning positions in the portfolio other than positions in ETFs that track diversified indices. This is because index-based ETFs that track closely to diversified indices are generally considered less prone to the effects of gap risk events.

The risk of large, unexpected price movements, particularly those caused by a gap risk event, are more likely to have a greater impact on portfolios with large net unsettled positions in securities that are susceptible to those events. Generally, index-based ETFs that track closely to diversified indices are less prone to the effects of gap risk events. Therefore, if the concentration threshold is met, NSCC currently calculates the gap risk charge for positions in the portfolio other than positions in ETFs that track diversified indices, referred to as ''non-index positions.''

To calculate the gap risk charge, NSCC multiplies the gross market value of the largest non-index net unsettled position in the portfolio by a gap risk haircut, which can be no less than 10 percent (''gap risk haircut'').[23] Currently, NSCC determines the gap risk haircut empirically as no less than the larger of the 1st and 99th percentiles of three-day returns of a set of CUSIPs that are subject to the VaR Charge pursuant to the Rules, giving equal rank to each to determine which has the highest movement over that three-day period. NSCC uses a look-back period of not less than ten years plus a one-year stress period, and if the one-year stress period overlaps with the look-back period, only the non-overlapping period would be combined with the look-back period. The resulting haircut is then rounded up to the nearest whole percentage and applied to the largest non-index net unsettled position to determine the gap risk charge.

[12] Under NSCC's Rules, a default would generally be referred to as a ''cease to act'' and could encompass a number of circumstances, such as a member's failure to make a margin payment on time. *See* Rule 46 (Restrictions on Access to Services) of the Rules, *supra* note 10.

[13] *See* Rule 4, *supra* note 10.

[14] *See* National Securities Clearing Corporation, Disclosure Framework for Covered Clearing Agencies and Financial Market Infrastructures, at 61 (Dec. 2022), *available at https://www.dtcc.com/legal/policy-and-compliance.*

[15] *See id.*

[16] *See* Procedure XV of the Rules, *supra* note 10.

[17] *See* Procedure XV, Sections II(B) of the Rules, *supra* note 10.

[18] *See id.* The Rules provide that required deposits to the clearing fund are due within one hour of demand, unless otherwise determined by NSCC. *Id.*

[19] *See* Sections I(A)(1)(a)(i) and I(A)(2)(a)(i) of Procedure XV of the Rules, *supra* note 10.

[20] Specifically, the VaR Charge is the greatest of (1) the larger of two separate calculations based on different underlying estimates that utilize a parametric VaR model, which addresses the market risk of a member's portfolio (referred to as the core parametric estimation), (2) the gap risk calculation, and (3) a portfolio margin floor calculation based on the market values of the long and short positions in the portfolio, which addresses risks that might not be adequately addressed with the other volatility component calculations.

[21] *See* Section I(A)(1)(a)(i)II and I(A)(2)(a)(i)II of Procedure XV of the Rules, *supra* note 10. *See also* Exchange Act Release Nos. 82780 (Feb. 26, 2018), 83 FR 9035 (Mar. 2, 2018) (SR–NSCC–2017–808); 82781 (Feb. 26, 2018), 83 FR 9042 (Mar. 2, 2018) (SR–NSCC–2017–020) (''Initial Filing'').

[22] *See* Section I(A)(1)(a)(i)II and I(A)(2)(a)(i)II of Procedure XV of the Rules, *supra* note 10; *see* Important Notice a9055 (Sept. 27, 2021), at *https://www.dtcc.com/-/media/Files/pdf/2021/9/27/a9055.pdf* (notifying members that the concentration threshold had been changed from 10% to 5%).

[23] *See* Section I(A)(1)(a)(i)II and I(A)(2)(a)(i)II of Procedure XV of the Rules, *supra* note 10.

III. The Advance Notice

NSCC is proposing to make the following changes to the gap risk charge: (1) make the gap risk charge an additive component of the member's total VaR Charge when it is applicable, rather than being applied as the applicable VaR Charge only when it is the largest of three separate calculations, (2) adjusting the gap risk charge to be based on the two largest positions in a portfolio, rather than based on the single largest position, (3) changing the floor of the gap risk haircut from 10 percent to 5 percent for the largest position, adding a floor of the gap risk haircut of 2.5 percent for the second largest position, and providing that gap risk haircuts would be determined based on backtesting and impact analysis, and (4) amending which ETF positions are excluded from the gap risk charge to more precisely include ETFs that are more prone to gap risk, *i.e.,* are non-diversified.

First, NSCC is proposing to make the result of the gap risk charge calculation an additive component of a member's total VaR Charge, rather than applicable as the VaR Charge only when it is the highest result of three calculations. Under the proposal, the VaR Charge would be equal to the sum of (1) the greater of either the core parametric estimation or the portfolio margin floor calculation, neither of which is changing in this proposal,[24] and (2) the gap risk charge calculation. Rather than being applied only when the gap risk charge exceeds the other two calculations, the gap risk charge calculation would apply every time the top two positions exceed the concentration threshold and would always be a portion of the overall VaR Charge in such circumstances. NSCC states that making this charge additive could improve its ability to mitigate idiosyncratic risks that it could face through the collection of the VaR Charge.[25] Based on impact studies, NSCC believes this broader application together with the other proposed changes outlined below would better protect against more idiosyncratic risk scenarios than the current methodology.[26]

Second, NSCC is proposing to make the gap risk charge rely upon the absolute values of the two largest non-diversified net unsettled positions, as opposed to using the absolute value of only the single largest non-diversified net unsettled position. Therefore, the gap risk charge would be calculated by first multiplying each of the two largest non-diversified net unsettled positions with a gap risk haircut, and then adding the sum of the resulting products. The gap risk charge would be applicable if that sum of the resulting products exceeded the concentration threshold.[27] NSCC states that applying the gap risk charge to the two largest non-diversified positions in the portfolio would cover concurrent gap moves involving more than one concentrated position, adding more flexibility and coverage.[28]

Third, NSCC proposes to revise the calculation of the gap risk haircut in response to making the proposal an additive component of a member's VaR Charge. Currently, the gap risk haircut is determined by selecting the largest of the 1st and 99th percentiles of three-day returns of a composite set of equities, using a look-back period of not less than 10 years plus a one year stress period.[29] NSCC believes that this methodology results in implicit overlapping of the risk covered by the core parametric VaR and the gap risk charge.[30] Because the proposal would make the gap risk charge an additive component to the VaR Charge rather than a substitutive component, NSCC does not believe that the current methodology for the gap risk haircut would result in an appropriate level of margin.[31] Under the proposal, NSCC would determine and calibrate the concentration threshold and the gap risk haircut periodically based on backtesting and impact analysis. NSCC states that the concentration threshold and the gap risk haircuts would be selected from various combinations of concentration thresholds and gap risk haircuts based on backtesting and impact analysis across all member portfolios, initially using a five year look-back period.[32] NSCC believes that this would provide more flexibility to set the parameters from time to time to provide improved backtesting performance, broader coverage for idiosyncratic risk scenarios and flexibility for model tuning to balance performance and cost considerations.[33]

In addition, NSCC proposes to revise the determination of the gap risk haircut in response to the proposal's inclusion of the two largest non-diversified net unsettled positions, as opposed to only the one, and to its additive nature. Currently, the percent that is applied to the largest non-index net unsettled position in the portfolio is no less than 10 percent.[34] Because of the proposal's shift to including the two largest positions, NSCC believes it is appropriate to set a lower floor for the gap risk haircut that applies to the largest of those two positions.[35] Moreover, because the gap risk charge would now be additive and would apply more frequently, NSCC believes that the flexibility to set a lower floor for the largest position would be appropriate.[36]

Specifically, NSCC is proposing to lower the gap risk haircut that would be applied to the largest non-diversified net unsettled position to be a percent that is no less than 5 percent. The gap risk haircut that would be applied to the second largest non-diversified net unsettled position in the portfolio would be no larger than the gap risk haircut that would be applied to the largest non-diversified net unsettled position and would be subject to a floor of 2.5 percent. NSCC states that, upon implementation of the proposed rule change, NSCC would set the concentration threshold at 10%, apply a gap risk haircut on the largest non-diversified net unsettled position of 10% and a gap risk haircut on the second largest non-diversified net unsettled position of 5%.[37] NSCC would set the concentration threshold and the gap risk haircuts based on backtesting and impact analysis in accordance with NSCC's model risk management practices and governance set forth in the Model Risk Management Framework.[38] NSCC would provide

[24] *See* note 20 *supra.*

[25] *See* Notice of Filing, *supra* note 5, 87 FR at 78178.

[26] *Id.*

[27] As noted in Section II.B above, the concentration threshold is currently set at 5%, and the Rules define the concentration threshold as no more than 30 percent of the value of the entire portfolio. *See* Section I(A)(1)(a)(i)II and I(A)(2)(a)(i)II of Procedure XV of the Rules, *supra* note 20. The proposed changes would clarify that the concentration threshold is not fixed at 30 percent by defining concentration threshold as a percentage designated by NSCC of the value of the entire portfolio and determined by NSCC from time to time, and that shall be no more than 30 percent. NSCC believes this proposed change will help clarify that the concentration threshold could change from time to time but could not be set to be more than 30 percent. *See* Notice of Filing, *supra* note 5, 87 FR at 78179.

[28] *See* Notice of Filing, *supra* note 5, 87 FR at 78178.

[29] *Id.*

[30] *See id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* at 78178–79.

[36] *Id.* at 78179.

[37] *Id.*

[38] *See* Exchange Act Release Nos. 81485 (Aug. 25, 2017), 82 FR 41433 (Aug. 31, 2017) (File No. SR–NSCC–2017–008); 84458 (Oct. 19, 2018), 83 FR 53925 (Oct. 25, 2018) (File No. SR–NSCC–2018–009); 88911 (May 20, 2020), 85 FR 31828 (May 27, 2020) (File No. SR–NSCC–2020–008); 92381 (July 13, 2021), 86 FR 38163 (July 19, 2021) (File No. SR–NSCC–2021–008); and 94272 (Feb. 17, 2022), 87 FR 10419 (Feb. 24, 2022) (File No. SR–NSCC–2022–001). NSCC's model risk management governance

Continued

notice to members by important notice of the concentration threshold and gap risk haircuts that it would be applying.

Fourth, NSCC is proposing to amend what positions are excluded from the gap risk charge calculation. Currently, only ''non-index'' positions and index-based exchange-traded products that track a narrow market index are included in the gap risk charge.[39] Under the proposal, this would be revised to refer to ''non-diversified'' positions instead of non-index positions. The rule text would specify that NSCC would exclude ETF positions from the calculation (that is, it would consider them diversified) if the positions have characteristics that indicate that they are less prone to the effects of gap risk events, including whether the ETF positions track to an index that is linked to a broad based market index, contain a diversified underlying basket, are unleveraged or track to an asset class that is less prone to gap risk. NSCC states that the proposed change would result in certain non-index based ETFs being excluded from the gap risk charge whereas they are currently included, such as unleveraged U.S. dollar based ETFs.[40] NSCC also states that this proposed change would provide greater transparency to members regarding which positions are excluded from this calculation.[41]

NSCC states that certain ETFs, both index based and non-index based, are less prone to the effects of gap risk events as a result of having certain characteristics and, therefore, are less likely to pose idiosyncratic risks that the gap risk charge is designed to mitigate.[42] By contrast, based on the proposed methodology, NSCC would include certain commodity ETFs in the gap risk charge that track to an index that is not a broad-based diversified commodity index; such ETFs are not currently subject to the gap risk charge, but would be subject going forward.

III. Commission Findings and Notice of No Objection

Although the Clearing Supervision Act does not specify a standard of review for an advance notice, the stated purpose of the Clearing Supervision Act is instructive: to mitigate systemic risk in the financial system and promote financial stability by, among other things, promoting uniform risk management standards for systemically important financial market utilities (''SIFMUs'') and strengthening the liquidity of SIFMUs.[43]

Section 805(a)(2) of the Clearing Supervision Act authorizes the Commission to prescribe regulations containing risk management standards for the payment, clearing, and settlement activities of designated clearing entities engaged in designated activities for which the Commission is the supervisory agency.[44] section 805(b) of the Clearing Supervision Act provides the following objectives and principles for the Commission's risk management standards prescribed under section 805(a) :[45]

- to promote robust risk management;
- to promote safety and soundness;
- to reduce systemic risks; and
- to support the stability of the broader financial system.

Section 805(c) provides, in addition, that the Commission's risk management standards may address such areas as risk management and default policies and procedures, among other areas.[46]

The Commission has adopted risk management standards under section 805(a)(2) of the Clearing Supervision Act and section 17A of the Exchange Act (the ''Clearing Agency Rules'').[47] The Clearing Agency Rules require, among other things, each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures that are reasonably designed to meet certain minimum requirements for its operations and risk management practices on an ongoing basis.[48] As such, it is appropriate for the Commission to review advance notices against the Clearing Agency Rules and the objectives and principles of these risk management standards as described in section 805(b) of the Clearing Supervision Act. As discussed below, the Commission believes the changes proposed in the Advance Notice are consistent with the objectives and principles described in section 805(b) of the Clearing Supervision Act,[49] and in the Clearing Agency Rules, in particular Rule 17Ad–22(e)(4)(i) and (e)(6)(i).[50]

A. Consistency With Section 805(b) of the Clearing Supervision Act

The Commission believes that the proposal contained in NSCC's Advance Notice is consistent with the stated objectives and principles of section 805(b) of the Clearing Supervision Act. Specifically, as discussed below, the Commission believes that the changes proposed in the Advance Notice are consistent with promoting robust risk management, promoting safety and soundness, reducing systemic risks, and supporting the stability of the broader financial system.[51]

The Commission believes that the Advance Notice is consistent with promoting robust risk management as well as safety and soundness because, based on the confidential information provided by NSCC and reviewed by the Commission, including the impact study demonstrating the collective impact of the proposed changes on the margin collected both at the overall clearing agency level and on a member-by-member basis and on NSCC's backtesting performance, the proposed changes with respect to the calculation of the gap risk charge provide better margin coverage than the current methodology. The Commission believes that the changes described in the Advance Notice should enable NSCC to better manage its exposure to portfolios with identified concentration risk, which should, in turn, limit its exposure to members in the event of a member default, which is consistent with promoting robust risk management.

The Commission believes that making the gap risk charge an additive component, as opposed to a potential substitutive option applicable only if it exceeds other methodologies for determining the VaR Charge, should help NSCC better protect against more idiosyncratic risk scenarios in concentrated portfolios than the current methodology. In addition, adjusting the gap risk calculation to take into account the two largest positions, as well as to apply two separate haircuts based on backtesting and impact analysis with floors set forth in the Rules, should allow NSCC to cover concurrent gap moves involving more than one concentrated position. Moreover, modifying the criteria for ETF positions subject to the gap risk charge based on

procedures include daily backtesting of model performance, periodic sensitivity analyses of models and annual validation of models. They would also provide for review of the concentration threshold and the gap risk haircuts at least annually.

[39] *See* Section I(A)(1)(a)(i)II and I(A)(2)(a)(i)II of Procedure XV of the Rules, *supra* note 10. *See also* Initial Filing, *supra* note 21.

[40] *See* Notice of Filing, *supra* note 5, 87 FR at 78178.

[41] *Id.* NSCC states that it uses a third-party provider to identify ETFs that meet its criteria of being diversified. *See id.*

[42] *Id.*

[43] *See* 12 U.S.C. 5461(b).

[44] 12 U.S.C. 5464(a)(2).

[45] 12 U.S.C. 5464(b).

[46] 12 U.S.C. 5464(c).

[47] 17 CFR 240.17Ad–22. *See* Exchange Act Release No. 68080 (Oct. 22, 2012), 77 FR 66220 (Nov. 2, 2012) (S7–08–11). *See also* Covered Clearing Agency Standards Adopting Release, Exchange Act Release No. 78961 (Sept. 28, 2016), 81 FR 70786 (Oct. 13, 2016). NSCC is a ''covered clearing agency'' as defined in Rule 17Ad–22(a)(5).

[48] 17 CFR 240.17Ad–22.

[49] 12 U.S.C. 5464(b).

[50] 17 CFR 240.17Ad–22(e)(4)(i) and (e)(6)(i).

[51] 12 U.S.C. 5464(b).

whether they are non-diversified rather than whether they are non-index would allow NSCC to more accurately determine which ETFs should be included and excluded from the gap risk charge based on characteristics that indicate that such ETFs are more or less prone to the effects of gap risk events, thereby providing more accurate coverage of the potential exposure arising from such positions.

Further, the Commission believes that, to the extent the proposed changes are consistent with promoting NSCC's safety and soundness, they are also consistent with reducing systemic risk and supporting the stability of the broader financial system. NSCC has been designated as a SIFMU, in part, because its failure or disruption could increase the risk of significant liquidity or credit problems spreading among financial institutions or markets.[52] The Commission believes that the proposed changes would support NSCC's ability to continue providing services to the markets it serves by addressing losses and shortfalls arising out of a member default. NSCC's continued operations would, in turn, help reduce systemic risk and support the stability of the financial system by reducing the risk of significant liquidity or credit problems spreading among market participants that rely on NSCC's central role in the market.

Accordingly, and for the reasons stated above, the Commission believes the changes proposed in the Advance Notice are consistent with section 805(b) of the Clearing Supervision Act.[53]

B. Consistency With Rule 17Ad–22(e)(4)(i) Under the Exchange Act

Rule 17Ad–22(e)(4)(i) under the Exchange Act requires that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by maintaining sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence.[54]

Based on its review of the record, the Commission believes NSCC's proposal to broaden the scope of the gap risk charge and the related adjustments to its calculation could help improve NSCC's backtesting performance, provide broader coverage for idiosyncratic risk scenarios, and could help address the potential increased risks NSCC may face related to its ability to liquidate a portfolio that is susceptible to such risks in the event of a member default. Specifically, the Commission has reviewed and analyzed NSCC's analysis of the improvements in its backtesting coverage,[55] and agrees that the analysis demonstrates that the proposal would result in better backtesting coverage and, therefore, less credit exposure to its members.

Accordingly, the Commission believes that the proposal would enable NSCC to better manage its credit risks by allowing it to respond regularly and more effectively to any material deterioration of backtesting performances, market events, market structure changes, or model validation findings, thereby helping to ensure that NSCC can take steps to collect sufficient margin to maintain sufficient financial resources to cover its exposure to its members. Therefore, the Commission believes the changes proposed in the Advance Notice are consistent with Rule 17Ad–22(e)(4)(i) under the Exchange Act.

C. Consistency With Rule 17Ad–22(e)(6)(i) Under the Exchange Act

Rule 17Ad–22(e)(6)(i) under the Exchange Act requires that each covered clearing agency that provides central counterparty services establish, implement, maintain and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market.[56]

The Commission understands that, as described above, the proposal as a whole is designed to enable NSCC to more effectively address the risks presented by members' concentrated positions in securities more prone to gap risk events and to produce margin levels that are more commensurate with the particular risk attributes of these concentrated holdings, including the market price risk of liquidating large positions in securities that are more prone to gap risk events. The Commission believes that the proposal would improve NSCC's ability to consider, and produce margin levels commensurate with, the risks and particular attributes presented by a portfolio that meets the concentration threshold and, therefore, is more susceptible to the impacts of idiosyncratic risks.

First, the Commission believes that broadening the gap risk charge to an additive feature of the VaR Charge and using the two largest non-diversified positions would help NSCC to more effectively manage the idiosyncratic risks of portfolios with concentrated holdings. Specifically, the proposed changes should result in an overall increase of margin for members that have positions subject to the gap risk charge.[57]

[52] Financial Stability Oversight Council, 2012 Annual Report, Appendix A, *https://home.treasury.gov/system/files/261/2012-Annual-Report.pdf.*

[53] 12 U.S.C. 5464(b).

[54] 17 CFR 240.17Ad–22(e)(4)(i).

[55] NSCC submitted more detailed results of the impact study as confidential Exhibit 3 to the Advance Notice. NSCC requested confidential treatment of Exhibit 3 pursuant to 5 U.S.C. 552(b)(4) and 552(b)(8) and 17 CFR. 200.80(b)(4) and 200.80(b)(8). A commenter raised a concern regarding redacted portions of the filing, which consisted of certain supporting exhibits filed confidentially as Exhibit 3 to the filing. *See https://www.sec.gov/comments/sr-nscc-2022-015/srnscc2022015-320658.htm.* NSCC asserted that this exhibit to the filing was entitled to confidential treatment because it contains: (i) trade secrets and commercial information that is privileged or confidential and which, if disclosed, would be accessible to the DTCC Companies' competitors and could result in substantial competitive injury to the DTCC Companies; and (ii) non-public, confidential information prepared for use by Commission staff. Under section 23(a)(3) of the Exchange Act, the Commission is not required to make public statements filed with the Commission in connection with a proposed rule change of a self-regulatory organization if the Commission could withhold the statements from the public in accordance with the Freedom of Information Act (''FOIA''), 5 U.S.C. 552. 15 U.S.C. 78w(a)(3). The Commission has reviewed the documents for which NSCC requests confidential treatment and concludes that they could be withheld from the public under the FOIA. FOIA Exemption 4 protects confidential commercial or financial information. 5 U.S.C. 552(b)(4). Under Exemption 4, information is confidential if it ''is both customarily and actually treated as private by its owner and provided to government under an assurance of privacy.'' *Food Marketing Institute* v. *Argus Leader Media,* 139 S. Ct. 2356, 2366 (2019). Based on its review of the materials submitted, the Commission believes that the information is the type that would not customarily be disclosed to the public. Specifically, this information consists of an impact study analyzing the effect that the changes to NSCC's margin methodology would have on each member's individual margin requirement to NSCC; information regarding NSCC's analysis and development of the particular changes to the margin methodology, including its consideration of potential alternative haircuts and thresholds; and excerpts from NSCC's non-public detailed margin methodology. In addition, by requesting confidential treatment, NSCC had an assurance of privacy because the Commission generally protects information that can be withheld under Exemption 4. Thus, the Commission has determined to accord confidential treatment to the confidential exhibits.

[56] 17 CFR 240.17Ad–22(e)(6)(i).

[57] The impact study indicated that the proposed changes would have resulted in a 10.88% increase for the daily total VaR Charge on average and would have resulted in a 4.89% increase in the daily total clearing fund on average during that period. *See* Notice of Filing, *supra* note 5, 87 FR at 78176. In addition, the Commission reviewed confidential

Continued

Second, given the proposed additive nature of the gap risk charge, the Commission believes the adjustments to the gap risk charge calculation (*i.e.,* establishing floors for the gap risk haircuts applicable to the two largest positions) are reasonably designed to cover NSCC's exposure to members arising from gap risks. The Commission believes the adjustments to the gap risk charge calculation are reasonable because the record shows the proposal should improve NSCC's ability to mitigate against idiosyncratic risks that NSCC may face when liquidating a portfolio that contains a concentration of positions, while balancing NSCC's consideration of the potential costs to members that may be subject to the gap risk charge.[58] The Commission believes that the established floors for the two haircuts should also help ensure that the gap risk charge collects margin sufficient to cover the potential exposure in a gap risk event.

Third, by providing additional specific objective criteria to determine which positions would be subject to the gap risk charge, the Commission believes that NSCC should be able to better identify those securities that may be more prone to idiosyncratic risks. Specifically, the proposal should ensure that ETFs identified as non-diversified (whether index-based or not) and therefore more prone to idiosyncratic risks will be subject to the gap risk charge.

Taken together, the Commission believes that the proposal should permit NSCC to calculate a gap risk charge that is more appropriately designed to address the gap risks presented by concentrated positions in portfolios. Accordingly, the Commission believes the proposal is consistent with Rule 17Ad–22(e)(6)(i) under the Exchange Act because it is designed to assist NSCC in maintaining a risk-based margin system that considers, and produces margin levels commensurate with, the risks and particular attributes of portfolios with identified concentration risks.[59]

IV. Conclusion

It is therefore noticed, pursuant to section 806(e)(1)(I) of the Clearing Supervision Act, that the Commission DOES NOT OBJECT to Advance Notice (SR–NSCC–2022–802) and that NSCC is AUTHORIZED to implement the proposal as of the date of this notice, or the date of an order by the Commission approving proposed rule change SR–NSCC–2022–015, whichever is later.

By the Commission.

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2023–17127 Filed 8–9–23; 8:45 am]

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materials submitted to the Commission, which included more granular information, at a member level, of the impacts of this proposal as compared to the current methodology. *See* note 55 *supra.*

[58] As part of the confidential materials submitted to the Commission, NSCC provided analysis of alternative potential haircuts and thresholds that it considered when developing the proposal. *See* note 55 *supra.* The Commission's review of those materials further supports its belief as to the reasonableness of this aspect of the proposal.

[59] 17 CFR 240.17Ad–22(e)(6)(i).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98055; File No. SR–ICC–2023–007]

Self-Regulatory Organizations; ICE Clear Credit LLC; Order Approving Proposed Rule Change Relating to the ICC Recovery Plan and the ICC Wind-Down Plan

August 4, 2023.

I. Introduction

On June 5, 2023, ICE Clear Credit LLC (''ICC'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(2) of the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend its Recovery Plan and Wind-Down Plan. The proposed rule change was published for comment in the **Federal Register** on June 22, 2023.[3] The Commission did not receive comments regarding the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposed Rule Change

A. Background

ICC is registered with the Commission as a clearing agency for the purpose of clearing CDS contracts.[4] The proposed rule change would amend both the Recovery Plan and the Wind-Down Plan, which serve as plans for the recovery and orderly wind-down of ICC, respectively, if such recovery or wind-down is necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses incurred by ICC. The Recovery Plan is designed to establish ICC's actions to maintain its viability as a going concern by addressing any uncovered credit loss, liquidity shortfall, capital inadequacy, or business, operational or other structural weakness that threatens ICC's viability as a going concern. The Wind-Down Plan is designed to establish how ICC could be wound down in an orderly manner in the event that it cannot continue as a going concern.

B. Recovery Plan

ICC proposes general updates and edits to its Recovery Plan to promote clarity and to ensure that the information in it is current. The proposed amendments to the Recovery Plan reflect and relate to changes that impacted ICC in the past year. To that end, the current Recovery Plan includes in the introduction a disclaimer that, unless otherwise specified, all information provided in the plan is current as of December 31, 2021. The proposed rule change would update that date to December 31, 2022. The proposed amendments to the Recovery Plan also would include changes to the coverage amount under the ICC clearing participant (''CP'') default insurance policy (''CP Default Insurance Policy''), and the addition of ICC-specific procedures for financial resource calculations.

Section IV covers key recovery elements. Within this section, the proposed rule change would amend clearing participation (IV.B), management and governance (IV.C), and key performance metrics (IV.D). In Section IV.B, ICC would create a reference to a membership category, Associate Clearing Participant. In Section IV.C, ICC would make a correction to the Management/Governance chart to indicate that the business continuity plan (''BCP'') and disaster recovery (''DR'') Oversight Committee is not a sub-committee of the ICC Audit Committee. In Section IV.C, ICC would update the description of ICE Holding Board Chairman Vincent Tese, who is currently listed as an independent director of both ICE Holding and ICE Inc. The proposed rule change would amend the description to remove his listing as an independent director of Ice Inc. In Section IV.D, ICC would update its revenues, volumes, and expenses for years 2021 and 2022.

The proposed rule change also would amend Section VI of the Recovery Plan, which covers interconnections and interdependencies. Specifically, ICC proposes to amend Sections VI.A

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Proposed Rule Change Relating to the ICC Recovery Plan and the ICC Wind-Down Plan; Exchange Act Release No. 97734 (June 15, 2023), 88 FR 40874 (June 22, 2023) (File No. SR–ICC–2023–007) (''Notice'').

[4] Capitalized terms not otherwise defined herein have the meanings assigned to them in ICC's Clearing Rules.

(Operational), VI.B (Financial), and VI.C (Contractual Agreements). The proposed updates to Section VI.A would reflect changes in the last year and would update the descriptions of ICC's personnel and facilities, as well as its in-house systems. Section VI.B currently includes a ''Counterparty Chart'' that lists all of ICC's various counterparties and indicates which function(s) each counterparty performs (*i.e.,* Clearing Participant, Custodian, Depository, etc.) would update the roles in its counterparty chart. The proposed changes to Section VI.B would update that chart to reflect changes to the functions performed by certain counterparties. The only proposed update to Section VI.C would be to the chart of counterparty contractual agreements in that section. Specifically, ICC would remove the reference to a service no longer received from a specific external service provider (*i.e.,* receipt of market data to value FX positions and collateral).

The proposed rule change would make several updates to Section VIII of the Recovery Plan, which addresses ICC's recovery tools, primarily in Section VIII.B. First, the proposed rule change would update the name of the carrier for ICC's CP Default Insurance Policy, which is maintained at the ICE Group level and may be used as a recovery tool in a CP default scenario pursuant to ICC's Rules, provided certain conditions are met. Second, it would amend the amount of coverage to reflect that the Policy coverage amount has increased to $75 million (from $50 million, as reflected in the current Recovery Plan); third, it would update the points of contact for ICC's Default Insurance Policy; and fourth, it would update the coverage amount under the Professional Liability/Cyber (E&O) Insurance Policy from $110 million to $120 million to reflect that coverage amount under that policy has increased since the last update to the Recovery Plan. Fifth, in Section VIII.B.1.iii (Direct Infusion of Cash to ICC from Parent/ICE Group), ICC would update the current description of ICC's, ICE Inc's, and ICE Group's respective year-end cash balances to reflect their most current consolidated balance sheets. Finally, the proposed rule change would add a footnote in Section VIII.B that references and describes ICC's Risk Appetite Statements and Metrics, which define the thresholds ICC has established with respect to regulatory capital requirements and provide for alerts in the event that ICC is nearing a breach of these amounts (*i.e.,* the current alert is triggered if ICC maintains 110% or less of its required regulatory capital). The reference to and description of ICC's Risk Appetite Statements and Metrics is intended to provide further details on how decreases in ICC's regulatory capital will trigger escalation within ICC, which in turn may lead to potential remedial actions, including whether ICC should initiate its plan to raise additional equity.

Section X of the Recovery Plan identifies ICC's Financial Resources for Recovery. The proposed rule change would add details regarding the calculation of ICC's financial resources available for recovery to reflect new ICC-specific Financial Resource Calculation Procedures that ICC has added since the last update to the Recovery Plan. Specifically, the Recovery Plan would specify that ICC completes a voluntary annual calculation of regulatory requirements under European Market Infrastructure Regulation (''EMIR'') guidelines. It would note that ICC's calculation approximates the EMIR requirements and is calculated by ICE Treasury on an annual basis upon the finalization of ICC's statutory audit and financial statements, as well as a discussion of future expectations with the ICC Treasury Director, and specify that the EMIR Estimate includes four elements relating to: winding down/restructuring; operational and legal risks; credit and counterparty risk/market risk; and business risks. The proposed update would also include a reference to the Financial Resource Calculation Procedures and note that the procedures include additional details regarding the calculation of regulatory capital requirements under EMIR guidelines. The proposed rule change also would amend Section X to update the expected costs of recovery and wind-down, including expenses related to legal services, consulting, operations, regulatory capital requirements, and other wind down costs.

Section XI of the Recovery Plan (Financial Information) provides the balance sheet and income statement for ICC and the consolidated balance sheet and income statement for ICE Inc. and its subsidiaries. The proposed rule change would update the financial information in this section to reflect the most current financial statements for both entities.

The proposed rule change would make minor edits to Section XIII, Appendix G, which covers form default insurance proof of loss, by updating the carrier and policy number for ICC's CP Default Insurance Policy. In Section XIV, which contains the index of exhibits, the proposed rule change would update the index of exhibits with the current versions of policies and procedures, consistent with updated footnote references. Finally, the proposed rule change would make non-substantive typographical fixes in the ICC Recovery Plan, as well as conforming changes in the ICC Wind-Down Plan, including updates to entity names, and grammatical and formatting changes.

C. Wind-Down Plan

ICC proposes updates and edits to promote clarity and to ensure that the information provided in the Wind-Down Plan is current. The proposed rule change reflects and relates to changes that have impacted ICC in the past year, including the addition of ICC-specific procedures for financial resource calculations. The current Wind-Down Plan includes in the introduction a disclaimer that, unless otherwise specified, all information provided in the plan is current as of December 31, 2021. The proposed rule change would update that date to December 31, 2022.

Section II of the Wind-Down Plan is an overview of the structure of ICC. Section II.A addresses ownership of ICC. The proposed rule change would add additional language for the headquarter location for ICC. Section IV addresses membership and ICC governance. The proposed rule change would amend the Management and Governance chart in Section IV.B because the previous chart incorrectly indicated that the BCP and DR Oversight Committee are sub-committees of the ICC Audit Committee. Additionally, the proposed rule change would update the description of Vincent Tese in Section IV.B, so that he is listed as just an independent director of ICC, but is no longer listed as an independent director of ICE Inc.

In the beginning of Section VII, which addresses interconnections and interdependencies, the proposed rule change would update ICC revenue. Later in VII.C.2, the proposed rule change would update the number of personnel and facilities. In Section VII.C, which addresses operational services, the proposed rule change would update a list of in-house systems. Section VII.D addresses financial services and the proposed rule change would update the roles on its counterparty chart.

Section IX addresses financial resources to support wind-down. In this section, the proposed rule change would include additional details regarding the calculation of ICC's financial resources available for wind-down to reflect the new ICC-specific Financial Resource

Calculation Procedures. The proposed rule change would add details regarding the calculation of regulatory capital requirements under EMIR guidelines. Similar to the proposed changes in the Recovery Plan, the proposed rule change would specify that calculations are performed by ICE Treasury on an annual basis upon the finalization of ICC's statutory audit and financial statements and include a discussion of future expectations with the ICC Treasury Director. Similar to the proposed changes in the Recovery Plan, the proposed rule change would note that ICC's calculation approximates the EMIR requirements and is calculated by ICE Treasury on an annual basis upon the finalization of ICC's statutory audit and financial statements, as well as a discussion of future expectations with the ICC Treasury Director, and specify that the EMIR Estimate includes four elements relating to: winding down/restructuring; operational and legal risks; credit and counterparty risk/market risk; and business risks. The proposed update would also include a reference to the Financial Resource Calculation Procedures and note that the procedures include additional details regarding the calculation of regulatory capital requirements under EMIR guidelines.

The proposed rule change would update and edit to promote clarity and consistency in the ICC Wind-Down Plan. In the counterparty contractual agreements chart in Section VIII, the proposed rule change would remove the reference to a service no longer received from a specific external service provider (*i.e.,* receipt of market data to value FX positions and collateral). In Section XII, the proposed rule change would update the index of exhibits with the current versions of policies and procedures, consistent with updated footnote references.

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization.[5] For the reasons given below, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act[6] and Rule 17Ad–22(e)(3)(ii).[7]

A. Consistency With Section 17A(b)(3)(F) of the Act

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of ICC be designed, to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, as well as to assure the safeguarding of securities and funds which are in the custody or control of ICC or for which it is responsible.[8]

As noted above, the proposed rule change primarily would update the Recovery Plan and Wind-Down Plan with current information about ICC's facilities, finances, operations, and Board. The Commission believes that by providing the most current information for ICC's revenues, volumes, and expenses, the proposed rule change will support ICC's ability to monitor its finances and compare its regulatory capital to its estimated recovery and wind-down costs. This in turn will help ensure ICC has the financial resources to promptly and accurately clear and settle transactions during recovery and, if necessary, conduct an orderly wind-down.

Further, the Commission believes that updating the Counterparty Chart to reflect current roles and changes to the functions performed by certain counterparties will generally support those utilizing the Plans by providing users of the Plans a correct overview of ICC's counterparties. Similarly, the Commission believes that updating the description of ICC's Default Insurance Policy and Professional Liability/Cyber (E&O) Insurance Policy to reflect increase coverage amounts and current points of contact will generally support those utilizing the Plans by providing users of the Plans a correct overview of these insurance policies. The Commission believes that these proposed changes would strengthen both plans by ensuring those utilizing them have information necessary to carry out recovery or an orderly wind-down, which in turn should help ICC to promptly and accurately clear and settle transactions during recovery and, if necessary, conduct an orderly wind-down.

ICC also proposed to include a reference to the thresholds for regulatory capital requirements that would trigger alerts for ICC nearing a capital requirement breach. This may lead to potential remedial actions, including whether ICC should initiate its plan to raise additional equity. The Commission believes that these proposed changes would strengthen the plans by ensuring those utilizing them have all of the information necessary to carry out recovery or an orderly wind-down, which in turn will help ensure ICC can promptly and accurately clear and settle trades and safeguard of securities and funds which are in its custody or control at these times.

For the reasons stated above, the Commission believes that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act.[9]

B. Consistency With Rule 17Ad–22(e)(3)(ii)

Rule 17Ad–22(e)(3)(ii) requires ICC to establish, implement, maintain, and enforce written policies and procedures reasonably designed to maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by ICC, which includes plans for the recovery and orderly wind-down of ICC necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.[10]

The Commission believes the proposed changes described above that would add current financial, personnel, and board information support ICC's maintenance of plans for the recovery and orderly wind-down of ICC with updated accurate information. The proposed rule change also would addi details regarding the calculation of ICC's financial resources available for wind-down to reflect the new ICC Financial Resource Calculation Procedures. Additionally, ICC adds a reference to its thresholds for regulatory capital requirements that would trigger alerts for when ICC is nearing a capital requirement breach. The Commission believes that current financial information provides relevant information to those using the Plans to understand the resources available for recovery or an orderly wind-down.

Therefore, the Commission finds that the proposed rule change is consistent with Rule 17Ad–22(e)(3)(ii).[11]

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and in particular, with the requirements of

[5] 15 U.S.C. 78s(b)(2)(C).

[6] 15 U.S.C. 78q–1(b)(3)(F).

[7] 17 CFR 240.17Ad–22(e)(3)(ii).

[8] 15 U.S.C. 78q–1(b)(3)(F).

[9] 15 U.S.C. 78q–1(b)(3)(F).

[10] 17 CFR 240.17Ad–22(e)(3)(ii).

[11] 17 CFR 240.17Ad–22(e)(3)(ii).

Section 17A(b)(3)(F) of the Act[12] and Rule 17Ad–22(e)(3)(ii).[13]

It is therefore ordered pursuant to Section 19(b)(2) of the Act[14] that the proposed rule change (SR–ICC–2023–007), be, and hereby is, approved.[15]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–17102 Filed 8–9–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98063; File No. SR–IEX–2023–08]

Self-Regulatory Organizations; Investors Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Pursuant to IEX Rule 15.110 To Amend IEX's Fee Schedule

August 4, 2023.

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 July 25, 2023, Investors Exchange LLC (''IEX'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Pursuant to the provisions of section 19(b)(1) under the Act,[4] and Rule 19b–4 thereunder,[5] IEX is filing with the Commission a proposed rule change to amend the Exchange's fee schedule applicable to Members[6] (the ''Fee Schedule'') pursuant to IEX Rule 15.110(a) and (c), to modify the fees applicable to executions of and with displayed orders for securities priced at or above $1.00 per share. Changes to the Fee Schedule pursuant to this proposal are effective upon filing,[7] and will be operative on September 1, 2023.

The text of the proposed rule change is available at the Exchange's website at *www.iextrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. *Purpose*

The Exchange proposes to modify its Fee Schedule, pursuant to IEX Rule 15.110(a) and (c), to modify the fees applicable to executions of and with displayed orders with an execution price at or above $1.00 per share. The Exchange currently does not charge Members a fee for an execution at or above $1.00 per share that provides displayed liquidity and charges Members $0.0009 per share for an execution at or above $1.00 per share that removes displayed liquidity.[8]

As proposed, for executions at or above $1.00 per share, Members that enter displayed orders that provide liquidity will receive a rebate of $0.0004 per share and Members that enter orders that remove displayed liquidity will be charged a fee of $0.0010 per share, unless a lower fee applies.[9] The proposed fee change would also apply to executions when the adding and removing orders originated from the same Member.

The Exchange provides the following Fee Codes on execution reports to Members for executions of and with displayed liquidity: ''ML'' for orders that provide displayed liquidity, ''MLS'' for orders that provide displayed liquidity that executes against an order that originated from the same Member, ''TL'' for orders that remove displayed liquidity, and ''TLS'' for orders that remove displayed liquidity added by the same Member.[10] These existing Fee Codes will continue to apply.

Specifically, the Exchange is proposing to make the following changes to its Fee Schedule:

- Replace the words ''Effective January 2, 2023'' at the top of the Fee Schedule with the words ''Effective July 25, 2023'' and on the line immediately after, add ''New underlined text and deletions in brackets will be operative on September 1, 2023'' (to indicate the date the fees in this proposal will be operative).
- Modify the first bullet point under the ''Transaction Fees'' header to specify that all fees identify the cost ''or rebate'' per share executed. And add a sentence stating that ''Rebates are indicated by parentheses ().''
- In the ''Base Rates'' table, change the fee for executions at or above $1.00 per share for Fee Code ML from ''FREE'' to ''($0.0004)''.
- In the ''Base Rates'' table, change the fee for executions at or above $1.00 per share for Fee Code TL from ''$0.0009'' to ''$0.0010''.
- In the ''Fee Code Combinations and Associated Fees'' table, change the fee for executions at or above $1.00 per share for Fee Code ML from ''FREE'' to ''($0.0004)''.
- In the ''Fee Code Combinations and Associated Fees'' table, change the fee for executions at or above $1.00 per share for Fee Code TL from ''$0.0009'' to ''$0.0010''.
- In the ''Fee Code Combinations and Associated Fees'' table, change the fee for executions at or above $1.00 per share for Fee Code MLS from ''FREE'' to ''($0.0004)''.
- In the ''Fee Code Combinations and Associated Fees'' table, change the fee for executions at or above $1.00 per share for Fee Code TLS from ''$0.0009'' to ''$0.0010''.

The Exchange is not proposing to change the fees applicable to executions of and with displayed orders with an execution price below $1.00 per share, which would remain free for such orders that provide displayed liquidity and 0.09% of the total dollar volume of the execution for orders that take displayed liquidity. IEX is also not proposing to make any changes to the fees applicable to the execution of

[12] 15 U.S.C. 78q–1(b)(3)(F).

[13] 17 CFR 240.17Ad–22(e)(3)(ii).

[14] 15 U.S.C. 78s(b)(2).

[15] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] 15 U.S.C. 78s(b)(1).

[5] 17 CFR 240.19b–4.

[6] *See* IEX Rule 1.160(s).

[7] 15 U.S.C. 78s(b)(3)(A)(ii).

[8] *See* Investors Exchange Fee Schedule, available at *https://www.iexexchange.io/resources/trading/fee-schedule.*

[9] As discussed *infra,* if a Retail order removes displayed liquidity, the Retail order would not be charged a fee.

[10] *See supra* note 8.

Retail[11] orders that remove displayed liquidity, which will continue to execute for free.

The current fees for orders that provide or take displayed liquidity were adopted in 2021 and designed to attract displayed order flow to the Exchange by offering a fee-based incentive to provide displayed liquidity.[12] The Exchange periodically assesses its fee structure and based upon a recent assessment, the Exchange believes that the proposed pricing change would further incentivize Members to submit displayed orders in securities priced at or above $1.00 per share. The proposed fee change is designed to incentivize posting displayed liquidity on IEX in securities priced at or above $1.00 per share in order to address competitive factors (as discussed more thoroughly in the Statutory Basis section) and facilitate price discovery and price formation, which the Exchange believes benefits all Members and market participants.

2. Statutory Basis

IEX believes that the proposed rule change is consistent with the provisions of section 6(b)[13] of the Act in general, and furthers the objectives of sections 6(b)(4)[14] of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities. The Exchange believes that the proposed fee change is reasonable, fair and equitable, and non-discriminatory. The Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The Exchange believes that the proposed fee structure will attract and incentivize displayed order flow as well as order flow seeking to trade with displayed order flow. Moreover, increases in displayed liquidity would contribute to the public price discovery process which would benefit all market participants and protect investors and the public interest.

The Exchange believes that the proposed fee structure for providing and removing displayed liquidity is reasonable and consistent with the Act. Specifically, the Exchange believes that for securities that trade at or above $1.00 per share, it is reasonable to provide a $0.0004 per share rebate for providing displayed liquidity and to modestly increase the fee for removing displayed liquidity to $0.0010 per share. As noted above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. Within that context, charging $0.0010 per share for orders that remove displayed liquidity (coupled with a $0.0004 per share rebate for orders that add displayed liquidity) is designed to keep IEX's displayed trading prices competitive with those of other exchanges. In this regard, IEX notes that while many competing exchanges pay rebates to provide displayed liquidity that are substantially higher than those proposed, others charge fees to provide displayed liquidity for securities that trade at or above $1.00 per share.[15] Further, IEX notes that for securities that trade at or above $1.00 per share, many competing exchanges charge substantially higher fees to remove displayed liquidity than those charged by IEX.[16] Consequently, IEX believes that the proposed fee structure for providing and removing displayed liquidity is within the range charged by competing exchanges and does not raise any new or novel issues not already considered by the Commission in the context of other exchanges' fees.

In addition, IEX believes that it is reasonable and consistent with the Act to apply the proposed fees to executions when the adding and removing order originated from the same Member. IEX believes that the same factors that support the proposed fees overall, are also applicable to such executions.

Specifically, IEX believes that the incentives to send displayed orders to IEX (and orders seeking to execute against displayed orders) will similarly provide an incentive to Members to send orders to IEX that might otherwise be internalized off-exchange, which may increase order interaction on IEX. Internalization on IEX is not guaranteed, and the additional orders that do not internalize are available to trade by all Members.

The Exchange also believes that it is reasonable and consistent with the Act not to modify its displayed fees for sub-dollar executions to synchronize those fees with the proposed fees for executions at or above $1.00 per share. The Exchange believes that the existing fee structure for such executions continues to be reasonably designed to incentivize displayed order flow (and orders seeking to trade with displayed order flow) in such securities.

Further, IEX believes that it is reasonable and consistent with the Act not to change the fees applicable to the execution of Retail orders that remove liquidity, which will continue to execute for free. In this regard, the Exchange believes that the existing fee structure continues to be reasonably designed to incentivize the entry of Retail orders, and notes that the Commission, in approving IEX's Retail Price Improvement Program, acknowledged the value of exchanges' offering incentives to attract both retail investor orders and orders specifically designated to execute only with retail orders.[17]

The Exchange further believes that the proposed fee change is consistent with the Act's requirement that the Exchange provide for an equitable allocation of fees that is also not unfairly discriminatory.

First, the fees for adding and removing displayed liquidity will apply on a per share basis in an equal and nondiscriminatory manner to all Members, without regard to the volume of orders submitted by a Member or other factors.

Second, because the fees would apply on a flat, per share basis—like IEX's existing fees—they will continue to be fully deterministic, in that a Member will be able to determine the Exchange fees for each execution. IEX believes this aspect of its fee proposal will assist all Members in making decisions about routing of orders without the uncertainties associated with volume tiers or other requirements that cannot

[11] *See* IEX Rule 11.190(b)(15).

[12] *See* Securities Exchange Act Release No. 91443 (March 30, 2021), 86 FR 17654 (April 5, 2021) (SR–IEX–2021–05).

[13] 15 U.S.C. 78f.

[14] 15 U.S.C. 78f(b)(4).

[15] *See e.g.,* Nasdaq BX Equity 7 Section 118(a) (up to $0.0030 fee per share to add displayed liquidity), available at *https://listingcenter.nasdaq.com/rulebook/bx/rules/BX%20Equity%207;* Cboe BYX Equities Fee Schedule (up to $0.0020 fee per share to add displayed liquidity, available at *https://www.cboe.com/us/equities/membership/fee_schedule/byx/;* Cboe EDGA Equities Fee Schedule (up to $0.0030 fee per share to add displayed liquidity, available at *https://www.cboe.com/us/equities/membership/fee_schedule/edga/.*

[16] *See e.g.,* Cboe BZX Equities Fee Schedule (up to $0.0030 fee per share to remove displayed liquidity), available at *https://markets.cboe.com/us/equities/membership/fee_schedule/bzx/;* MIAX Pearl Equities Exchange Fee Schedule (up to $0.00295 fee per share for liquidity removing executions), available at *https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Pearl_Equities_Fee_Schedule_07112023.pdf;* MEMX Fee Schedule (up to $0.0030 fee per share for liquidity removing executions), available at *https://info.memxtrading.com/fee-schedule/;* Nasdaq Equity 7 Section 118(a) (up to $0.0030 fee per share for any liquidity removing executions), available at *https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-equity-7;* New York Stock Exchange Price List 2023 (up to $0.0030 per share for liquidity removing executions), available at *https://www.nyse.com/publicdocs/nyse/markets/nyse/NYSE_Price_List.pdf.*

[17] *See* Securities Exchange Act Release No. 86619 (August 9, 2019), 84 FR 41769, 41771 (August 15, 2019) (SR–IEX–2019–05).

be determined at the time of the trade. IEX notes that applying fees in this way is consistent with the purpose of the Commission's proposal to require that exchange fees be set in a manner such that the amount of a fee or rebate related to each trade is determinable at the time of the trade.[18]

Additionally, the Exchange believes that it is reasonable to modify the first bullet under ''Transaction Fees'' to include a reference to rebates and to specify that rebates are indicated by parentheses. Updating this bullet point will avoid any potential confusion as to the applicable fees and rebates for each execution.

Finally, to the extent the proposed change is successful in incentivizing the entry and execution of displayed orders on IEX, such greater liquidity will benefit all market participants by increasing price discovery and price formation as well as market quality and execution opportunities.

B. Self-Regulatory Organization's Statement on Burden on Competition

IEX does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange operates in a highly competitive market in which market participants can readily favor competing venues if fee schedules at other venues are viewed as more favorable. Consequently, the Exchange believes that the degree to which IEX fees could impose any burden on competition is extremely limited, and does not believe that such fees would burden competition between Members or competing venues. Moreover, as noted in the Statutory Basis section, the Exchange does not believe that the proposed changes raise any new or novel issues not already considered by the Commission.

The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because, while different fees are assessed in some circumstances, these different fees are not based on the type of Member entering the orders that match or on the volume of orders submitted by a Member but on the type of order entered, and all Members can submit any type of order and will be subject to the same fee for that type of order. IEX believes that applying a flat, per share fee or rebate for each type of order avoids imposing a burden on competition by ensuring that individual Members do not gain a competitive advantage over other Members based solely on their size or volume of orders they are able to submit to the Exchange. Further, the proposed fee changes continue to be intended to encourage market participants to bring increased order flow to the Exchange, which benefits all market participants.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to section 19(b)(3)(A)[19] of the Act and subparagraph (f)(2) of Rule 19b–4[20] 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)[21] 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 (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–IEX–2023–08 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–IEX–2023–08. 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 (*https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–IEX–2023–08 and should be submitted on or before August 31, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–17109 Filed 8–9–23; 8:45 am]

BILLING CODE 8011–01–P

[18] *See* Securities Exchange Act Release No. 96494 (December 14, 2022), 87 FR 80266, 80292–93 (December 29, 2022) (File No. S7–30–22).

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f)(2).

[21] 15 U.S.C. 78s(b)(2)(B).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98060; File No. SR–C2–2023–017]

Self-Regulatory Organizations; Cboe C2 Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Enhance Its Drill-Through Protection Processes for Simple Orders and Make Other Clarifying Changes

August 4, 2023.

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 July 24, 2023, Cboe C2 Exchange, Inc. (the ''Exchange'' or ''C2'') 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 Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the ''Exchange'' or ''C2'') proposes to enhance its drill-through protection processes for simple orders and make other clarifying changes. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/ctwo/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this rule filing is to amend Rule 5.34(a), Order and Quote Price Protection Mechanisms and Risk Controls (Simple Orders), to enhance the drill-through protection process for simple orders and make other clarifying changes.

Drill-through price protection is currently described in Exchange Rule 5.34(a)(4)(A). Under Rule 5.34(a)(4)(A), if a buy (sell) order enters the Book [3] at the conclusion of the opening auction process or would execute or post to the Book at the time of order entry, the System [4] executes the order up to a buffer amount (the Exchange determines the buffer amount on a class and premium basis) above (below) the offer (bid) limit of the Opening Collar [5] or the National Best Offer (''NBO'') (National Best Bid (''NBB'')) that existed at the time of order entry, respectively (the ''drill-through price'').[6]

Rule 5.34(a)(4)(C) establishes an iterative drill-through process, whereby the Exchange permits orders to rest in the Book for multiple time periods and at more aggressive displayed prices during each time period.[7] Specifically, for a limit order (or unexecuted portion) with a Time-in-Force of Day, Good-til-Cancelled (''GTC''), or Good-til-Date (''GTD''), the System enters the order in the Book with a displayed price equal to the drill-through price. The order (or unexecuted portion) will rest in the Book at the drill-through price for the duration of consecutive time periods (the Exchange determines on a class-by-class basis the length of the time period in milliseconds, which may not exceed three seconds).[8] Following the end of each period, the System adds (if a buy order) or subtracts (if a sell order) one buffer amount (the Exchange determines the buffer amount on a class-by-class basis) to the drill-through price displayed during the immediately preceding period (each new price becomes the ''drill-through price'').[9] The order (or unexecuted portion) rests in the Book at that new drill-through price for the duration of the subsequent period. The System applies a timestamp to the order (or unexecuted portion) based on the time it enters or is re-priced in the Book for priority reasons. The order continues through this iterative process until the earliest of the following to occur: (a) the order fully executes; (b) the User [10] cancels the order; and (c) the buy (sell) order's limit price equals or is less (greater) than the drill-through price at any time during application of the drill-through mechanism, in which case the order rests in the Book at its limit price, subject to a User's instructions.

Currently, the above-described iterative drill-through process does not apply to market orders.[11] Specifically, if a buy (sell) market order would execute at the time of order entry, the System executes the order up to the Exchange-determined buffer amount above (below) the NBO (NBB) at the time of order entry and then rejects any remaining amount.[12] For example, suppose a market order to buy two contracts enters the System; assume that the drill-through price buffer for a certain option series is $0.90 and that the following quotes are in the Book: Quote 1 (NBBO): 1 @5.00 × 1 @7.00; Quote 2: 2 @4.00 × 1 @8.00. One contract in the market order will execute against the 7.00 offer quote. The remaining one contract of the market order is cancelled, because the next best offer of 8.00 is 1.00 above the NBO, which is more than the 0.90 buffer amount.

The Exchange proposes for market orders with a Time-in-Force of Day to go through the iterative drill-through process described above.[13] In the above example, rather than cancel the remaining one contract, the System would rest the one contract in the Book

[3] ''Book'' means the electronic book of simple orders and quotes maintained by the System, which single book is used during both the regular trading hours and global trading hours trading sessions. *See* Rule 1.1 (definition of, ''Book'').

[4] ''System'' means the Exchange's hybrid trading platform that integrates electronic and open outcry trading of option contracts on the Exchange and includes any connectivity to the foregoing trading platform that is administered by or on behalf of the Exchange, such as a communications hub. *See* Rule 1.1 (definition of, ''System'').

[5] *See* Rule 5.31(a) for the definition of Opening Collar.

[6] *See* Rule 5.34(a)(4)(A).

[7] The Exchange will announce to Trading Permit Holders the buffer amount and the length of the time periods in accordance with Rule 1.5. The Exchange notes that each time period will be the same length (as designated by the Exchange), and the buffer amount applied for each time period will be the same.

[8] *See* Rule 5.34(a)(4)(C). The proposed rule change defines this time period as an ''iteration.''

[9] *See* Rule 5.34(a)(4)(C).

[10] The term ''User'' shall mean any Trading Privilege Holder (TPH) or Sponsored User who is authorized to obtain access to the System pursuant to Rule 5.5.

[11] Rule 5.34(a)(4)(A) and (B).

[12] *Id.*

[13] *See* proposed Rule 5.34(a)(4)(C). The proposed rule change also adds ''a'' prior to the term ''Time-in-Force'' in that provision, which was inadvertently omitted; this is a nonsubstantive grammatical change that conforms the language to that in subparagraph (B).

at the drill-through price of 7.90 (*i.e.* the NBO plus the buffer amount) for the Exchange-determined time period. At the end of that time period, assuming the market has not changed, the remaining one contract would execute against the 8.00 offer, which is within a buffer amount of the subsequent drill-through price of 8.80. As a result, like super-aggressive limit orders (except for those with Time-in-Force of Immediate-or-Cancel (''IOC'') or Fill-or-Kill (''FOK'')) do today, market orders (except for those with Time-in-Force of IOC) will have additional execution opportunities pursuant to the drill-through process. As the proposed rule change only applies to market orders with a Time-in-Force of Day, the Exchange also proposes to amend Rule 5.34(a)(4)(B) to specify that the System will reject any market order with a Time-in-Force of IOC (or unexecuted portion) not executed pursuant to Rule 5.34(a)(4)(A).[14] The Exchange believes it is appropriate to not have a market order with a Time-in-Force of IOC to go through the iteration process, because the iteration process would be inconsistent with the IOC instruction (and thus the user's intent). Further, the Exchange proposes to amend Rule 5.34(a)(4)(A) to more generally describe when applicable order types may become subject to drill-through protection. Specifically, the Exchange proposes to specify that the protections described in Rule 5.34(a)(4)(A) become applicable if a buy (sell) order, to which Rule 5.34(a)(4) would apply, (i) enters the Book at the conclusion of opening auction process, or (ii) would execute or post to the Book when it enters the Book.[15]

The Exchange also proposes to amend Rule 5.34(a)(1)(A)(ii) to exclude from the current protections for market orders in no-bid series certain orders that would be otherwise subject to the drill-through protection under the proposed rule changes. Currently, under Rule 5.34(a)(1)(A)(ii), if the System receives a sell market order in a series after it is open for trading with an NBB of zero, and the NBO in the series is greater than $0.50, the System cancels or rejects the market order. The Exchange proposes amending this protection in the event a drill-through process is in progress. Specifically, the Exchange proposes to amend Rule 5.34(a)(1)(A)(ii) to note that in the event the System receives a sell market order in a series after it is open for trading with an NBB of zero and the NBO in the series is greater than $0.50, if the drill-through process is in progress for sell orders and the sell market order would be subject to drill-through protection, then the order would join the on-going drill-through process in the then-current iteration and at the then-current drill-through price, regardless of NBBO. The Exchange believes it is not optimal for these orders to be immediately booked at the minimum tick increment, as under the proposed rule change, such orders would instead, be subject to the drill-through protection mechanism described under Rule 5.34(a)(4), which may allow opportunity for execution at a more beneficial price level than the minimum tick increment.

Further, the Exchange proposes to amend Rule 5.34(a)(2) to specifically exclude orders that would be subject to drill-through protection from the market order NBBO width protections described therein. Currently, under Rule 5.34(a)(2), if a User submits a market order to the System when the NBBO width is greater than x% of the midpoint of the NBBO, subject to a minimum and maximum dollar amount (as determined by the Exchange on a class-by-class basis), the System cancels or rejects the market order. The Exchange proposes amending Rule 5.34(a)(2) to exclude Stop (Stop-Loss)[16] and Market-on-Close orders from this protection. Such orders may intentionally be further away from the NBBO at the time the order is entered, and the protection may cause the orders to be inadvertently rejected pursuant to this check. The Exchange believes it is not optimal for these orders to be subject to the market order NBBO width protection, as the check may inadvertently cause rejections for orders that may otherwise not have an opportunity to execute if they are immediately cancelled due to market width. Under the proposed rule change, such orders would instead, upon entry into the Book (when elected in accordance with their definitions), be subject to the drill-through protection mechanism described under Rule 5.34(a)(4). The Exchange also proposes a clarification to Rule 5.34(a)(4)(E). Currently, under Rule 5.34(a)(4)(E), if multiple Stop (Stop-Loss) or Stop-Limit[17] orders to buy (sell) have the same stop price and are thus triggered by the same trade price or NBBO, and would execute or post to the Book, the System uses the contra-side NBBO that existed at the time the first order in sequence was entered into the Book as the drill-through price for all orders. The Exchange proposes to remove the conditional language noting that such Stop (Stop-Loss) or Stop-Limit orders to buy (sell) must have the same stop price, as it is possible that orders with different stop prices may be triggered by the same trade price or NBBO. Further, the Exchange proposes to add language stating that, where multiple orders are simultaneously re-priced, the orders will be prioritized under subparagraph (C)(v) of Rule 5.34(a)(4) and will be sequenced based on the original time each order was entered into the Book.

For example, assume that the drill-through price buffer for a certain option series is $0.90, and that the following quotes are in the Book: Quote 1 (NBBO): 1 @5.00 × 1 @7.00; Quote 2: 2 @4.00 × 1 @8.00. Additionally, the following Stop orders are being held in the System when Quote 2 is updated to 2 @4.00 × 1 @6.50 (the System received these stop orders in the below sequence):

Order 1: Sell 1 @Market, Stop Price = $6.50

Order 2: Sell 1 @Market, Stop Price = $6.55

Order 3: Sell 1 @$3.95, Stop Price = $6.60

Each of orders 1, 2 and 3 have a stop price less than the NBO, and will therefore be triggered by the 6.50 quote and enter the Book for execution or posting. A drill-through price for all three orders is set at the contra-side NBB of 5.00. Per proposed Rule 5.34(a)(4)(C), the orders will go through the drill-through process as follows:

1. Order 1 will execute against Quote 1 @$5.00.

2. Orders 2 and 3 are posted to sell at $4.10 for the Exchange-determined time period.

3. Drill-through process continues for orders 2 and 3 until they are canceled or executed.

As amended, under Rule 5.34(a)(4)(E), all Stop (Stop-Loss) and Stop-Limit

[14] There is no change to the handling of market orders with a Time-in-Force of GTC or GTD as a result of this rule change; such orders will continue to be rejected by the Exchange.

[15] This includes, for example, when a Stop (Stop-Loss) or Stop-Limit order is elected.

[16] A ''Stop (Stop-Loss)'' order is an order to buy (sell) that becomes a market order when the consolidated last sale price (excluding prices from complex order trades if outside of the NBBO) or NBB (NBO) for a particular option contract is equal to or above (below) the stop price specified by the User. Users may not designate a Stop Order as All Sessions. Users may not designate bulk messages as Stop Orders. *See* Rule 5.6(c) (definition of ''Stop (Stop-Loss)'' order).

[17] A ''Stop-Limit'' order is an order to buy (sell) that becomes a limit order when the consolidated last sale price (excluding prices from complex order trades if outside the NBBO) or NBB (NBO) for a particular option contract is equal to or above (below) the stop price specified by the User. A User may not designate a Stop-Limit Order as All Sessions. Users may not designate bulk messages as Stop-Limit Orders. A User may not designate a bulk orders as Stop Limit orders. *See* Rule 5.6(c) (definition of ''Stop-Limit'' order).

orders elected as a result of the same election trigger (NBBO update or last sale price) will continue to use the same reference price for drill-through (even though they may have different stop prices).

The Exchange proposes to amend Rule 5.34(a)(4)(c)(ii), to specify that if at any time during the drill-through process, the NBO (NBB) changes to be below (above) the current drill-through price, such NBO (NBB) will become the new drill-through price and a new drill-through will immediately begin. As a result, any improvements to the market that occur while the drill-through is in process will be incorporated, thereby providing Users with further opportunity to be priced within the market while still being protected. Under the proposed rule change, any limit order with a price that is less aggressive than the new drill-through price would be entered in the Book at its limit price.

The Exchange also proposes to add Rule 5.34(a)(4)(C)(iv) [18] to provide that if the System receives a market or limit order that would be subject to the drill-through process while a drill-through is in progress in the same series, the order joins the ongoing drill-through process in the then-current iteration and at the then-current drill-through price. Under the proposed rule, orders that come in while a drill-through is in process receive the benefit of joining the drill-through at the NBBO at the time of entry, as opposed to immediately executing or being displayed at a more aggressive price than the drill-through price. By way of illustration, consider the following example:

Assume that the drill-through price buffer for a certain option series is $0.90, and that the following quotes are in the Book: Quote 1 (NBBO): 1 @5.00 × 1 @7.00; Quote 2: 2 @4.00 × 1 @8.00. The System receives the following orders in the below sequence:

Order 1: Sell 1 @Market, Stop Price = $6.50

Order 2: Sell 1 @Market, Stop Price = $6.55

Order 3: Sell 1 @$3.95, Stop Price $6.60

Order 4: Sell 2 @Market, Stop Price = $4.50

During this time, Quote 2 is updated to: 2 @4.00 × 1 @6.50. Orders 1, 2, and 3 are elected, and the drill-through reference price for all three orders is set to contra-side NBB of 5.00.

1. Order 1 executes Quote 1 @$5.00.
2. Orders 2 and 3 are posted to sell @ $4.10 (drill-through price) for the Exchange-determined time period.
3. Order 4 is elected due to updated best offer of $4.10, and joins Orders 2 and 3 at the iterative drill-through price of $4.10. The offer is updated to 4 @ $4.10.
4. Order 5 (Sell 10 @Market (Day)) and Order 6 (Sell 1 @$4.05 Limit (Day)) enter the Book. Per proposed Rule 5.34(a)(4)(C)(iv), Orders 5 and 6 join the drill-through iteration at the drill-through reference price of $4.10, and the best offer is updated to 15 @$4.10.
5. The drill-through process continues for orders 2, 3, 4, 5, and 6 until the contracts are canceled or executed.

Because the proposed rule change may result in multiple orders going through the drill-through process at the same price and at the same time, the proposed rule change also describes how these orders will be prioritized and allocated when executing against resting interest or incoming interest. Specifically, proposed Rule 5.34(a)(4)(C)(v) states the System prioritizes orders that are part of the same drill-through iteration (A) based on the time the System enters or reprices them in the Book (*i.e.,* in time priority) when, after an iteration, the new drill-through price makes the order(s) marketable against resting orders and (B) in accordance with the applicable base allocation algorithm when executing against any incoming interest. The Exchange believes this is appropriate because incoming marketable orders would ultimately execute in time priority today. Additionally, having multiple orders execute in accordance with the applicable base allocation algorithm when executing against incoming interest is consistent with how resting orders execute against incoming interest.

Continuing from the above example, assume the drill-through process iterates to the next drill-through price, which would be $3.20. In doing so, Order 6 posts at its limit price of $4.05, and the rest of the orders are eligible to execute in time sequence against the resting $4.00 bid. Per proposed Rule 5.34(a)(4)(C)(v), the orders will go through the drill-through process as follows:

1. Order 2 (Sell 1 @Market) will execute against Quote 2 @$4.00
2. Order 3 (Sell 1 @$3.95) will execute against Quote 2 @$4.00
3. The Quote 2 is exhausted, and the next best bid is Quote 1 for 5 @$3.00
4. Remaining drill-through is Order 4 (Sell 2 @Market) and Order 5 (Sell 10 @Market). Market is now 5 @$3.00 × 12 @$3.20, and the drill-through process continues until these contracts are executed or cancelled.

If, prior to the next drill-through iteration, Order 7 (buy 5 @$3.25) is entered and executes against Orders 4 and 5 at $3.20, the allocation will depend on the allocation algorithm for the relevant class, under the amended Rule.

1. If pro-rata, Order 7 trades 1 contract against Order 4 and 4 contracts against Order 5.
2. If price-time, Order 7 trades 2 contracts against Order 4 and 3 contracts against Order 5.
3. Remaining size on Order 4 (if applicable) and Order 5 will continue to drill-through as described in previous examples.

The Exchange also proposes to amend Rule 5.34(a)(4)(C)(vi).[19] Currently, the rule states that an order will continue through the drill-through process until the earliest of the following to occur: (a) the order fully executes; (b) the User cancels the order; and (c) the buy (sell) order's limit price equals or is less (greater) than the drill-through price at any time during application of the drill-through mechanism, in which case the orders rests in the Book at its limit price, subject to a User's instruction. The Exchange proposes to amend part (c) to remove reference to when the order's limit price equals the drill-through price, since under the drill-through process, if a buy (sell) order's limit price equals the drill-through price during the application of the drill-through mechanism it will remain part of the drill-through process, until the order's limit price is less (greater) than the drill-through price, at which point it will rest in the Book at its limit price. The Exchange also proposes to remove reference to a User's instruction, as there is no additional instruction that would allow a User to choose a different order handling option once the buy (sell) order limit price is less (greater) than the drill-through price.

Finally, the Exchange proposes to add Rule 5.34(a)(4)(C)(vii) to specify that the drill-through protection mechanism applies during all trading sessions and to provide clarity as to what happens to orders that are undergoing the drill-through process at the end of a trading session. Under the proposed rule change, if an order(s) (or unexecuted portion(s)) is undergoing the drill-through process at the end of a Global Trading Hours (''GTH'') [20] session, then

[18] As a result of the additional provisions described herein, the proposed rule change renumbers current subparagraph (iv) to be proposed subparagraph (vi).

[19] *Id.*

[20] The Exchange does not currently operate a GTH session. In the event the Exchange were to operate

the drill-through process concludes and the order(s) (or unexecuted portions(s)) enters the Regular Trading Hours (''RTH'') [21] Queuing Book [22] as a market order or limit order (at its limits price) on that same trading day, subject to a User's instructions. If an order(s) (or unexecuted portion(s)) is undergoing the drill-through process at the end of its last eligible trading session for that trading day (*i.e.,* RTH), the drill-through process concludes. Any order (or unexecuted portion) with a Time-in-Force of (i) Day is canceled, and (ii) GTC or GTD enters the Queuing Book for the next eligible trading session (*i.e.,* GTH or RTH) as a market order or limit order (at its limit price).

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[23] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [24] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [25] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes the proposed rule change to enhance drill-through protections for simple orders and to make certain market orders eligible for drill-through protection will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors, because it will provide these orders with additional and consistent execution opportunities and protections. The primary purpose of the drill-through price protection is to prevent orders from executing at prices ''too far away'' from the market when they enter the Book for potential execution. The Exchange believes the proposed rule change is consistent with this purpose, because Users who submit market orders with a Time-in-Force of Day will receive the same level of drill-through price protection against execution at potentially erroneous prices that is currently afforded to supermarketable limit orders while receiving the same additional execution opportunities. Supermarketable limit orders currently go through the drill-through process, and market orders with a Time-in-Force of Day are functionally similar to supermarketable limit orders. Therefore, the Exchange believes it is appropriate to provide both types of orders with the same price protection.

Further, the proposed rule change to provide that any new market and limit orders that would be subject to drill-through protection will join any in-progress drill-through iterations and display at the then-current drill-through price (and the corresponding changes regarding allocation and prioritization) allows new orders to receive the same level of price protection as other orders undergoing the drill-through process. The proposed rule change will allow all orders additional execution opportunities while continuing to protect them against execution at potentially erroneous prices. Similarly, the Exchange believes the proposed change to consider changes to the NBO (NBB) during drill-through and to update the drill-through price to such NBO (NBB) should it be lower (higher) than the drill-through price will further provide opportunity for execution at reasonable prices by capturing any market moves that may result in more aggressive prices.

The Exchange believes the proposal will enhance risk protections, the individual firm benefits of which flow downstream to counterparties both at the Exchange and at other options exchanges, which increases systemic protections as well. The Exchange believes enhancing risk protections will allow Users to enter orders and quotes with further reduced fear of inadvertent exposure to excessive risk, which will benefit investors through increased exposure to liquidity for the execution of their orders.

Additionally, the Exchange believes changes to specifically exclude from market order NBBO width and market order in no-bid series protections certain orders that would be subject to drill-through protection will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors. Specifically, the Exchange believes the changes to exclude certain orders that would be subject to drill-through protection from market order NBBO width protections may reduce inadvertent rejection of such orders which may be purposely priced far away from the NBBO at the time of entry and may otherwise miss an opportunity for execution if immediately cancelled. The Exchange also believes the changes to exclude certain orders that would be subject to drill-through protection from market order in no-bid series protections may allow opportunity for execution at a more beneficial price level than if they were immediately booked at the minimum tick increment. This proposed rule change may increase execution opportunities for Users that submit such Stop (Stop-Loss) and Market-on-Close orders (in the case of market order NBBO width protections) and sell market orders with an NBB of zero when the NBO in the series is greater than $0.50 (in the case of market orders in no-bid series protections).

The Exchange believes the proposed change to Rule 5.34(a)(4)(E) will protect investors because it clarifies that if multiple Stop (Stop-Loss) and Stop-Limit orders are triggered by the same trade price or NBBO (even if the orders have different stop prices), and would execute or post to the Book, the System uses the contra-side NBBO that existed at the time the first order in sequence was entered into the Book as the drill-through price for all orders. The Exchange believes that the proposed rule change will bring greater transparency and clarity to the rulebook, thus benefitting investors.

Finally, the Exchange believes the proposed changes to clarify when an order ceases to remain a part of the drill-through process and to specify what happens to orders undergoing drill-through at the end of a trading session will protect investors by adding transparency to the rules regarding the drill-through functionality and provide greater certainty as to the application of the drill-through process.

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a GTH session, it would begin at 8:30 a.m. and go until 9:15 a.m. ET on Monday through Friday.

[21] RTH for transactions in equity options (including options on individual stocks, ETFs, ETNs, and other securities) are the normal business days and hours set forth in the rules of the primary market currently trading the securities underlying the options, except for options on ETFs, ETNs, Index Portfolio Shares, Index Portfolio Receipts, and Trust Issued Receipts the Exchange designates to remain open for trading beyond 4:00 p.m. Eastern Time (ET) but in no case later than 4:15 p.m. ET. RTH for transactions in index options are from 9:30 a.m. to 4:15 p.m. ET, subject to certain exceptions.

[22] *See* Rule 5.31 for the definition of Queuing Book.

[23] 15 U.S.C. 78f(b).

[24] 15 U.S.C. 78f(b)(5).

[25] *Id.*

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 that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the enhanced drill-through protection will apply to all marketable orders in the same manner. Additionally, it will provide the same price protection and execution opportunities to relevant market orders that are currently provided to supermarketable limit orders, which function in a similar manner.

The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed enhancement to the drill-through protection is consistent with the current protection and provides relevant market orders with improved protection against execution at potentially erroneous prices through drill-through price protection in accordance with User instructions. Additionally, the proposed rule change relates specifically to a price protection offered on the Exchange and how the System handles orders as part of this price protection mechanism.

The Exchange believes the proposed rule change would ultimately provide all market participants with additional execution opportunities when appropriate while providing protection from erroneous execution. The Exchange believes the proposal will enhance risk protections, the individual firm benefits of which flow downstream to counterparties both at the Exchange and at other options exchanges, which increases systemic protections as well. The Exchange believes enhancing risk protections will allow Users to enter orders and quotes with further reduced fear of inadvertent exposure to excessive risk, which will benefit investors through increased exposure to liquidity for the execution of their orders. Without adequate risk management tools, Trading Permit Holders could reduce the amount of order flow and liquidity they provide. Such actions may undermine the quality of the markets available to customers and other market participants. Accordingly, the proposed rule change is designed to encourage Trading Permit Holders to submit additional order flow and liquidity to the Exchange. Accordingly, the proposed rule change is designed to encourage Trading Permit Holders to submit additional order flow and liquidity to the Exchange. The proposed flexibility may similarly provide additional execution opportunities, which further benefits liquidity in potentially volatile markets. In addition, providing Trading Permit Holders with more tools for managing risk will facilitate transactions in securities because, as noted above, Trading Permit Holders will have more confidence protections are in place that reduce the risks from potential system errors and market events.

Finally, the proposed clarifying changes are not intended to have any impact on competition, but rather codify current functionality to add transparency to the Rules.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act [26] and subparagraph (f)(6) of Rule 19b–4 thereunder.[27]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

[26] 15 U.S.C. 78s(b)(3)(A)(iii).

[27] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

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 (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–C2–2023–017 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–C2–2023–017. 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 (*https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–C2–2023–017 and should be submitted on or before August 31, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–17107 Filed 8–9–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98056; File No. SR–GEMX–2023–09]

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Reduce GEMX's Options Regulatory Fee

August 4, 2023.

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 July 25, 2023, Nasdaq GEMX, LLC (''GEMX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend GEMX's Pricing Schedule at Options 7, Section 5 to reduce the GEMX Options Regulatory Fee or ''ORF.''

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments become operative on August 1, 2023.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/gemx/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

GEMX proposes to lower its ORF from $0.0013 to $0.0012 per contract side on August 1, 2023. Previously, GEMX lowered or waived its ORF in 2019, 2021, 2022 and 2023.[3] After a review of its regulatory revenues and regulatory costs, the Exchange proposes to reduce the ORF to ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, does not exceed the Exchange's total regulatory costs.

Volumes in the options industry went over 900,000,000 in 2023. GEMX has taken measures this year as well as in prior years to lower and waive its ORF to ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. Despite those prior measures, GEMX will need to reduce its ORF again to account for trading volumes in the first half of 2023 that were higher than the Exchange forecast for ORF assessment purposes, which resulted in the collection of more ORF revenues than anticipated in the first half of 2023. At this time, GEMX believes that the options volume it experienced in the first half of 2023 is likely to persist. The anticipated options volume would continue to impact GEMX's ORF collection which, in turn, has caused GEMX to propose reducing the ORF to ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, would not exceed the Exchange's total regulatory costs.

Collection of ORF

GEMX will continue to assess its ORF for each customer option transaction that is either: (1) executed by a Member on GEMX; or (2) cleared by an GEMX Member at The Options Clearing Corporation (''OCC'') in the customer range,[4] even if the transaction was executed by a non-Member of GEMX, regardless of the exchange on which the transaction occurs.[5] If the OCC clearing member is a GEMX Member, ORF is assessed and collected on all cleared customer contracts (after adjustment for CMTA [6]); and (2) if the OCC clearing member is not a GEMX Member, ORF is collected only on the cleared customer contracts executed at GEMX, taking into account any CMTA instructions which may result in collecting the ORF from a non-Member.[7]

In the case where a Member both executes a transaction and clears the transaction, the ORF will be assessed to and collected from that Member. In the case where a Member executes a transaction and a different Member clears the transaction, the ORF will be assessed to and collected from the Member who clears the transaction and not the Member who executes the transaction. In the case where a non-Member executes a transaction at an away market and a Member clears the transaction, the ORF will be assessed to and collected from the Member who clears the transaction. In the case where a Member executes a transaction on GEMX and a non-Member clears the transaction, the ORF will be assessed to the Member that executed the transaction on GEMX and collected from the non-Member who cleared the transaction. In the case where a Member executes a transaction at an away market and a non-Member clears the transaction, the ORF will not be

[28] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 85140 (February 14, 2019), 84 FR 5511 (February 21, 2019) (SR–GEMX–2019–01) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Options Regulatory Fee); 92698 (August 18, 2021), 86 FR 47355 (August 24, 2021) (SR–GEMX–2021–08) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend GEMX's Options Regulatory Fee); 94069 (January 26, 2022), 87 FR 5545 (February 1, 2022) (SR–GEMX–2022–03) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Reduce GEMX's Options Regulatory Fee); and 96598 (January 3, 2023), 88 FR 1308 (January 9, 2023) (SR–GEMX–2022–14) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Reduce GEMX's Options Regulatory Fee).

[4] Participants must record the appropriate account origin code on all orders at the time of entry of the order. The Exchange represents that it has surveillances in place to verify that members mark orders with the correct account origin code.

[5] The Exchange uses reports from OCC when assessing and collecting the ORF.

[6] CMTA or Clearing Member Trade Assignment is a form of ''give-up'' whereby the position will be assigned to a specific clearing firm at OCC.

[7] By way of example, if Broker A, a GEMX Member, routes a customer order to CBOE and the transaction executes on CBOE and clears in Broker A's OCC Clearing account, ORF will be collected by GEMX from Broker A's clearing account at OCC via direct debit. While this transaction was executed on a market other than GEMX, it was cleared by a GEMX Member in the member's OCC clearing account in the customer range, therefore there is a regulatory nexus between GEMX and the transaction. If Broker A was not a GEMX Member, then no ORF should be assessed and collected because there is no nexus; the transaction did not execute on GEMX nor was it cleared by a GEMX Member.

assessed to the Member who executed the transaction or collected from the non-Member who cleared the transaction because the Exchange does not have access to the data to make absolutely certain that ORF should apply. Further, the data does not allow the Exchange to identify the Member executing the trade at an away market.

ORF Revenue and Monitoring of ORF

The Exchange monitors the amount of revenue collected from the ORF to ensure that it, in combination with other regulatory fees and fines, does not exceed regulatory costs. In determining whether an expense is considered a regulatory cost, the Exchange reviews all costs and makes determinations if there is a nexus between the expense and a regulatory function. The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter offset ORF.

Revenue generated from ORF, when combined with all of the Exchange's other regulatory fees and fines, is designed to recover a material portion of the regulatory costs to the Exchange of the supervision and regulation of member customer options business including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. Regulatory costs include direct regulatory expenses and certain indirect expenses in support of the regulatory function. The direct expenses include in-house and third-party service provider costs to support the day-to-day regulatory work such as surveillances, investigations and examinations. The indirect expenses include support from such areas as Office of the General Counsel, technology, and internal audit. Indirect expenses were approximately 39% of the total regulatory costs for 2023. Thus, direct expenses were approximately 61% of total regulatory costs for 2023.[8]

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of its Members, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities.

Proposal

Based on the Exchange's most recent review, the Exchange is proposing to reduce the amount of ORF that will be collected by the Exchange from $0.0013 per contract side to $0.0012 per contract side. The Exchange issued an Options Trader Alert on June 30, 2023 indicating the proposed rate change for August 1, 2023.[9]

The proposed reduction is based on current levels of options volume. The below table displays monthly total volume for 2023.[10]

Month	Total volume	Customer sides
January 2023	919,299,330	802,712,235
February 2023	883,234,837	780,284,838
March 2023	1,052,984,722	915,674991
April 2023	760,808,909	673,183,772
May 2023	944,534,205	826,490,407
June 2023[11]	909,616,267	801,688,960

Options volumes remained higher in 2023 with March 2023 exceeding 1,000,000,000 total contracts, higher than any month in 2022. With respect to customer options volume, it also remains high in 2023. There can be no assurance that the Exchange's regulatory costs for the remainder of 2023 will not differ materially from the Exchange's budgeted amount, nor can the Exchange predict with certainty whether options volume will remain at the current level going forward. The Exchange notes however, that when combined with regulatory fees and fines, the revenue that may be generated utilizing an ORF rate of $0.0013 per contract side may result in revenue which exceeds the Exchange's estimated regulatory costs for 2023 if options volumes remain at levels higher than forecasted.

GEMX lowered its ORF in the beginning of 2023 to account for options volume in 2022. The Exchange proposes to reduce its ORF to $0.0012 per contract side to ensure that revenue does not exceed the Exchange's estimated regulatory costs in 2023. Particularly, the Exchange believes that reducing the ORF when combined with all of the Exchange's other regulatory fees and fines, would allow the Exchange to continue covering a material portion of its regulatory costs, while lessening the potential for generating excess revenue that may otherwise occur using the rate of $0.0013 per contract side.[12]

The Exchange will continue to monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs. If the Exchange determines regulatory revenues may exceed or are projected to exceed regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission and notifying[13] its Members via an Options Trader Alert.[14] The Exchange is also deleting obsolete text in the Exhibit 5 regarding prior ORF rates.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[15] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[16] which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its members, and other persons using its

[8] These numbers are taken from the Exchange's 2023 Regulatory Budget.

[9] *See* Options Trader Alert 2023–15.

[10] Volume data in the table represents numbers of contracts; each contract has two sides.

[11] June numbers reflect volumes through June 29, 2023.

[12] The Exchange notes that its regulatory responsibilities with respect to Member compliance with options sales practice rules have largely been allocated to FINRA under a 17d–2 agreement. The ORF is not designed to cover the cost of that options sales practice regulation.

[13] The Exchange provides Members with such notice at least 30 calendar days prior to the operative date of the change. *See* Options Trader Alert 2023–15.

[14] The Exchange notes that in connection with this proposal, it provided the Commission confidential details regarding the Exchange's projected regulatory revenue, including projected revenue from ORF, along with projected regulatory expenses.

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(4).

facilities. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [17] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes the proposed fee change is reasonable because customer transactions will be subject to a lower ORF fee as of August 1, 2023 and the amount of the lower fee will fund a reasonable portion of the Exchange's regulatory costs. Moreover, the proposed reduction is necessary for the Exchange to avoid collecting revenue, in combination with other regulatory fees and fines, that would be in excess of its anticipated regulatory costs.

The Exchange designed the ORF to generate revenues that would be less than the amount of the Exchange's regulatory costs to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs, which is consistent with the view of the Commission that regulatory fees be used for regulatory purposes and not to support the Exchange's business operations. As discussed above, however, after review of its regulatory costs and regulatory revenues, which includes revenues from ORF and other regulatory fees and fines, the Exchange determined that absent a reduction in ORF, it may collect revenue which would exceed its regulatory costs. Indeed, the Exchange notes that when taking into account the potential that recent options volume persists, it estimates the ORF may generate revenues that would cover more than the approximated Exchange's projected regulatory costs. As such, the Exchange believes it's reasonable and appropriate to reduce the ORF amount from $0.0013 to $0.0012 per contract side on August 1, 2023.

The Exchange also believes the proposed fee change is equitable and not unfairly discriminatory in that it is charged to all Members on all their transactions that clear in the customer range at OCC.[18] The Exchange believes the ORF ensures fairness by assessing higher fees to those Members that require more Exchange regulatory services based on the amount of customer options business they conduct. Regulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive. For example, there are costs associated with main office and branch office examinations (*e.g.,* staff expenses), as well as investigations into customer complaints and the terminations of registered persons. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (*e.g.,* Member proprietary transactions) of its regulatory program. Moreover, the Exchange notes that it has broad regulatory responsibilities with respect to activities of its Members, irrespective of where their transactions take place. Many of the Exchange's surveillance programs for customer trading activity may require the Exchange to look at activity across all markets, such as reviews related to position limit violations and manipulation. Indeed, the Exchange cannot effectively review for such conduct without looking at and evaluating activity regardless of where it transpires. In addition to its own surveillance programs, the Exchange also works with other SROs and exchanges on intermarket surveillance related issues. Through its participation in the Intermarket Surveillance Group (''ISG'') [19] the Exchange shares information and coordinates inquiries and investigations with other exchanges designed to address potential intermarket manipulation and trading abuses. Accordingly, there is a strong nexus between the ORF and the Exchange's regulatory activities with respect to customer trading activity of its Members.

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. This proposal does not create an unnecessary or inappropriate intra-market burden on competition because the ORF applies to all customer activity, thereby raising regulatory revenue to offset regulatory expenses. It also supplements the regulatory revenue derived from non-customer activity. The Exchange notes, however, the proposed change is not designed to address any competitive issues. Indeed, this proposal does not create an unnecessary or inappropriate inter-market burden on competition because it is a regulatory fee that supports regulation in furtherance of the purposes of the Act. The Exchange is obligated to ensure that the amount of regulatory revenue collected from the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [20] of the Act and subparagraph (f)(2) of Rule 19b–4 [21] 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) [22] 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:

[17] 15 U.S.C. 78f(b)(5).

[18] If the OCC clearing member is a GEMX member, ORF is assessed and collected on all cleared customer contracts (after adjustment for CMTA); and (2) if the OCC clearing member is not a GEMX member, ORF is collected only on the cleared customer contracts executed at GEMX, taking into account any CMTA instructions which may result in collecting the ORF from a non-member.

[19] ISG is an industry organization formed in 1983 to coordinate intermarket surveillance among the SROs by cooperatively sharing regulatory information pursuant to a written agreement between the parties. The goal of the ISG's information sharing is to coordinate regulatory efforts to address potential intermarket trading abuses and manipulations.

[20] 15 U.S.C. 78s(b)(3)(A).

[21] 17 CFR 240.19b–4(f)(2).

[22] 15 U.S.C. 78s(b)(2)(B).

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–GEMX–2023–09 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–GEMX–2023–09. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–GEMX–2023–09 and should be submitted on or before August 31, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–17103 Filed 8–9–23; 8:45 am]

BILLING CODE 8011–01–P

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98059; File No. SR–CboeBZX–2023–053]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Enhance Its Drill-Through Protection Processes for Simple Orders and Make Other Clarifying Changes

August 4, 2023.

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 July 24, 2023, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') 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 Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') proposes to enhance its drill-through protection processes for simple orders and make other clarifying changes. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this rule filing is to amend Rule 21.17, Additional Price Protection Mechanisms and Risk Controls, to enhance the drill-through protection process for simple orders and make other clarifying changes.

Drill-through price protection is currently described in Exchange Rule 21.17(d). Under Rule 21.17(d)(1), if a buy (sell) order enters the BZX Options Book[3] (''Book'') at the conclusion of the opening auction process or would execute or post to the Book at the time of order entry, the System[4] executes the order up to a buffer amount (the Exchange determines the buffer amount on a class and premium basis) above (below) the offer (bid) limit of the Opening Collar[5] or the National Best Offer (''NBO'') (National Best Bid (''NBB'')) that existed at the time of order entry, respectively (the ''drill-through price'').[6]

Current Rule 21.17(d)(2) (as amended, proposed Rule 21.17(d)(3))[7] establishes an iterative drill-through process, whereby the Exchange permits orders to rest in the Book for multiple time periods and at more aggressive displayed prices during each time period.[8] Specifically, the System enters the order in the Book with a displayed price equal to the drill-through price (unless the terms of the order instruct otherwise).[9] The order (or unexecuted portion) will rest in the Book at the drill-through price for the duration of consecutive time periods (the Exchange determines on a class-by-class basis the

[3] ''BZX Book'' means the System's electronic file of orders. *See* Rule 1.5 (e).

[4] ''System'' means the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when applicable, routing away. *See* Rule 1.5 (aa).

[5] *See* Rule 21.7(a) for the definition of Opening Collar.

[6] *See* Rule 21.17(d)(1).

[7] As part of the rule changes described herein, the Exchange proposes to renumber current subparagraph (d)(2) to be proposed subparagraph (d)(3), and to renumber current subparagraph (d)(3) to be proposed subparagraph (d)(4).

[8] The Exchange will announce to Members the buffer amount and the length of the time periods. The Exchange notes that each time period will be the same length (as designated by the Exchange), and the buffer amount applied for each time period will be the same.

[9] Currently, the drill-through protections described under current Rule 21.17(d)(2) apply only to a limit order with a Time-in-Force of Day, Good-til-Cancel (''GTC''), or Good-til-Day (''GTD''). This rule proposal also seeks to clarify which orders are subject to the drill-through protections, as described herein.

length of the time period in milliseconds, which may not exceed three seconds).[10] Following the end of each period, the System adds (if a buy order) or subtracts (if a sell order) one buffer amount (the Exchange determines the buffer amount on a class-by-class basis) to the drill-through price displayed during the immediately preceding period (each new price becomes the ''drill-through price'').[11] The order (or unexecuted portion) rests in the Book at that new drill-through price for the duration of the subsequent period. The System applies a timestamp to the order (or unexecuted portion) based on the time it enters or is re-priced in the Book for priority reasons. The order continues through this iterative process until the earliest of the following to occur: (a) the order fully executes; (b) the User[12] cancels the order; and (c) the buy (sell) order's limit price equals or is less (greater) than the drill-through price at any time during application of the drill-through mechanism, in which case the order rests in the Book at its limit price, subject to a User's instructions.

Currently, the above-described iterative drill-through process does not apply to market orders. Specifically, if a buy (sell) market order would execute at the time of order entry, the System executes the order up to the Exchange-determined buffer amount above (below) the NBO (NBB) at the time of order entry and then rejects any remaining amount. For example, suppose a market order to buy two contracts enters the System; assume that the drill-through price buffer for a certain option series is $0.90 and that the following quotes are in the Book: Quote 1 (NBBO): 1 @5.00 × 1 @7.00; Quote 2: 2 @4.00 × 1 @8.00. One contract in the market order will execute against the 7.00 offer quote. The remaining one contract of the market order is cancelled, because the next best offer of 8.00 is 1.00 above the NBO, which is more than the 0.90 buffer amount.

The Exchange proposes for market orders with a Time-in-Force of Day to go through the iterative drill-through process described above.[13] The Exchange also proposes to amend current Rule 21.17(d)(2) (as amended, proposed Rule 21.17(d)(3)) to clarify that limit orders with a Time-in-Force of Day, GTC, or GTD also go through the iterative drill-through process. In the above example, rather than cancel the remaining one contract, the System would rest the one contract in the Book at the drill-through price of 7.90 (*i.e.* the NBO plus the buffer amount) for the Exchange-determined time period. At the end of that time period, assuming the market has not changed, the remaining one contract would execute against the 8.00 offer, which is within a buffer amount of the subsequent drill-through price of 8.80. As a result, like super-aggressive limit orders (except for those with Time-in-Force of Immediate-or-Cancel (''IOC'') or Fill-or-Kill (''FOK'')) do today, market orders (except for those with Time-in-Force of IOC) will have additional execution opportunities pursuant to the drill-through process. As the proposed rule change only applies to market orders with a Time-in-Force of Day, and the drill through protections described under current Rule 21.17(d)(2) continue to apply only to limit orders with a Time-in-Force of Day, GTC, or GTD, the Exchange also proposes to adopt proposed Rule 21.17(d)(2)[14] to specify that the System will cancel or reject any market order with Time-in-Force of IOC (or unexecuted portion) or limit order with a Time-in-Force of IOC or FOK (or unexecuted portion) not executed pursuant to 21.17(d)(1).[15] The Exchange believes it is appropriate to not have a market order with a Time-in-Force of IOC to go through the iteration process, because the iteration process would be inconsistent with the IOC instruction (and thus the user's intent). Further, the Exchange proposes to amend Rule 21.17(d)(1) to more generally describe when applicable order types may become subject to drill-through protection. Specifically, the Exchange proposes to specify that the protections described in Rule 21.17(d)(1) become applicable if a buy (sell) order, to which Rule 21.17(d)(1) would apply, (i) enters the Book at the conclusion of opening auction process, or (ii) would execute or post to the Book when it enters the Book.[16]

The Exchange also proposes to amend Rule 21.17(e)(1)(B) to exclude from the current protections for market orders in no-bid series certain orders that would be otherwise subject to the drill-through protection under the proposed rule changes. Currently, under Rule 21.17(e)(1)(B), if the System receives a sell market order in a series after it is open for trading with an NBB of zero, and the NBO in the series is greater than $0.50, the System cancels or rejects the market order. The Exchange proposes amending this protection in the event a drill-through process is in progress. Specifically, the Exchange proposes to amend Rule 21.17(e)(1)(B) to note that in the event the System receives a sell market order in a series after it is open for trading with an NBB of zero and the NBO in the series is greater than $0.50, if the drill-through process is in progress for sell orders and the sell market order would be subject to drill-through protection, then the order would join the on-going drill-through process in the then-current iteration and at the then-current drill-through price, regardless of NBBO. The Exchange believes it is not optimal for these orders to be immediately booked at the minimum tick increment, as under the proposed rule change, such orders would instead, be subject to the drill-through protection mechanism described under Rule 21.17(d), which may allow opportunity for execution at a more beneficial price level than the minimum tick increment.

Further, the Exchange proposes to amend Rule 21.17(a) to specifically exclude orders that would be subject to drill-through protection from the market order NBBO width protections described therein. Currently, under Rule 21.17(a), if a User submits a market order to the System when the NBBO width is greater than x% of the midpoint of the NBBO, subject to a minimum and maximum dollar amount (as determined by the Exchange on a class-by-class basis), the System cancels or rejects the market order. The Exchange proposes amending Rule 21.17(a) to exclude Stop Orders[17] and Market-on-Close orders from this protection. Such orders may intentionally be further away from the NBBO at the time the order is entered, and the protection may cause the orders to be inadvertently rejected pursuant to this check. The Exchange believes it is not optimal for these orders to be subject to the market order NBBO width protection, as the check may

[10] *See* current Rule 21.17(d)(2)(A) (as amended, Rule 21.17(d)(3)(A)). The proposed rule change defines this time period as an ''iteration.''

[11] *See* current Rule 21.17(d)(2)(B) (as amended, Rule 21.17(d)(3)(B)).

[12] The term ''User'' shall mean any Member or Sponsored Participant who is authorized to obtain access to the System pursuant to Rule 11.3. *See* Rule 1.5(cc).

[13] *See* proposed Rule 21.17(d)(3).

[14] *See* supra note 9.

[15] There is no change to the handling of market orders with a Time-in-Force of GTC or GTD as a result of this rule change; such orders will continue to be rejected by the Exchange.

[16] This includes, for example, when a Stop (Stop-Loss) or Stop-Limit order is elected.

[17] A ''Stop Order'', or Stop (Stop-Loss) Order, is an order that becomes a BZX market order when the stop price is elected. A Stop Order to buy is elected when the consolidated last sale in the security occurs at, or above, the specified stop price. A Stop Order to sell becomes a limit order when the consolidated last sale in the security occurs at, or below, the specified stop price. *See* Rule 11.9(c)(16).

inadvertently cause rejections for orders that may otherwise not have an opportunity to execute if they are immediately cancelled due to market width. Under the proposed rule change, such orders would instead, upon entry into the Book (when elected in accordance with their definitions), be subject to the drill-through protection mechanism described under Rule 21.17(d). The Exchange also proposes a clarification to proposed Rule 21.17(d)(4).[18] Currently, under Rule 21.17(d)(4), if multiple Stop (Stop-Loss) or Stop-Limit[19] orders to buy (sell) have the same stop price and are thus triggered by the same trade price or NBBO, and would execute or post to the Book, the System uses the contra-side NBBO that existed at the time the first order in sequence was entered into the Book as the drill-through price for all orders. The Exchange proposes to remove the conditional language noting that such Stop (Stop-Loss) or Stop-Limit orders to buy (sell) must have the same stop price, as it is possible that orders with different stop prices may be triggered by the same trade price or NBBO. Further, the Exchange proposes to add language stating that, where multiple orders are simultaneously re-priced, the orders will be prioritized under proposed Rule 21.17(d)(3)(E)[20] and will be sequenced based on the original time each order was entered into the Book.

For example, assume that the drill-through price buffer for a certain option series is $0.90, and that the following quotes are in the Book: Quote 1 (NBBO): 1 @5.00 × 1 @7.00; Quote 2: 2 @4.00 × 1 @8.00. Additionally, the following Stop orders are being held in the System when Quote 2 is updated to 2 @4.00 × 1 @6.50 (the System received these stop orders in the below sequence):

Order 1: Sell 1 @Market, Stop Price = $6.50
Order 2: Sell 1 @Market, Stop Price = $6.55
Order 3: Sell 1 @$3.95, Stop Price = $6.60

Each of orders 1, 2 and 3 have a stop price less than the NBO, and will therefore be triggered by the 6.50 quote and enter the Book for execution or posting. A drill-through price for all three orders is set at the contra-side NBB of 5.00. Per proposed Rule 21.17(d)(3), the orders will go through the drill-through process as follows:

1. Order 1 will execute against Quote 1 @$5.00.
2. Orders 2 and 3 are posted to sell at $4.10 for the Exchange-determined time period.
3. Drill-through process continues for orders 2 and 3 until they are canceled or executed.

As amended, under Rule 21.17(d)(4), all Stop (Stop-Loss) and Stop-Limit orders elected as a result of the same election trigger (NBBO update or last sale price) will continue to use the same reference price for drill-through (even though they may have different stop prices).

The Exchange proposes to amend Rule 21.17(d)(3)(B),[21] to specify that if at any time during the drill-through process, the NBO (NBB) changes to be below (above) the current drill-through price, such NBO (NBB) will become the new drill-through price and a new drill-through will immediately begin. As a result, any improvements to the market that occur while the drill-through is in process will be incorporated, thereby providing Users with further opportunity to be priced within the market while still being protected. Under the proposed rule change, any limit order with a price that is less aggressive than the new drill-through price would be entered in the Book at its limit price.

The Exchange also proposes to add Rule 21.17(d)(3)(D)[22] to provide that if the System receives a market or limit order that would be subject to the drill-through process while a drill-through is in progress in the same series, the order joins the ongoing drill-through process in the then-current iteration and at the then-current drill-through price. Under the proposed rule, orders that come in while a drill-through is in process receive the benefit of joining the drill-through at the NBBO at the time of entry, as opposed to immediately executing or being displayed at a more aggressive price than the drill-through price. By way of illustration, consider the following example:

Assume that the drill-through price buffer for a certain option series is $0.90, and that the following quotes are in the Book: Quote 1 (NBBO): 1 @5.00 × 1 @7.00; Quote 2: 2 @4.00 × 1 @8.00. The System receives the following orders in the below sequence:
Order 1: Sell 1 @Market, Stop Price = $6.50
Order 2: Sell 1 @Market, Stop Price = $6.55
Order 3: Sell 1 @$3.95, Stop Price $6.60
Order 4: Sell 2 @Market, Stop Price = $4.50

During this time, Quote 2 is updated to: 2 @4.00 × 1 @6.50. Orders 1, 2, and 3 are elected, and the drill-through reference price for all three orders is set to contra-side NBB of 5.00.

1. Order 1 executes Quote 1 @$5.00.
2. Orders 2 and 3 are posted to sell @ $4.10 (drill-through price) for the Exchange-determined time period.
3. Order 4 is elected due to updated best offer of $4.10, and joins Orders 2 and 3 at the iterative drill-through price of $4.10. The offer is updated to 4 @ $4.10.
4. Order 5 (Sell 10 @Market (Day)) and Order 6 (Sell 1 @$4.05 Limit (Day)) enter the Book. Per proposed Rule 21.17(d)(3)(D), Orders 5 and 6 join the drill-through iteration at the drill-through reference price of $4.10, and the best offer is updated to 15 @$4.10.
5. The drill-through process continues for orders 2, 3, 4, 5, and 6 until the contracts are canceled or executed.

Because the proposed rule change may result in multiple orders going through the drill-through process at the same price and at the same time, the proposed rule change also describes how these orders will be prioritized and allocated when executing against resting interest or incoming interest. Specifically, proposed Rule 21.17(d)(3)(E)[23] states the System prioritizes orders that are part of the same drill-through iteration (A) based on the time the System enters or reprices them in the Book (*i.e.,* in time priority) when, after an iteration, the new drill-through price makes the order(s) marketable against resting orders and (B) in accordance with the applicable base allocation algorithm when executing against any incoming interest. The Exchange believes this is appropriate because incoming marketable orders would ultimately execute in time priority today. Additionally, having multiple orders execute in accordance with the applicable base allocation algorithm when executing against incoming interest is consistent with how resting orders execute against incoming interest.

Continuing from the above example, assume the drill-through process iterates to the next drill-through price, which would be $3.20. In doing so, Order 6 posts at its limit price of $4.05, and the rest of the orders are eligible to execute in time sequence against the resting $4.00 bid. Per proposed Rule 21.17(d)(3)(E), the orders will go through the drill-through process as follows:

[18] *See* supra note 9.

[19] A ''Stop-Limit'' order is an order that becomes a limit order when the stop price is elected. A Stop Limit Order to buy is elected when the consolidated last sale in the security occurs at, or above, the specified stop price. A Stop Limit Order to sell becomes a sell limit order when the consolidated last sale in the security occurs at, or below, the specified stop price. *See* Rule 11.9(c)(17).

[20] *See* supra note 9.

[21] *See* supra note 9.

[22] As a result of the additional provisions described herein, the proposed rule change renumbers current subparagraph (D) to be proposed subparagraph (F) and current subparagraph (E) to be proposed subparagraph (H). *See also* supra note 9.

[23] *Id.*

1. Order 2 (Sell 1 @Market) will execute against Quote 2 @$4.00.

2. Order 3 (Sell 1 @$3.95) will execute against Quote 2 @$4.00.

3. The Quote 2 is exhausted, and the next best bid is Quote 1 for 5 @$3.00.

4. Remaining drill-through is Order 4 (Sell 2 @Market) and Order 5 (Sell 10 @ Market). Market is now 5 @$3.00 × 12 @$3.20, and the drill-through process continues until these contracts are executed or cancelled.

If, prior to the next drill-through iteration, Order 7 (buy 5 @$3.25) is entered and executes against Orders 4 and 5 at $3.20, the allocation will depend on the allocation algorithm for the relevant class, under the amended Rule.

1. If pro-rata, Order 7 trades 1 contract against Order 4 and 4 contracts against Order 5.

2. If price-time, Order 7 trades 2 contracts against Order 4 and 3 contracts against Order 5.

3. Remaining size on Order 4 (if applicable) and Order 5 will continue to drill-through as described in previous examples.

The Exchange also proposes to amend Rule 21.17(d)(3)(F).[24] Currently, the rule states that an order will continue through the drill-through process until the earliest of the following to occur: (a) the order fully executes; (b) the User cancels the order; and (c) the buy (sell) order's limit price equals or is less (greater) than the drill-through price at any time during application of the drill-through mechanism, in which case the orders rests in the Book at its limit price, subject to a User's instruction. The Exchange proposes to amend part (c) to remove reference to when the order's limit price equals the drill-through price, since under the drill-through process, if a buy (sell) order's limit price equals the drill-through price during the application of the drill-through mechanism it will remain part of the drill-through process, until the order's limit price is less (greater) than the drill-through price, at which point it will rest in the Book at its limit price. The Exchange also proposes to remove reference to a User's instruction, as there is no additional instruction that would allow a User to choose a different order handling option once the buy (sell) order limit price is less (greater) than the drill-through price.

Finally, the Exchange proposes to add Rule 21.17(d)(3)(G) to specify that if an order(s) (or unexecuted portion(s)) is undergoing the drill-through process at the end of its last eligible trading session for that trading day (*i.e.,* RTH), the drill-through process concludes. Any order (or unexecuted portion) with a Time-in-Force of (i) Day is canceled, and (ii) GTC or GTD enters the Queuing Book for the next eligible trading session as a market order or limit order (at its limit price).

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[25] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [26] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [27] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes the proposed rule change to enhance drill-through protections for simple orders and to make certain market orders eligible for drill-through protection will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors, because it will provide these orders with additional and consistent execution opportunities and protections. The primary purpose of the drill-through price protection is to prevent orders from executing at prices ''too far away'' from the market when they enter the Book for potential execution. The Exchange believes the proposed rule change is consistent with this purpose, because Users who submit market orders with a Time-in-Force of Day will receive the same level of drill-through price protection against execution at potentially erroneous prices that is currently afforded to supermarketable limit orders while receiving the same additional execution opportunities. Supermarketable limit orders currently go through the drill-through process, and market orders with a Time-in-Force of Day are functionally similar to supermarketable limit orders. Therefore, the Exchange believes it is appropriate to provide both types of orders with the same price protection.

Further, the proposed rule change to provide that any new market and limit orders that would be subject to drill-through protection will join any in-progress drill-through iterations and display at the then-current drill-through price (and the corresponding changes regarding allocation and prioritization) allows new orders to receive the same level of price protection as other orders undergoing the drill-through process. The proposed rule change will allow all orders additional execution opportunities while continuing to protect them against execution at potentially erroneous prices. Similarly, the Exchange believes the proposed change to consider changes to the NBO (NBB) during drill-through and to update the drill-through price to such NBO (NBB) should it be lower (higher) than the drill-through price will further provide opportunity for execution at reasonable prices by capturing any market moves that may result in more aggressive prices.

The Exchange believes the proposal will enhance risk protections, the individual firm benefits of which flow downstream to counterparties both at the Exchange and at other options exchanges, which increases systemic protections as well. The Exchange believes enhancing risk protections will allow Users to enter orders and quotes with further reduced fear of inadvertent exposure to excessive risk, which will benefit investors through increased exposure to liquidity for the execution of their orders.

Additionally, the Exchange believes changes to specifically exclude from market order NBBO width and market order in no-bid series protections certain orders that would be subject to drill-through protection will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors. Specifically, the Exchange believes the changes to exclude certain orders that would be subject to drill-through protection from market order NBBO width protections may reduce inadvertent rejection of such orders which may be purposely priced far away from the NBBO at the time of entry and may otherwise miss an opportunity for execution if immediately cancelled. The Exchange also believes the changes to exclude

[24] *Id.*

[25] 15 U.S.C. 78f(b).

[26] 15 U.S.C. 78f(b)(5).

[27] *Id.*

certain orders that would be subject to drill-through protection from market order in no-bid series protections may allow opportunity for execution at a more beneficial price level than if they were immediately booked at the minimum tick increment. This proposed rule change may increase execution opportunities for Users that submit such Stop (Stop-Loss) and Market-on-Close orders (in the case of market order NBBO width protections) and sell market orders with an NBB of zero when the NBO in the series is greater than $0.50 (in the case of market orders in no-bid series protections).

The Exchange believes the proposed change to Rule 21.17(d)(4) will protect investors because it clarifies that if multiple Stop (Stop-Loss) and Stop-Limit orders are triggered by the same trade price or NBBO (even if the orders have different stop prices), and would execute or post to the Book, the System uses the contra-side NBBO that existed at the time the first order in sequence was entered into the Book as the drill-through price for all orders. The Exchange believes that the proposed rule change will bring greater transparency and clarity to the rulebook, thus benefitting investors.

Finally, the Exchange believes the proposed changes to specify what happens to orders undergoing drill-through at the end of a trading session will protect investors by adding transparency to the rules regarding the drill-through functionality and provide greater certainty as to the application of the drill-through process.

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 that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the enhanced drill-through protection will apply to all marketable orders in the same manner. Additionally, it will provide the same price protection and execution opportunities to relevant market orders that are currently provided to supermarketable limit orders, which function in a similar manner.

The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed enhancement to the drill-through protection is consistent with the current protection and provides relevant market orders with improved protection against execution at potentially erroneous prices through drill-through price protection in accordance with User instructions. Additionally, the proposed rule change relates specifically to a price protection offered on the Exchange and how the System handles orders as part of this price protection mechanism.

The Exchange believes the proposed rule change would ultimately provide all market participants with additional execution opportunities when appropriate while providing protection from erroneous execution. The Exchange believes the proposal will enhance risk protections, the individual firm benefits of which flow downstream to counterparties both at the Exchange and at other options exchanges, which increases systemic protections as well. The Exchange believes enhancing risk protections will allow Users to enter orders and quotes with further reduced fear of inadvertent exposure to excessive risk, which will benefit investors through increased exposure to liquidity for the execution of their orders. Without adequate risk management tools, Members could reduce the amount of order flow and liquidity they provide. Such actions may undermine the quality of the markets available to customers and other market participants. Accordingly, the proposed rule change is designed to encourage Members to submit additional order flow and liquidity to the Exchange. Accordingly, the proposed rule change is designed to encourage Members to submit additional order flow and liquidity to the Exchange. The proposed flexibility may similarly provide additional execution opportunities, which further benefits liquidity in potentially volatile markets. In addition, providing Members with more tools for managing risk will facilitate transactions in securities because, as noted above, Members will have more confidence protections are in place that reduce the risks from potential system errors and market events.

Finally, the proposed clarifying changes are not intended to have any impact on competition, but rather codify current functionality to add transparency to the Rules.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[28] and subparagraph (f)(6) of Rule 19b–4 thereunder.[29]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeBZX–2023–053 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–CboeBZX–2023–053. 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 (*https://www.sec.gov/*

[28] 15 U.S.C. 78s(b)(3)(A)(iii).

[29] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeBZX–2023–053 and should be submitted on or before August 31, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–17106 Filed 8–9–23; 8:45 am]

BILLING CODE 8011–01–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA 2023–0017]

Notice of Verification Transaction Fee Increase for Consent Based Social Security Number Verification Service

AGENCY: Social Security Administration.

ACTION: Notice of fee increase.

SUMMARY: The Social Security Administration (SSA) is announcing a fee increase for the Consent Based Social Security Number (SSN) Verification (CBSV) service. We provide a fee-based SSN verification service to enrolled private businesses and government agencies who obtain a valid, signed consent form from the Social Security number holder.

DATES: *Applicability date for fee increase:* The verification transaction fee increase will go into effect on October 1, 2023.

FOR FURTHER INFORMATION CONTACT: Vivian Adebayo, Branch Chief, Office of Data Exchange, Policy Publications, and International Negotiations, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, (866) 395–8801, email *CBSV@ssa.gov.*

For information on eligibility or filing for benefits, call SSA's national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit SSA's internet site, Social Security Online, at *https://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION: Based on the consent forms, we verify the number holders' SSNs for the requesting party. The Privacy Act of 1974 (5 U.S.C. 552a(b)), section 1106 of the Social Security Act (42 U.S.C. 1306) and our regulation at 20 CFR 401.100, establish the legal authority for us to provide SSN verifications to third party requesters based on the written consent of the subject of the record. The CBSV process provides the business community and other government entities with consent-based SSN verifications in high volume. We developed CBSV as a user-friendly, internet-based application with safeguards that will protect the public's information. In addition to the benefit of providing high volume, centralized SSN verification services to the business community in a secure manner, CBSV provides us with cost and workload management benefits.

New Information: Currently, to use CBSV, interested parties must pay a one-time non-refundable enrollment fee of $5,000 and pay a fee of $1.00 per SSN verification transaction in advance of services. This $1.00 fee has been in place since fiscal year (FY) 2017. We calculate our costs periodically for providing CBSV services and adjust the fees as needed. We will notify our customers who currently use the service and allow them to cancel or continue using the service at the new transaction fee. Based on the most recent cost and transaction analysis, we will adjust the FY 2024 fee to $2.25 per SSN verification transaction in advance of services. New customers will still be responsible for the one-time $5,000 enrollment fee.

The primary reason for the fee increase is the declining volume in CBSV services. CBSV transactional volumes have decreased from 3.1 million transactions in FY 2021 to 2.1 million transactions in FY 2022. For FY 2023, we are projecting less than 1 million transactions based on current usage. Due to the significant decline in transactions, the per transaction costs are increasing. We will reevaluate transactional volumes in FY 2024. If the transaction volumes continue to decline, we will issue a subsequent notice to increase the CBSV fees again during FY 2024. We note that any unused advances and any fees collected in excess of our actual costs per transactions each year for CBSV services are refunded after the end of the fiscal year.

Stephen Evangelista,

Acting Deputy Commissioner, Office of Retirement and Disability Policy, Social Security Administration.

[FR Doc. 2023–17146 Filed 8–9–23; 8:45 am]

BILLING CODE 4191–02–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2023–0007]

Privacy Act of 1974; Matching Program

AGENCY: Social Security Administration (SSA).

ACTION: Notice of a new matching program.

SUMMARY: In accordance with the provisions of the Privacy Act, as amended, this notice announces a new matching program with the Bureau of the Fiscal Service (Fiscal Service), Department of the Treasury (Treasury). Under this matching program, Fiscal Service, Treasury will disclose savings security data to SSA. SSA will use the data to determine continued eligibility for Supplemental Security Income (SSI) applicants and recipients SSA will also use the data to determine the correct benefit amount for recipients and deemors who either did not report or who incorrectly reported their ownership of savings securities.

DATES: The deadline to submit comments on the proposed matching program is September 11, 2023. The matching program will be applicable on December 26, 2023, or once a minimum of 30 days after publication of this notice has elapsed, whichever is later. The matching program will be in effect for a period of 18 months.

ADDRESSES: You may submit comments by any one of three methods—internet, fax, or mail. Do not submit the same comments multiple times or by more than one method. Regardless of which method you choose, please state that your comments refer to Docket No. SSA–2023–0007 so that we may associate your comments with the correct regulation. Caution: You should be careful to include in your comments only information that you wish to make publicly available. We strongly urge you not to include in your comments any personal information, such as Social

[30] 17 CFR 200.30–3(a)(12).

Security numbers (SSNs) or medical information.

1. *Internet:* We strongly recommend that you submit your comments via the internet. Please visit the Federal eRulemaking portal at *https://www.regulations.gov.* Use the *Search* function to find docket number SSA–2023–0007 and then submit your comments. The system will issue you a tracking number to confirm your submission. You will not be able to view your comment immediately because we must post each submission manually. It may take up to a week for your comments to be viewable.

2. *Fax:* Fax comments to (833) 410–1631.

3. *Mail:* Matthew Ramsey, Executive Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, G–401 WHR, 6401 Security Boulevard, Baltimore, MD 21235–6401, or emailing *Matthew.Ramsey@ssa.gov.* Comments are also available for public viewing on the Federal eRulemaking portal at *https://www.regulations.gov* or in person, during regular business hours, by arranging with the contact person identified below.

FOR FURTHER INFORMATION CONTACT: Interested parties may submit general questions about the matching program to Cynthia Scott, Division Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, G–401 WHR, 6401 Security Boulevard, Baltimore, MD 21235–6401, at telephone: (410) 966–1943, or send an email to *Cynthia.Scott@ssa.gov.*

SUPPLEMENTARY INFORMATION: None.

Matthew Ramsey,

Executive Director, Office of Privacy and Disclosure, Office of the General Counsel.

Participating Agencies: SSA and Fiscal Service, Treasury.

Authority for Conducting the Matching Program: This matching agreement is executed in compliance with the Privacy Act of 1974 (5 U.S.C. 552a), as amended by the Computer Matching and Privacy Protection Act of 1988, and the regulations and guidance promulgated thereunder.

Legal authority for the disclosure under this agreement for SSA to conduct this matching activity is contained in section 1631(e)(1)(B) and (f) of the Social Security Act (42 U.S.C. 1383(e)(1)(B) and (f)).

Purpose(s): This matching agreement sets forth the terms, conditions, safeguards, and procedures under which Fiscal Service, Treasury will disclose savings security data to SSA. SSA will use the data to determine continued eligibility for SSI applicants and recipients, or the correct benefit amount for recipients and deemors who either did not report or who incorrectly reported their ownership of savings securities.

Categories of Individuals: The individuals whose information is involved in this matching program are SSI applicants, recipients, and deemors who either did not report or incorrectly reported ownership of savings securities.

Categories of Records: The finder file SSA provides to Fiscal Service will contain approximately 10 million records of individuals for whom SSA requests data for the administration of the SSI program. Fiscal Service will use files that contain approximately 185 million SSNs, with registration indexes, to match SSA records. Fiscal Service will provide a response record providing matched results to SSA, which will contain approximately 1 million records.

System(s) of Records: The relevant SSA system of records (SOR) is ''Supplemental Security Income Record and Special Veterans Benefits,'' 60–0103. The SOR Notice (SORN) was fully published on January 11, 2006 at 71 FR 1830 and updated on December 10, 2007 at 72 FR 69723; July 3, 2018 (83 FR 31250–31251), and November 1, 2018 (83 FR 54969). The relevant Fiscal Service SOR is Fiscal Service SORN .014 (United States Securities and Access). The SORN was last published on February 27, 2020 at 85 FR 11776.

[FR Doc. 2023–17157 Filed 8–9–23; 8:45 am]

BILLING CODE 4191–02–P

TENNESSEE VALLEY AUTHORITY

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Tennessee Valley Authority (TVA).

ACTION: 60-Day notice of submission of information collection approval and request for comments.

SUMMARY: The proposed information collection described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act of 1995. The Tennessee Valley Authority is soliciting public comments on this proposed collection.

DATES: Comments should be sent to the Public Information Collection Clearance Officer no later than October 10, 2023.

ADDRESSES: Requests for information, including copies of the information collection proposed and supporting documentation, should be directed to the Public Information Collection Clearance Officer: Jennifer A. Wilds, Specialist, Records Compliance, Tennessee Valley Authority, 400 W Summit Hill Dr., CLK–320, Knoxville, Tennessee 37902–1401.

FOR FURTHER INFORMATION CONTACT: Jennifer A. Wilds, Telephone (865) 632–6580 or by email at *pra@tva.gov.*

SUPPLEMENTARY INFORMATION:

Type of Request: New collection.

Title of Information Collection: TVA CUI Program Challenge Request Form.

Frequency of Use: On occasion.

Type of Affected Public: Authorized holders, including any individual or organization who has been provided with CUI and has a lawful government purpose to possess CUI.

Small Businesses or Organizations Affected: No.

Federal Budget Functional Category Code: 455.

Estimated Number of Annual Responses: 12.

Estimated Total Annual Burden Hours: 18.

Estimated Average Burden Hours per Response: 1.5.

Need For and Use of Information: The TVA CUI Program Challenge Request Process, also referred to as the ''CUI Challenge Request Process'' in this document, provides the process used for TVA Controlled Unclassified Information (CUI) authorized holders to challenge the designation of information that has been marked as CUI as improperly or incorrectly designated government purpose to possess the information. Any authorized holder who believes that the designation of specific information as CUI is improper or incorrect, or who believes they have received unmarked CUI, may use this process to formally notify TVA CUI Senior Agency Official (SAO). The process also allows for TVA CUI SAO and CUI Program Manager to process such requests and to issue a Final Decision from the CUI SAO.

The CUI Challenge Request Process is not intended to be used to address all disagreements regarding the proper designation of CUI. Authorized holders are encouraged to seek or utilize less formal means when resolving internal good faith disputes over the proper designation of information as CUI, such as discussion with the creator or designator of the information in dispute. Where resolution cannot be achieved through less formal means, the CUI challenge request process is available.

The CUI Challenge Request Process does not supersede any obligations under law or TVA policy to report information spills.

Rebecca L. Coffey,

Agency Records Officer.

[FR Doc. 2023–17091 Filed 8–9–23; 8:45 am]

BILLING CODE 8120–08–P

TENNESSEE VALLEY AUTHORITY

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Tennessee Valley Authority (TVA).

ACTION: 30-Day notice of submission of information collection renewal approval with minor modifications and request to OMB.

SUMMARY: Tennessee Valley Authority (TVA) provides notice of submission of this information clearance request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The general public and other federal agencies are invited to comment. TVA previously published a 60-day notice of the proposed information collection reinstatement for public review June 5, 2023 and no comments were received.

DATES: The OMB will consider all written comments received on or before September 11, 2023.

ADDRESSES: Written comments for the proposed information collection reinstatement 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:

Type of Request: Reinstatement, with minor modification, of a previously approved information collection for which approval has expired.

Title of Information Collection: Generic Clearance for the Collection of Qualitative Feedback and Input on Agency Services and Program Delivery and Registration.

OMB Control Number: 3316–0114.

Current Expiration Date: July 31, 2023.

Frequency of Use: On occasion.

Type of Affected Public: Individuals and Households, Businesses and Organizations, State, Local and Tribal Governments.

Small Businesses or Organizations Affected: Yes.

Federal Budget Functional Category Code: 455.

Estimated Number of Annual Responses: 10,000.

Estimated Total Annual Burden Hours: 5000.

Estimated Average Burden Hours per Response: 0.50

Need For and Use of Information: Renewal of this information collection will enable TVA to obtain qualitative customer and stakeholder feedback and input in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery and enable the public to register for public forums, events, and other opportunities. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback and input will provide TVA with insights into customer or stakeholder perceptions, experiences, and expectations; help TVA quickly identify actual or potential problems with how the agency provides services to the public; or focus attention on areas where communication, training, or changes in operations might improve TVA's delivery of its products or services; and engage the public on community needs and concerns to guide the direction of new products and services. These collections will allow for ongoing, collaborative, and actionable communications between TVA and its customers and stakeholders. It will also allow feedback and input to contribute directly to the improvement of program management. TVA will solicit feedback and input in areas such as: Timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, resolution of issues with service delivery, impacts of events, community needs and concerns, and interest in new programs and services. TVA will use the responses to plan and inform its efforts to improve or maintain the quality of service and programs offered to the public and chart the direction of new programs and offerings. TVA will use the registration information for logistical planning for public events, required access control to government property, and connection to service and program offerings. If this information is not collected, TVA will not have access to vital feedback and input from customers and stakeholders about the agency's services and programs and the public will not have access to TVA-sponsored events, programs, or services. TVA will only submit an information collection for approval under this generic clearance if it meets the following conditions:

- The collections are voluntary;
- The collections are low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and are low-cost for both the respondents and the Federal Government;
- The collections are non-controversial and do not raise issues of concern to other Federal agencies;
- The collections are targeted to the solicitation of feedback and input from respondents who have experience with the program or who may have experience with the program in the near future;
- Personally identifiable information (PII) is collected only to the extent necessary and will not be retained beyond the immediate need;
- Information gathered is intended to be used only internally for general service improvement and program management purposes and is not intended for release outside of the agency (if released, TVA will indicate the qualitative nature of the information);
- Information gathered will not be used for the purpose of substantially informing influential policy decisions; and
- Information gathered will yield qualitative information, and the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study. Feedback collected under this generic clearance provides useful information, but will not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. As a general matter, information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

Rebecca L. Coffey,

Agency Records Officer.

[FR Doc. 2023–17093 Filed 8–9–23; 8:45 am]

BILLING CODE 8120–08–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. 2023–0088]

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Airman Knowledge Test Registration Collection

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval of a renewed collection. The collection involves the voluntary submission of information for registration of an Airman Knowledge Test as part of the FAA Airman Certification Process. The information collected is necessary to ensure compliance and proper registration of an individual for the necessary knowledge test for the certification or rating pursued by the individual.

DATES: Written comments should be submitted by September 11, 2023.

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.

FOR FURTHER INFORMATION CONTACT: Ryan C. Smith by email at: *Ryan.C.Smith@faa.gov*, Phone: 405–651–5400.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information.

OMB Control Number: 2120–0792.

Title: Airman Knowledge Test Registration Collection.

Form Numbers: There are no forms associated with this collection.

Type of Review: Renewed information collection.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on January, 17, 2023 (88 FR 2752). Individuals pursuing an FAA certificate or rating to operate in the National Airspace System (NAS) must meet the standards established in the FAA regulations specific to the certificate sought by the individual. FAA certification requires that an individual must successfully pass an Airman Knowledge Test as part of the requirements to obtain an FAA certificate or rating. The FAA develops and administers 90 different knowledge tests in many different areas that are required as part of the overall airman certification process.

Airman Knowledge Tests are administered at approved Knowledge Testing Centers by an approved test proctor who is required to administer the appropriate Airman Knowledge Test to the individual pursuing FAA certification. Individuals taking an FAA Airman Knowledge Test must provide the following information to be collected in order to complete the registration process before the administration of the Airman Knowledge Test: Name, FAA Tracking Number (FTN), physical address, Date of Birth, email address, photo identification, phone number, test authorization (credentials of the individual such as an instructor endorsement), and previous number of test attempts.

The information provided by the individual is collected and stored electronically in the application used for test registration and delivery. This information is used to determine the identify and eligibility of the individual for compliance of FAA certification requirements.

Respondents: 224,474 annually.

Frequency: n/a.

Estimated Average Burden per Response: 2 minutes.

Estimated Total Annual Burden: 7,482 hours annually.

224,474 respondents × 2 minutes each = 448,948 minutes,

448,948 minutes/60 minutes in an hour = 7,482 hours annually.

Issued in Oklahoma City, OK, on August 7, 2023.

Ryan C. Smith,

Airman Knowledge Testing Program Manager, Airman Testing Standards Branch (AFS–630).

[FR Doc. 2023–17180 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Action on the Rocky Flats NWR Trails and Rocky Mountain Greenway Connections Project in Colorado

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation.

ACTION: Notice of limitation on claims for judicial review of actions by FHWA and other Federal agencies.

SUMMARY: This notice announces actions taken by FHWA and other Federal agencies that are final. This final agency actions relate to a proposed trail project on and adjacent to the Rocky Flats National Wildlife Refuge (NWR) in Jefferson County, Colorado. The FHWA's Finding of No Significant Impact (FONSI) provides details on the proposed action.

DATES: By this notice, FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(*l*)(1). A claim seeking judicial review of the Federal agency actions on the Rocky Flats NWR Trails and Rocky Mountain Greenway Connections Project will be barred unless the claim is filed on or before January 8, 2024. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Tomasz Kubicz, Project Manager, Federal Highway Administration, Central Federal Lands Highway Division, 12300 W Dakota Avenue, Suite 380, Lakewood, Colorado 80228; telephone: (720) 963–3498, email: *tomasz.kubicz@dot.gov.* Regular office hours are Monday through Friday, 8:00 a.m. to 5:00 p.m. (Mountain Time).

SUPPLEMENTARY INFORMATION: Notice is hereby given that FHWA has taken a final agency action by issuing a FONSI and approving the Rocky Flats NWR Trails and Rocky Mountain Greenway Connections Project in Jefferson County, Colorado.

The project includes the construction of trails and two trail bridges on the Rocky Flats NWR and two road crossings with connecting trails adjacent to the Refuge. The U.S. Fish and Wildlife Service will construct the on-Refuge trails, which will be part of the regional Rocky Mountain Greenway trail system. The FHWA will construct the two trail bridges on the Refuge and the two road crossings and trails off the Refuge. The two road crossings consist of an underpass (concrete box culvert) at

State Highway 128 and a pedestrian bridge across Indiana Street with about 0.6 mile total of connecting trails.

The FHWA's action, related actions by other Federal agencies, and the laws under which such actions were taken, are described in the U.S. Fish and Wildlife Service's Environmental Assessment for Improved Visitor Access at Rocky Flats NWR, published in August 2020; the Service's FONSI, dated November 2020; FHWA's FONSI, dated August 2023; and other documents in the project file. The Service's EA and FONSI are available for download at *https://www.fws.gov/refuge/rocky-flats/library.* The FHWA FONSI is available for download at *https://highways.dot.gov/federal-lands/projects/co/rocky-flats* or can be requested by contacting FHWA at the address provided above.

This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including by not limited to:

1. *General:* National Environmental Policy Act [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 139].

2. *Air:* Clean Air Act [42 U.S.C. 7401–7671(q)].

3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303].

4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and section 1536], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)], Migratory Bird Treaty Act [16 U.S.C. 703–712].

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–470(ll)]; Archeological and Historic Preservation Act [16 U.S.C. 469–469(c)]; Native American Grave Protection and Repatriation Act [25 U.S.C. 3001–3013].

6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996].

7. *Wetlands and Water Resources:* Clean Water Act (Sections 401, 402, and 404) [33 U.S.C. 1251–1377]; Safe Drinking Water Act [42 U.S.C. 300(f)–300(j)(6)]; Flood Disaster Protection Act [42 U.S.C. 4001–4128].

8. *Hazardous Materials:* Comprehensive Environmental Response, Compensation, and Liability Act [42 U.S.C. 9601–9675]; Superfund Amendments and Reauthorization Act of 1986; Resource Conservation and Recovery Act [42 U.S.C. 6901–6992(k)].

9. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction.)

Authority: 23 U.S.C. 139 (*l*)(1).

Issued on: August 4, 2023.

Marcus Wilner,

Division Director, Federal Highway Administration, Lakewood, Colorado.

[FR Doc. 2023–17151 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2010–0049]

North County Transit District's Request for Approval To Begin Field Testing on Its Positive Train Control Network

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of availability and request for comments.

SUMMARY: This document provides the public with notice that on July 25, 2023, North County Transit District (NCTD) submitted a request to field test its new Crash Energy Management (CEM) Bi-Level cab cars that have been equipped with NCTD's Interoperable Electronic Train Management System (I–ETMS) technology. FRA is publishing this notice and inviting public comment on NCTD's request to test its positive train control (PTC) system.

DATES: FRA will consider comments received by August 30, 2023. FRA may consider comments received after that date to the extent practicable and without delaying implementation of valuable or necessary modifications to a PTC system.

ADDRESSES:

Comments: Comments may be submitted by going to *https://www.regulations.gov* and following the online instructions for submitting comments.

Instructions: All submissions must include the agency name and the applicable docket number. The relevant PTC docket number for this host railroad is Docket No. FRA–2010–0049. For convenience, all active PTC documents are hyperlinked on FRA's website at *https://railroads.dot.gov/research-development/program-areas/train-control/ptc/railroads-ptc-dockets.* All comments received will be posted without change to *https://www.regulations.gov;* this includes any personal information.

FOR FURTHER INFORMATION CONTACT: Gabe Neal, Staff Director, Signal, Train Control, and Crossings Division, telephone: 816–516–7168, email: *Gabe.Neal@dot.gov.*

SUPPLEMENTARY INFORMATION: In general, title 49 United States Code (U.S.C.) section 20157(h) requires FRA to certify that a host railroad's PTC system complies with title 49 Code of Federal Regulations (CFR) part 236, subpart I, before the technology may be operated in revenue service. On September 21, 2018, FRA certified NCTD's I–ETMS PTC system under 49 CFR 236.1015 and 49 U.S.C. 20157(h). Pursuant to 49 CFR 236.1035, a railroad must obtain FRA's approval before field testing an uncertified PTC system, or a product of an uncertified PTC system, or any regression testing of a certified PTC system on the general rail system. *See* 49 CFR 236.1035(a). NCTD's test request, including a complete description of NCTD's Concept of Operations and its specific test procedures, including the measures that will be taken to ensure safety during testing, are available for review online at *https://www.regulations.gov* in Docket No. FRA–2010–0049.

Interested parties are invited to comment on NCTD's Test Request by submitting written comments or data. During its review of the test request, FRA will consider any comments or data submitted within the timeline specified in this notice and to the extent practicable, without delaying testing of valuable or necessary modifications to a PTC system. *See* 49 CFR 236.1035. FRA, however, may elect not to respond to any particular comment, and under 49 CFR 236.1035, FRA maintains the authority to approve, approve with conditions, or deny the test request at its sole discretion.

Privacy Act Notice

In accordance with 49 CFR 211.3, FRA solicits comments from the public to better inform its decisions. DOT posts these comments, without edit, including any personal information the

commenter provides, to *https://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See *https://www.regulations.gov/privacy-notice* for the privacy notice of *regulations.gov.* To facilitate comment tracking, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. If you wish to provide comments containing proprietary or confidential information, please contact FRA for alternate submission instructions.

Issued in Washington, DC.

Carolyn R. Hayward-Williams,

Director, Office of Railroad Systems and Technology.

[FR Doc. 2023–17101 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Hazardous Materials: Notice of Actions on Special Permits

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of actions on special permit applications.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations, notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein.

DATES: Comments must be received on or before September 11, 2023.

ADDRESSES: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Donald Burger, Chief, Office of Hazardous Materials Safety General Approvals and Permits Branch, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH–13, 1200 New Jersey Avenue Southeast, Washington, DC 20590–0001, (202) 366–4535.

SUPPLEMENTARY INFORMATION: Copies of the applications are available for inspection in the Records Center, East Building, PHH–13, 1200 New Jersey Avenue Southeast, Washington, DC.

This notice of receipt of applications for special permit is published in accordance with part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on July 28, 2023.

Donald P. Burger,

Chief, General Approvals and Permits Branch.

Application No.	Applicant	Regulation(s) affected	Nature of the special permits thereof
SPECIAL PERMITS DATA—Granted			
15721–M	Probe Technology Services, Inc.	173.304(a)	To modify the special permit to authorize an additional packaging.
15848–M	Ambri Inc	173.222(c)(1)	To modify the special permit to update the design terminology.
16279–M	Stericycle, Inc	173.196(a)	To modify the special permit to authorize the transportation in commerce of the Marburg virus.
20493–M	Tesla, Inc	172.101(j)	To modify the special permit to authorize additional lithium ion batteries and additional cell type.
21235–M	United States Dept. of Energy	173.413, 173.416	To modify the special permit to authorize return shipments and higher payload containers.
21360–M	ABG Bag, Inc	173.12(b)(2)(ii)(C), 178.707(d)	To modify the special permit to authorize Division 5.2 hazardous materials.
21490–N	Myers Industries, Inc	173.28(b)(2), 178.509(b)(7), 178.601(h).	To authorize the manufacture, mark, sale, and use of jerricans manufactured to a specification not meeting all the requirements for UN 3H1 specification jerricans.
21517–N	Bayerische Motoren Werke Aktiengesellschaft.	172.101(j)	To authorize the transportation in commerce of lithium ion batteries exceeding 35 kg net weight aboard cargo-only aircraft.
21518–N	Bedrock Ocean Exploration, Pbc.	172.101(j)	To authorize the transportation in commerce of prototype lithium batteries exceeding 35 kg via cargo-only aircraft.
21528–N	Honeywell Intellectual Properties Inc.	173.302a(a)(1)	To authorize the manufacture, mark, sale, and use of non-DOT specification welded cylinder that is comparable to DOT specification 3HT cylinder for the transportation in commerce of the hazardous materials authorized by this special permit.
21536–N	WAE Technologies Limited	172.101(j), 173.185(b)(6)	To authorize the transportation in commerce of lithium ion batteries exceeding 35 kg net weight aboard cargo-only aircraft.
21563–N	LG Energy Solution, Ltd	172.102(a), 172.102(b), 172.102(c).	To authorize the transportation in commerce of lithium ion batteries exceeding 35 kg net weight aboard cargo-only aircraft.

Application No.	Applicant	Regulation(s) affected	Nature of the special permits thereof
SPECIAL PERMITS DATA—Denied			
21553–N	Pacific Scientific Energetic Materials Company (california) Llc.	173.21(b), 173.51(a), 173.54, 173.54(a), 173.56(b).	To authorize the one-way transportation in commerce of unapproved explosives originating from Pacific Scientific Energetic Materials Company LLC, and transported to Clean Harbors Waste Facility in Colfax, LA for final disposal by motor vehicle transport only.
SPECIAL PERMITS DATA—Withdrawn			
21569–N	National Air Cargo Group, Inc	172.204(c)(3), 172.101(j), 173.27(b)(2), 173.27(b)(3), 175.30(a)(1).	To authorize the transportation in commerce of certain Class 1 and Division 2.3 materials that are forbidden for transport via cargo-only aircraft by cargo-only aircraft.
21576–N	Neponset Valley Engineering Company, Inc.	173.301(a)(6)	To authorize the transportation in commerce of one DOT 4BA–240 cylinder that is suspected of being overdue for periodic requalification prior to being filled with a hazardous material.
21577–N	Factorial Inc	173.185	To authorize the shipment and receival of damaged, defective or recalled lithium cells/batteries under UN3090.
21583–N	Sidney Lee Welding Supply, Inc.	180.209(b)(1)	To authorize a 10-year requalification interval for certain DOT Specification 3A and 3AA cylinders used for the transportation in commerce of certain Division 2.1 and Division 2.2 gases in bundles.

[FR Doc. 2023–17096 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Hazardous Materials: Notice of Applications for Modification to Special Permits

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications for modification of special permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations, notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein.

DATES: Comments must be received on or before August 25, 2023.

ADDRESSES: Record Center, Pipeline and Hazardous Materials Safety Administration U.S. Department of Transportation Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Donald Burger, Chief, Office of Hazardous Materials Safety General Approvals and Permits Branch, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH–13, 1200 New Jersey Avenue Southeast, Washington, DC 20590–0001, (202) 366–4535.

SUPPLEMENTARY INFORMATION: Each mode of transportation for which a particular special permit is requested is indicated by a number in the ''Nature of Application'' portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft.

Copies of the applications are available for inspection in the Records Center, East Building, PHH–13, 1200 New Jersey Avenue Southeast, Washington, DC or at *http://regulations.gov.*

This notice of receipt of applications for special permit is published in accordance with part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on July 28, 2023.

Donald P. Burger,

Chief, General Approvals and Permits Branch.

SPECIAL PERMITS DATA

Application No.	Applicant	Regulation(s) affected	Nature of the special permits thereof
12135–M	Daicel Safety Systems Inc	173.301(a)(1), 173.302a, 178.65(c)(3).	To modify the special permit to authorize the use of the cylinders up to 15 years after the date of manufacture. (modes 1, 2, 3, 4).
13102–M	Siemens Large Drives LLC	173.306(a), 173.306(a)(1), 173.322, 173.150(b), 173.222(c).	To change Siemens Large Drives LLC company name to Innomotics LLC. (modes 1, 2, 4).
13211–M	Copperhead Chemical Company, Inc.	172.102(c)(5)	To modify the package in paragraph 7 of the special permit to be 4GV/X11.3/S/**/USA/+CN1216, stock number UN111. (modes 1, 3, 4).
14152–M	Entegris, Inc	173.27(f)	To modify the special permit to authorize an additional hazardous material. (modes 1, 3, 4).
14992–M	VIP Transport, Inc	173.196(a), 173.196(b), 173.199, 178.609.	To modify the special permit to authorize smaller inner packagings. (mode 1).

SPECIAL PERMITS DATA—Continued

Application No.	Applicant	Regulation(s) affected	Nature of the special permits thereof
15882–M	Ryan Air, Inc	172.101, 173.27, 173.243	To add a C–208 to carry bulk fuel in a 476-galon BATT Tank. (mode 4).
15999–M	Lockheed Martin Corporation ..	172.300, 172.400, 173.1	To modify the special permit to authorize an alternative transportation route. (modes 1, 3).
20352–M	Schlumberger Technology Corp.	173.301(f), 173.302(a), 173.304(a).	To modify the special permit to authorize an additional packaging. (modes 1, 2, 3, 4).
20796–M	Sodastream USA Inc	172.400, 172.200, 172.300, 171.2(k), 172.700(a), 172.500.	To modify the special permit to authorize additional outer packagings. (modes 1, 2, 3).
20936–M	CO2 Exchange LLC	171.2(k), 172.200, 172.300, 172.700(a), 172.400, 172.500.	To modify the special permit to authorize cylinders to be packaged within an outer fiberboard box with or without a dispensing machine. (modes 1, 2).
21290–M	Orion Engineered Carbons LLC.	171.23(a)(1), 171.23(b)(10), 173.314.	To modify the special permit to authorize an increase in the annual number of shipments. (modes 1, 3).
21297–M	Luxfer Canada Limited	173.301(i), 178.75	To modify the special permit to authorize mounting of a cylinder within a structural frame during transportation. (modes 1, 2, 3, 4).
21307–M	Packaging and Crating Technologies, LLC.	172.200, 172.300, 172.400, 172.700(a), 172.600, 172.500, 172.102(c)(1), 173.185(d).	To modify the special permit to authorize a higher Wh rating battery. (modes 1, 2).
21460–M	Amerex Corporation	173.309(c)	To modify the special permit to authorize an additional extinguisher model.

[FR Doc. 2023–17097 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Hazardous Materials: Notice of Applications for New Special Permits

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications for special permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations, notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein.

DATES: Comments must be received on or before September 11, 2023.

ADDRESSES: Record Center, Pipeline and Hazardous Materials Safety Administration U.S. Department of Transportation Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Donald Burger, Chief, Office of Hazardous Materials Safety General Approvals and Permits Branch, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH–13, 1200 New Jersey Avenue Southeast, Washington, DC 20590–0001, (202) 366–4535.

SUPPLEMENTARY INFORMATION: Each mode of transportation for which a particular special permit is requested is indicated by a number in the ''Nature of Application'' portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft.

Copies of the applications are available for inspection in the Records Center, East Building, PHH–13, 1200 New Jersey Avenue Southeast, Washington, DC.

This notice of receipt of applications for special permit is published in accordance with part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on July 28, 2023.

Donald P. Burger,

Chief, General Approvals and Permits Branch.

SPECIAL PERMITS DATA

Application No.	Applicant	Regulation(s) affected	Nature of the special permits thereof
21582–N	ABG Bag, Inc	172.102, 173.36(b)(2), 173.241(e)(1).	To authorize the manufacture, mark, sale, and use of UN 51H large packagings for the purpose of transporting polychlorinated biphenyls by motor vehicle. (mode 1)
21584–N	National Air Cargo Group, Inc	172.204(c)(3), 172.101(j), 173.27(b)(2), 173.27(b)(3), 175.30(a)(1).	To authorize the transportation in commerce by cargo-only aircraft of Class 1 explosives which are forbidden or exceed the quantities authorized in 172.101 Column 9B. (mode 4)
21586–N	OEC Freight (NY) Inc	173.241	To authorize the transportation in commerce of a hazardous substance (ethylene glycol) in alternative packaging. (mode 1)

SPECIAL PERMITS DATA—Continued

Application No.	Applicant	Regulation(s) affected	Nature of the special permits thereof
21588–N	Ford Motor Company	173.185(h)	To authorize the transportation in commerce of lithium ion batteries exceeding 35 kg aboard cargo-only aircraft. (mode 4)
21589–N	Department of Energy	172.400(b), 173.302a(a)(1), 173.56(b).	To authorize the transportation in commerce of certain hazardous materials in non-DOT specification pressure vessels that are equipped with a valve with a Class 1 component that has not be classified in accordance with 49 CFR 173.56(b). (mode 1)
21593–N	Livent USA Corp	Parts 172, 173	To authorize the transportation in commerce of certain hazardous materials between applicant facilities (distances of less than one mile) without being subject to Parts 172 and 173 of the Hazardous Materials Regulations. (mode 1)
21598–N	ME Logistic Services GmbH & Co.KG.	173.185(e)	To authorize the shipment of low production batteries exceeding the quantity limitation. (modes 1, 4)
21601–N	Air Liquide Electronics U.S. LP	173.3(e)(1)	To authorize the transportation in commerce of specification DOT 3A480 cylinders with valve assemblies that have been repaired using an alternate method. (mode 1)
21602–N	Sharpsville Container Corporation.	178.601(k)(1)(i)	To authorize the manufacture, mark, sale, and use of UN specification steel drums, other than stainless steel drums, that have been tested in the same manner as stainless steel drums. (mode 1)
21605–N	The United States Department of Air Force.	172.101	To authorize the transportation of batteries containing acid or alkali, battery acid fluid, non-spillable wet batteries, and lithium ion batteries (including those packed with or in equipment) on the same vehicle, without being subject to certain requirements of the Hazardous Materials Regulations. (mode 4)
21608–N	Columbiana Boiler Company, LLC.	178.274(b), 178.275(a), 178.276(b)(1), 180.605(d).	To authorize the transportation in commerce of non-DOT specification portable tanks for the transportation in commerce of certain toxic or corrosive hazardous materials. (modes 1, 4)
21609–N	Polaris Industries Inc	172.101(j)	To authorize the transportation in commerce of lithium batteries exceeding 35 kg by cargo-only aircraft. (mode 4)
21611–N	Cenergy Solutions Inc	172.101(a), 173.302	To authorize the transportation in commerce of methane contained in MC–331 cargo tanks via highway. (mode 1)

[FR Doc. 2023–17099 Filed 8–9–23; 8:45 am]
BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

Agency Information Collection Activities; Proposed Renewal; Comment Request; Renewal Without Change of Reports of Foreign Financial Accounts Regulations and FinCEN Form 114, Report of Foreign Bank and Financial Accounts

AGENCY: Financial Crimes Enforcement Network (FinCEN), Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, FinCEN invites comment on a renewal, without change, of existing information collection requirements concerning reports of foreign financial accounts and FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR). This request for comments is made pursuant to the Paperwork Reduction Act of 1995 (PRA).

DATES: Written comments are welcome and must be received on or before October 10, 2023

ADDRESSES: Comments may be submitted by any of the following methods:

- *Federal E-rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Refer to Docket Number FINCEN–2023–0008 and the Office of Management and Budget (OMB) control number 1506–0009.
- *Mail:* Policy Division, Financial Crimes Enforcement Network, P.O. Box 39, Vienna, VA 22183. Refer to Docket Number FINCEN–2023–0008 and OMB control number 1506–0009.

Please submit comments by one method only. Comments will be reviewed consistent with the PRA [1] and applicable OMB regulations and guidance. All comments submitted in response to this notice will become a matter of public record. Therefore, you should submit only information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: FinCEN's Regulatory Support Section (RSS) at 1–800–767–2825 or electronically at *frc@fincen.gov.*

SUPPLEMENTARY INFORMATION:

I. Statutory and Regulatory Provisions

The legislative framework generally referred to as the Bank Secrecy Act (BSA) consists of the Currency and Foreign Transactions Reporting Act of 1970, as amended by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Public Law 107–56 (October 26, 2001), and other legislation, including the Anti-Money Laundering Act of 2020 (AML Act).[2] The BSA is codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1960, and 31 U.S.C. 5311–5314 and 5316–5336, and notes

[1] Public Law 104–13, 44 U.S.C. 3506(c)(2)(A).

[2] The AML Act was enacted as Division F, sections 6001–6511, of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283, 134 stat. 3388 (2021).

thereto, with implementing regulations at 31 CFR chapter X.

The BSA authorizes the Secretary of the Treasury (the ''Secretary''), *inter alia,* to require financial institutions to keep records and file reports that are determined to have a high degree of usefulness in criminal, tax, or regulatory matters, risk assessments or proceedings, or in the conduct of intelligence or counter-intelligence activities to protect against international terrorism, and to implement AML programs and compliance procedures.[3] Regulations implementing the BSA appear at 31 CFR chapter X. The authority of the Secretary to administer the BSA has been delegated to the Director of FinCEN.[4]

Under 31 U.S.C. 5314, the Secretary ''shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to . . . keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency.'' The term ''foreign financial agency'' encompasses the activities found in the statutory definition of ''financial agency,'' [5] notably, ''a person acting for a person as a financial institution, bailee, depository trustee, or agent, or acting in a similar way related to money, credit, securities, gold, or a transaction in money, credit, securities, or gold.'' [6] The Secretary is also authorized to prescribe exemptions to the reporting requirement and to prescribe other matters the Secretary considers necessary to carry out 31 U.S.C. 5314.

The regulations implementing 31 U.S.C. 5314 appear at 31 CFR 1010.350, 1010.306, and 1010.420. Section 1010.350 generally requires each U.S. person having a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country to report such relationship to the Commissioner of Internal Revenue for each year such relationship exists, and to provide and report such information specified in a reporting form prescribed under 31 U.S.C. 5314. The FBAR is used to file the information required by this section and must be filed electronically with FinCEN.[7] 31 CFR 1010.306(c) requires the FBAR to be filed for foreign financial accounts exceeding $10,000 maintained during the previous calendar year. No FBAR is required to be filed if the aggregate value of foreign financial accounts did not exceed $10,000 at any time during the previous calendar year.

The FBAR must be filed on or before April 15 of each calendar year for accounts maintained during the previous calendar year.[8]

31 CFR 1010.420 outlines the recordkeeping requirements associated with foreign financial accounts required to be reported under section 1010.350. Specifically, filers must retain records of such accounts, to include type of account, account number, name of foreign financial institution maintaining the account, address of the foreign financial institution, and maximum value of the account during the calendar year, for a period of five years and make the records available for inspection as authorized by law.

II. Paperwork Reduction Act of 1995

Title: Reports of foreign financial accounts (31 CFR 1010.350), records to be made and retained by persons having financial interests in foreign financial accounts (31 CFR 1010.420), filing of reports (31 CFR 1010.306(c)), and FinCEN Form 114—FBAR.

OMB Control Number: 1506–0009.

Form Number: FinCEN Form 114—FBAR.

Abstract: FinCEN is issuing this notice to renew the OMB control number for the FBAR regulations and form.

Affected Public: Individuals, businesses or other for-profit institutions, and non-profit institutions that qualify as U.S. persons.

Type of Review: Renewal without change of a currently approved information collection.

Frequency: Annual.

Estimated Number of Respondents: 1,503,807 FBAR filers.[9]

Estimated Reporting and Recordkeeping Burden:

The estimated average burden associated with the FBAR reporting and recordkeeping requirements will vary depending on the number of reportable foreign financial accounts and the applicability of special rules provided in the regulations which provide some relief from the full scope of the reporting obligations.[10]

The information required to be reported on the FBAR is basic information U.S. persons will have received on account statements from the foreign financial institutions where the accounts are opened and maintained. Those statements will provide a U.S. person with the information needed to complete and file the FBAR. No special accounting or legal skills are necessary to transfer the basic information required to be reported, such as the name of the foreign financial institution, the type of account, and the account number, to the FBAR.

The special rules located at 31 CFR 1010.350(g) provide a variety of relief to FBAR filers by (1) limiting the information reported in the FBAR to the number of accounts and certain other basic identifying information, if the filer has a financial interest in, or signature or other authority over, 25 or more reportable accounts; (2) allowing for entities to file consolidated FBARs on their own behalf and on behalf of entities for which they have a direct or indirect ownership interest of over 50 percent; and (3) exempting reporting of foreign financial interest in accounts involving certain trust and retirement plans. However, filers reporting financial interest in, or signature authority over, 25 or more foreign financial accounts are required to maintain a record of the detailed account information on each of their foreign financial accounts, including the account number, the name of the foreign financial institution that holds the account, the address of the foreign financial institution, the maximum value of the account during the calendar year, and the type of account.[11]

[3] Section 358 of the USA PATRIOT Act expanded the purpose of the BSA by including a reference to reports and records ''that have a high degree of usefulness in intelligence or counterintelligence activities to protect against international terrorism.'' Section 6101 of the AML Act further expanded the purpose of the BSA to cover such matters as preventing money laundering, tracking illicit funds, assessing risk, and establishing appropriate frameworks for information sharing.

[4] Treasury Order 180–01 (Jan. 14, 2020).

[5] 31 U.S.C. 5312(b)(2).

[6] *See* 31 U.S.C. 5312(a)(1), which exempts from the definition of financial agency a person acting for a country, a monetary or financial authority acting as a monetary or financial authority, or an international financial institution of which the United States Government is a member.

[7] Formerly Form TD–F 90–22.1. FinCEN Form 114 can be completed by accessing FinCEN's BSA E-Filing System website at *http://bsaefiling.fincen.treas.gov/main.html.*

[8] In accordance with section 2006(b)(11) of Public Law 114–41, the filing due date for the report is April 15 effective as of the 2016 reporting year. The statute permits the Secretary to extend the filing due date for up to six months. Filers who submit complete and accurate reports to FinCEN no later than October 15 of the year the report is due will be deemed to have timely filed. FinCEN issued a statement on its website in 2016 noting the FBAR date change as a result of the statutory change. FinCEN intends to revise the FBAR regulations at 31 CFR 1010.306(c) to reflect the statutory date change.

[9] The total number of FBARs filed in 2022 for foreign financial accounts held during calendar year 2021 is 1,503,807. Multiple foreign financial accounts may be reported on a single FBAR.

[10] 31 CFR 1010.350(g).

[11] Filers availing themselves of special rules under 31 CFR 1010.350(g)(1) and (2) involving 25 or more reportable foreign financial accounts are

For the reasons noted above, FinCEN estimates that the approximate FBAR reporting burden will vary depending on the number of reportable foreign financial accounts and will range from approximately 20 minutes to 90 minutes. FinCEN estimates the average reporting burden per FBAR filer will be 55 minutes.

Past estimates of the FBAR recordkeeping requirement took into account time to store paper copies of the FBAR form and estimated that the approximate recordkeeping burden was 30 minutes. Since 2011, FBARs have been filed electronically. Electronically filing the FBAR allows a filer to save an electronic copy of the report, which satisfies the recordkeeping part of the requirement. FinCEN estimates it would take a filer five minutes to save an electronic copy of the FBAR. In addition to maintaining a copy of the form, those filers who take advantage of the special rules related to financial interests in or signature authority over 25 or more accounts would be required to respond to requests for detailed information on those accounts. However, FinCEN believes that in most cases, such information would be maintained by filers in the ordinary course of business in the form of periodic account statements and other business records which would be maintained mostly electronically. There is no requirement in the FBAR regulations to maintain such information in any particular format.

For these reasons, FinCEN estimates that the FBAR recordkeeping burden will be approximately five minutes.

FinCEN estimates the total annual reporting and recordkeeping burden per FBAR filer will be one hour (55 minutes for FBAR reporting, and five minutes for FBAR recordkeeping).

Estimated Total Annual Reporting and Recordkeeping Burden: The estimated total annual PRA burden is 1,503,807 hours (1,503,807 [12] FBARs multiplied by one hour).

Estimated Total Annual Reporting and Recordkeeping Cost: Of the 1,503,807 FBARs filed in calendar year 2022, 1,434,362 were filed by individuals, and 69,445 were filed by entities. FinCEN cannot quantify the cost to individuals who file FBARs on their own behalf. For entities, FinCEN estimates the following annual burden cost: 69,445 hours × $52.55 [13] per hour = $3,649,334.75.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Records required to be retained under the BSA must be retained for five years.

Request for Comments:

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (i) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (ii) the accuracy of the agency's estimate of the burden of the collection of information; (iii) ways to enhance the quality, utility, and clarity of the information to be collected; (iv) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (v) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Himamauli Das,

Acting Director, Financial Crimes Enforcement Network.

[FR Doc. 2023–17092 Filed 8–9–23; 8:45 am]

BILLING CODE 4810–02–P

required to maintain and provide detailed account information for each foreign financial account, if requested by the Secretary or their delegate.

[12] FinCEN received 1,503,807 FBARs in calendar year 2022.

[13] The average hourly wage rate is calculated from the May 2022 U.S. Bureau of Labor Statistics average hourly wage for ''13–1041 Compliance Officer'' of $37.01, plus an additional 42% for benefits to produce a fully-loaded rate of $52.55. The ratio between benefits and wages for private industry workers is $11.86 (hourly benefits)/$28.37 (hourly wages) = 0.42, as of March 2023. The benefit factor is 1 plus the benefit/wages ratio, or 1.42. $37.01 multiplied by 1.42 equals $52.55. See U.S. Bureau of Labor Statistics, *Employer Costs for Employee Compensation: Private Industry dataset* (March 2023), available at *https://www.bls.gov/web/ecec/ecec-private-dataset.xlsx.*

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple Alcohol and Tobacco Tax and Trade Bureau Information Collection Requests

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on these requests.

DATES: Comments should be received on or before September 11, 2023 to be assured of consideration.

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.

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained from Melody Braswell by emailing *PRA@treasury.gov,* calling (202)–622–1035, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Alcohol and Tobacco Tax and Trade Bureau (TTB)

1. OMB Control No. 1513–0041

Title: Distilled Spirits Plants—Records and Monthly Reports of Processing Operations.

TTB Form Number: TTB F 5110.28.

TTB REC Number: TTB REC 5110/03.

Abstract: In general, the Internal Revenue Code of 1986, as amended (IRC), at 26 U.S.C. 5001, imposes a Federal excise tax on distilled spirits produced or imported into the United States. Additionally, the IRC at 26 U.S.C. 5207 requires that distilled spirits plant (DSP) proprietors keep records and submit reports regarding their production, storage, denaturation, and processing operations in such form and manner as the Secretary of the Treasury (the Secretary) by regulation prescribes. Under that IRC authority, the Alcohol and Tobacco Tax and Trade Bureau (TTB) regulations in 27 CFR part 19 require DSP proprietors to keep records regarding their processing operations, as well as any wholesale liquor dealer or taxpaid storeroom operations they conduct. The part 19 regulations also require DSP proprietors to submit monthly reports based on those records, using form TTB F 5110.28. TTB uses the collected information to ensure proper tax collection. TTB also aggregates the collected information to produce generalized distilled spirits statistical reports for public release.

Current Actions: There are no program changes to this information

collection, and TTB is submitting for extension purposes only. As for adjustments, due to a change in agency estimates resulting from continued growth in the number of DSPs in the United States, TTB is increasing the estimated number of annual respondents, total responses, and burden hours associated with this information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profits; State and local governments.

Number of Respondents: 4,900.

Average Responses per Respondent: 12 (once per month).

Number of Responses: 58,800.

Average Per-Response Burden: 2 hours (1 hour recordkeeping and 1 hour reporting).

Total Burden: 117,600 hours.

2. OMB Control No. 1513–0058

Title: Usual and Customary Business Records Maintained by Brewers.

TTB Recordkeeping Number: TTB REC 5130/1.

Abstract: The IRC at 26 U.S.C. 5415 requires brewers to keep records in such form and containing such information as the Secretary prescribes by regulation as necessary to protect the revenue. In addition, the IRC at 26 U.S.C. 5555 requires any person liable for Federal excise tax on alcohol beverages, including beer, to keep records, render statements, make returns, and comply with rules and regulations as prescribed by the Secretary. Under those IRC authorities, the TTB regulations in 27 CFR part 25 require brewers to keep usual and customary business records that allow TTB to verify various brewery activities. These activities include, for example, the quantities of raw materials received at a brewery, the quantity of beer and cereal beverages produced at and removed from a brewery taxpaid or without payment of tax, and the quantity of beer previously removed subject to tax returned to the brewery.

Current Actions: There are no program changes associated with this information collection, and TTB is submitting it for extension purposes only. As for adjustments, due to changes in agency estimates, TTB is increasing the estimated number of annual respondents and responses to this information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profits.

Number of Respondents: 14,100.

Average Responses per Respondent: 1 (one) per year.

Number of Responses: 14,100.

Average Per-Response and Total Burden: This information collection consists of usual and customary records kept by respondents during the normal course of business, regardless of any regulatory requirement to do so. As such, under 5 CFR 1320.3(b)(2), this information collection imposes no additional burden on respondents.

3. OMB Control No. 1513–0071

Title: Tobacco Products Importer or Manufacturer—Record of Large Cigar Wholesale Prices.

TTB Recordkeeping Number: TTB REC 5230/1.

Abstract: In general, the IRC at 26 U.S.C. 5701 imposes Federal excise taxes on tobacco products and cigarette papers and tubes, and, as described at 26 U.S.C. 5701(a)(2), the excise tax on large cigars is based on a percentage of the price at which such cigars are sold by the manufacturer or importer. The IRC at 26 U.S.C. 5741 also requires every manufacturer and importer of tobacco products to keep records in such manner as the Secretary shall by regulation prescribe. Under those IRC authorities, the TTB regulations at 27 CFR 40.187 and 41.181 require that manufacturers and importers of large cigars maintain certain records regarding the price for which those cigars are sold. The required records are necessary as they provide a basis upon which to verify that the appropriate amount of Federal excise tax is paid on large cigars.

Current Actions: There are no program changes or adjustments associated with this information collection, and TTB is submitting it for extension purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profits.

Number of Respondents: 300.

Average Responses per Respondent: 1 (one) per year.

Number of Responses: 300.

Average Per-Response Burden: 2.33 hours.

Total Burden: 699 hours.

Authority: 44 U.S.C. 3501 et seq.

Melody Braswell,

Treasury PRA Clearance Officer.

[FR Doc. 2023–17166 Filed 8–9–23; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF VETERANS AFFAIRS

Solicitation of Nominations for the Appointment to the Advisory Committee on Tribal and Indian Affairs

ACTION: Notice; amended.

SUMMARY: The Department of Veterans Affairs (VA), Office of Public and Intergovernmental Affairs (OPIA), Office of Tribal Government Relations (OTGR), is seeking nominations of qualified candidates to be considered for appointment as a member of the Advisory Committee on Tribal and Indian Affairs (''the Committee'') to represent the following Indian Health Service (IHS) Areas: Bemidji; California; Great Plains; Nashville; Navajo; Tucson.

DATES: Nominations for membership on the Committee must be received no later than 5 p.m. EST on August 21, 2023.

ADDRESSES: All nomination packages (Application, should be mailed to the Office of Tribal Government Relations, 810 Vermont Ave. NW, Suite 915H (075), Washington, DC 20420 or emailed to: *tribalgovernmentconsultation@va.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Stephanie Birdwell and/or Mr. Peter Vicaire, Office of Tribal Government Relations, 810 Vermont Ave. NW, Ste 915H (075), Washington, DC 20420. A copy of the Committee charter can be obtained by contacting *Peter.Vicaire@va.gov* (612–558–7744) or by accessing the website managed by OTGR at: *https://www.va.gov/TRIBALGOVERNMENT/index.asp.*

SUPPLEMENTARY INFORMATION: In carrying out the duties set forth, the Committee responsibilities include, but are not limited to:

(1) Identify for the Department evolving issues of relevance to Indian Tribes, Tribal organizations and Native American Veterans relating to programs and services of the Department;

(2) Propose clarifications, recommendations and solutions to address issues raised at Tribal, regional and national levels, especially regarding any Tribal consultation reports;

(3) Provide a forum for Indian Tribes, Tribal organizations, urban Indian organizations, Native Hawaiian organizations and the Department to discuss issues and proposals for changes to Department regulations, policies and procedures;

(4) Identify priorities and provide advice on appropriate strategies for Tribal consultation and urban Indian organizations conferring on issues at the Tribal, regional, or national levels;

(5) Ensure that pertinent issues are brought to the attention of Indian Tribes, Tribal organizations, urban Indian organizations and Native Hawaiian organizations in a timely manner, so that feedback can be obtained;

(6) Encourage the Secretary to work with other Federal agencies and Congress so that Native American Veterans are not denied the full benefit of their status as both Native Americans and Veterans;

(7) Highlight contributions of Native American Veterans in the Armed Forces;

(8) Make recommendations on the consultation policy of the Department on Tribal matters;

(9) Support a process to develop an urban Indian organization confer policy to ensure the Secretary confers, to the maximum extent practicable, with urban Indian organizations; and

(10) With the Secretary's written approval, conduct other duties as recommended by the Committee.

Authority: The Committee was established in accordance with section 7002 of Public Law 116–315 (H.R. 7105—Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020). In accordance with Public Law 116–315, the Committee provides advice and guidance to the Secretary of Veterans Affairs on all matters relating to Indian Tribes, Tribal organizations, Native Hawaiian organizations and Native American Veterans. The Committee serves in an advisory capacity, makes recommendations to the Secretary on ways the Department can improve the programs and services of the Department to better serve Native American Veterans.

Membership Criteria: OTGR is requesting nominations for the current vacancies on the Committee. The Committee is composed of 15 members. As required by statute, the members of the Committee are appointed by the Secretary from the general public, including:

(1) At least one member of each of the 12 IHS service areas is represented in the membership of the Committee nominated by Indian Tribes or Tribal organization.

(2) At least one member of the Committee represents the Native Hawaiian Veteran community nominated by a Native Hawaiian Organization.

(3) At least one member of the Committee represents urban Indian organizations nominated by a national urban Indian organization.

(4) Not fewer than half of the members are Veterans, unless the Secretary determines that an insufficient number of qualified Veterans were nominated.

(5) No member of the Committee may be an employee of the Federal Government.

In accordance with Public Law 116–315, the Secretary determines the number and terms of service for members of the Committee, which are appointed by the Secretary, except that a term of service of any such member may not exceed a term of two years. Additionally, a member may be reappointed for one additional term at the Secretary's discretion.

Professional Qualifications: In addition to the criteria above, VA seeks—

(1) Diversity in professional and personal qualifications;

(2) Experience in military service and military deployments (please identify your Branch of Service and Rank);

(3) Current work with Veterans;

(4) Committee subject matter expertise; and

(5) Experience working in large and complex organizations.

Requirements for Nomination Submission:

Nominations should be typewritten (one nomination per nominator). Nomination package should include: (1) a letter of nomination that clearly states the name and affiliation of the nominee, the basis for the nomination (*i.e.,* specific attributes which qualify the nominee for service in this capacity), and a statement from the nominee indicating a willingness to serve as a member of the Committee; (2) the nominee's contact information, including name, mailing address, telephone number(s), and email address; (3) the nominee's curriculum vitae or resume, *not to exceed five pages* and (4) a summary of the nominee's experience and qualification relative to the *professional qualifications* criteria listed above.

The individual selected for appointment to the Committee shall be invited to serve a two-year term. All members will receive travel expenses and a per diem allowance in accordance with the Federal Travel Regulations for any travel made in connection with their duties as members of the Committee.

The Department makes every effort to ensure that the membership of its Federal advisory committees is balanced in terms of points of view represented and the committee's function. Every effort is made to ensure that a broad representation of geographic areas, males & females, racial and ethnic minority groups, and Veterans with disabilities are given consideration for membership. Appointment to this Committee shall be made without discrimination because of a person's race, color, religion, sex (including gender identity, transgender status, sexual orientation, and pregnancy), national origin, age, disability, or genetic information. Nominations must state that the nominee is willing to serve as a member of the Committee and appears to have no conflict of interest that would preclude membership. An ethics review is conducted for each selected nominee.

Dated: August 7, 2023.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2023–17182 Filed 8–9–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0215]

Agency Information Collection Activity: Request for Information To Make Direct Payment to Child Reaching Majority

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veteran's Benefits Administration (VBA), 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 ectension 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 October 10, 2023.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy Kessinger, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0215'' 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), 810 Vermont Ave. NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0059'' 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: Title 38 U.S.C. 1310, 1313, 1542, and 101(4).

Title: Request for Information to Make Direct Payment to Child Reaching Majority (VA Form Letter 21P–863).

OMB Control Number: 2900–0215.

Type of Review: Extension of a currently approved collection.

Abstract: The Department of Veterans Affairs (VA), through its Veterans Benefits Administration (VBA), administers an integrated program of benefits and services established by law for veterans, service personnel, and their dependents and/or beneficiaries.

Title 38 U.S.C. 1310, 1313, 1542, and 101(4) provide for payment of death pension or dependency and indemnity compensation (DIC) to an eligible veteran's child when there is not an eligible surviving spouse and the child is between the ages of 18 and 23 and attending school. Until the child reaches the age of majority, payment is made to a custodian or fiduciary on behalf of the child. An unmarried schoolchild who is not incompetent is entitled to begin receiving direct payment on the age of majority. Regulatory authority is found in 38 CFR 3.403, 3.667, and 3.854.

Form Letter 21P–863 is used to gather the necessary information to determine a schoolchild's continued eligibility to VA death benefits and eligibility to direct payment at the age of majority. If the collection were not conducted, VA would have no means of determining a child's current address, marital status, and school attendance. Without this information, continued entitlement to death benefits and eligibility for direct payment at the age of majority could not be determined, and proper payment would not be made. This is an extension only with no substantive changes and the respondent burden has not changed.

Affected Public: Individuals and households.

Estimated Annual Burden: 3 Hours.

Estimated Average Burden per Respondent: 10 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 20.

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. 2023–17125 Filed 8–9–23; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Former Prisoners of War, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. ch. 10., that the Advisory Committee on Former Prisoners of War (ACFPOW) will conduct a hybrid meeting (in-person and virtual) on August 30, 2023 and August 31, 2023 at various times and multiple locations in Washington, DC. The meeting sessions will begin and end as follows:

Public participation will commence as follows:

Date	Time	Location	Open session
August 30, 2023	8:00 a.m.–4:00 p.m.—Eastern Standard Time (EST).	810 Vermont Avenue NW, Sonny Montgomery Room 230, Washington, DC 20420/Webex Link and Call-in Information Below.	Yes.
August 31, 2023	9:00 a.m.–10:30 a.m. (EDT)	Washington VA Medical Center, 50 Irving Street NW, Washington, DC 20420/Webex Link and Call-in Information Below.	Yes.
August 31, 2023	11:00 a.m.–1:00 p.m. (EDT)	Washington VA Medical Center, 50 Irving Street NW, Washington, DC 20420.	No.
August 31, 2023	1:00 p.m.–5:00 p.m. (EDT)	810 Vermont Avenue NW, Sonny Montgomery Room 230, Washington, DC 20420/Webex Link and Call-in Information Below.	Yes.

Sessions are open to the public, except when the Committee is conducting a tour of VA facilities. Tours of VA facilities are closed, to protect Veterans' privacy and personal information, by 5 U.S.C. 552b(c)(6).

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the administration of benefits under title 38 U.S.C., for Veterans who are Former Prisoners of War (FPOW), and to make recommendations on the needs of such Veterans for compensation, health care and rehabilitation.

On Wednesday, August 30th, the Committee will assemble in open session from 8:00 a.m. to 4:00 p.m. for discussion and briefings from senior leadership with Veterans Affairs Central Office, Veterans Benefits Administration and Veterans Health Administration officials.

On Thursday, August 31st, the Committee will assemble in open session from 9:00 a.m. to 10:30 a.m. for discussion and briefings from VA Washington DC Healthcare and the Baltimore Regional Office officials. The Committee will then convene a closed session from 11:00 a.m.–1:00 p.m. to tour the Washington DC VA Medical Center in conjunction with lunch.

Any member of the public wishing to attend the meeting or seeking additional information should contact, Designated Federal Officer, Department of Veterans Affairs, Advisory Committee on Former

Prisoners of War at *Julian.Wright2@va.gov.*

Any member of the public who wishes to participate in the virtual meeting may use the following Cisco Webex Meeting Links:

Join On Your Computer or Mobile App

Day 1

https://veteransaffairs.webex.com/veteransaffairs/j.php?MTID=mbf66ee71738417c8894f48c3f32d4a48
Webinar Number: 2760 144 0627

Dial *27601440627@veteransaffairs.webex.com*
You can also dial 207.182.190.20 and enter your webinar number.

Join by phone

14043971596 USA Toll Number
Access code 2760 144 0627

Day 2

https://veteransaffairs.webex.com/veteransaffairs/j.php?MTID=mbe296f038ca41d484fdc4a8989ff627f
Webinar Number: 2764 210 3612

Dial *27642103612@veteransaffairs.webex.com*
You can also dial 207.182.190.20 and enter your webinar number.

Join by phone

14043971596 USA Toll Number
Access code 2764 210 3612

Dated: August 7, 2023.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2023–17148 Filed 8–9–23; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

Vol. 88 Thursday,

No. 153 August 10, 2023

Part II

Library of Congress

Copyright Royalty Board

37 CFR Part 385

Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III); Final Rule

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 385

[Docket No. 16–CRB–0003–PR (2018–2022) (Remand)]

Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III)

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule and order.

SUMMARY: The Copyright Royalty Judges announce their final determination after remand of the rates and terms for making and distributing phonorecords for the period beginning January 1, 2018, and ending on December 31, 2022.

DATES:

Effective date: August 10, 2023.

Applicability date: The regulations apply to the license period beginning January 1, 2018, and ending December 31, 2022.

ADDRESSES: The final determination after remand is posted in eCRB at *https://app.crb.gov/.* For access to the docket to read the final determination after remand and submitted background documents, go to eCRB and search for docket number 16–CRB–0003–PR (2018–2022) (Remand).

FOR FURTHER INFORMATION CONTACT: Anita Brown, CRB Program Assistant, (202) 707–7658, *crb@loc.gov.*

SUPPLEMENTARY INFORMATION:

Final Determination After Remand

On October 26, 2020, the United States Court of Appeals for the D.C. Circuit (D.C. Circuit) issued its mandate vacating and remanding in part the original Determination [1] issued by the Copyright Royalty Judges (Judges) in the captioned proceeding. *See Johnson* v. *Copyright Royalty Board,* 969 F.3d 363 (D.C. Cir. 2020). In its ruling on appeal, the D.C. Circuit found that in the original Determination, the Judges (1) failed to give adequate notice to participants of their overhaul of the royalty rate structure combined with significantly increased and uncapped rates for section 115 licenses; (2) failed to explain why they rejected a benchmark based on a past settlement agreement [2] in lieu of overhauling of the rate structure and significantly increasing rates; and (3) failed to identify their legal authority to redefine a material term after they promulgated a definition of that term in the original Initial Determination circulated to the participants. *See Johnson,* 969 F.3d at 367, 381; Initial Determination, *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III),* 16–CRB–0003–PR (2018–2022) (Jan. 27, 2018).

After receipt of the D.C. Circuit's ruling and mandate, the Judges consulted with the parties to the appeal and established procedures for the remand proceeding. *See* Order Adopting Schedule for . . . Remand (Dec. 23, 2020).[3] Each side offered opening submissions, responsive submissions, additional evidentiary filings, and further supplemental briefing requested by the Judges. The parties' submissions included legal briefing and incorporated evidence from the original proceeding as well as evidence newly developed for the remand proceeding. After preliminary deliberations, the Judges asked for supplemental briefing from the parties responsive to a proposed alternative rate structure. *See* Notice and *Sua Sponte* Order Directing the Parties to Provide Additional Materials (Dec. 9, 2021). With respect to redefinition of the material term Bundled Revenue, the Judges also sought legal analysis from the parties relating to the D.C. Circuit's directive that the Judges either provide ''a fuller explanation of the agency's reasoning at the time . . .'' or take ''new agency action accompanied by the appropriate procedures.'' *See Johnson,* 969 F.3d at 392 (citing *Department of Homeland Security* v. *Regents of the Univ. of Cal.,* 140 S. Ct. 1891, 1908). On February 9, 2022, the Judges invited additional briefing on the Bundled Revenue definition issue, specifically permitting the parties to offer additional analysis of possible characterization of the Copyright Owners' motion for clarification following the Determination as a motion for rehearing under the Copyright Act, title 17, United States Code at sec. 803(c)(2). *See Sua Sponte* Order Regarding Additional Briefing (Feb. 9, 2022).

At the request of the parties, the Judges agreed to forego live testimony. On March 8, 2022, all parties were afforded an opportunity to present oral argument on all remand issues.[4] On July 1, 2022, the Judges issued an Initial Ruling and Order after Remand (Initial Ruling) [5]—applying *Johnson* and considering the entire record developed pre-remand and post-remand.

In the Initial Ruling, the Judges directed the parties to attempt to submit jointly agreed-upon regulatory provisions implementing the Initial Ruling for the Judges to consider. The Judges further ruled that, if the parties could not agree on all the regulatory language, they should make separate submissions regarding regulatory provisions in dispute. *See* Initial Ruling at 114.

The parties agreed to many regulatory provisions but disagreed as to several such provisions. Accordingly, they filed separate submissions and respective replies regarding the regulatory provisions. Services' Joint Submission of Regulatory Provisions (July 18, 2022); Copyright Owners' Submission of Regulatory Provisions to Implement the Initial Ruling (July 18, 2022); Services' Joint Response to Copyright Owners' Submission of Regulatory Provisions (Aug. 5, 2022); Copyright Owners' Response to Judges' July 27, 2022 Order Soliciting Responses Regarding Regulatory Provisions (Aug. 5, 2022).

The Judges considered those submissions and entered an order addressing the disputed regulatory provisions. *See* Corrected Order regarding Regulatory Provisions

[1] *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III),* 84 FR 1918 (Feb. 5, 2019) (final rule and order) (original Determination); *see also* Final Determination, 16–CRB–0003–PR (2018–2022) (Nov. 5, 2018). The original Determination was issued by two of the Judges (Majority) and was accompanied by a dissenting opinion (Dissent) authored by the third Judge. The Dissent is appended to and part of the same document as the original Determination.

[2] The referenced settlement agreement formed the basis for regulatory terms relating to section 115 musical works royalties and was adopted as a final rule in *Adjustment [or] Determination of Compulsory License Rates for Mechanical and Digital Phonorecords,* Docket No. 2011–3 CRB Phonorecords II, 78 FR 67938 (Nov. 13, 2013). *See also* Technical Amendment at 78 FR 76987 (Dec. 20, 2013).

[3] Following the original remand scheduling order, the Judges amended the remand proceeding schedule by, *e.g.,* permitting additional briefing, changing due dates, and seeking additional input with regard to specific issues. *See, e.g.,* Order . . . Modifying Scheduling Orders (Dec. 13, 2021) (eCRB no. 25973).

[4] Copyright Owners and Services divided the time for oral argument. George Johnson dba GEO Music Group waived oral argument.

[5] The Initial Ruling (eCRB no. 26938) is included in Related Rulings and Orders as section A. The findings and conclusions in the Initial Ruling were adopted by a majority of the Judges, but two Judges filed separate opinions. *See* Initial Ruling at 2 n.5. One Judge, former Chief Judge Suzanne Barnett, dissented from the Majority's conclusion in the Initial Ruling regarding the *Phonorecords II* rate structure (section II of the Initial Ruling), though not from the exception to that benchmark with regard to the headline rate of 15.1% and the imposition of a cap on the TCC rate prong. *See* Dissent in Part re Benchmark (July 1, 2022) (eCRB no. 26943). The other opinion was issued by Judge Strickler, who dissented from the *reasoning* relating to the adoption of the definition of Service Revenue (section V), but concurred in the *adoption* of that definition. *See* Dissent in Part as to Section IV of the Initial Ruling and Order after Remand . . . (July 1, 2022) (eCRB no. 26965).

Following Initial Ruling and Order (after Remand) (Nov. 10, 2022) (November 10th Order).[6]

On November 30, 2022, the parties filed a Joint Submission in which they provided joint regulatory language no longer in dispute that applied the binding rulings of the Judges and the D.C. Circuit.[7] However, the parties identified the single issue in dispute that relates to the ''Total Content Cost'' (''TCC'') rates for nine offerings made by interactive streaming services. Joint Submission . . . Regarding Regulatory Provisions Following Initial Ruling and Order (after Remand) (Nov. 30, 2022) (Joint Submission) (eCRB no. 27337).

Having considered the parties' submissions (including the Joint Submission), the Initial Ruling, and all other pertinent material, the Judges adopted the several TCC rates set forth in the Phonorecords II-based benchmark as proposed by the Services. *See* Order 43 on Phonorecords III Regulatory Provisions (eCRB no. 28210).[8]

Based on the entirety of the record, the Judges adopt *in toto*[9] the Initial Ruling and the Order 43 on Phonorecords III Regulatory Provisions which are set out in this document. Accordingly, those two documents are adopted by reference in this Final Determination After Remand. Additionally, the regulatory terms that will codify this Final Determination After Remand are set out in this document.[10]

On the basis of the foregoing, the Judges propound the rates and terms described in this Final Determination After Remand for the period January 1, 2018, through December 31, 2022.[11] No participant having filed a timely petition for rehearing, the Judges have made no substantive alterations to the body of the Initial Determination After Remand. The Register of Copyrights reviewed the Judges' Final Determination After Remand for legal error in resolving a material issue of substantive law under title 17, United States Code, and has closed her review. Non-substantive typos have been corrected and non-substantive formatting changes have been made to the version reviewed by the Register in order to accommodate the **Federal Register**'s formatting standards. The Librarian shall cause the Judges' Final Determination After Remand, and any correction thereto by the Register, to be published in the **Federal Register** no later than the conclusion of the Register's 60-day review period.

Related Rulings and Orders

*A. Initial Ruling and Order After Remand (Redacted Version With **Federal Register** Naming and Formatting Conventions)*

On October 26, 2020, the United States Court of Appeals for the D.C. Circuit (D.C. Circuit) issued its mandate vacating and remanding in part the Determination[12] issued by the Copyright Royalty Judges (Judges) in the captioned proceeding. *See Johnson* v. *Copyright Royalty Board,* 969 F.3d 363 (D.C. Cir. 2020). In its ruling on appeal, the D.C. Circuit found that in the Determination, the Judges (1) failed to give adequate notice to participants of their overhaul of the royalty rate structure combined with significantly increased and uncapped rates for section 115 licenses; (2) failed to explain why they rejected a benchmark based on a past settlement agreement[13] in lieu of overhauling of the rate structure and significantly increasing rates; and (3) failed to identify their legal authority to redefine a material term after they promulgated a definition of that term in the Initial Determination circulated to the participants. *See Johnson,* 969 F.3d at 367, 381; Initial Determination, *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III),* 16–CRB–0003–PR (2018–2022) (Jan. 27, 2018).

After receipt of the D.C. Circuit's ruling and mandate, the Judges consulted with the parties to the appeal and established procedures for the remand proceeding. *See* Order Adopting Schedule for . . . Remand (Dec. 23, 2020).[14] Each side offered opening submissions, responsive submissions, additional evidentiary filings and further supplemental briefing requested by the Judges. The parties' submissions included legal briefing and incorporated evidence from the original proceeding as well as evidence newly developed for the remand proceeding. After preliminary deliberations, the Judges asked for supplemental briefing from the parties responsive to a proposed alternative rate structure. *See* Notice and *Sua Sponte* Order Directing the Parties to Provide Additional Materials (Dec. 9 Order). The Judges also sought legal analysis from the parties relating to the D.C. Circuit's directive that the Judges either provide ''a fuller explanation of the agency's reasoning at the time . . .'' or take ''new agency action accompanied by the appropriate procedures.'' *See Johnson,* 969 F.3d at 392 (citing *Dep't of Homeland Sec.* v. *Regents of the Univ. of Cal.,* 140 S. Ct. 1891, 1908 (*Regents*)). On February 9, the Judges invited additional briefing on

[6] The November 10th Order corrected an otherwise substantively identical order issued two days earlier, on November 8, 2022, which had inadvertently included a small amount of text. *See* November 10th Order at 1 (eCRB no. 27312).

[7] The Judges largely adopt the regulations in the Joint Submission, which reflect the substance of the Judges' post-remand rulings, the substance and formatting that the Judges had adopted in the pre-remand Final Determination that were not raised as issues on appeal, and updates to references to subparagraphs of Section 115 to conform to statutory amendments made pursuant to the Music Modernization Act in 2018. Any differences in language or style are made for ease of reference, consistent with the parties' post-remand joint filings.

[8] The Judges also found good cause to adopt a joint proposal for modified language regarding late fees, in 37 CFR 385.3. Order 43 on Phonorecords III Regulatory Provisions at 9.

[9] *But see* Judge Strickler's Dissent, cited at n.5 *supra,* in which—although he agrees with the Majority as to the definition of a Service Revenue Bundle—he disagrees as to the legal reasoning supporting that conclusion.

[10] The documents are: Initial Ruling and Order After Remand, designated as Related Rulings and Orders, section A; Order 43 on Phonorecords III Regulatory Provisions, designated as Related Rulings and Orders, section B; Dissent in Part as to Section IV of the Initial Ruling and Order after Remand by Judge David R. Strickler, designated as Related Rulings and Orders, section C; and Dissent in Part re Benchmark, designated as Related Rulings and Orders, section D.

[11] The regulations applicable to the period 2018 through 2022, as set forth following this **SUPPLEMENTARY INFORMATION** section, will appear in the CFR as appendix A to the current regulations. Although these Phonorecords III regulations adopt the substance of the Phonorecords II-based benchmark where the Judges so require, in §§ 385.21 and 385.22, these Phonorecords III regulations are structured, consistent with the parties' Joint Submission, in the same consolidated manner as set forth in the pre-remand Phonorecords III regulations (a structure as to which no party appealed). See Exhibit A to the Joint Submission at 16, n. 47; see also Exhibit B to the Joint Submission at n.17 (red-lined version of Exhibit A, supra).

[12] *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III),* 84 FR 1918 (Copyright Royalty Board Feb. 5, 2019) (final rule and order) (''Determination''); *See also* Final Determination, 16–CRB–0003–PR (2018–2022) (Nov. 5, 2018) (citations to the Determination and to the Dissent in this Initial Ruling and Order after Remand (Initial Ruling) are found in this document). The Determination was issued by two of the Judges (Majority) and was accompanied by a dissenting opinion (Dissent) authored by the third Judge. The Dissent is appended to and part of the same document as the Determination.

[13] The referenced settlement agreement formed the basis for regulatory terms relating to section 115 musical works royalties and was adopted as a final rule in *Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords,* Docket No. 2011–3 CRB Phonorecords II, 78 FR 67938 (Nov. 13, 2013), Technical Amendment at 78 FR 76987 (Dec. 20, 2013). In this Initial Ruling, references to *Phonorecords II,* PR II, and PR II-based benchmark are references to this final rule.

[14] Following the original remand scheduling order, at the request of parties or on their own motion, the Judges amended the remand proceeding schedule by, *e.g.,* permitting additional briefing, changing due dates, and seeking additional input with regard to specific issues. *See, e.g.,* Order . . . Modifying Scheduling Orders (Dec. 13, 2021).

the service bundle definition issue, specifically permitting the parties to offer additional analysis of possible characterization of the Copyright Owners' motion for clarification following the Determination as a motion for rehearing under the Copyright Act, title 17, United States Code (Act) at sec. 803(c)(2).

At the request of the parties, the Judges agreed to forego live testimony. On March 8, 2022, all parties were afforded an opportunity to present oral argument on all remand issues.[15] Following oral argument, the Judges deliberated and now issue this Initial Ruling after Remand.

After due consideration of all of the evidence and oral argument of counsel, the Judges [16] determine: [17]

(1) With regard to the applicable rates and rate structure, the percent-of-revenue all-in headline royalty rate for the mechanical license shall be set at 15.1%, phased-in, as set forth below:

2018–2022 ALL-IN HEADLINE ROYALTY RATES

	2018	2019	2020	2021	2022
Percent of Revenue	11.4%	12.3%	13.3%	14.2%	15.1%

In all other respects, the rates and rate structure of the *Phonorecords II*-based benchmark proposed by the Services (as that benchmark is defined herein) shall constitute the rates and rate structure for the *Phonorecords III* period.[18]

To be clear: the 15.1% headline percentage rate substitutes for the headline percentage rates in subparts B and C of the Services *Phonorecords II*-based benchmark, and the definition of ''Service Revenue'' for bundles shall be the definition contained in 37 CFR 385.11 (paragraph (5) for the ''Service Revenue'' definition) as proposed in the Services' *Phonorecords II*-based benchmark.

(2) The Services' *Phonorecords II*-based benchmark is the better of the benchmarks proposed by the parties and satisfies the requirements of 17 U.S.C. 801(b)(1) in all respects. However, as noted *supra,* to be consistent with this statutory section and the decision in *Johnson,* the royalty rate of 10.5% in that benchmark shall be replaced with the 15.1% rate set forth in paragraph (1) above.

(3) To reiterate for clarity, consistent with the adoption of the *Phonorecords II*-based benchmark, and for the reasons more fully developed herein, the Judges adopt the definition of ''Service Revenue for Bundled Services'' as it appeared in the Initial Determination in the underlying proceeding. Following are the Judges' analysis and ruling after remand.

I. Preliminary Issue: Burden of Proof

As a preliminary matter, the Judges address the issue of burden of proof raised by both parties. Pursuant to the Administrative Procedure Act (APA), ''the proponent of a rule or order has the burden of proof.'' 5 U.S.C. 556(d). *See also* Initial Remand Submission of Copyright Owners at 48 (Apr. 1, 2021) (''CO Initial Submission'') (citing section 556(d) of the APA as setting forth ''a basic rule of these rate-setting proceedings that a participant is required to provide evidence establishing the propriety of all aspects of its own proposed rates and terms, including all aspects of the participant's proposed rate structure.''). Accordingly, it is clear to the Judges that the Services should continue to bear the burden of proof regarding the sufficiency of their proffered Phonorecords II-based benchmark in this remand proceeding. And, in like fashion, because on remand Copyright Owners have assumed the mantle of pursuing the vacated rate structure and rates, they bear the burden of proof with regard to their proposal.

However, Copyright Owners assert that it is *the Services* who bear the burden of proof as to Copyright Owners' proposal regarding the appropriateness, *vel non,* of an uncapped TCC rate prong. According to Copyright Owners, this burden falls on the Services because ''only the Services . . . proposed TCC prongs at the hearing,'' in the form of the mix of capped and uncapped TCC prongs contained in the Services' Phonorecords II benchmark. *Id.* at 47. The Judges find that the fact that the Phonorecords II-based benchmark advanced by the Services contains this mix of capped and uncapped TCC prongs does not bear on Copyright Owners' duty, under 5 U.S.C. 556(d), to satisfy the burden of proof with regard to the rates and rate structure they are advancing on this remand. Moreover, the D.C. Circuit has already held that the fact that some of the Streaming Services' proposals contemplated continued use of an uncapped total content cost prong for some categories ''does not mean they anticipated that the [Judges] would uncap the total content cost prong *across the board* . . . [which] is quite different.'' *Johnson,* 369 F.3d at 382. The difference, according to *Johnson,* is that ''[u]ncapping the total content cost prong across all categories leaves the Streaming Services exposed to potentially large hikes in the mechanical license royalties they must pay.'' *Id.*

Accordingly, the Judges find that Copyright Owners indeed do bear the burden of proof with regard to the appropriateness of uncapped rate structure and rates they are proposing on remand and the Services bear the burden of proof with regard to the appropriateness of the Phonorecords II-based benchmark they are continuing to advance on remand.

II. Rate Structure and Rates

A. Relevant Rulings in Johnson

In establishing a royalty rate structure and the rates within it in the context of this remand proceeding, the Judges are guided by the rulings in *Johnson.*

1. Percent of Revenue Prong

The D.C. Circuit noted that the Judges found the royalties in the *Phonorecords II* period were too low and that record companies were receiving a disproportionate share of the sum of the mechanical and sound recording royalties. *Johnson,* 969 F.3d at 384–85. The D.C. Circuit acknowledged that ''[t]he Judges . . . then carefully

[15] Copyright Owners and Services divided the time for oral argument. George Johnson dba GEO Music Group waived oral argument.

[16] The findings and conclusions in this Initial Ruling are adopted by a majority of the Judges. One Judge dissents from the adoption of the entirety of the *Phonorecords II* rate structure (section II), though not from the exception to that benchmark with regard to the headline rate of 15.1% and the imposition of a cap on the TCC rate prong. One Judge dissents in part from the reasoning relating to adoption of the definition of Service Revenue (section V), but not from the adoption of that definition.

[17] As addressed *infra,* the Judges also order that the participants in this remand proceeding prepare and submit regulatory provisions consistent with this ruling. *See* Footnote 174.

[18] The Services include in their Joint Rate Proposal a chart summarizing the proposed rates for their offerings. That chart is attached as an Addendum to this Initial Ruling.

analyzed the competing testimony and drew from it rates that were grounded in the record and supported by reasoned analysis.'' *Id.* at 385. The D.C. Circuit found that the Judges acted well within their discretion and not arbitrarily, relying on substantial evidence in establishing the ''zone of reasonableness'' for the rates. *Id.* As the D.C. Circuit noted, the Judges' process was ''the type of *line-drawing and reasoned weighing of the evidence* [that] falls squarely within the [Judges'] wheelhouse as an expert administrative agency.'' *Id.* at 385–86 (emphasis added).

2. Uncapped TCC Prong

The D.C. Circuit found fault, however, in the Judges' determination to establish an uncapped and increased percentage-based total content cost (TCC).[19] *Id.* at 380. This approach ''removed the only structural limitation on how high the [TCC] . . . can climb.'' *Id.* The D.C. Circuit reasoned that uncapping the TCC alternative rate prong across all categories of service exposed the Services to potentially large hikes in the overall mechanical royalties they must pay. *Id.* at 382. The D.C. Circuit noted: ''As the [Judges] acknowledge, sound recording rightsholders have considerable market power *vis-à-vis* interactive streaming service providers . . . . The interactive streaming services are . . . exposed to the labels' market power and record companies could, if they so chose, put those services out of business entirely . . . . [B]y virtue of their oligopoly power, the sound recording copyright holders have extracted 'inflated' royalties. . . .'' *Id.* (cleaned up).

While the Services had advocated uncapping the TCC alternative rate prong for some categories of service, that ''does not mean they anticipated that the [Judges] would uncap the total content cost prong *across the board.* That is quite different.'' *Id.* at 382. The D.C. Circuit found that the Judges ''failed to provide adequate notice of the drastically modified rate structure [they] ultimately adopted.'' *Id.* at 381. The D.C. Circuit emphasized that the failure to provide adequate notice of their intentions ''is no mere formality [because] [i]nterested parties' ability to provide evidence and argument . . . not only protects the parties' interests, it also helps ensure that the [Judges'] ultimate decision is well-reasoned and grounded in substantial evidence.'' *Id.* at 381–82.

To support their adoption of an uncapped TCC rate prong, the Judges ''predicted that the sound recording copyright owners' royalty rates would naturally decline in the course of their negotiations with interactive streaming services.'' *Id.* at 372. The Judges found persuasive the rebuttal testimony of one of Copyright Owners' economic expert witnesses, Professor Watt, that an increase in mechanical royalties payable by the Services would lead to a corresponding decrease in the Services' sound recording royalty obligations. *See* Determination at 73–74 (''[S]ound recording royalty rates in the unregulated market will decline in response to an increase in the compulsory license rate for musical works [and] Professor Watt's bargaining model predicts that the total of musical works and sound recordings royalties would stay ''almost the same'' in response to an increase in the statutory royalty.''). The Services painstakingly criticized this ''see-saw'' theory.

The D.C. Circuit concluded that, on remand, if and when the Judges consider the ''uncapped'' rate structure, they shall address all substantive challenges to that approach raised by the Services, including the issue of whether ''an increase in mechanical license royalties would lead to a decrease in sound recording royalties.'' *Id.* at 383.

Thus, the D.C. Circuit held, the Judges erred procedurally in adopting an uncapped TCC alternative rate prong. The D. C. Circuit therefore instructed the Judges to provide the parties with the opportunity to fully address the issues regarding the uncapped TCC prong, and for the Judges to address the ''substantive challenges'' raised by the Services.

3. Four Itemized Statutory Objectives

The statutory standard found in section 801(b)(1) instructs the Judges to set rates that are not only ''reasonable,'' but also reflective of four itemized objectives, or factors, which, as the D.C. Circuit stated, set forth ''competing priorities.'' 17 U.S.C. 801(b)(1)(A)–(D); *Johnson,* 969 F.3d at 387.[20] With regard to these four priorities, the D.C. Circuit found that the Judges properly analyzed and applied the first objective (Factor A). *Id.* at 387–88. In particular, the D.C. Circuit did not disturb the Judges' ruling that an increase in the royalty rates for mechanical licenses was necessary in order to satisfy Factor A. *Johnson,* 369 F.3d at 387–88. According to *Johnson,* in making this finding, the Judges had engaged in a ''reasonable reading of the record'' and had relied on ''substantial evidence.'' *Id.* at 388. Thus, Factor A (when considered without regard to the other three objectives) indicated that the statutory rate needed to be higher than it was during the *Phonorecords II* period.[21]

With regard to the other three objectives, *Johnson* stated that ''[t]he question whether the [Judges] adequately addressed factors B through D . . . is intertwined with the nature of the rate structure ultimately imposed by the [Judges].'' *Id.* at 389. Accordingly, the D.C. Circuit concluded that it ''need not . . . address whether the [Judges] adequately considered these remaining factors.'' *Id.*[22]

Within the parameters of the holdings in *Johnson,* the Judges consider the record facts and the arguments made in this remand proceeding, together with the pertinent facts and arguments made in the original proceeding.

B. Rate Evidence for the 33-Months From January 2018 Through September 2020

After the Determination was issued, from its effective inception on January 1, 2018, through September 30, 2020—a 33-month period—the parties operated under the rates and rate structure set forth in that ruling. In light of the D.C. Circuit's decision in *Johnson,* as of October 1, 2020, the parties reverted to the *Phonorecords II* rates. The Services have asserted in this remand proceeding that, during the 33-month period when the Majority's new and higher

[19] ''TCC'' refers to ''Total Content Cost,'' and is defined as ''a percentage of the royalties paid by the service . . . to sound recording copyright holders.'' *Johnson,* 969 F.3d at 370; *see also* Determination at 13 n.38 (''TCC'' is an industry acronym for ''Total Content Cost'', a shorthand reference to the extant regulatory language describing generally the amount paid by a service to a record company for the section 114 right to perform digitally a sound recording.'').

[20] These competing objectives are: (A) To maximize the availability of creative works to the public; (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions; (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication; and (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices. *Id.*

[21] However, as the D.C. Circuit also noted, because the four section 801(b)(1) objectives reflect ''competing priorities, *id*'' at 387, the holding that Factor A militates toward a higher rate is not ultimately dispositive. Rather, it must be weighed with the other statutory factors.

[22] The phrase ''intertwined with the nature of the rate structure'' requires emphasis because the Majority independently considered how to weigh Factors B and C specifically as to the 15.1% revenue rate, without regard to the overall rate structure, as discussed *infra.*

Phonorecords III rates were in effect, [REDACTED]. By contrast, Copyright Owners, on remand, looking at the same data over this 33-month period, aver that they prove the existence of the seesaw theory.

1. Services' Position

According to the Services, [REDACTED]. [REDACTED]. Moreover, according to the Services, [REDACTED]. The Services further maintain that, [REDACTED].

The Services make the [REDACTED]. And, [REDACTED]. Id. ¶¶ 5, 9–13, 16–19, 22–23, 26–27.

The Services claim that [REDACTED]. More particularly, [REDACTED].

[REDACTED]. [REDACTED].

The Services' economic experts rushed to judgment upon learning of these facts, claiming that they disproved the seesaw theory. *See* Katz WDRT ¶¶ 25–27 (relying on testimonies cited *supra* and concluding that seesaw theory was disproved, based on [REDACTED]); Marx WDRT ¶¶ 48–51 (relying on same testimonies and likewise finding because [REDACTED]); Leonard WDRT ¶ 17. ([REDACTED]).

2. Copyright Owners' Position

Copyright Owners analyzed the royalty data over the same 33-month period (January 2018 through September 2020) and reach the opposite conclusion. One of their economic expert witnesses, Dr. Jeffrey Eisenach, testified that [REDACTED]. Moreover, he opined that [REDACTED]. *See* Eisenach RWRT sec. 2(A) & appx. C.

Based on this analysis, Professor Watt declares empirical vindication of his seesaw theory. Watt RWRT ¶¶ 41–42, 46 (''The [Judges'] bargaining theory insights about the relationship between royalty rates were correct. . . . [REDACTED]. . . .'').

3. Analysis and Decision Regarding Evidence of Post-Determination Rates

The Judges are perplexed by the willingness of the expert economic witnesses on both sides to opine that the rate changes from January 2018 through September 2020 can serve as confirmation of their clients' respective positions. The issue to be considered empirically was whether the sound recording rate would decrease in response to the increase in the mechanical rate. That is, if the record labels had previously set royalties at a level that would allow the Services merely to survive, would the record labels agree to lower their sound recording rate if more of the Services' surplus were acquired by Copyright Owners? To answer this question, the economists on both sides applied sophisticated bargaining models and critiques to explain the nature of the negotiations that would ensue.

In the process, the economists lost track of an obvious, elementary point: The *Phonorecords III* rates were being challenged by the Services' appeal, and might not persist. Indeed, the rates were ultimately vacated and the parties returned in October 2020 to the *Phonorecords II* rates.[23] Now, the rates will be changed again by this post-remand Determination, and going forward may be subject to further potential change, consistent with the provisions of title 17. In light of such ongoing fundamental uncertainty, why would any economist or businessman assume that the sound recording companies would agree to adjust their rates in response to a change in the mechanical rate? The Judges are amazed that the economic experts neglected even to raise this uncertainty as a complicating issue, let alone a dispositive one.[24]

Moreover, no party called as a witness any representatives of the Majors, or subpoenaed their testimony or documents, to provide the Judges with evidence of how these record companies perceived the seesaw issue, whether as a permanent phenomenon or as an uncertain matter, given the pendency of the legal proceedings regarding the ultimate mechanical rate. Any of the parties could have requested that the Judges subpoena a sound recording industry witness to give testimony and produce documents as to this issue, pursuant to 17 U.S.C. 803(b)(6)(C)(ix), but none did so. Further, Copyright Owners, who are representing the music publishing interests of *inter alios,* Sony, Universal, Warner, and Merlin, likely could have produced such sound recording witnesses without the need for a subpoena. Witnesses from these entities who negotiated with the Services after the *Phonorecords III* rates and rate structure became effective certainly would have knowledge relevant to the testimony of the Services' witnesses [REDACTED] who claimed that [REDACTED].

Simply put, the period from period from January 2018 through September 2020 was a time the Judges construe as ''33-months of uncertainty,'' *see* 3/8/22 Tr. 87, 91 (Closing Argument) when no party could ascertain with any assuredness the ultimate *Phonorecords III* rates and rate structure. Thus, for the economists and the parties to claim vindication for their arguments by reliance on how the record labels did or did not respond to the challenged and ever-shifting rates during this ''33 months of uncertainty'' reflects the elevation of adversarial zeal over objective judgment.

Accordingly, the Judges place no weight on the purported changes or stability of the sound recording rates during the *Phonorecords III* rate period.

C. Percent-of-Revenue Rate Prong

1. Copyright Owners' Position

In their initial remand submission, Copyright Owners provided no new evidence to support any aspect of the 15.1% revenue-based rate (or for that matter, any new evidence to support the rates or rate structure in the Determination), and elected to rely on the pre-remand record. In fact, in their initial remand submission, Copyright Owners do not so much as mention the 15.1% revenue rate derived by the Judges. However, in their reply remand submission (which the Judges found also to constitute, in part, a substantive *initial* submission [25]) Copyright Owners do address the 15.1% revenue rate. In the reply submission, Copyright Owners simply stated: ''[T]he Circuit affirmed the Board's derivation of rate percentages, including raising the revenue rate to 15.1%.'' Copyright Owners' Reply Brief on Remand (in Reply Remand Submission of Copyright Owners, Vol. 1) at 64, n.48 (July 2, 2021) (''CO Reply''). In a subsequent submission, Copyright Owners added that ''*[t]he narrow mandate on this Remand does not allow for reopening the rate percentage determination in the [ ]Determination.*'' Copyright Owners' Motion for Reconsideration or Clarification at 15 & n.10 (Dec. 17, 2021) (emphasis added) (Dec. 17th Motion).

Thereafter, Copyright Owners asserted that the D.C. Circuit's affirmance of the

[23] There also was uncertainty as to the effective inception date of the *Phonorecords III* rate period, because the Services had appealed (ultimately unsuccessfully) the CRB Judges' finding that the period commenced, retroactively, as of January 1, 2018.

[24] To place this point in the economic context of this proceeding, the Judges characterize the ongoing ''legal uncertainty'' as another ''independent variable'' to add to the economic experts' list of such variables, discussed *infra,* that affect the ''dependent variable,'' *viz.,* the sound recording rate.

[25] *See* Order Denying in Part and Granting in Part Services' Motion to Strike Copyright Owners' Expert Testimony and Granting Services' Request to File Supplemental Testimony and Briefing at 11 (Oct. 1, 2021) (Oct. 1st Order) (The Judges found that ''with one exception . . . the challenged testimonial evidence of Copyright Owners' economic expert witnesses serve the dual purposes of direct and rebuttal statements'' and, as a consequence, ''provide[d] the Services an opportunity to file supplemental testimony and briefing in opposition.

[Judges'] revenue percentage rate calculation was ''strong[ ]'' and ''detailed.'' Copyright Owners' Reply in Further Support of Motion for Reconsideration or Clarification at 4 (January 5, 2022). Moreover, Copyright Owners took note that the Services had relied on substantively identical language in *Johnson* to support their argument that other statements in that D.C. Circuit decision should be deemed affirmed. *See id.* at 4–5 (noting Services' reliance on *Johnson's* description of the Judges' rulings regarding student and family discounts (''*grounded in substantial record evidence . . . based on the weight and credibility of the evidence [and] squarely within the Judges' expertise)*'' as demonstrating that the D.C. Circuit had affirmed those rulings) (emphasis added); *see also* Copyright Owners' Brief in Response to the Additional Materials Orders at 2, 6–7 (Jan. 24, 2022) (''CO Additional Submission'') (again asserting that ''the 15.1% revenue rate . . . was specifically affirmed in detail by *Johnson.*'').

2. Services' Position

In their initial submission after the remand, the Services objected to any continued application by the Judges of the 15.1% revenue rate because, ''as the Majority acknowledged, this particular division of revenues will never happen in the real world because of the complementary oligopoly power of the record labels.'' Services' Joint Opening Brief (in Services' Joint Written Direct Remand Submission at Tab D) at 52 (''Services' Initial Submission'') (Apr. 1, 2021). More particularly in this regard, the Services note that Professor Marx's Shapley Value Model,[26] which served as an input for the generation of the 15.1% revenue rate, also indicated that only [REDACTED]% of the interactive streaming revenue should be paid out as royalties to the sound recording rightsholders, with the remaining [REDACTED]% of these revenues retained by the interactive streaming services. *Id.* (''Both Professor Marx's and Professor Watt's models show lower combined royalties being paid by the services than are currently paid in the marketplace. . . . The discrepancy in total royalties between the models and the real world is explained, in part, by the absence of supranormal complementary oligopoly profits in the Shapley model, and the presence of those profits in the actual market.''). *Id.* (quoting *Phonorecords III,* 84 FR 1952).

By this approach, the Services maintain, ''the Majority awarded the Copyright Owners the full 15.1% of revenue dictated by its model (phased in over time), and left it up to the Services to convince the complementary oligopolist major labels to dramatically lower sound recording rates.'' *Id.* at 54–55. The Services argue that, instead, the Majority should have applied to Professor Marx's [REDACTED]% total royalty obligation what they characterize as ''any of the[ ] real-world ratios in place of the [REDACTED] ratio taken from ''Professor Gans' ''Shapley-inspired'' model. *Id.* at 54. According to the Services, these lower ratios would have reduced the revenue percentage rate well below 15.1%. *Id.*

Alternatively, the Services propose, through Professor Marx's post-remand written testimony, that the Judges now adopt ''a more balanced, burden-sharing approach'' to address what she described as the Majority's ''imbalance'' problem. *Id.* at 57; *see also* Marx WDRT ¶¶ 52–63.[27] Essentially, her proposal begins with an assumption, based on record evidence, that labels typically take specific shares of service revenue, including shares of [REDACTED]%, [REDACTED]% and [REDACTED]%.[28] These shares are significantly higher than the [REDACTED]% that Professor Marx generated from her Shapley model. Next, Professor Marx's post-remand burden-sharing approach uses as inputs the 15.1% of service revenue and the [REDACTED]% of service revenue that would be retained by the musical works owners and the Services respectively.[29] Putting these two factors together, she sets forth the basic math: Using her [REDACTED]% sound recording share as an example, she notes that there is not enough revenue for the labels to take this [REDACTED]% share, if the musical works owners also receive 15.1% and the Services also retain the [REDACTED]% derived from her model ([REDACTED]% + 15.1% + [REDACTED]% = [REDACTED]%, an irrational result). *See* Services' Joint Opening Brief at 57.

Professor Marx engages in an analysis based on the following math and logic (again, using the [REDACTED]% sound recording rate as an example of the fixed amount taken by the labels): (1) [REDACTED]% of the streaming revenues remain available to be split between the services and the musical works copyright owners; (2) adding the 15.1% revenue rate and her [REDACTED]% revenue retention percentage equals [REDACTED]%; and (3) the 15.1% revenue rate, as a percent of this [REDACTED]%, is [REDACTED]%; and (4) [REDACTED]% of the [REDACTED]% available for splitting between the services and the musical works copyright owners is [REDACTED]% (rounded). *Id.* at fig.8.

Thus, she identifies her version of a ''fair'' result: The Services and Copyright Owners would split the residual revenue remaining after the labels have exercised their complementary oligopoly power to take an outsized fixed share—with the split proportional to the 15.1%-to-[REDACTED]% revenue amounts calculated respectively by the Judges (the 15.1% musical works rate) and Professor Marx (the [REDACTED]% service revenue retention). *Id.* 59, table. 8.[30]

In their final post-remand submission, the Services also flatly state: ''[T]he D.C. Circuit did not ''affirm'' the 15.1% rate—it vacated that rate.'' Services' Joint Rebuttal Brief Addressing the Judges' Working Proposal at 2 (Feb. 24, 2022) (''Services' Additional Submission''). However, the Services do not support that quoted statement with any citation to *Johnson. See id.* Further, the Services assert that the 15.1% revenue rate is not immune from post-remand review and reduction because ''the D.C. Circuit withheld judgment ''on whether that final percentage satisfies factors B through D of Section 801(b)(1). . . .'' *Id.* at 3.

[26] Generally, a Shapley Value Model is a game theory analysis. It models a hypothetical bargain that assigns each ''player'' the average marginal value it contributes to the bargain and (after accounting for the costs that each ''player'' would need to recover) the remaining ''surplus'' is allocated among the players according to their relative contributions. *See Johnson,* 969 F.3d at 372. For the reasons discussed *infra,* in the present case, the Shapley surplus from the streaming revenue is split essentially equally by the owners of the sound recording and musical works owners *inter se,* but the royalty rates themselves that would result from their bargaining would be different as between these two inputs, because of their differing costs. *See, e.g.,* Gans WDT ¶ 73.

[27] Claiming consistency with the Majority's analysis, Professor Marx appears to maintain that her ''burden-sharing'' approach generates the statutorily-required ''reasonable'' rate as well as a rate that satisfies the ''fair return''/''fair income'' objectives of statutory Factor B. *See* Marx WDRT ¶ 52 (introducing her correction of the alleged ''imbalance'' problem by noting that ''the ''right'' mechanical royalty rate is one that is ''reasonable'' and achieves the four objectives laid out in Section 801(b)(1).''

[28] *See* Marx WDRT, fig. 7 ([REDACTED]).

[29] The [REDACTED]% of revenue that the services would retain is based on one of Professor Marx's ''Shapley Value Models.'' Shapley Value modeling is discussed *infra.*

[30] Using the same logic and calculation method, Professor Marx finds that the services would retain |[REDACTED]% ÷ [REDACTED]%, which equals |[REDACTED]%. Assuming again that [REDACTED]% of the steaming revenue is available to split (because the labels have appropriated [REDACTED]%), the services would retain [REDACTED]% [REDACTED]% rounded) of the streaming revenue. *Id.*

3. Analysis and Decision Regarding 15.1% Revenue Rate Prong

The Judges determine that they are clearly bound by the D.C. Circuit's decision in *Johnson* to maintain the 15.1% revenue rate, as phased-in by the Determination. Several reasons support this decision.

First, the Judges conclude that the D.C. Circuit's decision in *Johnson* is conclusive and unambiguous regarding the revenue percentage rate. The D.C. Circuit rejected the Services' assertion that the Judges acted ''arbitrarily'' as to this particular issue, noting that the Services had misstated the relevant facts. *Johnson,* 969 F.3d at 385–86 (responding to Services' misdescription of Judges' analysis and explaining what Services described as ''not what happened.''). Moreover, the D.C. Circuit held that with regard to the construction of the 15.1% revenue rate, the Judges had ''engaged in the type of line-drawing and reasoned weighing of the evidence [which] falls squarely within the [Judges'] wheelhouse as an expert administrative agency.'' *Id.* at 386. The D.C. Circuit further noted that the Judges ''proceed[ed] cautiously'' to set the 15.1% revenue rate by establishing a ''zone of reasonableness'' for the revenue rate. *Id.* at 385. Indeed, with regard to each aspect of this revenue rate analysis, the D.C. Circuit found that the Judges' decision making was ''grounded in the record and supported by reasoned analysis'' and that ''[s]ubstantial evidence supports [their] judgment.'' *Id.* at 385.

Second, when the D.C. Circuit reviewed the Determination, it applied ''the same standards set forth in the Administrative Procedure Act, 5 U.S.C. 706.'' *Id.* at 375 (noting that 17 U.S.C. 803(d)(3) cross-references 5 U.S.C. 706); *see also id.* (''[W]e will set aside the [ ] Determination 'only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if the facts relied upon by the agency have no basis in the record.'').

Here, the D.C. Circuit explicitly found that the Judges' analysis and findings in connection with the 15.1% revenue rate are *not* arbitrary and capricious, and that the facts relied upon by the Judges have a sufficient basis in (are ''grounded in'') the record. It seems beyond dispute that the D.C. Circuit affirmed the Judges in their setting of the 15.1% revenue rate as a rate that is reasonable, and thus satisfies that aspect of the section 801(b)(1) standard.[31] Indeed, it would border on the Orwellian to misconstrue the D.C. Circuit's unequivocal and obvious affirmance of the reasonableness of the 15.1% revenue rate as a vacating of that finding.

Third, the Judges note that *Johnson* conspicuously declines to identify the Judges' setting of the 15.1% percent-of-revenue rate as one of the findings to be revisited on remand. Rather, *Johnson* states that the three overarching issues for resolution on remanded are the Majority's failure: (1) ''to provide adequate notice of the rate structure it adopted,'' (2) ''to explain its rejection of a past settlement agreement as a benchmark for rates going forward; and (3) ''[to] identif[y] the source of its asserted authority to substantively redefine a material term after publishing its Initial Determination.'' *Johnson,* 369 F.3d at 367. The Majority's finding that the 15.1% royalty rate is ''reasonable'' was not identified by the D.C. Circuit as a finding that was vacated and subject to further review and, indeed, as noted *supra,* the appellate panel credited what it characterized as the Majority's careful analysis and line-drawing in arriving at that finding.

The clarity of the D.C. Circuit's affirmance of the royalty rate of 15.1% for the percent-of-revenue prong moots the issue of whether Professor Marx's attempt, described *supra,* to correct the so-called ''imbalance'' problem has merit. However, the Judges note that, even if this issue had not been conclusively decided in *Johnson,* they would reject her approach as futile. That is, Professor Marx fails to acknowledge that any surplus that her approach would appear to provide to the Services would be siphoned off by the Majors, given their complementary oligopoly power.

More particularly, the sound recording royalty rates she posits ([REDACTED]%, [REDACTED]% and [REDACTED]%) are all functions of the sound recording companies' understanding of the Services' non-content costs (costs that the Services must recover out of retained revenues in order to remain in operation, *i.e.,* to ''survive'') and the then-existing musical works content (royalty) costs (comprised of the mechanical rate and the performance rate). If, as Professor Marx contemplates, the mechanical rate is reduced so that Copyright Owners ''share the burden'' of the complementary oligopoly effect on sound recording rates, that ''burden sharing'' would increase the revenues retained by the Services (that is the purpose of Professor Marx's approach!). But such an increase would raise the Services' revenue above their ''survival'' rate, as understood by the record labels. Thus, the record labels, given their complementary oligopoly power, would increase the Services' royalty rate above what it otherwise would have been.

Alternately stated, when Professor Marx hypothesizes a given sound recording royalty rate in column 1 of Figure 8 in her WDRT, that rate is assumed, by the logic of the complementary oligopoly theory, to have already allowed the services to cover only their non-content costs and musical works royalties, as understood by the record labels. So, her assumed rate in column 1 is not a fixed parameter, but rather an independent variable, which is a function of, *inter alia,* the costs incurred by the services, *i.e.,* their non-content costs plus their musical works royalty costs.[32] If those service costs decreased (for example, in an attempt to reduce the services' burden of bearing the full brunt of the labels' complementary oligopoly power as in Professor Marx's attempt to correct the imbalance problem), the percentage in column 1 of Figure 8 would increase, as the labels siphoned off that surplus over the services' survival revenue requirements. To find otherwise would be to refute the logic of the dynamics of the complementary oligopoly effect.[33]

Moreover, the defect in Professor Marx's attempt to remedy the so-called ''imbalance'' problem is a consequence of the statutory licensing and royalty scheme. To recap, the licensing of content used by the interactive services is bifurcated. The sound recording royalties paid by the interactive services to the record labels are not regulated, and complementary oligopoly power exists in that market, inflating sound recording royalty rates above an effectively competitive level. *See*

[31] The CRB Judges intentionally distinguish between the ''reasonable'' rate standard in the initial body of section 801(b)(1) and the objectives set forth as Factors A–D of section 801(b)(1). A rate can satisfy the statutory ''reasonable rate'' requirement yet require adjustment (higher or lower) to reflect the balancing of the four additional factors. Accordingly, the Judges defer to a subsequent section, *infra,* a discussion of how Factors A–D should be addressed on this remand.

[32] The interactive services also pay a separate royalty for the performance license necessary to transmit a song. However, under the Judges' ''All-In'' royalty structure, that performance royalty is deducted from the ''All-In'' calculation to determine the mechanical royalty. Also, the performance royalty paid to the largest Performing Rights Organization (PROs) are subject to determination by federal judges in the Southern District of New York (the so-called ''rate court'').

[33] To be clear, the Judges are not stating that the Services' retention of only enough revenue to allow them to cover their noncontent costs and thus merely ''survive'' is indicia of an effectively competitive (or even healthy) market—but are merely acknowledging the state of affairs given the unregulated nature of the sound recording royalties and the complementary oligopoly power that exists in that market.

Determination at 73 (''[T]he existence of complementary oligopoly conditions in the market for sound recordings'' is the basis for ''the record companies' ability to obtain most of the available surplus'' generated by interactive streaming.) [34] However (and to state the obvious), the mechanical rate paid by the interactive services for musical works is regulated, pursuant to 17 U.S.C. 115 and, until the 2018 enactment of the Music Modernization Act,[35] according to the rate standards in 17 U.S.C. 801(b)(1). Thus, there is no statutory or regulatory impediment to prevent record labels from responding to a decrease in the mechanical rate by increasing the unregulated sound recording rate if such an increase is in their economic interest.[36]

Accordingly, any attempt by the Judges to reduce the mechanical royalty rate in order to allow the Services to retain more of the surplus would fail; it would be like pouring water into a bucket with a siphon at its base. More water would not remain in the bucket, but rather would accumulate wherever the siphon leads—in this case, to the record labels. The Judges could keep mechanical royalty rates depressed and allow this to occur, but that would harm Copyright Owners while providing no relief to the Services. And despite the old adage that ''misery loves company,'' the Judges detect no directive under section 801(b)(1) that they harm Copyright Owners without providing a gain for the interactive streaming services—and that they provide a windfall for the record labels, to boot.

Although Professor Marx's attempt to reduce the Services' ''misery'' by sharing it with Copyright Owners is unavailing, the statutory scheme and market forces do appear to combine to mitigate the burden created by the complementary oligopoly power of the sound recording companies. If interactive streaming revenue were to grow over the rate period,[37] then the phase-in to the 15.1% rate will reflect fixed annual percentages of a larger base, allowing services to retain a higher dollar level of the interactive streaming revenues.[38] [REDACTED]. *See, e.g.,* Diab WDRT ¶¶ 10–11 (Google agreements); Mirchandani WDRT ¶¶ 16–17 (Amazon agreements); Bonavia WDRT ¶¶ 8; 14–19 (Spotify agreements); White WDRT ¶¶ 6; 8–14; 19; 24; 27–28 (Pandora agreements). Additionally, the Services' headline sound recording rates [REDACTED]. *Services' Joint Remand Reply Brief* at 40 (and record citations therein). Thus, assuming no increase in non-content costs (or increases smaller than the increases in streaming revenue), the Services will realize increased revenue above and beyond what they needed to survive.

The Services and Copyright Owners recognize the mitigation of harm to the Services generated by these facts (although they may well disagree with the Judges' application of these facts). During colloquy with counsel for Pandora and Spotify during closing arguments on remand, the Judges asked why they should in essence apply the ''misery loves company'' adage:

> [JUDGE STRICKLER] [T]he problem is . . . the sound recording [rates] are unregulated in the interactive market . . . . Congress did not want that to be controlled at all. So every time I see . . . the services' argument about how we have [to] set a rate that's fair even though there's this ability of the sound recording [companies] to take more, my margin note is always this: ''Are they arguing that 'misery loves company?' '' [W]hy shouldn't that misery be shared with Copyright Owners? . . . Isn't that really Professor Marx's argument in her proposed split . . . using the 15.1 percent figure . . . ?
>
> [COUNSEL] [Regarding] Judge Strickler['s] . . . ''misery loves company'' issue. . . . I think . . . the way [Judge Strickler] put it during the trial was, even if I thought rates needed to come down, how would that help you; wouldn't the labels just take all that surplus for themselves based on their complementary oligopoly power? . . . . I want[ ] to address it right off the bat . . . . in open session.
>
> Relat[ed] to . . . the seesaw . . . our point is that *these label rates* are *sticky* in both directions. If you see an increase in musical works rates, *you do not see a quick decrease in label rates, and the opposite is true. These rates are sticky.*
>
> . . .
>
> *There's a lot of friction with respect to the ability of label rates to change quickly* in response to the dynamic marketplace or the dynamic for business reasons or because of regulatory changes in musical works rate. *These are multi-year contracts. They take a long time to negotiate.* They are complex, *et cetera.*
>
> *So, I do think it's right that at a minimum you can buy time where the ratio is more aligned with the 801(b) factors. In other words, you don't have to worry that the labels will take it all right away, even if you believe they will ultimately take that.*
>
> [JUDGE STRICKLER] *So you are saying we have something that reduces misery for a period of time until the misery returns?*
>
> [COUNSEL] *That's right.* And I think that would have been true in 2018 when you were sitting drafting the decision. *It's even more true today in 2022 when the label rates, as I mentioned, are effectively set, bought and paid for.*
>
> 3/8/22 Tr. 29–30, 43–46 (Closing Argument) (emphasis added).

Similarly, on this topic, Copyright Owners' counsel accurately characterized the Judges' adoption of the static 15.1% Shapley-based rate as the inevitable consequence of ''regulatory lag,'' that requires a regulator to keep a rate constant over the statutory term because there is no sufficient data to project future rates. *Id.* at 273–75; *see generally* A. Kahn, 2 *The Economics of Regulation* at 48 (1971) ''The regulatory lag [is] the inevitable delay that regulation imposes in the downward . . . [and] upward adjustments'' to rate levels, and ''thus is to be regarded not as a deplorable imperfection of regulation but as a positive advantage [because] companies can for a time keep the higher profits they reap from a superior performance. . . .'').[39]

[34] As the Judges have consistently noted, this complementary oligopoly power is generated by the concentration of ownership of sound recording licenses for ''Must Have'' repertoires among the three Majors (Sony Music Group, Warner Music Group and Universal Music Group), plus Merlin (a consortium of Indies sometimes referred to as ''the fourth Major''), as indicated by their reported collective 85% share of Spotify's streams in 2018, the first year of the rate period at issue here. *See https://www.midiaresearch.com/blog/smaller-independents-and-artists-direct-grew-fastest-in-2020.*

[35] In subsequent rate periods, the rate remains regulated, but is subject to a different standard—the ''willing buyer-willing seller marketplace standard,'' for shorthand) under 17 U.S.C. 115.

[36] The inverse relationship between changes in the mechanical royalty rate and changes in the sound recording royalty rate has been characterized as the ''seesaw'' effect, which is discussed in further detail infra, with regard to the uncapped TCC rate prong.

[37] Because this proceeding was appealed and remanded, the Judges have the benefit of knowing the ''future'' (beyond 2017), during which U.S. interactive streaming revenues have continued to grow, a fact that is undisputed, and as to which the Judges take administrative notice. *See, e.g.,* RIAA 2018 Year-End Music Industry Revenue Report (available at *https://www.riaa.com/wp-content/uploads/2019/02/RIAA-2018-Year-End-Music-Industry-Revenue-Report.pdf;* RIAA 2020 Year-End Music Industry Revenue Report (available at *https://www.riaa.com/wp-content/uploads/2021/02/2020-Year-End-Music-Industry-Revenue-Report.pdf* (interactive streaming revenue increased within this rate period from (approximately) $1.6 billion in 2018 to $7.7 billion in 2019 and $8.8 billion in 2020).

[38] For example, if a royalty is set at a flat rate of 15.1% when a revenue base is $1,000, then the royalty is $151, leaving $849 in revenues to cover other costs which, for this example, are held constant. If the revenue base doubles to $2,000, the same flat 15.1% royalty rate generates $302 in royalties, leaving $1,698 in revenues to cover other costs which, if constant, allow for the additional revenue ($1,698 − $849 = $849) to generate profits.

[39] The Judges emphasize two points that mitigate any negative impact on Copyright Owners from the static nature of the 15.1% revenue rate. First, as a percent-of-revenue rate, it generates more royalty revenue in a growing market, so the quantum of revenue is not static. Second, Copyright Owners' own economic expert witness, Professor Gans, testified that the data in the ''market observations'' from the Goldman Sachs Report on which he relied were the result of ''negotiated rates in the free market and thus ''presumed to . . . fully consider[ ]

Continued

4. Consideration of Factors A–D in Section 801(b)(1)

Finally, the Judges consider the impact of Factors A–D of section 801(b)(1) in connection with the setting of the revenue percentage rate of 15.1%.[40] Regarding Factor A, it cannot be gainsaid that the D.C. Circuit has left this issue unresolved. Rather, *Johnson* unambiguously affirmed the Majority's finding that an increase in the mechanical royalty rate was warranted. Specifically, *Johnson* states that the Majority's decision in this regard met the ''test'' that it be ''supported by substantial evidence [and] reflect a reasonable reading of the record.'' *Johnson, supra,* at 388. Moreover, with regard to the level of the increase, the D.C. Circuit did not disturb the finding by the Majority that ''[t]he rates determined by the Judges represent a 44% increase over the current headline rate, and thus satisfies the Factor A objective. . . .'' Determination at 85.[41]

With regard to Factors B and C,[42] even if *Johnson* were construed as permitting the Judges to revisit this issue, they would not adjust the 15.1% revenue rate on the basis of these two factors. In this regard, the Judges note that the Majority found that the 15.1% revenue rate was not only ''reasonable,'' but also a ''*fair* allocation of revenue between copyright owners and services.'' Determination at 87 (emphasis added). The Majority thus found explicitly that ''with regard to Factors B and C . . . there is no basis to depart from [its] determination of the reasonable . . . rate structure and rates as set forth *supra.*'' *Id.* More particularly, the Majority calculated the 15.1% rate by utilizing the total royalty percentage revenue of only [REDACTED]% as calculated by Spotify's economic expert witness, Professor Marx, whose economic modeling intentionally reflected a conception of fairness by reducing the effect of the labels' complementary oligopoly market power. *See* Determination at 67–68 (noting that Professor Marx testified that this aspect of her model ''represents a *fair outcome* in the absence of market power [and] . . . eliminates . . . market power'' which . . . if left in the economic analysis would ''render[ ] . . . the analysis incompatible with the objectives of *Factors B and C* of section 801(b)(1).)'') (emphasis added).[43]

Accordingly, the Judges find it would be substantively unwarranted to engage in any new consideration on remand of the impact, if any, of Factors B and C on the otherwise reasonable 15.1% revenue rate.[44]

The final itemized statutory factor—Factor (D)—instructs the Judges to consider the ''competing priority'' of ''minimiz[ing] any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.'' 17 U.S.C. 801(b)(1)(D). As with Factors B and C, even if Johnson were construed to allow the Judges to revisit this issue on remand with respect to the 15.1% revenue rate, the Judges would not change the Majority analysis or findings. In the Determination, the Judges adopted the following interpretation of this standard set forth in previous determinations:

> [T]he Judges reiterated their understanding of Factor D, concluding that a rate would need adjustment under Factor D if that rate directly produces an adverse impact that is substantial, immediate and irreversible in the short-run because there is insufficient time for either [party] to adequately adapt to the changed circumstance produced by the rate change and, as a consequence, such adverse impacts threaten the viability of the music delivery service currently offered to consumers under this license.

Determination at 86 (emphasis added).

Also, in order to minimize any economic disturbance to the Services' businesses, the Majority decided to phase-in the 15.1% rate over the five-year rate term, setting annual percent-of-revenue rates as follows: 11.4% in 2018; 12.3% in 2019; 13.3% in 2020; and 14.2% in 2021, before the full 15.1% rate became effective in 2022 the final year of the rate term. *Id.* at 87–88.

On remand, the Services have not made any argument that the rate structure or rates set by the Majority were ''disruptive under this standard.'' [45] In sum, there is insufficient basis for the Judges to change the Majority's application of Factor (D) to the 15.1% revenue rate finding by the Majority.[46]

. . . expectations of future costs and revenues . . . . incorporate[ing] expectations of future values.'' Gans WRT ¶¶ 37–38. On this issue, it is noteworthy that both the Majority and the D.C. Circuit credited Professor Gans's reliance on these projections. *See* Determination at 70 (''The Judges . . . find Professor Gans' reliance on financial analysts' projections for the respective industries to be reasonable.''); *Johnson,* 969 F.3d at 386 (holding that ''[t]he CRB Judges' finding that Gans's . . . reliance on Goldman Sachs' profit projections'' was ''reasonable'' and the] . . . type of line-drawing and reasoned weighing of the evidence [that] falls squarely within the [Copyright Royalty Board's] wheelhouse as an expert administrative agency.'')

Thus, dynamic changes going forward in the rate term are embodied in the 15.1% revenue rate, and dynamic market expectations are incorporated in the modeling data used to establish that rate.

[40] The D.C. Circuit ruled, with regard to the ''*nature of the rate structure,*'' that because it had ''vacat[ed] and remand[ed] . . . for lack of notice'' ''[t]he question whether the [Judges] adequately addressed factors B through D is bound up with the [Judges'] analysis of sound recording rightsholders' likely responses to the new rate structure.'' *Johnson, supra,* at 389. However, the 15.1% revenue rate, viewed separately, is not bound up in the ''rate structure'' issue, which relates to the uncapped TCC prong and how the 15.1% revenue rate may be ''intertwined'' with that second rate prong. As explained *infra,* the Judges are not adopting an uncapped TCC rate prong, so the 15.1% rate is no longer ''bound up'' with the vacated and remanded ''rate structure'' issue, making moot the argument that a new post-remand analysis of Factors B through D is necessary or appropriate. However, on remand, Copyright Owners have placed in issue the ''disruption'' element of Factor D, claiming that the Services have not proven that the uncapped TCC rates and rate prong have or will cause disruption.

[41] The 44% figure cited by the Majority reflects the percentage increase of the headline rate, from 10.5% to 15.1%.

[42] Factors B and C are typically considered jointly, because of the overlap in the objectives of providing a ''fair return'' and a ''fair income'' to the licensors and licensees respectively (the Factor B objectives) and reflecting their relative roles in making the streamed music available to the public (the Factor C objectives). *See Johnson,* 969 at 388 (noting without criticism the joint consideration of Factors B and C; Determination at 85–86 (noting without criticism the several experts' joint consideration of Factors B and C).

[43] Additonal facts support the Majority's finding that the 15.1% revenue rate is fair. The record evidence indicates that the headline percent-of-revenue sound recording rate was between approximately [REDACTED]% to [REDACTED]% in 2017. *See* Marx WDRT ¶ 58, fig 7. When the 15.1% mechanical rate is added to that rate range, the range of the total royalty obligation (based on headline rates) is [REDACTED]% to [REDACTED]%. (Plus, given the phase-in of the rates expressly to avoid disruption, the total royalty obligation would be even lower before 2022, at current sound recording rates.) The evdence pre-remand indicated that the Services were ''surviving'' while incurring noncontent of costs of approximately [REDACTED]% of revenue, leaving about [REDACTED]% of revenue available to pay royalties while still remaining in business. *See* Eisenach WRT ¶ 79 (Copyright Owners' expert economic witness); McCarthy WDT ¶¶ 28–29 (Spotify's Chief Financial Officer.) Thus, even if the Judges were to engage in a *de novo* analysis of the potential applicability of Factors B and C to the 15.1% rate, they would not find any basis sufficient to warrant a downward rate adjustment, beyond the phase-in adopted in the Determination.

[44] However, the Judges take note of their further observation, discussed *supra,* that the combined impact of ''sticky'' sound recording royalty rates and the inevitable regulatory lag provide an additional modicum of fairness with regard to the mechanical royalty rate.

[45] The Judges further discuss the Factor D ''disruption issue *infra* in connection with their analysis of the uncapped TCC prong.

[46] Additional facts further support the Majority's finding that the 15.1% revenue rate is would not be disruptive under Factor D. The record evidence indicates that the headline percent-of-revenue sound recording rate was between approximately [REDACTED]% to [REDACTED]% in 2017. *See* Marx WDRT ¶¶ 14, 19. When the 15.1% mechanical rate is added to that rate range, the range of the total royalty obligation (based on headline rates) is [REDACTED]% to [REDACTED]%. (Plus, given the phase-in of the rates expressly to avoid disruption, the total royalty obligation would be even lower before 2022, at current sound recording rates.) The evidence pre-remand indicated that the Services were ''surviving'' while incurring noncontent costs of approximately [REDACTED]% of revenue, leaving about [REDACTED]% of revenue available to pay royalties while still remaining in business. *See* Eisenach WRT ¶ 79 (Copyright Owners' expert

5. Conclusion Regarding the 15.1% Revenue Rate

For the forging reasons, the Judges do not disturb the Majority's finding that the percent-of-revenue rate at 15.1%, phased-in annually over the rate period, constitutes a ''reasonable'' rate under section 801(b)(1) to be used as the statutory rate for the 2018 to 2022 period.[47]

D. Uncapped TCC Rate Prong

1. Two Post-Remand Rationales for Uncapped TCC Rate Prong

The Determination set forth the following two primary reasons for adopting a ''greater-of' rate structure that also included an uncapped TCC rate prong:

First, the use of an uncapped TCC metric is the most direct means of implementing a key finding . . . by the experts for participants on both sides in this proceeding: the ratio of sound recording royalties to musical works royalties should be lower than it is under the current rate structure. Incorporating an uncapped TCC metric into the rate structure permits the Judges to influence that ratio directly.

Second, an uncapped TCC rate prong effectively imports into the rate structure the protections that record companies have negotiated with services to avoid the diminution of revenue.

Determination at 35–36.[48]

2. Copyright Owners' Position

Copyright Owners claim that the uncapped TCC prong should be adopted. They contend that the D.C. Circuit remand was merely ''procedural'' rather than substantive, and the Judges thus are not precluded from readopting the uncapped TCC prong in this remand proceeding. CO Initial Submission at 35–38 (and record citations therein).

They further contend that the uncapped TCC prong was adopted to provide protection against revenue deferment and displacement occasioned by the Services choosing to elevate the growth of subscribers and other listeners over revenue maximization. *Id.* at 38–43 (and record citations therein). The uncapped TCC prong was first proposed by Google to persuade the Judges to reject Copyright Owners' proposed ''greater-of'' rate structure containing a per-play prong and a per subscriber prong. *Id.* at 43–46 (and record citations therein).

Copyright Owners argue that the uncapped TCC prong should be adopted because: (1) the Services have not shown any actual or threatened ''disruption'' or other harm resulting from the uncapped TCC prong during the 33-month period; (2) the Services actually experienced ''unprecedented growth and profit'' during this period; and (3) the Services paid lower percentages of revenues in mechanical and total royalties when the uncapped TCC prong was in effect. Copyright Owners' Reply Brief on Remand at 34–48 (and record citations therein).

Relatedly, according to Copyright Owners the Services' argument that the ''see-saw'' effect is unsupported by empirical evidence has collapsed, given the evidence relating to market performance. Further Copyright Owners maintain that this argument is irrelevant to the rate structure issue. *Id.* at 48–50 (and record citations therein).

3. Services' Position

The Services argue on remand that the uncapped TCC rate prong must be rejected. The Services reject the ''seesaw'' theory claiming it is disproved by the experience of the parties during the 33-month period. Services' Joint Opening Brief at 48–49; Services' Joint Supplemental Brief at 7–13 (Nov. 15, 2021) (and record citations therein). The Services further contend that Copyright Owners have disavowed the ''seesaw'' theory as understood by the Majority. The Services allege that Copyright Owners now claim that the theory was nothing more than ''a nod'' to certain ''core principles'' of bargaining theory, rather than a specific prediction of a commensurate inverse relationship between increases in the mechanical royalty rate and decreases in the sound recording royalty rate. Services' Joint Supplemental Brief at 2, 5–7 (and record citations therein).

With regard to the uncapped TCC rate prong, the Services assert that Copyright Owners have not even attempted to demonstrate—nor could they demonstrate—that the uncapped TCC rate prong is consistent with all four statutory objectives set forth in section 801(b)(1). Services' Joint Reply Brief at 1, 3–4, 33–34 36 (July 2, 2021) (''Services' Reply''); *see also* Services' Joint Opening Brief at 44–64 (and record citations therein). The Services claim that ''yoking'' the mechanical rate to the ''complementary oligopoly rates extracted by the labels is plainly unreasonable.'' Services' Joint Opening Brief at 44–46. The Services argue that the existence, *vel non,* of any ''disruptive impact'' arising from the uncapped TCC rate prong, is misguided and not dispositive, because it is only one of the four separately itemized factors and, as this factor relates to Copyright Owners' proposed uncapped TCC prong, they bear the burden of proof. Services' Reply at 35–37.

Finally, the Services contend that Copyright Owners have failed to explain their self-contradictory pre-remand argument that ''an uncapped TCC prong 'does nothing to protect Copyright Owners from the Services' revenue

economic witness); McCarthy WDT ¶¶ 28–29 (Spotify's Chief Financial Officer). Thus, even if the Judges were to engage on remand in a *de novo* analysis of the potential applicability of Factor D to the 15.1% rate, they would not find any disruption sufficient to warrant a downward rate adjustment, beyond the phase-in adopted in the Determination.

[47] The Services' assert that the Judges previously found that the reasonableness of the 15.1% rate was subject to revision on remand. In support of this position, the Services cite to the Judges' Order Granting in Part and Denying in Part Copyright Owners' Motion for Reconsideration or, in the Alternative, Clarification at 3, 4 n.7 (January 6, 2022) (Jan. 6th Order). But the Judges said in that interlocutory proposal merely that Copyright Owners were incorrect in their extreme assertion that the Judges could not make an ''alternative rate and rate structure finding . . . except for the re-adoption of the vacated rate and rate structure approach in the *Phonorecords III Determination* [because] . . . [t]hat . . . would . . . be inconsistent with *Johnson* [and] . . . would render the D.C. Circuit's vacating and remanding of the proceeding without force or effect.'' *Id.* at 4, n.7. That did not mean that certain elements of the D.C. Circuit's ruling could be ignored. Further, when the Judges provided the parties with the Judges' *explicitly tentative* ''Working Proposal,'' they did not declare that the 15.1% revenue rate calculation could be revisited. Rather, the Judges ''express[ed] a *concern,* not that the foregoing calculations could be *overridden,* but rather that this analysis . . . is '*incomplete*' . . .'' Jan. 6th Order at 6 (emphasis added). The parties' submissions in response to the Judges' ''Working Proposal'' demonstrated that the 15.1% revenue rate calculation was not ''incomplete'' in the manner that had raised the Judges' concern. Nothing the Judges said in this interlocutory and tentative ''Working Proposal'' constituted a definitive statement regarding the Judges' view of what was and was not subject to review on remand. *See generally merriam-webster.com (defining the adjective* ''*working*'' *in this context as* ''assumed or adopted to permit or facilitate further work or activity . . . a working draft.''). Indeed, a primary purpose of the ''Working Proposal'' was to allow the Judges and the parties to address potential issues and resolutions, without prejudice going forward.

[48] The Majority added two other reasons that are not germane to this remand. In particular, the Majority stated that, compared to the *Phonorecords II* benchmark proposed by the Services, the ''greater-of'' structure with the uncapped TCC rate prong was ''simpler'' to understand than the ''Rube Goldberg-esque'' nature of the *Phonorecords II* rate structure. *Id.* at 36. This issue apparently was not raised on appeal, as it was not mentioned in *Johnson,* and Copyright Owners have not raised the issue on remand. *See* CO Initial Submission, *supra.* (However, the Judges do consider this issue in their analysis of the PR II-based benchmark, *infra.*) The final reason provided by the Majority was that its adoption of an uncapped TCC rate prong was supported by evidence of Google's agreements with labels that included an uncapped rate structure, on which Google had relied to propose, post-hearing, the same greater-of rate structure. *Id.* However, the D.C. Circuit found that Google's proposal was distinguishable, as it was based on a far lower TCC rate (15%) as well as a far lower percent-of-revenue rate (10.5%). The D.C. Circuit thus declined to rely on the Google-based approach as support for the uncapped TCC rate prong. *Johnson,* 969 F.3d at 383.

displacement and deferment.' '' Services' Reply at 43.

4. Application of *Johnson* Findings Regarding Uncapped TCC Rate Prong

The Judges conclude that the D.C. Circuit affirmed the Majority's *derivation and calculation* of the 26.1% TCC rate, but vacated and remanded the Judges' *application and inclusion* of that rate prong in the rate structure. The D.C. Circuit noted that, on appeal, the Services contended that ''it was arbitrary and capricious for the [Judges] to rely on information drawn from different expert analyses in calculating the mechanical royalty rates.'' *Johnson,* 969 F.3d at 384. Thus, the Services were making the same ''information''-based argument in opposition to the calculation of both aspects of the mechanical royalty rates—the revenue percentage prong and the TCC prong. *See also id.* (''the Streaming Services separately leveled objections to the particular percentages adopted by the Copyright Royalty Board to calculate the revenue *and total content cost prongs.*'') (emphasis added)

In fact, both rate prongs were indeed derived from the same analyses. *See* Determination at 75 (table) (showing that both 15.1% revenue rate and 26.2% TCC rate derived from same data—Professor Marx's model showing total royalties as high as [REDACTED]% [Majority's lower bound] and Professor Gans's ''Shapley-inspired'' model showing TCC percent should be [REDACTED]%.)[49]

It is also clear from *Johnson* that the D.C. Circuit found that the Majority had reasonably derived and calculated the 26.2% TCC rate:

> When it came to . . . the ratio of sound recording to musical work royalties that Gans derived from his analysis the [CRB Judges] specifically found . . . reasonable Gans' equal value assumption [for dividing the Shapley surplus . . . between sound recording and musical works owners] and his reliance on Goldman Sachs' profit projections. *That type of line-drawing and reasoned weighing of the evidence falls squarely within the Board's wheelhouse as an expert administrative agency.*

See Johnson, 969 F.3d at 385–86 (cleaned up) (emphasis added). Accordingly, because the identical analysis was performed by the Judges to derive the 26.2% TCC rate as was done to derive the 15.1% revenue rate, the Majority's finding with regard to the *derivation and calculation* of the TCC rate likewise is not subject to further consideration on remand by the Judges.

However, it is equally clear that the D.C. Circuit *vacated* and remanded the Majority's *application and inclusion* of *the 26.2% TCC rate* in a separate ''greater-of'' TCC prong. The defect that generated the vacating on this issue was *procedural*— ''the Streaming Services had no notice that they needed to defend against and create a record addressing such a significant, and significantly adverse, overhaul of the mechanical license royalty scheme . . .'' *Id.* at 382. The consequence of the D.C. Circuit's action, however, was *substantive.* The D.C. Circuit stated:

> This is no mere formality. Interested parties' ability to provide evidence and argument bearing on the essential components and contours of the [Judges'] ultimate decision not only protects the parties' interests, it also helps ensure that the [Judges'] ultimate decision is well-reasoned and grounded in substantial evidence. . . .
>
> The Streaming Services separately challenge the uncapped rate structure as *arbitrary* and *capricious.* In particular, they argue that the rate structure formulated by the [Judges] failed to account for the sound recordings rightsholders' market power. They also object that the [Judges] failed to provide a 'satisfactory explanation, or root in substantial evidence, [their] conclusion that an increase in mechanical license royalties would lead to a decrease in sound recording royalties [the ''inverse relationship'' a/k/a the ''seesaw'' effect].

Id. at 381–83 (cleaned up) (emphasis added). Thus, the D.C. Circuit explicitly declined to address these substantive issues, because of the deficient procedure. Instead, the D.C. Circuit remanded these substantive issues back to the Judges. *Id.* Simply put, *Johnson* found that the absence of notice here could be outcome-determinative. Thus, the Judges categorically reject Copyright Owners' assertion that the remand as to the uncapped TCC rate structure was merely ''procedural.'' The Judges do not accept the notion that the Majority simply committed some ministerial *faux pas* that could be summarily corrected so that the uncapped TCC rate structure could be rubber-stamped on remand. Rather, the Judges' error rendered it impossible for them to consider the pros and cons of such a rate structure without the necessary input from the Services (and, for that matter, Copyright Owners as well).

Because the procedural infirmity precluded the D.C. Circuit from deciding whether the Majority's decision was ''well-reasoned and grounded in substantial evidence,'' there also can be no substantive presumption of the appropriateness of the uncapped TCC rate prong, as suggested by Copyright Owners. To the contrary, the D.C. Circuit's opinion makes it clear that on remand the Judges must engage in a fresh consideration of the statutory appropriateness, *vel non,* of the uncapped TCC rate prong, by weighing and contextualizing the *competing* evidence and testimony entered into the record both before and after the remand.

Accordingly, although Copyright Owners correctly assert that *Johnson* did not find the uncapped TCC rate structure to be ''unfair, unreasonable or inequitable,'' *Johnson* just as clearly did *not* find that structure to be ''fair, reasonable or equitable.'' Rather, the purpose of the remand was for the Judges to make these determinations. Accordingly, the Judges next examine whether setting the statutory mechanical rate as an uncapped TCC rate is ''reasonable,'' as required by section 801(b)(1).[50]

5. Determining Whether Uncapped TCC Rate Prong is ''Reasonable''

a. Rejection of First Rationale for Including Uncapped TCC Rate

Two substantive issues are implicated raised with regard to the issue of reasonableness: (1) whether the ''seesaw'' theory is valid; and (2) if it is valid, whether there exist sufficient data to support the phased-in 26.2% uncapped TCC rate.[51] To demonstrate that this uncapped TCC rate prong and the (phased-in) 26.2% rate are reasonable, Copyright Owners rely on the combined application of two economic models—the Shapley Value model and a Nash Bargaining Model. Accordingly, it is necessary to consider how these two models relate to each other and how these models and their interrelationship impact the setting of the statutory rate.

The D.C. Circuit described the Shapley Value Model methodology:

> The Shapley methodology is a game theory model that seeks to assign to each market player the average marginal value that the player contributes to the market. This methodology first determines the costs that

[49] The reciprocal of Professor Gans's [REDACTED]ratio of sound recording:musical works royalties is [REDACTED], or [REDACTED]%.

[50] The Judges consider *infra* whether any of the four itemized statutory factors require an adjustment to this analysis.

[51] As noted *supr*a, in the Judges' recitation of the parties' remand arguments regarding the uncapped TCC rate prong, they make other arguments as well, specifically regarding: (1)) whether it would be necessary and/or appropriate to adopt this uncapped TCC rate prong to offset revenue deferral and/or displacement by the Services; (2) whether this rate prong has caused, or would cause, economic ''disruption'' to the Services (under Factor D of section 801(b)(1)); (3) whether the uncapped TCC rate prong would satisfy Factors B and C of section 801(b)(1); and (4) whether this rate prong improperly imports the complementary oligopoly power of sound recording licensors. The Judges consider these issues after addressing the issues relating to the ''seesaw'' theory.

each player should recover, then divides the ''surplus'' among the players in proportion to the value of their contributions to the worth of the hypothetical bargain that would be struck.

Johnson, 969 F.3d at 372. The Judges provided a consistent but more detailed definition:

> The Shapley value gives each player his average marginal contribution to the players that precede him, where averages are taken with respect to all potential orders of the players. The Shapley value approach models bargaining processes in a free market by considering all the ways each party to a bargain would add value by agreeing to the bargain and then assigns to each party their average contribution to the cooperative bargain. The idea of the Shapley value is that each party should pay according to its average contribution to cost or be paid according to its average contribution to value. It embodies a notion of fairness. The Shapley model is a game theory model that is ultimately designed to model the outcome in a hypothetical 'fair' market environment. It is closely aligned to bargaining models, when all bargainers are on an equal footing in the process.

Determination at 62–63 (cleaned up).

To apply a Shapley Value Model in a rate proceeding, the economic modeler must obtain usable cost and revenue data to be inputted into the model. More particularly for this proceeding, the modeler must identify the parties' input costs, including the Services' non-content costs, and the revenue derived from interactive streaming.[52] The difference between these revenues and the Services' noncontent costs represents the Shapley ''surplus'' that can be shared among the Services, the sound recording companies and Copyright Owners.

(i) The Shapley Approach of the Parties' Economic Expert Witnesses

(a) Professor Gans's ''Shapley-Inspired'' Model

Professor Gans, Copyright Owners' expert, utilized royalty and profit interactive streaming data for record companies and music publishers that he obtained from ''a [then] recent music industry equity analysis report,'' namely, a Goldman, Sachs Equity Research report dated October 4, 2016 entitled ''Music in the Air, Stairway to Heaven.'' Gans WDT ¶ 76 & n.39. As the Majority summarized Professor Gans's approach, ''[h]e found that, for the music publishers to recover their costs and achieve profits commensurate with those of the record companies under his approach, *the ratio of sound recording royalties to musical works royalties derived from his Shapley-inspired analysis was* [REDACTED] (which attributes equal profits to both classes of rights holders and acknowledges the higher costs incurred by record companies compared to music publishers).'' Determination at 69 (citing Gans WDT ¶ 77 tbl.3) (emphasis added).

Regarding Professor Gans's Shapley-inspired analysis, the Majority stated:

> [T]he Judges find the *ratio* of sound recording to musical work royalties that Professor Gans derived from his analysis to be informative. Professor Gans computed this ratio based on an assumption of equal Shapley values between musical works and sound recording copyright owners. The Judges find this assumption to be reasonable . . . .[53]

Determination at 70. This is part and parcel of the ''line-drawing'' undertaken by the Majority that the D.C. Circuit affirmed. Thus, on remand, the Judges do not find cause to reconsider the Majority's limited adoption of Professor Gans's Shapley-inspired analysis.[54]

(b) Professor Marx's Shapley Value Model

Professor Marx constructed two Shapley Value Models, one of which was relied upon by the Majority. In the model credited by the Majority, Professor Marx assumed one collective owner of sound recording copyrights and one collective owner of musical works. She also assumed the presence of a single interactive service. *See* Determination at 64–68. That approach yielded a total royalty obligation for sound recordings and musical works ranging between [REDACTED]% and [REDACTED]% of the hypothetical service's revenue. Dissent at 133.

Copyright Owners criticized Professor Marx's decision to assume in her model only one interactive streaming service, rather than the multiple services that actually existed. They contend that assumption reduced the market power of the licensors in her model. According to Copyright Owners' economic experts, Professor Marx's approach was a misuse of the Shapley Value Model. They aver that the Shapley Value approach is intended only to eliminate from the rate derivation the bargaining ability of a ''Must Have'' input supplier (like the sound recording companies and Copyright Owners) to ''hold-out'' and thus squeeze licensees for higher royalties. By modeling every possible ''arrival ordering,'' they contend, the ''hold-out'' problem is avoided. They further contend that Professor Marx misconstrued the purpose of the Shapley approach by wrongly modeling market participants in a manner that significantly reduced the actual market power of these ''Must Have'' input suppliers. Determination at 66–67.

The Majority agreed with Professor Marx. The two Judges in the Majority found that her modeling reasonably ''attempts to eliminate a separate factor—market power—that she asserts renders a market-based Shapley Analysis incompatible with the objectives of Factors B and C of section 801(b)(1).'' *Id.* at 68.

Although the Majority ultimately relied upon Professor Marx's modeling in this regard, the Majority found that her data inputs were problematic. Determination at 65. Specifically, Professor Marx relied on 2015 data from Warner/Chappell and Warner Music Group for music publisher sound recording company noncontent costs, respectively. The Majority found that 2015 data was less probative than 2016 data and understated the percentage of revenue to be paid to the two classes of content providers. However, the Majority ultimately found only that this one-year older data served to ''understate'' the allocation of surplus to the upstream content providers, and thus rejected only her lower [REDACTED]% bound for total royalties, The Majority did decide to adopt her upper bound of [REDACTED]% value for total royalties, which could (and ultimately did) ''constitute a lower bound for total royalties in computing a royalty rate,'' applied by the Majority in order to make a downward adjustment to offset the complementary oligopoly effect of ''Must Have'' inputs. *Id.* at 73, 75.

(c) Professor Watt's Criticisms of and Adjustments to Professor Marx's Shapley Modeling

Professor Richard Watt was called by Copyright Owners as a rebuttal witness at the hearing, for the purpose of reviewing Professor Marx's WDT. Watt WRT ¶ 3. He concluded that Professor Marx's Shapley Value Model contains important methodological and data

[52] Identifying useful data is a vexing problem. As one of Copyright Owners' expert economic witnesses, Professor Watt, has written: ''[T]he main problem with the Shapley approach . . . a particularly pressing problem [is] that of data availability.'' R. Watt, *Fair Copyright Remuneration: The Case of Music Radio,* 7 Rev. Econ. Rsch Copyright. Issues at 21, 27 (2010).

[53] The assumption of equal Shapley values is based on the understanding that a sound recording license and a musical works license are both necessary (*i.e.,* perfect complements) in order for a service to stream a song. Determination at 69 & n.122 therein.

[54] Because the ratio of sound recording to musical works royalties that Professor Gans derived from the data and other evidence was the only portion of his testimony on which the Majority relied, and because that reliance was affirmed by the D.C. Circuit, the criticisms of other aspects of Professor Gans's modeling are no longer relevant.

flaws which, in his opinion, caused her to significantly understate the mechanical and overall (musical works + sound recording) royalty rates to be paid by interactive services pursuant to a proper Shapley analysis. *Id.* at ¶ 5.

Professor Watt also criticized her Shapley Value Model for failing to incorporate the fact that ''the different interactive streaming companies—Spotify, Apple Music, Rhapsody/Napster, Google Play Music, Amazon, etc.—do all compete (and rather fiercely) among themselves, offering (perhaps perfectly) substitutable services.'' *Id.* at ¶ 25. Even more strongly in this vein, Professor Watt relied on the following description of the substitutability of the streaming services, *inter se:*

> Each [interactive streaming] service in the increasingly crowded field is working frantically to overcome the perception that the main distinction among the uniformly priced $9.99 a month offering is little more than font style, quirky playlist title and color scheme. . . . [M]usic platforms have long fought against the perception that they're . . . selling a nearly interchangeable product . . . You're getting sold the same car [with] just got a different lick of paint on it.'').

Id. at ¶ 32 n.19.

Professor Watt claimed that incorporating this downstream competition into the model would reduce the Shapley values of the Services and increase the Shapley values for the input suppliers, by recognizing which players provide ''essential inputs'' and which are in competition with other suppliers of substitutable inputs. *Id.*

He further criticized Professor Marx for including in her model ''other distributors'' who are not interactive streaming services. *Id.* at ¶ 27. According to Professor Watt, these other distributors ''do not belong in a properly constructed Shapley Value Model because their presence would ''show up'' in the model as lower revenues for interactive services as their subscribers or listeners left for these other distributors (such as noninteractive services). *Id.*

Additionally, because he criticized Professor Marx's use of 2015 data (as noted *supra*), Professor Watt re-worked Professor Marx's model by examining how the use of 2016 data, as opposed to her 2015 data, would ''better reflect[ ] . . . the reality of the market. *Id.* at ¶ 37*; see also id.* at ¶ 44. When using the (higher) 2016 revenues (and making some relatively more minor adjustments he found necessary), Professor Watt estimated that the share of streaming revenues that would be paid out in total royalties (for musical works + sound recordings) in Professor Marx's model would range from [REDACTED]% to [REDACTED]%. *Id.* at ¶¶ 50–52.[55]

After analyzing these Shapley analyses,[56] the Majority found that the mechanical royalty rate needed to be increased in order to provide Copyright Owners with a reasonable rate as required by section 801(b)(1). As a matter of arithmetic though, if the mechanical rate increased and the sound recording rate did not decrease by a corresponding amount, then the total royalties paid by the Services would increase. That issue brings the Judges to consideration of Professor Watt's bargaining model, on which the Majority relied to posit an inverse relationship (the seesaw effect), by which an increase in the mechanical rate would result in a commensurate reduction in the sound recording rate.

(ii) Professor Watt's Bargaining Model

Professor Watt's Nash Bargaining Model is the linchpin that connects: (a) the higher mechanical royalty rates generated by the Shapley Value results relied upon by the Majority with (b) the assumed lower sound recording rates—a connection that the Majority found to render ''reasonable'' and ''fair'' its uncapped TCC prong. *See* Determination at 73–74 (''As to the issue of applying a TCC percentage to a sound recording royalty rate that is artificially high as a result of musical works rates being held artificially low through regulation, the Judges rely on Professor Watt's insight (demonstrated by his bargaining model) that sound recording royalty rates in the unregulated market will decline in response to an increase in the compulsory license rate for musical works.''). Alternately stated, Professor Watt's bargaining model result, *i.e.,* the seesaw effect, if sufficiently supported in the record, is the phenomenon that would allow the Judges on remand to apply the Shapley results by increasing the mechanical rate, without unduly exposing the Services to the risk of higher total royalties.

More particularly, the Majority recognized a potential problem that those Judges would have to resolve before utilizing the Shapley Value approach to create an uncapped TCC prong: ''This is problematic because the sound recording rate against which the TCC rate would be applied is inflated . . . both by . . . complementary oligopoly [market] conditions . . . and the record companies' ability to obtain most of the available surplus due to the music publishers' absence from the bargaining table.'' Determination at 73.[57] But the Majority found that Professor Watt had provided a rationale which permitted them to resolve the second problem:

> As to the issue of applying a TCC percentage to a sound recording royalty rate that is artificially high as a result of musical works rates being held artificially low through regulation, the Judges rely on Professor Watt's insight . . . that sound recording royalty rates in the unregulated market will decline in response to an increase in the compulsory license rate for musical works. 3/27/17 Tr. 3090 (Watt) (''[T]he reason why the sound recording rate is so very high is because the statutory rate is very low. And if you increase the statutory rate, the bargained sound recording rate will go down.'').

Determination at 73–74; *see also* Watt WRT ¶ 23 n.13 (''[I]in my Appendix 3, I show that . . . if the musical works rate is increased to what would be a realistically fair and reasonable rate, then the negotiated fee for sound recordings would decrease almost dollar for dollar . . . .''); *see also id.* at ¶ 36 (''The statutory rate for mechanical royalties . . . is significantly below the predicted fair rate, and the statutory rate effectively removes the musical works rightsholders from the bargaining table with the services. Since this leaves the sound recording rightsholders as the only remaining essential input, bargaining theory tells us that they will successfully obtain most of the available surplus.'').[58]

[55] As noted *supra,* when the Majority weighed and credited Professor Watt's entire Shapley analysis, in which his estimate of total royalties was [REDACTED]%, those Judges contextualized Professor Marx's [REDACTED]% total royalty calculation as the lower bound of a zone of reasonable rates, and applied it as a measure that, in their analysis, would offset the complementary oligopoly effect of real-world royalties. Determination at 75 (text and tbl.).

[56] Because his testimony was made in rebuttal, leaving the Services no procedural right to file written testimony in opposition, the Majority gave little weight to Professor Watt's total royalty projections and no weight to his proffered ratios of sound recordings-to-musical works royalties. Determination at 75.

[57] The other problem the Majority needed to resolve was how to deflate the market-based sound recording royalty rates to mitigate the complementary oligopoly effect in those rates. *Id.* As discussed *supra,* the Judges resolved this problem by applying the low total royalty payment sum, [REDACTED]%, from Professor Marx's Shapley Value Model.

[58] In full detail, Professor Watt concluded: ''[F]or every dollar that the statutory rate for musical works undercuts a fair and reasonable rate, the freely negotiated rate for sound recordings will increase by an estimated [REDACTED] cents. That is, if the musical works rate is increased to what would be a realistically fair and reasonable rate, then the negotiated fee for sound recordings would decrease almost dollar for dollar, with only a minor change in the total royalty rate for all copyrights combined.'' *Id.* at ¶ 23, n.13; see also *id.,* appx. 3 at 12.

To repeat: *This inverse relationship is what has been described as the ''seesaw'' effect.* The question in this regard on remand is whether the record proves that the seesaw theory is valid and measurable going forward. Alternately stated, does the record prove that Professor Watt's bargaining model serves as the linchpin that would allow the Judges to apply the Shapley results by increasing the mechanical rate, without unduly exposing the Services to the risk of higher total royalties?

To resolve this issue, the Judges examine this bargaining model dispute in detail, as it bears on whether the uncapped TCC rate structure can be incorporated into the statutory rate.

(a) Bargaining Model Dispute

Professor Watt utilized a general Nash Bargaining Model.[59] In his particular application, Professor Watt modeled the streaming services and the labels each as a ''single unit,'' asserting (as is common in Shapley analyses) that this single-unit modeling was done ''for simplicity.'' Watt WRT, appx. 3 at 10. Applying this and other modeling assumptions, Professor Watt posited: ''If there were to be no successful deal, then each of these two bargainers [the assumed ''single'' interactive service and ''single'' label] would earn 0, since in that case the interactive streaming service could not operate.'' *Id.*

In his *oral* testimony at the hearing, Professor Watt did not opine as to whether changes in variables *other than musical works royalties* would also have an impact on the level of sound recording royalty rates, even as higher musical works rates would otherwise place virtually 1:1 downward pressure on the sound recording rate. However, in his *written* rebuttal hearing testimony, *i.e.,* his WRT, Professor Watt *did* make varying assumptions regarding the changes in the Services' non-content costs, by which he did change the total revenue share for content providers. Watt WRT ¶¶ 50–52. He concluded from this varying replication of Professor Marx's Shapley model ''*that the results that it delivers are very dependent upon the amount of total interactive streaming revenue and the fraction of that revenue that is taken up by downstream non-content costs.*'' *Id.* at ¶ 53 (emphasis added).[60]

The Services had no procedural right under part 351 of the Judges' regulations to proffer surrebuttal written testimony from economic witnesses to challenge Professor Watt's assertion, made for the first time in rebuttal, of the seesaw relationship between changes in the musical works royalty rate and the sound recording royalty rate paid by interactive services. Moreover, the Services and their economists also had no opportunity to weigh in on the Majority's application of same (which was not revealed until the Judges rendered their decision). *See Johnson,* 969 F.3d at 381 (''Streaming Services had no notice that they needed to defend against and create a record addressing such a significant, and significantly adverse, overhaul of the mechanical license royalty scheme.'').[61] Now though, on this remand, the Services have been afforded the opportunity to present these criticisms, through their expert witnesses.

(b) Professor Katz's Principal Criticism

Pandora's economic expert, Professor Michael Katz, levied several criticisms of the bargaining model proffered by Professor Watt and applied by the Majority. The most important problem with Professor Watt's analysis, according to Professor Katz, is that the former's model assumes an ''extremely unrealistic'' *zero payoff* to the label in the absence of an agreement with a streaming service—an assumption which is ''far from . . . innocuous.'' Written Direct Remand Testimony of Professor Michael Katz (Katz WDRT) ¶¶ 16, 20.

Professor Katz opines that this *zero payoff* assumption is equivalent to assuming, contrary to undisputed market facts, that: (1) subscribers and listeners to an interactive service would not switch to other interactive services if that service failed to reach an agreement with the labels; and (2) the interactive service is a ''Must-Have'' input supplier. Katz WDRT ¶¶ 17–18. In terms of Nash modeling, according to Professor Katz, Professor Watt's assumption is thus equivalent to ''assum[ing] that the sound recording copyright owners have no *outside option.*'' Katz WDRT ¶ 127 (app. A) (emphasis added).

Moreover, not only does Professor Katz assert the indisputability that such substitution would occur, he points out that *Professor Watt himself* acknowledged in his own testimony that such substitution would occur. Katz WDRT ¶ 19.[62]

Beyond this purported inconsistency, Professor Katz finds Professor Watt's no-substitution assumption to be a serious *modeling* error because, in order to quantify accurately each Nash bargainer's contribution to the net surplus to be divided, the extent of substitutability on each side of the market must be captured by the modeling. Katz WDRT ¶ 20. That is, he opines that ''Professor Watt's assumption that there is no substitution dramatically biases his model toward finding a large seesaw effect and renders his analysis unreliable . . . lead[ing]to a prediction that the share of an increase in musical works royalties that will fall on the streaming services is approximately *eight times* larger than Professor Watt's prediction. *Id.* at ¶ 21.

As a matter of music business dynamics, Professor Katz interprets Professor Watt's substitutability error as follows.

> The assumption that a label receives a zero payoff if it does not reach agreement with a streaming service is equivalent to assuming that, if a streaming service shut down, none of the consumers who would otherwise have used that streaming service will switch to alternative streaming services or other sources of licensed music. The two forms of the assumption are equivalent because, when the services are substitutes, failure to reach an agreement with one service will not drive a label's payoffs from interactive streaming to zero. It will not result in the loss of all of the benefits that could be enjoyed by reaching an agreement. Instead, many consumers would engage in substitution and choose other streaming services, which will allow the label to earn profits from the additional royalties that would be paid to it by those other services.

Id. at ¶ 18.

Professor Katz attempts to adjust Professor Watt's Nash Bargaining Model to account for this substitution effect. In his Appendix A, Professor Katz—acknowledging the reality of multiple interactive services—changes Professor Watt's assumed single label's payoff

[59] The Nash Bargaining Model is one type of game-theoretic approach used by economists to model the distribution of ''gains from trade'' between two parties ''in a manner that reflects 'fairly' the bargaining strength of the different agents. Marx WDRT ¶ 28 n.33 (citing A. Mas-Colell, M. Whinston, and J. Green, *Microeconomic Theory* 838 (1995)). To understand the parties' modeling dispute, it is necessary to appreciate the essential elements of the Nash Bargaining Model, as previously summarized by the Judges: ''In the Nash Framework [for full quotation, see eCRB no. 27063 n.48].'' *SDARS III* Final Determination, 83 FR 65210, 65215 & n.32 therein (Dec. 19, 2018).

[60] The Judges take note here of Professor Watt's presentment of alternative scenarios, because, as discussed *infra,* the Services and their economists accuse Professor Watt of changing his testimony, post-remand, by limiting the scenarios in which his ''seesaw'' argument would apply in order to salvage the credibility of his bargaining model.

[61] The Services could have sought leave to file surrebuttal testimony, and could have challenged the Majority's understanding of Professor Watt's testimony, after the Initial Determination, by filing a Motion for Rehearing pursuant to 37 CFR 353.1. However, a party is not required to engage in either of these procedural approaches, but rather may challenge the Determination on appeal, as has occurred here.

[62] The Judges have quoted Professor Watt's testimony in this regard *supra.*

(designated as parameter ''A'' in the Nash Bargaining Model) from a value of zero to a value equal to ''the share of revenues that would be diverted to other streaming services'' multiplied by ''the royalty rate that the label receives from the other interactive streaming services.'' *Id.* ¶¶ 119, 127. Professor Katz asserts that the diversion to other streaming services represents an ''outside option'' available to a label. *Id.* ¶ 127. Professor Katz incorporates this ''outside option'' in his revised version of Professor Watt's Nash Bargaining Model.

In addition, Professor Katz asserts that Professor Watt's modeling is unreliable because ''his prediction of the size of the see-saw effect is very sensitive to the assumed values of various other parameters.'' *Id.* at ¶ 23. For example, Professor Katz asserts that a change in the royalty rate paid to the labels could materially affect the balance or even the existence of the seesaw effect. *Id.* at ¶ 127. As further support for his opinion, Professor Katz relies on the testimony of one of Copyright Owners' own economic expert witnesses, who gave testimony clearly indicating that the ''seesaw'' effect was not at all likely to occur. *Id.* ¶ 24, n.16 (citing Gans WRT ¶ 32).[63]

In sum, Professor Katz finds Professor Watt's Nash Bargaining Model to be unusable as a foundation to set royalty rates because, although ''there are theoretical reasons to believe that a see-saw effect *may* occur, . . . there are complications and it is difficult to predict how big the effect will be.'' *Id.* ¶ 24 (emphasis added).

(c) Professor Watt's Rebuttal to Professor Katz

In rebuttal to Professor Katz's criticisms, Professor Watt states that ''the record needs to be straight on Nash bargaining theory,'' in order to explain ''the foundational error'' committed by Professor Katz. Watt RWRT ¶ 52. This basic mistake, according to Professor Watt, is Professor Katz's erroneous assertion that the bargaining model must account for a label's ''outside option.'' *Id.* ¶ 53. Relying on economic authority regarding bargaining theory, Professor Watt defines an ''outside option'' as ''the best alternative that a player can command *if he withdraws unilaterally* from the bargaining process.'' *Id.* ¶ 59 (emphasis added); *see also id.* ¶ 53 (''An outside option is a payoff that the label would receive *if negotiations with the service do not result in an agreement.*'') (emphasis added).[64]

Connecting this principle of bargaining theory to economic theory, Professor Watt explains his understanding of the relationship of the ''outside option'' to the more familiar economic concept of ''opportunity cost'':

> An outside option could also be referred to as an ''opportunity cost,'' since it is the value of what would be foregone should a deal with the service actually be struck. It is . . . useful to recognize the equivalence between an outside option and an opportunity cost, because economics in general has a very long history of understanding how opportunity costs weigh in on economic decision making.

Id.

Professor Watt then opines how Professor Katz confused the ''outside option'' with the disagreement (a/k/a threat) point in the Nash Bargaining Model:

> [Professor] Katz claim[s] that the outside option value that the labels would enjoy should they not reach an agreement with the services should be included as part of the ''disagreement point'' within the bargaining model and reimbursed like a cost prior to bargaining. Doing this can dramatically alter the results of the model. It is also definitively not how such an option should be modelled. [Professor] Katz [is] guilty of misunderstanding the Nash bargaining model, and concretely, the meaning of a ''disagreement point,'' and the way that an outside option should be brought into the model.

Id. ¶ 55.

More particularly, according to Professor Watt, these outside options/opportunity costs do not belong in a Nash Bargaining Model, because they are ''not the types of status quo actual financial payments that may be modelled as disagreement points.'' *Id.* ¶ 57. Rather, he asserts that, as Professor Katz essentially acknowledged, they are ''payoffs from *substitution,* [*i.e.,*] an option *instead of* the deal, and they are not actual financial payments, but opportunity costs. *Id.*

Professor Watt then explains that an outside option/opportunity that by definition exists as an alternative to a bargain between two parties lies outside the two parties' bargain, and is thus out-of-place within a proper Nash Bargaining Model:

> In the case at hand, if the parties never stop negotiating and never take up substitute options, then no joint enterprise is offered and there is no surplus to share, so each necessarily gets a payoff equal to 0, just as I assumed in my model.
>
> . . .
>
> [A]gainst this backdrop, an outside option (a potential payoff that is not directly related to a share of the surplus that is being negotiated) . . . comes in [to the model] as a constraint upon the set of feasible deals that could be struck, exactly as an opportunity cost would be treated.

Id. ¶¶ 57–58.

(d) Dr. Leonard's Criticisms of Professor Watt's Bargaining Model

According to Google's economic expert witness, Dr. Gregory Leonard, the Majority wrongly relied on Professor Watt's bargaining model because it is ''highly stylized'' and theoretically ''simplified'' in ways that make it unable to predict that ''an increase in the musical works royalty would be offset nearly dollar-for-dollar by a decrease in the sound recording royalties (the ''seesaw effect''), thus leaving the services virtually unaffected by the proposed increase in musical works royalties.'' Leonard WDRT ¶8.

Pointedly, Dr. Leonard criticizes Professor Watt's bargaining model as comprised of a ''veneer of 'complexity' . . . mathematical formulas and [a] reference to John Nash,'' adopted to provide a rationalization for adoption of his Shapley Value modeling that would significantly increase the mechanical royalty rate.'' *Id.* ¶ 16. These modeling deficiencies, Dr. Leonard asserts, are not merely ''simplifying assumptions [that] better focus on the specific question the model is meant to address,'' but rather ''simplify away economic characteristics . . . entirely abstract[ing] away economic characteristics . . . central to the question at hand.'' *Id.* ¶ 18.

In particular, Dr. Leonard avers that Professor Watt's bargaining model materially abstracts away from, *inter alia:* (1) the nature of consumer demand for streaming services and competing forms of music; (2) how services decide to enter or exit the streaming market; (3) the nature of the oligopolistic interaction among the labels; (4) the nature and timing of the bargaining between each label and each service; (5)

[63] In this regard, Professor Gans testified: ''[When considering] the general distribution of profit when royalty rates for musical works rightsholders are increased[,] [i]n principle, those funds could come from a decrease in service profit, a decrease in sound recording royalties, or an increase in consumer pricing . . . . The general redistribution of profit in response to increased musical works royalties is fundamentally an empirical question. . . .'' Gans WRT ¶ 32.

[64] The phrase ''outside option'' suggests the existence of an ''inside option.'' Indeed, a treatise cited by Professor Watt identifies the ''inside option,'' defining it as ''[t]he payoff the [bargainer] obtains while the parties *temporarily* disagree''—contrasting it with the ''outside option'' as (consistent with Professor Watt's testimony) ''the payoff [the bargainer] obtains if she chooses to *permanently* stop bargaining, and chooses not to reach an agreement with [the counterparty].'' A. Muthoo, *Bargaining Theory with Applications* at 137 (1999).

the potential for ''hold-up'' [65] by labels that perceive the services to be in a vulnerable bargaining position due to their previous industry-specific investments made under their assumption that the pre-existing statutory structure would be maintained; and (6) the failure of Professor Watt's bargaining model to grapple with the complementary oligopoly structure of the sound recording market. *Id.* ¶¶ 18, 20.

These factors, he posited, are ''important for determining how sound recording royalties would *actually* change in response to a change in the statutory musical works royalty.'' *Id.* Professor Leonard concludes that, by not modeling these factors, Professor Watt's ''prediction of a virtual dollar for dollar decrease in sound recording royalties is unreliable as a basis for formulating policy.'' *Id.* ¶ 20.

Regarding the complementary oligopoly structure of the market and its impact on the bargaining process, Professor Leonard emphasizes that an important ''real-world hurdle'' assumed away by Professor Watt's modeling of a single label entity is that ''each label would prefer to have the other labels lower their sound recording royalties while maintaining its own royalties at pre-existing levels . . . .'' *Id.* ¶ 21. More particularly, Dr. Leonard explains that ''even if a label were to recognize that it is more efficient for overall sound recording royalties to be lower, the label may not be willing to lower its royalty rate without assurance that the other labels will do the same,'' a result which he asserts ''is unlikely to happen absent some form of collusive behavior.'' *Id.* Thus, Dr. Leonard maintains that the existence and size of any ''seesaw''-induced decrease in sound recording royalties remains indeterminate, and it remains ''within the realm of theoretical possibility that the labels do not agree to *any* reduction in sound recording royalties even if a reduction in overall royalties would be economically efficient. *Id.*

(e) Professor Watt's Rebuttal to Dr. Leonard's Criticisms

Professor Watt replies with a spirited defense of economic modeling in general and his economic bargaining model in particular. He begins by pointing out that models are not supposed to be ''perfect representations of reality [but rather] are intended to isolate what is important, in order to expose a useful insight on some issue of relevance.'' Watt RWRT ¶ 105. He adds that economic models (not merely his bargaining model) ''*do not necessarily deliver predictions* of situations that are immune to changes in variables outside the model, but rather the results inform conclusions about the relationships between the variables and parameters within the model, [which is] by nature *a crude representation[ ] of reality,* but the lessons and insights that they provide can be very relevant to real-world applications.'' *Id.* ¶¶ 106–07 (emphasis added).

With particular regard to his bargaining model, Professor Watt takes issue with Dr. Leonard's assertion that in the former's model the surplus is a ''fixed constant.'' *See* Watt RWRT ¶¶ 110–111. Rather, Professor Watt avers that his bargaining model assume[s] that when the surplus . . . *whatever value it takes* . . . is to be shared, the parties understand that the amount to be shared is, *at that moment, given*.'' *Id.* ¶ 111 (emphasis added).

Turning to Dr. Leonard's critique regarding the purported distortionary effect of Professor Watt's modeling assumption of a single label and a single interactive service, Professor Watt responds by acknowledging that, if he had modeled multiple labels and services in the bargaining process, that would be ''not particularly enlightening *vis-à-vis* the single bargain setting, as it will not lead to different insights than those distilled by the [Majority].'' *Id.* ¶ 113.[66] Further, Professor Watt characterizes this criticism as ''empty,'' because under either his two-player Nash model or Dr. Leonard's posited multi-player (Nash-in-Nash) model, the labels will not respond to a musical works royalty increase *ipso facto* with a reduction in the sound recording royalty (*i.e.,* the seesaw effect will not occur if there is ''a change in some other variable.''). *Id.* ¶ 114.

(f) Professor Marx's Criticisms of Professor Watt's Bargaining Model

Professor Marx criticizes Professor Watt's application of the Nash Bargaining Model because, in her opinion, its ''precise prediction'' of the nearly one-to-one seesaw relationship ''depends critically on the assumptions that he makes and the numerical inputs that he uses.'' Marx WDRT ¶ 33. First, criticizing his modeling *assumptions,* like Professor Katz, she criticizes his decision to abstract from reality by positing a single label and a single interactive streaming service. She opines that his one label/one service modeling assumption ineluctably leads to his conclusion that each of these two parties ''has a 'disagreement payoff' of zero [meaning that] each party ends up with nothing in the absence of a deal.'' *Id.* ¶ 34. But this zero ''disagreement payoff'' is merely a product of Professor Watt's abstraction from reality, according to Professor Marx, because ''[i]n reality, if interactive streaming went away, a share of the music listening that had occurred through interactive streaming services would migrate to other forms of music distribution, generating revenues for the label . . . *meaning that the disagreement payoff would be positive for the label*). *Id.* (emphasis added).[67] Consistent with Professor Katz, she maintains that Professor Watt himself acknowledged the presence of this substitution effect when he testified that ''[t]he existing interactive streaming companies do not hold an essential input, as first they compete with the non-interactive services . . . .'' *Id.* ¶ 35, n.43 (citing Watt WRT, app. 3).

More particularly, Professor Marx maintains, a record label's disagreement payoff must be considered realistically ''in any accounting of what would happen if record labels and interactive streaming services failed to reach an Agreement . . . .'' Marx RWDT ¶ 35. And, she opines, when this real-world substitution effect is taken into account, the seesaw effect that Professor Watt estimates is reduced dramatically, because ''[t]he greater . . . the substitution between streaming and other forms of distribution, the greater is the revenue that the record label can capture in the event of disagreement

[65] A hold-up problem occurs when: (1) parties to a future transaction must make specific investments prior to the transaction in order to prepare for it; and (2) the exact form of the optimal transaction (*e.g.,* how many units if any, what quality level, the time of delivery) cannot be specified with certainty *ex ante.* W. Rogerson, *Contractual Solutions to the Hold-Up Problem,* Rev. Econ. Stud. 777 (1992). Here, the interactive services may need to commit to paying for long-term investments, even though they cannot know the level of their largest costs (content royalties) beyond a single rate term.

[66] Professor Watt describes Dr. Leonard's multiple simultaneous negotiations in a bargaining model as a ''Nash-in-Nash'' model, but the former does not explain why he concludes that this approach ''will not lead to different insights'' than those the Majority distilled from his two-party Nash model.

[67] Professor Marx's reference to a substitution from a shutdown interactive service to ''other forms of music distribution'' is different from, but analytically analogous to, Professor Katz's assertion that the shutdown of any one interactive service would result in migration of its subscribers and other users to the remaining interactive services. These analogous critiques are complementary. *See* Marx WDRT ¶ 37 (''One would expect the same decrease in the estimated see-saw effect by including a second, competing interactive streaming service in the market instead of just the one that Professor Watt uses. In that case, if no deal is reached, users would migrate to an even closer substitute—a competing interactive streaming service—resulting in an even higher degree of profit migration and thus an even lower estimated see-saw effect'').

and the lower is the estimated see-saw effect.'' *Id.*[68]

Professor Marx opines that modeling the bargaining process without these real-world particulars diminishes the value of Professor Watt's Nash model in several significant ways. First, because his model fails to incorporate the presence of three major record labels, ''each with substantial complementary oligopoly power,'' it fails to capture the fact that ''each record label does not fully internalize the impact of its rates on the viability of the industry.'' *Id.* ¶ 39. She points to the Judges' Final Determination in *Web IV,* where the Judges note how this aspect of complementary oligopoly compromises the value of a rate as a useful benchmark. *Id.* ¶ 39 n.45 (quoting *Web IV* Final Determination). More particularly, she opines that when, as here, ''there are multiple negotiations between multiple record labels and multiple services,'' sound recording rates can be affected ''by the order of negotiations'' among the several label:service negotiating pairs—a factor that Professor Watt's bargaining model fails to capture. Marx WRDRT ¶ 41.

Next, Professor Marx avers that Professor Watt's bargaining model ''does not explain how or over what time frame the market would move to a new equilibrium.'' *Id.* ¶ 40. More particularly, she testifies, because interactive services' ''agreements with record labels often contain multi-year terms and can take many years to negotiate . . . there may be little incentive or practical ability for both sides to move to a new rate before the contract expires''. *Id.* ¶ 41. She takes note that this point was established at the hearing during questioning of Professor Watt from the bench:

> JUDGE STRICKLER: What of the situation . . . that the . . . time period for the existing agreements between the . . . labels and the interactive streamers is such that they've already locked in a particular rate and then we set a rate that's higher for the mechanical to reflect the fact that the sound recording royalty should drop, but it's locked in for a period of time? Are we running the risk, then, of disrupting the market by having a total royalty that's greater than what is indicated by your Shapley testimony, simply because of the disparity of times in which the rates are . . . implemented?
>
> PROFESSOR WATT: That's a very fair point. And I didn't even think of that until you've mentioned it . . . [T]he model I have done is . . . assuming that . . . the bargained thing happens at the same time as the—or in the same general period of time as a change in the statutory rate. You're absolutely correct.

3/27/17 Tr. 3091–92 (Watt); *see* Marx WRDRT ¶ 42, n.46

Third, Professor Marx points out that Professor Watt's Nash model does not attempt to capture the effects of the heterogeneous and asymmetric distribution of information relevant to the bargain available to each party at the time of negotiation. *Id.* ¶ 41.

Lastly, Professor Marx avers that Professor Watt's Nash Bargaining Model fails to address, on a more general basis beyond informational issues, other ''asymmetries among record labels and among services.'' Marx WDRT ¶ 41.

In sum, Professor Marx concludes that these foregoing real-world points all preclude the Judges from relying on Professor Watt's testimony to identify a stable relationship between changes in the mechanical royalty rate and the sound recording royalty rate because they all share a common defect—they ''lie outside Professor Watt's model.'' Marx WRDT ¶ 41.

To be clear, Professor Marx does not criticize Professor Watt for neglecting to include these points in his bargaining model; rather, she acknowledges that ''[t]hese are difficult features to capture in a tractable equilibrium model.'' *Id.* Indeed, she urges *the Judges* to appreciate that relying on such a necessarily limited model, as the Majority did, can have ''dramatic effects'' on the royalty rates derived. *Id.* Professor Marx emphasizes that all of these inherent modeling deficiencies are especially pernicious, if the bargaining model is applied yet again on remand, to set specific rates *over a five-year period,* when other variables will have independent effect on royalty rates. *Id.*

(g) Professor Watt's Rebuttal to Professor Marx

Because Professor Marx's criticisms are of a similar nature to Professor Katz's criticisms, Professor Watt responds to Professor Marx as he did to Professor Katz. To summarize, Professor Watt responds to Professor Marx's points as follows:

- Her criticism is centered on what he characterizes as her ''bogus'' argument that he supposedly had predicted almost a ''dollar for dollar'' sound recording rate reduction in response to an increase in the musical works rate (the seesaw effect). Watt RWRT ¶ 19. Professor Watt finds this argument ''particularly disheartening,'' because Nash bargaining theory explains why the seesaw would apply to the splitting of the surplus based on the available data, and that ''there are quite apparent reasons why available surplus may not decrease even if the musical works rate increased, *because of simultaneous changes to other variables in the model.*'' *Id.* ¶ 34 (emphasis added).
- Professor Marx implicitly contradicts her own reliance on the complementary oligopoly power of the Major labels by modifying his bargaining model through the insertion of a lower value for their bargaining power. *Id.* ¶¶ 19, 22–24, 26.
- Professor Marx misconstrues the purpose of his Nash model, which was to serve ''as a reply'' to Professor Marx's direct testimony, and ''to show bargaining insights that bore upon aspects of the case.'' *Id.* ¶ 29.
- Professor Marx, like Professor Katz, improperly includes in her bargaining model a potential payoff for the label arising from an ''outside option,'' *i.e.,* from an alternative that the label can choose only if the Nash bargaining terminates. *Id.* ¶¶ 53—68.

(h) Professor Marx's Reply to Professor Watt's Criticism[69]

In her supplemental remand testimony, Professor Marx challenged several of Professor Watt's criticisms contained in his remand testimony. First, she takes issue with what he identified as two ''core'' economic principles of bargaining: (1) that all of the available net surplus will be shared; and (2) that neither of the two bargainers will demand a share such that more than the total net surplus is shared. Marx WSRT ¶¶ 7–8.

As an initial matter, she disputes the notion that these are ''core'' principles of bargaining. *Id.* ¶ 8. More particularly, she states that, in the present case, because ''the label does not know with exactitude the precise maximum that a service would be willing to pay (*i.e.,* its ''survival'' rate), and the service likewise does not know the exact minimum that the label would be willing to accept,'' the simple bargaining model must be expanded to address ''the potential for delay and/or bargaining breakdown.'' *Id.*

As a further criticism, Professor Marx avers that ''[i]n the real world, the negotiated royalty outcomes do not involve just two parties, but rather a sequence of overlapping, interrelated,

[68] In the context of the bargaining model, Professor Marx identifies Professor Watt's choice of ''a market structure that is completely symmetric between record labels and services not reflective of the real world'' as forcing his model ''to attribute[ ] all the . . . surplus division to . . . bargaining power . . . and none of it to the market structure.'' *Id.* ¶ 38.

[69] The Judges found that Professor Watt's remand testimony, denoted as ''rebuttal,'' also provided *de facto* ''direct'' testimony, to which the Services could respond with supplemental testimony and argument. Oct. 1st Order at 11–12. Professor Marx's response in the following text was set forth in Spotify's permitted supplemental testimony.

bilateral bargains involving multiple competing services and multiple record labels with complementary oligopoly power.'' *Id.* ¶ 12.[70] This complication, she opines, exacerbates the informational deficit noted in the immediately preceding paragraph, such that negotiations within the several pairings of labels and services ''are affected by uncertainty and private information and . . . Professor Watt's discussion of bargaining theory [thus] does not support any particular real-world see-saw outcome.'' *Id.*

(iii) Resolution of the Bargaining Dispute

(a) Professor Watt's Nash Bargaining Model Does Not Support Adoption of Uncapped TCC Rate

The purpose of Professor Watt's Nash Bargaining Model was to allay the Judges' concern that increasing the mechanical rate would lead to higher total royalties for the Services. His bargaining model was understood by the Majority to show that such higher total royalties would not result, because the model demonstrated the ''seesaw'' effect, whereby the sound recording rate would fall almost dollar-for-dollar with the increase in the mechanical rate. *See* Determination at 73–74 (''[T]he Judges rely on Professor Watt's insight . . . *demonstrated by his bargaining model* that sound recording royalty rates in the unregulated market will decline in response to an increase in the compulsory license rate for musical works. . . . Professor Watt's bargaining model *predicts* that the total of musical works and sound recordings royalties would stay 'almost the same' in response to an increase in the statutory royalty.'') (emphasis added).[71]

On the surface, the economic experts on both sides appear to be at loggerheads regarding the existence and applicability of the seesaw relationship. However, as discussed below, on further analysis of their respective positions, in light of Professor Watt's remand testimony regarding *a key assumption* in his bargaining model, their disagreement narrows considerably and—in an important respect—vanishes completely.[72]

To recap: In his WRT, Professor Watt stated

> [W]ith an appropriately modelled bargaining analysis . . . in my Appendix 3 . . . I show that for every dollar that the statutory rate for musical works undercuts a fair and reasonable rate, the freely negotiated rate for sound recordings will increase by an estimated [REDACTED] cents.
>
> That is, if the musical works rate is increased to what would be a realistically fair and reasonable rate, then the negotiated fee for sound recordings would decrease almost dollar for dollar, with only a minor change in the total royalty rate for all copyrights combined.

Watt WRT ¶ 23 & n.13. But nowhere in his WRT did he qualify this statement by explicitly acknowledging that in his bargaining model there are certain assumptions lurking, *i.e.,* that his ''concrete'' analysis is subject to the ''*ceteris paribus*'' constraint—that all other things are held constant (*i.e.,* equal before and after the change in the musical works rate) other things being equal).[73]

It is only in his later remand testimony—after the D.C. Circuit's remand had compelled him to confront criticism from adverse economists—that Professor Watt expresses this assumption overtly, making explicit the ''understanding'' that he had theretofore only tacitly assumed:

> In other words, a model in which only the two copyright rates are permitted to change . . . as was the *understanding* in my original model, allows the system to derive a clear relationship between those two rates, and that relationship is that an increase in one leads to a decrease in the other, that is, the 'see-saw effect.' But if . . . something else changes along with the musical works rate . . . then *the net effect does not predict that the negotiated rate of the labels will decrease.*''

Watt RWRT ¶ 35 (emphasis added).

Indeed, as noted *supra,* Professor Watt *did* give a nod to the relaxing of his implied *ceteris paribus* assumption in his WRT, by identifying varying ''scenarios'' in which he considered the impact of potential changes in service revenues and service non-content costs, leading to different percentages of royalties paid to content providers. Watt WRT ¶¶ 45–52. Professor Watt then used these several assumptions and scenarios to opine as follows: ''The message that should be taken from this exercise . . . is that the results . . . are very dependent upon the amount of total interactive streaming revenue and the fraction of that revenue that is taken up by downstream non-content costs.'' *Id.* ¶ 53.[74]

Professor Spulber, on behalf of Copyright Owners, likewise emphasizes on remand the importance of the *ceteris paribus* assumption in economic modeling:

> [A]long with an increase in the compulsory license rate, *all other things being equal,* we would expect to see a decrease in sound recording royalty rates.
>
> . . .
>
> ''All other things being equal'' (*ceteris paribus* in Latin), is a central principle for economic modelling. This economic analysis of bargaining highlights an important relationship between two content cost variables. However, that relationship does not exist in a vacuum. *Many other variables affect the bargaining situation and, for any given period, the net effect of all of the different variables may be different than the effect of the modeled variable alone.* Thus, this economic analysis of bargaining will not assure that a streaming service will not face disruption in the real world for any reason.
>
> . . .
>
> Economic modeling is supposed to simplify the situation in order to distill useful principles and teachings.

Spulber RWRT ¶¶ 26–28 (emphasis added).

The Judges agree that the *ceteris paribus* principle[75] is a fundamental

[70] In like manner, Professor Marx opines that Professor Spulber's discussion of bargaining theory is irrelevant to any assessment of ''the complexities affecting real-world negotiations'' and the presence, *vel non,* of a seesaw outcome. *Id.* ¶ 13.

[71] Copyright Owners note the Majority's recognition that, regardless of the rate structure, *i.e.,* uncapped TCC or otherwise, Professor Watt's ''insight'' from ''bargaining theory'' would still apply. *See* Determination at 74, n.138. That being the case, the Majority's first rationale for adopting an uncapped TCC rate is undermined.

[72] This is unsurprising. The difference of opinion among economists often lies in their assumptions, which may be left unstated or opaque (intentionally or not). Once those assumptions are laid upon the table, their differences often evaporate. As the esteemed economist Fritz Machlup noted more than sixty years ago: ''The most prolific source of disagreement lies in differences of factual assumptions. It is not customary for experts to state all the assumptions that underlie their conclusions; it would be much too cumbersome. But when they have reached very different conclusions, then we are forced to go back and find out what implicit assumptions they have made.'' F. Machlup, *Why Economists Disagree,* 109 Proceedings of the American Philosophical Society 1, 3 (1965). In the modern world of more formal economic modeling as well, the obfuscation of assumptions continues to be an important source of dispute, according to a book written by a leading game theorist upon which Professor Watt relies in his testimony. A. Rubinstein, *Economic Fables* at 20 (2012) (''[T]he model's formal mantle enables economists . . . to conceal from the layman the assumptions the model uses.''); *see* J. Schlefer, *The Assumptions Economists Make* at 29 (2012) ([S]ome assumptions made by economists capture important insights, others are insane. All you have to do is decide which capture insights, which are insane, and in which situations.'')

[73] In his oral testimony, Professor Watt likewise did not qualify his opinion by taking note of his *ceteris paribus* assumption. See 3/27/17 Tr. 3026 *et seq.* (Watt).

[74] Further, in his remand testimony, Professor Watt points out that Professor Katz made clear in his testimony that he applied the ''all else equal'' assumption expressly in his own Nash bargaining analysis at the hearing. Watt RWRT ¶ 20 (quoting Katz WRT ¶ 67).

[75] The phrase is often translated into English as ''all other things *equal.*'' However, that is somewhat ambiguous. Equal to what? Not to other things. Rather, every ''thing'' (*i.e.,* every other independent variable) whose effects are not being measured

Continued

principle in economic analysis and modeling. Professor Watt succinctly makes this point, quoting the Nobel laureate economist James Buchanan, for the following proposition:

> At the heart of any analytical process lies simplification or abstraction, the whole purpose of which is that of making problems scientifically manageable. In the economic system we recognize, of course, that 'everything depends on everything else,' and also that 'everything is always changing'.

Watt RWRT ¶ 32 (*quoting* J. Buchanan, *Ceteris paribus: Some Notes on Methodology,* 24 *So. Econ. J.* 259, 259 (1958).

However, Professor Watt does not quote another portion of Professor Buchanan's article that makes a point that looms large in the present proceeding, *to wit,* the *limitations* inherent in applying the necessary *ceteris paribus* condition:

> Real problems require the construction of models, and the skill of the scientist is reflected in the predictive or explanatory value of the model chosen. We simplify reality to construct these models, but the fundamental truth of interdependence must never be forgotten. . . . [However,] *[f]ew, if any, meaningful results may be achieved by using ceteris paribus to eliminate the study of large numbers of variables.* If such variables are closely related, they must be studied simultaneously; there is no escape route open.

Id. at 259–60 (emphasis added); *see also* A. Rubinstein, *Comments on Economic Models, Economics, and Economists: Remarks on Economics Rules by D. Rodrik,* 55 J. Econ. Lit.162, 167 (2017) ''[W]hat matters to the empirical relevance of a model is the realism of its *critical* assumptions'') (emphasis added).[76]

This is not to say that Professor Watt was unaware of this caveat. As noted *supra,* he recognizes the difficulty of extrapolating from a *ceteris paribus* world to the real world. The present panel of Judges likewise recognizes this. However, the Majority missed this distinction in the Determination when it applied Professor Watt's correct but *ceteris paribus* ''insight'' for a constant real-world relationship between sound recording and musical works royalty rates. Again, not a single economist made this improper analytical leap or proposed an uncapped TCC rate in order to set a TCC ratio across the entire rate term. Indeed, on careful inspection, no economist states in his or her remand testimony that Professor Watt's bargaining model provides economic support for the uncapped TCC rate prong.

With the foregoing testimony in mind, the Judges see particularly relevant several additional points in Professor Watt's *remand* rebuttal testimony that pertain to the appropriateness, *vel non,* of a TCC rate prong. Referring to the application of his bargaining model to the present case, Professor Watt made these crucial statements regarding the lack of a seesaw effect that would generate decreases in sound recording rates when the mechanical rate is increased:

> [T]he actual effects one would expect to see several years later would be based on the actual data at that time. Moreover, I would expect many other variables to have a larger effect on the bargains than the relatively small changes in the musical works rate. . . . [U]nderstanding actual market outcomes requires understanding these variables.
>
> . . .
>
> [A]n attempt to capture all aspects of the real world is too complex for a simple statistical exercise involving an econometric regression. There is no obvious data to actually use for some of the independent variables, such as consumer demand equations, costs of entry and exit, a measure of oligopolistic interaction, different timings of different rate bargains, and the actual values of outside options.

Watt WRWT ¶¶ 6(iv), 118.[77]

Although Professor Watt was hardly transparent in *disclosing* his *ceteris paribus* assumption in his original testimony, it seems clear that he always *understood* its presence, and that, when this assumption was relaxed, ''the actual effects . . . several years later would be based on the *actual data at that time* [and] *many other variables [with] a larger effect on the bargains than the relatively small changes in the musical works rate.*'' *Id.* ¶ 6(iv) (emphasis added).

Professor Spulber likewise opined that the absence of an explicit statement of these assumptions in Professor Watt's testimony was unremarkable and appropriate:

> [A]ll other things being equal'. . . should be generally read into economic modeling conclusions or predictions, whether or not the words are repeated in each instance. Economists do not typically repeat these words in each place where they apply, since it would lead to constant repetition.

Spulber RWRT ¶ 46, n.8.

Regardless of whether economists invariably identify the existence of implicit assumptions lurking in each other's models, Professor Watt overlooked a cardinal rule of communication: *Know your audience.* Here, his audience is comprised of three Judges, only one of whom is also an economist.[78] Failing to appreciate Professor Watt's implied *ceteris paribus* assumption, the Majority transformed his limited (albeit important) ''insight'' regarding the equal split of the Shapley surplus between the two classes of rights holders—and the seesaw effect that would have if the mechanical rate were increased when the split was imposed—*into a justification for the imposition of an uncapped TCC rate prong over the five-year rate term.* The Majority's language reveals this point clearly:

> As to the issue of applying a TCC percentage to a sound recording royalty rate that is artificially high as a result of musical works rates being held artificially low through regulation, the Judges rely on Professor Watt's insight . . . *demonstrated by his bargaining model* that sound recording royalty rates in the unregulated market *will decline in response to an increase in the compulsory license rate for musical works. See* 3/27/17 Tr. 3090 (Watt) (''[T]he reason why the sound recording rate is so very high is because the statutory rate is very low. And *if you increase the statutory rate, the bargained sound recording rate will go down.''*)
>
> Professor Watt's bargaining model *predicts* that the total of musical works and sound recordings royalties would stay ''almost the same'' in response to an increase in the statutory royalty. *Id.* at 3091.

Determination at 73–74 (emphasis added).

Making the point ever so plainly, Professor Watt *now* expressly acknowledges that his '' 'see-saw effect' was never really a '*prediction*' '' at all! Watt RWRT ¶ 117. Rather, he now cautions the present panel of Judges, that, ''to make the jump from the model to the actual real-world effects, one cannot ignore the words that are omnipresent in all economic modeling,

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remain ''constant,'' or ''controlled,'' *i.e.,* ''equal'' to their measure prior to the change of the independent variable being examined. *See* W. Nicholson, *Microeconomic Theory: Basic Principles and Extensions* at 649 (9th ed. 2005) (defining ''*ceteris paribus*'' as ''[t]he assumption that all other relevant factors are held constant when examining the influence of one particular variable in an economic model'').

[76] The Judges note now that Professor Watt did not claim that his bargaining model generated any *predictions,* but rather that it explained the splitting of the Shapley surplus by the sound recording and musical works copyright owners, respectively, and the impact of that split on royalty rates, *given the assumptions and the data in his model.*

[77] In the language of econometrics, Professor Watt describes this problem as the ''almost sure[ ] impossibil[ity] of ''introduce[ing] a control variable for each and every possible aspect that could potentially impinge upon the relationship [that] could easily lead to such a low R^2, and/or statistically insignificant key coefficients, as to make the regression meaningless.'' *Id.* ¶ 118.

[78] The dissenting Judge (the only economist on the panel) warned that the seesaw effect was rife with assumptions that rendered it too speculative to be relied upon to support the uncapped TCC rate prong. *See* Dissent at 7–8.

that predictions about causal relationships are understood to be ''all else equal.'' *Id.* ¶ 32.

Without the benefit of these caveats regarding an extrapolation of the ''seesaw'' theory to the real-world, and with absence of an explicit statement of the *ceteris paribus* assumption, the Majority misapplied his testimony as a basis to adopt a fixed TCC rate, based upon data from a snapshot in time (2016) to cement that rate relationship for the entire five-year period.[79] The Majority misapplied Professor Watt's *correct* insight from bargaining theory regarding the use of a fixed ratio for the equal division by two ''Must Have'' input suppliers of the Shapley surplus to set royalty rates in a period, by using that insight *incorrectly* to establish a fixed ratio of royalty rates over the rate term.[80]

[79] The importance of Professor Watt's failure to make explicit the *ceteris paribus* assumption in his WRT is demonstrated by his need to make it explicit in his RWRT. But even now, rather than acknowledge that the Majority missed the point, he claims that the Services' are wrongly blaming the Majority for failing to understand this assumption: ''The Services' testimony on this remand seems primarily focused on creating a ''straw man'' argument . . . accus[ing] the [Majority] of something that the [Majority] did not do—that is, rely on a guarantee of a particular decrease in sound recording royalty rates—and the Services then attack the Board's determination by claiming that the decrease did not occur.'' Watt RWRT ¶ 5. As shown *supra,* however, this is precisely how the Majority interpreted Professor Watt's ''insight.'' The Judges understand that, as a matter of tact and tactics, Copyright Owners may be reluctant to acknowledge that the error lies in the combination of their witness's opaque testimony and the Majority's lack of understanding of the assumptions economists make. Copyright Owners might prefer to cast the Majority as the victims of the Services' incorrect accusation. But the plain language of the Determination belies Copyright Owners' characterization as to how the confusion arose.

[80] The forgoing analysis as applied to the uncapped TCC rate needs to be contrasted with the application of Professor Watt's bargaining model to increase the percent of-revenue rate to 15.1%. That higher rate was set by the Majority after its consideration of the same Shapley approaches, pursuant to the Judges' combination of inputs from Professor Gans model (his [REDACTED] round recording-to-musical works ratio) and the Shapley Value Model of Professor Marx that adjusted for complementary oligopoly power by establishing a lower total royalty level ([REDACTED]%). But the difference is that the 15.1% revenue rate was set by applying the Shapley results *based on actual and projected market data, see* Gans WRT ¶ 38, whereas the uniform uncapped TCC rate (26.2%) was based on the *ceteris paribus* assumption that held constant the actual data regarding the aforementioned independent variables. As explained above though, Professors Watt and Spulber make it clear that the ''insight'' from bargaining theory did not have implications to allow for a ''prediction'' of rates in future periods.

Thus, when the Majority engaged in its analysis and ''line-drawing'' to apply the data and market projections relied upon by Dr. Gans's data, the Majority was operating—to use the D.C. Circuit's phrase—in its ''wheelhouse,'' making a finding that withstood appeal. *Johnson, supra,* 969 F.3d at 385–86; *see also* Determination at 69–70 (''Professor Gans utilized data from projections in a Goldman Sachs analysis to identify the aggregate profits of the record companies and the music publishers, respectively. . . . The Judges also find Professor Gans's reliance on financial analysts' projections for the respective industries to be reasonable.'').

Additionally, an examination of the expert economists' testimony reveals that their facial disagreements vanish once the necessary assumptions are laid bare. Professor Watt and the Services' three economists all identify the following independent variables that will impact the relative levels of sound recording and musical works rates paid by interactive services:

(1) the level of downstream consumer demand;

(2) entry costs;

(3) exit costs;

(4) oligopolistic interaction;

(5) the timing of sound recording agreements *vis-à-vis* statutory rate setting; and

Professor Watt and the three Service economists agree with regard to the relevancy of these six independent variables. *Compare* Watt RWRT ¶¶ 6(iv), 118 (identifying all five independent variables) *with* Leonard WDRT ¶ 18 (identifying independent variables 1–4 above); Marx WDRT ¶¶ 4–5, 42; (identifying independent variables 1–5 above); Katz WDRT ¶¶ 127, 134 n.115 (identifying independent variables 4 and 6 above). Accordingly, the remand record shows a consensus as to the lack of modeling of independent variables that would be important to estimate an uncapped TCC royalty ratio that could be utilized by the Judges to lock-in a ratio over the rate term.

Indeed, as noted *supra,* a careful reading of the remand testimony by Copyright Owners' economists, Professors Watt and Spulber, reveals that neither of them actually testifies that there is sufficient theoretical and empirical evidence to support the uncapped TCC rate prong and the 26.2% TCC rate phased in on that prong. Rather, those two witnesses testify to something far narrower: the alleged correctness of Professor Watt's ''seesaw'' theory as demonstrating an equal splitting of the surplus between the two ''Must Have'' input suppliers, and the effect of that split when all other relevant independent variable are held constant.

In this regard, it is noteworthy that none of Copyright Owners' several economic experts in this proceeding (Dr. Eisenach, Professor Gans, Dr. Rysman, or Professor Watt) ever *proposed* an uncapped TCC rate prong in any form, let alone within a greater-of formulation. Such a proposal would have been improper, because, as the expert testimony described above makes clear, the *ceteris paribus* assumption, reasonable for modeling purposes to provide insight as to the surplus split, lacks the input of the omitted variables that the experts on both sides find relevant to the application of economic modeling in this proceeding. A further review of Copyright Owners' economic expert witness testimony on remand—the first time any of them had occasion to weigh-in on the appropriateness of the uncapped TCC prong—reveals that they also *have not endorsed* the uncapped TCC rate prong as a proper form of rate setting. To be sure, they strongly endorse the insight first described by Professor Watt in his WRT that the Nash surplus would be split essentially evenly between the two suppliers of essential content, given his simplifying assumptions. But such endorsement is hardly the same as endorsement of the uncapped rate prong itself.

For these reasons, the Judges find erroneous the Majority's identification of a fixed relationship between the sound recording and mechanical royalty rates that could serve as a basis for the Majority's first rationale for yoking the mechanical rate to an uncapped TCC rate prong.

(b) The Services Have Not Rebutted Copyright Owners' *Prima Facie* Showing That Professor Watt's Model Demonstrates a More Limited ''Seesaw'' Effect

The foregoing analysis and decision related to the absence of a fixed relationship between the sound recording and mechanical royalty *rates.* A *separate* fixed relationship—the one Professor Watt has clarified he was demonstrating all along—is that if the Judges increase the mechanical royalty rate, the Shapley surplus realized by the labels will decrease almost dollar-for-dollar with the increase in the mechanical rate. The Services' economists aver that even this version of the seesaw is defective.

According to Professors Katz and Marx, the Nash Bargaining Model constructed by Professor Watt is deficient because it fails to properly characterize the ''disagreement payoff'' to the sound recording company when it and an interactive service fail to reach an agreement. More particularly, as explained *supra,* they assert that Professor Watt's model omits the value of ''outside options'' available to the sound recording company. This criticism relates to the issue of whether the seesaw effect would occur as posited in Professor Watt's model. That is, the increase in the sound recording

company's ''disagreement payoff'' (a/k/a ''threat point'') would lead to a higher royalty in the Nash bargain between the sound recording company and the interactive service than needed to generate the seesaw effect to offset the higher mechanical royalty rate.

As the several experts' positions in this regard, discussed *supra,* make clear, however, each side has a different understanding of whether an ''outside option'' is properly included in the definition and calculation of the ''disagreement payoff.'' On the one hand, Professors Katz and Marx claim that the existence and value of ''outside options'' should be included in the ''disagreement payoff.'' However, they provide no economic authority for that assertion.

By contrast, Professor Watt cites to multiple economic game theory publications and authorities for the proposition that the presence and value of ''outside options'' are not to be included in the ''disagreement payoff'' contained in a Nash Bargaining Model. *See* A. Muthoo, *Bargaining Theory with Applications* at 105 (1999) (''I thus emphasize that *the outside option point does not affect the disagreement point.*''); M. Osborne & A. Rubinstein, *Bargaining and Markets* at 88 (1990) (''it is definitely *not* appropriate to take as the disagreement point an outside option. . . .''); K. Binmore, A. Rubinstein & A. Wolinsky, *The Nash Bargaining Solution in Economic Modeling,* 17 RAND J. Econ. 176, 185 (1986) (''An outside option is defined to be the best alternative that a player can command if he withdraws unilaterally from the bargaining process.'').

According to Professor Watt and these authorities, the reason for excluding ''outside options'' from the Nash Bargaining Model is fundamental to the nature of the model itself. In the Nash approach, the negotiating parties are bargaining with each other only over the surplus *their deal* can generate, and they are attempting to agree upon an allocation of that surplus that exists within the bounds of their respective ''disagreement payoffs.'' Each may have ''inside options,'' which are alternatives available to them *while bargaining is ongoing and they temporarily disagree. See Muthoo, supra,* at 137. However, ''outside options'' are available to a Nash bargaining party *only* in lieu of continuing the Nash bargaining with the original counterparty if it ''withdraws'' from the Nash bargaining process. *See Binmore et al., supra.* Professor Watt characterizes the distinction as follows:

> [T]he Nash bargaining model [is] designed as [a] self-contained portrayal[ ] of negotiating behavior. . . . Given a surplus to share, the Nash model . . . provide[s] allowance for *financial* payments that a party is *actually* receiving, only while negotiations are *ongoing, without* walking away for another option, and that would cease as a result of the deal, to be factored into modelling as a cost in some situations.'')
> . . .
> [A]n outside option (a potential payoff that is not directly related to a share of the surplus that is being negotiated) . . . comes in as a constraint upon the set of feasible deals that could be struck. . . .''

Watt RWRT ¶¶ 56, 58.[81]

The Services never sought to introduce further testimony regarding this important dispute. This is particularly striking because the Services filed a motion to strike certain portions of the CO Reply, or for leave to file supplemental testimony responsive to those itemized portions. The portions the Services identified in their motion *did not include Professor Watt's criticisms as to the inclusion of* ''*outside options*'' *in their experts' Nash modeling.* Further, after the Judges granted the Services' motion by providing them leave to file supplemental testimony—consistent with the designations in their motion—the supplemental testimonies did not address this ''outside options'' issue.

In the course of discussions among the parties and the Judges regarding remand procedures, the Judges invited the parties to produce witnesses for a hearing, at which one or more of the Services' economic expert witnesses could have addressed this ''outside options'' issue. However, the Services (and Copyright Owners) waived the opportunity to produce witnesses at a hearing. Rather, they offered, and the Judges agreed, that they would stand on their written testimonies and proceed to closing arguments by counsel.

In the closing arguments, each side argued numerous points of controversy and provided the Judges with dozens of demonstrative aids summarizing record evidence and the parties' arguments, but none of those arguments or demonstrative aids so much as mentioned this ''outside options'' dispute. Moreover, when the Judges inquired during closing arguments as to whether Services' counsel would be addressing any of the experts' ''modeling disputes,'' counsel said that they were resting on their papers. 3/8/22 Tr. 86–87 (Closing Argument). Similarly, when the Judges inquired of Copyright Owners' counsel whether he would be addressing the modeling ''dust-up'' between Professors Watt and Katz, counsel demurred, stating that although he would ''love to engage on it but . . . ''there would be too many slides. . . .'' *Id.* at 262–64.

Simply put, the Services' economic experts made an assertion regarding the need for Professor Watt to have included ''outside options'' in his Nash Bargaining Model, but Professor Watt presented authority clearly stating that such inclusions would be improper. Thus, Copyright Owners made a *prima facie* showing that in a Nash Bargaining Model, the surplus generated by the streaming surpluses acquired by the content providers would be split equally as between the sound recording licensors and musical works licensors, and that, *ceteris paribus,* an increase in the mechanical rate to provide Copyright Owners more of the surplus (per the Shapley-based results relied on by the Majority) would be essentially offset through a nearly 1:1 reduction in the sound recording rate. In response to Copyright Owners' *prima facie* case, the Services stood mute in response to the rebuttal argument claiming that their experts misapprehended the Nash modeling distinctions between ''inside options'' and ''outside options.''[82]

Accordingly, the Judges find that the Services' criticisms in this regard are insufficient to rebut Copyright Owners' *prima facie* showing that Professor Watt's Nash Bargaining Model properly

[81] Professor Marx in fact cites several of these authorities (for other points), without noting the distinction they make between the appropriate inclusion of ''inside options'' and exclusion of ''outside options'' in Nash modeling. *See id.* ¶ 59.

[82] The third economic expert for the Services, Dr. Leonard, did not utilize the ''outside option'' phraseology to describe his critiques. Rather, he first criticized Professor Watt for assuming the existence of a ''fixed surplus.'' Leonard WDRT ¶ 16. However, as discussed *supra,* that assumption came from the Majority's extrapolation from Professor Watt's hearing testimony. His explicit statement regarding the *ceteris paribus* assumption makes clear that he was not assuming a ''fixed surplus.'' Watt RWRT ¶¶ 110–11. (Again, the only ''fixed'' surplus was not ''assumed,'' but rather *quantified,* in order to establish the Majority's percent-of-revenue prong royalty rate of 15.1%.)

Dr. Leonard next claims that Professor Watt's assumption that the labels would bear virtually the entirety of an increase in the statutory rate, because they previously ''have captured almost all'' [the] surplus,'' has been contradicted by the evidence. Specifically, he refers to the 33-month period in which the Phonorecords III rates were effective (January 2018 through September 2020). Leonard WDRT ¶ 16. However, as the Judges find in this Determination, that 33-month period was marked by significant uncertainty with regard to the ultimate rates and rate structure (and the rates were being phased-in), so no findings could reliably be made based on sound recording rate changes during that period.

The remainder of Dr. Leonard's critique concerns issues that would make a fixed TCC ratio inappropriate over the rate term. The Judges agree with those criticisms as previously discussed, but they do not pertain to this narrower issue of whether the *surplus* generated by interactive streaming would be split in a manner consistent with Professor Watt's Nash Bargaining Model.

identified and valued the ''disagreement payoff.'' [83] [84]

b. Rejection of Second Rationale for Including Uncapped TCC Rate Prong

In the Determination, as noted *supra,* the Majority also justified the adoption of the uncapped TCC rate prong because it had the effect of ''import[ing] into the rate structure the protections that record companies have negotiated with services to avoid the undue diminution of revenue through the practice of revenue deferral.'' Determination at 36; *see also Johnson,* 369 F.3d at 372 (''By pegging the mechanical license royalties to an uncapped total content cost prong, the Board sought to ensure that owners of musical works copyrights were neither undercompensated relative to sound recording rightsholders, *nor harmed by the interactive streaming services' revenue deferral strategies.* . . .'') (emphasis added).

(i) Parties' More Specific Arguments

Copyright Owners likewise argue that the uncapped TCC rate structure should be ''adopted to provide protection against revenue deferment and displacement in a revenue-based rate structure.'' CO Initial Submission at 38; *see also id.* at 40 (describing uncapped TCC rate prong as ''critical backstop in a revenue-based rate structure.'').

Whereas Copyright Owners echo the Majority, the Services adopt the reasoning of the Dissent. They argue as follows:

> [A] rate structure with a capped TCC prong, like the *Phonorecords II* settlement, achieves the same goal of protecting the Copyright Owners from any potential revenue deferral through a ''structure that provides alternate rate prongs and floors, below which the royalty revenue cannot fall,'' . . . and does so *without allowing Copyright Owners to impermissibly share in the labels' complementary oligopoly power.* . . . [T]he streaming industry has twice concluded, after extensive negotiations, that the appropriate way to address any concerns regarding revenue deferral is to have a rate structure that includes a capped TCC prong. *Phono I,* 74 FR 4510; *Phono II,* 78 FR 67938.

Services' Joint Opening Brief at 62 (quoting *Dissent,* 84 FR 1990) (emphasis added).

In their Reply, Copyright Owners argue that the Majority maintained the benefits of price discrimination contained in the prior *Phonorecords II* framework, but balanced that goal with added protection against Service revenue deferral and displacement. Copyright Owners' Reply Brief on Remand at 49 (''In adopting a rate structure with [an uncapped] TCC for all service offerings, the [Majority] balanced its concerns about fostering price discrimination while also protecting against proven revenue diminution by the Services.'').

The Services, in their Reply, take note that pre-remand, Copyright Owners had strenuously objected to any yoking of the mechanical royalty rate to the sound recording rate, maintaining that, although the Copyright Owners now advocate for an uncapped TCC rate to protect against revenue displacement and diminution:

> [I]n their [pre-remand] reply proposed findings, the Copyright Owners had expressed a very different view, arguing that an uncapped TCC prong ''does nothing to protect Copyright Owners from the Services' revenue displacement and deferment'' [and] Copyright Owners have not even tried to explain away their complete about-face on this issue.

Services' Reply at 43.

(ii) Analysis and Decision Regarding Revenue Diminution or Deferral

The Judges find that the second rationale put forth to support an uncapped TCC rate does not justify the adoption of that rate prong. Several reasons support this finding.

First, there is insufficient evidence to show how the sound recording companies contractually structure their own royalty rates, which would constitute the rate base for an uncapped TCC rate for the mechanical royalty. The sound recording royalty rate, when proffered for use as a mechanical royalty rate base, is analogous to pegging the value of a foreign currency to the U.S. dollar. That is no mere benchmark. The Judges must have the benefit of sufficient record evidence to demonstrate that the pegging (or, to use the D.C. Circuit's word in *Johnson,* ''yoking'') of a statutory rate to an unregulated rate serves the statutory purposes for the rate at issue, here, the mechanical rate.

But Copyright Owners presented virtually no evidence regarding how the sound recording companies structure their interactive service royalties. Indeed, in the hearing, Dr. Eisenach acknowledged that the ''relative value of sound recording [to] musical works licenses may depend on a variety of factors,'' but he intentionally eschewed unnecessary ''assumptions, complexities and uncertainties associated with theoretical debates'' as to why the particular market ratios existed. *See* Determination at 44. Indeed, the Majority found fault with Dr. Eisenach's willful ignoring of these issues, agreeing with the Services' criticism that Dr. Eisenach's ''use of sound recording royalties paid by interactive services embeds within his analysis the inefficiently high rates that arise in that unregulated market through the complementary oligopoly structure of the sound recording industry and the Cournot Complements inefficiencies that arise in such a market. *See* Determination at 47. The uncapped TCC rate advocated now by Copyright Owners suffers from the same affliction.

The only reference to such sound recording rate formulae in Copyright Owners' voluminous PFF after the hearing was its statement that the effective revenue calculations in two of the Major labels' agreements with the

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[83] To be clear, the Judges' ruling is narrow; they make no finding beyond crediting this *prima facie* showing and the failure of the Services to rebut sufficiently that showing. It might be the case that the existence and definition of ''outside options''—and their relationship to ''inside options''—have other implications *vis-a-vis* a Nash Bargaining Model applied in the context of a rate setting proceeding. However, the Judges may not introduce and rely on analytical approaches not developed by the parties. *See Johnson,* 969 F.3d at 381 (the Judges must not ''procedurally blindside[ ]'' the parties with an ''approach . . . first presented in the determination and not advanced by any participant.''). *See generally* P. Wald, *Limits on the Use of Economic Analysis in Judicial Decisionmaking,* 50 J. L. & Contemporary Problems 225, 228 (1987) (' judicial analysis, economic or otherwise, takes place only in the context of lawsuits between two or more parties imposes a practical constraint on the judge's ability to use economic analysis.'').

[84] Professor Katz also criticizes Professor Watt's assumption that ''a label's non-content costs are proportional to licensing revenues.'' Katz WDRT ¶ 22. More particularly, Professor Katz claims that this is not ''plausible'' because ''the royalty rate does not directly affect the sound recording copyright owners' non-content cost.'' *Id.* ¶ 133. The effect of eliminating this assumption, according to Professor Katz, is to reduce the seesaw effect in Professor Watt's model of [REDACTED] slightly further away from a 1:1 ratio, to .92. *Id.*

In rebuttal, Professor Watt says this criticism is inconsistent with Professor Katz's own analysis, because the latter also ''sets the cost equal to a fraction of revenue. . . .'' Watt ¶ 82 n.31 (referring apparently to a comparison of Katz WDRT ¶ 129 with *id.* ¶ 133). Professor Watt concludes that not only does ''[Professor] Katz's own model contain the same feature that he is critical of in my model,'' it is also ''not a flaw in the bargaining model.'' Watt ¶ 82. As a substantive matter, Professor Watt defends the assumption that non-content costs would rise with royalty income, because ''[g]reater revenue should be directly equated with a larger scale of business'' and ''the additional royalty income would have to be managed (*i.e.,* distributed to those who need to be paid from it, such as artists), implying higher administration costs.'' *Id.* ¶ 79.

The Judges find that the common use by both experts of this assumed proportionality of a label's non-content costs to licensing revenues alone blunts Professor Katz's criticism of Professor Watt's modeling. Further, Professor Watt reasonably posits that higher revenue would imply a larger scale of business with associated general cost increases. (But the Judges do no agree that it was reasonable for Professor Watt to assume that distribution and administrative costs in particular would increase merely because of an increase in royalty rates; simply paying more money, *ceteris paribus,* is not self-evidently associated with an increase in costs.)

services was based on [REDACTED]. *See* Copyright Owners' PFF ¶¶ 72, 91 (cited post-remand at Copyright Owners' Motion for Reconsideration or Clarification at 25, n.14). On remand, the Services have provided a further summary of the types of [REDACTED]. *See* White WDRT ¶¶ 6–7, 14–15, 20, 24–26, 28–29 ([REDACTED]); Bonavia WDRT ¶¶ 15–17 ([REDACTED]); Mirchandani WDRT ¶¶ 16, 21–24 ([REDACTED]). Clearly, the levels of [REDACTED] would have to be weighed and the impact of complementary oligopoly power would need to be identified in order to adjust the rate prongs to account for that power. But the record is devoid of such details.

Second, compounding this problem, because the uncapped TCC rate is embedded in a ''greater-of'' rate structure, the labels can exploit their complementary oligopoly power when creating *the switching points that toggle royalty payments between and among rate prongs.* As the Judges have explained previously, in declining to import a ''greater of'' structure from the unregulated interactive market, this structure[it] is based on ''agreements [which] were all negotiated in a market characterized by the lack of effective competition, and that *the lack of competition would affect the structure* as well as the level of rates.'' *SDARS III,* 83 FR 65210, 65228 (Dec. 19, 2018) (emphasis added). Further, the Judges held therein that the ''advantageous'' nature of a ''greater-of'' structure to sound recording licensors ''may well represent an example of what licensors can and would obtain when they exploit their ''must have'' status for a special competitive advantage.'' *Id.; see also* Dissent at 47 (in absence of testimony explaining how greater-of structure is consonant with effective competition, use by licensor suggests a game of ''heads I win tails you lose.).''

Thus, there is insufficient evidence or testimony that would permit the Judges to make any adjustment for the complementary oligopoly power that may be built into each prong of the sound recording royalty rate structures.

Third, as the Services note, Copyright Owners pre-remand, opposed the *identical rate structure*—consisting of a percent-of-revenue prong and an uncapped TCC prong—before Copyright Owners were in favor of it, post-remand.[85] Although Copyright Owners took a 180-degree turn on this issue, they never stated they were wrong to oppose it previously. Indeed, the *Dissent* relied upon Copyright Owners' strenuous objection to an uncapped TCC rate, quoting it verbatim:

> Copyright Owners rightly note that they obtain no legal protection under such a TCC prong. In making this argument regarding displacement and deferral of revenue, Copyright Owners lay out comprehensively *all the problems* inherent in an uncapped TCC prong set in a greater of rate structure, such as adopted in the majority opinion:
>
> The notion that [the] TCC prong will provide protection from revenue gaming, deferral and displacement, and other revenue prong problems is unsupported and speculative. *Relying on just the TCC to solve those admitted problems leaves the Copyright Owners' protection from such problems entirely outside the statute.* . . . the per-user rates in the label deals are what protects the Copyright Owners from price-slashing by the services. *What is left unanswered . . .is . . . how can it be reasonable to ask the Judges to set a rate that does not itself provide for a fair return . . . but simply puts the Copyright Owners' fair return in the hands of the labels to negotiate terms that will adequately protect the publishers and songwriters as well? The labels do not have a mandate to ensure that the Services provide a fair return to the Copyright Owners, and cannot be directed to ensure such.* Indeed, labels may not have the same incentives as songwriters and publishers to negotiate such protections in their deals. To wit, a label could make an agreement with a service that includes only a revenue prong in exchange for equity or some other consideration that it may never include in the applicable revenue subject to the TCC. . . . [W]hat if Google purchased one or more record labels and did not have to pay *any* label royalties? Or what if Spotify chose to avail itself of the compulsory license to create its own master recordings embodying musical works—which it is already doing . . . and chose to compensate itself for its use of the master recordings on a sweetheart basis (or not at all)? Or what if one or more labels decided to enter the interactive streaming market and did not have to pay themselves royalties? In each case, the Copyright Owners' protection—the protection that the Services admit the Copyright Owners need and is provided by the TCC—would be gone.

Dissent at 5–6 (quoting Copyright Owners' RPFF-Google at 39–41) (emphasis added). To make the identical point post-remand, *but from the Services' perspective,* Pandora's economic expert witness, Professor Katz, simply utilizes Copyright Owners' verbatim language (bolded above), but substitutes the word ''Services'' for ''Copyright Owners'' (and ''income'' for ''return'') to highlight how reliance on the sound recording royalty rate is improper:

> What is left unanswered . . . is . . . how can it be reasonable to ask the Judges to set a rate that does not itself provide for a fair income . . . but simply puts the Services' fair income in the hands of the labels to negotiate terms that will adequately protect the Services as well? The labels do not have a mandate to ensure that the Copyright Owners provide a fair income to the Services, and cannot be directed to ensure such.

Katz WDRT ¶ 71.

The Judges find this argument persuasive, both in its own right and in the fact that it has been advanced by Copyright Owners and the Services alike.[86]

Fourth, the Judges note that the Majority did not find that revenue diminution, via displacement, deferral, or otherwise was pervasive, as Copyright Owners aver. *Compare* CO Initial Submission at 40 (''The record overwhelmingly established that the percent of revenue prong *often* results in musical works royalties that are too low . . . drive[n] [by] . . . . revenue deferral [and] revenue displacement'') *with* Determination at 21 (''The Judges agree that there is *no support for any sweeping inference that cross-selling has diminished the revenue base.*'') (emphasis added) *and* 36 (''The Judges find that the present record indicates that the Services do seek to engage *to some extent* in revenue deferral in order to promote their long-term growth strategy.'') (emphasis added).

Given that the Majority found revenue diminution through displacement and/or deferral exists only ''to some extent'' and is not a ''sweeping'' issue, the Judges on remand find that the uncapped TCC rate structure creates the potential for unbalanced harm. As noted *supra,* the only protection against runaway mechanical rates, the seesaw hypothesis, cannot justify yoking the mechanical rate to a fixed ratio with the

[85] When Copyright Owners opposed the concept of an uncapped TCC rate prong in a greater-of structure, the proposed uncapped TCC rate was Google's 15% (and its proposed percent-of-revenue rate was 10.5%). Determination at 13. But after the Majority set the uncapped TCC rate at 26.2%—a *75% increase over the 15% TCC rate*—Copyright Owners became zealous converts to the concept of an uncapped TCC rate proper.

[86] At Closing Arguments on remand, Judge Strickler queried counsel for Copyright Owners regarding their prior *rejection of an uncapped TCC prong* within a ''greater-of'' rate structure. Counsel's response was that an uncapped TCC doesn't provide *enough* protection against revenue diminution: ''It provides more than the *Phonorecords II* rates, but not as much as we want,'' although ''still better than'' the negotiated *Phonorecords II* approach. 3/8/22 Tr. 240–41(Closing Argument). But Copyright Owners have neither distinguished nor disavowed their persuasive legal point quoted in the text above, to wit that an uncapped TCC rate would be unreasonable if the ''protection'' it affords lies ''entirely outside the statute.'' Whether the ''protection'' relates to Copyright Owners' concern over revenue diminution or to the Services' concern over uncapped mechanical rates, the legal defect is the same—the unreasonableness of leaving the purported protection ''entirely outside the statute.''

unregulated sound recording rate.[87] By contrast, and as discussed *infra,* the *Phonorecords II*-based benchmark approach, despite its own imperfections, is superior in this regard, because its series of alternate rate prongs and floors represents a negotiated compromise (negotiated by trade associations with countervailing power) between the potential for revenue diminution that would harm Copyright Owners, on the one hand, and the potential for runaway mechanical rates (yoked to the sound recording companies' complementary oligopoly power) that would injure the Services, on the other.

(iii) Distinction Between the ''Reasonable'' Rate Statutory Standard and the Factor (D) Objective To Minimize ''Disruptive Impact''

The Judges next consider an issue emphasized by Copyright Owners: whether the Services have demonstrated that the uncapped TCC rate prong would cause a ''disruptive impact'' as set forth in Factor (D) of section 801(b)(1).[88]

Section 801(b)(1) provides that one of the competing priorities of the Judges in setting the mechanical rate is ''[t]o minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.'' 17 U.S.C. 801(b)(1)(D). In *Johnson,* the D.C. Circuit did not identify any argument by the Services that was predicated on a claim that this statutory form of ''disruption'' had occurred, or was likely to occur, as a consequence of the Majority's rates and rate structure. Additionally, the D.C. Circuit did not ground its decision to vacate and remand the Judges' uncapped TCC rate and rate structure rulings based on the potential that these rulings would be disruptive to the Services, let alone would cause a statutory ''disruptive impact.''

After the D.C. Circuit's ruling, an argument regarding ''disruption'' was first made by Copyright Owners, not the Services. Copyright Owners argued that the vacated rates should nonetheless be maintained as interim rates, during the pendency of the remand proceeding. Motion of Copyright Owners to Adopt Interim Rates and Terms Pending the Remand Determination, *passim* (Nov. 2, 2020). Copyright Owners argued that reverting to the rates that existed before the Determination would constitute a ''disruption'' and self-servingly predicted that the Services would attempt to argue that the uncapped TCC rate and rate structure were themselves ''disruptive.'' Copyright Owners opined that such an argument would be a ''hollow exercise.'' *Id.* at 12, n.5; *see id.* at 2–3, 9 (claiming absence of disruption from uncapped TCC rate and structure despite absence of such argument by Services).

In response to that motion, the Services did *not* assert that the Majority's uncapped TCC rates and rate structure would constitute disruption or have disruptive impact, whether under statutory Factor D or otherwise. *See* Services' Opposition to the National Music Publishers' Association (NMPA) and Nashville Songwriters Association International's (NSAI) ''Interim Rates Motion'' (Nov. 18, 2020). In reply, Copyright Owners shifted from anticipating a ''disruption'' argument to misinterpreting *Johnson,* asserting, *without citation:* ''With respect to the TCC prong, *the remand directs only that services be given opportunity to offer evidence of disruption* from rates that have now been in effect for three years without any disruption.'' Copyright Owners' Reply in Support of Motion to Adopt Interim Rates at 7–8 (Nov. 25, 2020) (emphasis added).

On December 10, 2020, the Services submitted to the Judges their Proposal for Remand Proceedings, in which they made *no argument* that the uncapped TCC rates and rate structure (or, for that matter, any aspect of the Determination) would cause disruption or have a disruptive impact, whether under statutory Factor D or otherwise. By contrast, in their remand proposal, Copyright Owners reference twelve times that, for the Judges to reject the uncapped TCC rates and structure, the Services must show the presence of ''disruption'' arising from the Majority's uncapped TCC rates and structure. Copyright Owners made this argument notwithstanding that the ''reasonable'' rate standard is separate from the ''disruptive impact'' issue, which is an itemized objective (one of four) to be considered as an adjustment to what would otherwise constitute a ''reasonable'' rate. *See* Proposal of Copyright Owners for the Conduct and Schedule of the Resolution of the Remand at 2, 7–8, 22–24 (Dec. 10, 2020).[89]

In the CO Initial Submission, Copyright Owners assert, *without citation to any of the Services' filings:* ''The Services contend that, had they been given such an opportunity [at the hearing], they supposedly could have established that an ''uncapped'' TCC *is disruptive* because the market for sound recordings is not effectively competitive.'' *Id.* at 5. Copyright Owners further aver that the Services must ''provide evidence, consistent with the [CRB Judges'] well-established disruption standard, that because of the labels' supposed market power, the TCC structure adopted by the Board has *actually, substantially, immediately* and *irreversibly* threatened the continued viability of the interactive streaming industry'' in a manner that will ''threaten the viability of the music delivery service currently offered to consumes under [the] license.'' *Id.* at 7, 56 (citations omitted).

Copyright Owners then assert that *the Services* bear the burden of proving disruption under Factor D from the

[87] Even Google, the party that, post-hearing, broached in its PFF the idea of an uncapped TCC prong, candidly identified the risk arising from an uncapped TCC: ''Having no cap on TCC . . . leaves the services exposed to the labels' market power, and *would warrant close watching if adopted.* . . .'' Google PFF ¶ 73 (emphasis added). But as the Dissent noted, there is no satisfactory way to monitor an uncapped TCC rate prong: ''*Who* would do the ''watching''? *When* would such watching occur? Congress directed the Judges to be the ''watchers,'' and Congress instructed that the ''watching'' should occur only through rate proceedings. . . .'' Dissent at 4 (emphasis in original).

[88] Separate and apart from the ''disruptive impact'' argument made by Copyright Owners, there is no need to consider how this prong would relate to Factor D, because the Judges find the uncapped TCC rate prong with the (phased-in) 26.2% rate to be ''unreasonable.'' If it were necessary to separately consider the four itemized factors, the Judges would confirm that Factor A is satisfied, because, as the D.C. Circuit found, the Majority reasonably found that rates should increase from the *Phonorecords II* period, and the 15.1% revenue rate represents a 44% increase. The Judges would also find Factors B and C to be satisfied without a separate uncapped TCC rate prong. The reason is that, under the section 801(b)(1) standard, the ''reasonableness'' standard filters out more statutorily infirm rates than the fairness objectives. By contrast, when a rate does satisfy the ''reasonableness'' standards under section 801(b)(1), the Judges must also consider the rate through the finer ''fairness'' filter. *Cf.* Determination at 68 & n.120 (distinguishing between: (1) a Shapley Value analysis that filters out *unreasonable* rates by reducing licensors' ability to *abuse* market power by threatening or exercising their refusal to license (''hold-out or ''hold-up'' power); and (2) a Shapley Value analysis that further filters out *unfair* rates by going beyond eliminating *abuse* of market power to also make a ''market power *adjustment*'' explicitly to address Factors B and C). Finally, as the text *infra,* explains, the Judges also find no basis under Factor D to alter their analysis.

[89] When Copyright Owners do address an argument that the Services *actually* made (on appeal) regarding the uncapped TCC rates and structure, they note *not* that the Services had made a ''disruption'' argument, but rather that ''the Services appealed for the reversal of the TCC prong as *substantively unreasonable.*'' *Id.* at 22 (emphasis added). But Copyright Owners then assert, coyly, that ''this request was not granted by the Circuit'' (citing *Johnson,* 969 F.3d at 383), when in actuality, the D.C. Circuit did not rule against the Services on this point, but rather stated only that it was not addressing substantive arguments made by the Services ''[b]ecause we have vacated the rate structure devised by the [Judges] for lack of notice. . . .'' *Id.*

uncapped rates and rate structure embodied within the rate proposal (even though only Copyright Owners are pursuing this approach on remand). Further, Copyright Owners assert that the Services' objection to the uncapped rates and rate structure must fail unless they can show that such a disruptive impact occurred during the 33-month period (from January 2018 through September 2020) when the *Phonorecords III* rates were in effect. *Id.* at 56.

In their initial substantive remand briefing, the Services once more *did not* assert that the Determination's uncapped TCC rates and structure would cause disruption pursuant to Factor D of section 801(b)(1), or even assert a non-statutory disruption arising therefrom. Rather, the Services directly attacked this rate approach as inconsistent with the statutory ''reasonable'' rate requirement, maintaining that ''[t]ying the mechanical rates directly to the complementary oligopoly sound recording rates in the manner of the Majority's uncapped TCC rates and rate structure is plainly *unreasonable.*'' Services' Joint Opening Brief at 46 (Apr. 1, 2021) (emphasis added). The Services also asserted that the uncapped TCC rates and rate structure are ''unreasonable'' because they do not promote the statutory objectives of Factor B (''fair income'' to the copyright user) and Factor C (reflecting the copyright users' itemized role in making the musical works ''available to the public.''). *Id. a*t 45, 50–51, 55.[90]

In the Services' Reply, the Services attack Copyright Owners' ''singular focus on the disruptive impact of the uncapped TCC prong.'' Services' Reply at 35. In particular, the Services argue:

1. they have maintained and demonstrated that Copyright Owners' uncapped rates and rate structure are ''*unreasonable,*'' separate and apart from demonstrating that this uncapped approach also fails to satisfy the four itemized statutory factors;

2. the burden of proof with regard to Factor D disruption lies with Copyright Owners, because they are the ones who are advocating for the uncapped TCC rates and rate structure;

3. the presence of Factor D disruption, *vel non,* is not dispositive, because section 801(b)(1) and *Johnson* require the Judges to apply the entirety of the statutory standard (which consists of the ''reasonable rate'' requirement and consideration of all four itemized Factors; and

4. the ''full extent of the disruption to the Services from an uncapped TCC prong was never tested in the marketplace [because] [t]he Majority set escalating rates, and the [ ] Determination was vacated before the significant hike in rate levels was fully implemented.''

Id. at 35–36.

In their Remand Reply, with regard to the issue of ''disruption,'' Copyright Owners assert:

1. The Services have ''completely abandoned'' their appellate argument asserting disruption, and admit to having no evidence that the Board's adopted rate structure has any materially disruptive impact. Copyright Owners' Reply Brief on Remand at 5 (July 2, 2021).

2. The Services have not even attempted to show any Factor D related effect or other disruption from the adopted rates and structure. *Id.* at 15, n.9.

3. The failure of the Services to provide evidence of disruption or to pursue the argument that disruption had occurred was inconsistent with their prior assertions that the uncapped TCC rates and rate structure created ''a real risk of economic harm'' and the ''impact'' or ''harm' that the uncapped approach generated. *Id.* at 35.

4. Each of the Services, in response to Copyright Owners' discovery requests, acknowledges that it was not offering new evidence regarding the ''impact'' of the Phonorecords III rates and rate structure. *Id.* at 36–38.

5. The Services did not merely suffer no disruption, they experienced unprecedented growth and profit under the uncapped TCC rate prong. *Id.* at 45.[91]

6. The Services on remand have attempted to replace their prior ''disruption'' assertion with a claim of ''unreasonableness.'' *Id.* at 50, n.36.

(iv) Analysis and Decision Regarding ''Disruption'' Issue

The full Factor D ''disruption'' standard, as set forth by the Judges, states that an adjustment is warranted by Factor D if the rate analysis made by the Judges would otherwise:

> directly produce[ ] an adverse impact that is substantial, immediate and in the short-run because there is insufficient time for either [party] to adequately adapt to the changed circumstance produced by the rate change and, as a consequence, such adverse impacts threaten the viability of the music delivery service currently offered to consumers under this license.

Determination at 87. Factor D is not applicable, particularly as proposed by Copyright Owners. Thus, the Judges reject Copyright Owners' assertion that the uncapped TCC prong should be adopted because of the absence of evidence of ''disruptive impact'' proffered by the Services. This rejection is based on several findings of fact and conclusions of law.

First, the issue of ''disruptive impact'' pertains here to the proposal advanced by Copyright Owners, not the Services. Thus, the burden of proving that this uncapped TCC rate prong proposal satisfies the elements, including Factor D, of the section 801(b)(1) standard in a sufficient manner lies with Copyright Owners, not the Services. *See* 5 U.S.C. 556(d). Accordingly, the fact that the Services did not affirmatively assert an argument of ''disruptive impact'' is of no consequence. Moreover, as the review of the Services' filing makes clear, *the Services never abandoned that argument, because they never made it.*

[90] The Services' only references to the concept of ''disruption'' relate to their argument that their own benchmark premised on the prior *Phonorecords II* rate structure and rates would not be disruptive. *Id.* at 4, 24, 29–30. That argument is properly made by Services in this context, because a party seeking to persuade the Judges to adopt its proposal bears the burden of proof, pursuant to section 556(d) of the APA, regarding the consonance of its proposal with all the standards contained in section 801(b)(1). The Judges do note that one of the Services' expert witnesses, Professor Katz, found the Majority's attempt to avoid disruption by phasing-in the new rate provisions insufficient ''to mitigate the risk of short-term market disruption''. That testimony does not constitute a direct reliance by the Services on the statutory disruption objective in Factor D, but rather emphasizes the Majority's own concern with such disruption and the witness's concern that the phase-in did not prevent the disruptive effect that the Majority itself had contemplated. In any event, Professor Katz, as an economist, cannot make a *legal* argument regarding the applicability of the Factor D objective, the Services did not rely on his testimony in that regard and, as noted, the Services made no legal Factor D ''disruption'' argument on remand. Thus, the Judges do not give any weight to Professor Katz's testimony in this regard.

[91] The Judges allowed the Services to make a supplemental filing in response to Copyright Owners' remand reply, because those papers contained direct as well as reply materials. In their supplemental filing, the Services argued that they had not ''thrived,'' that the financial data on which Copyright Owners' relied did not isolate revenue attributable to interactive services, was not limited to U.S. generated revenue, and used changes in the market capitalization of Amazon and Alphabet (Google's parent corporation) as a proxy for the economic fortunes of their interactive services. Services' Joint Supplemental Brief at 13–15. As explained *supra,* the Judges find the permanency of the *Phonorecords III* rate structure during the 33-month period from January 2018 through September 2020 to have been in question, pending the appeal that resulted in the vacating and remanding of the Determination and the reversion back to the *Phonorecords II* rates and rate structure. Given that uncertainty, the Judges find it wholly inappropriate to draw any conclusions from the change or stasis in the sound recording rates or the total royalty payments by a Service over that period.

Rather, they have consistently argued that the uncapped TCC rate prong was *unreasonable,* not that it was statutorily ''disruptive'' as that standard has been applied by the Judges.

Second, Copyright Owners did not demonstrate with sufficient evidence or testimony that the uncapped TCC rate would be consistent with Factor D. To be clear, by this the Judges do not mean that Copyright Owners were obliged to prove a negative. Rather, they needed to prove, and indeed attempted to do so, that it was unlikely that their rates would cause a ''disruptive impact.''

In this regard, as an *empirical* matter, Copyright Owners proffered the testimony of an economic expert witness, Dr. Eisenach, who opined that the Services' [REDACTED]. Eisenach WRT ¶¶ 12–41 ([REDACTED]) CO Reply at 40–41. However, as the Judges discuss *supra,* that period reflected ''33 months of uncertainty,'' during which no one could predict the final mechanical rate and structure that would be adopted by the Judges and/or the D.C. Circuit after appeals. Accordingly, that factual evidence is unpersuasive.

Further, as a *theoretical* matter, Copyright Owners rely on Professor Watt's testimony regarding the ''seesaw'' effect. In that regard, and as discussed *supra,* the Majority took comfort in what it understood to be Professor Watt's ''prediction'' that increases in mechanical royalties would be offset almost dollar-for-dollar by reductions in the sound recording royalty. However, as also discussed *supra,* Professor Watt has now clarified on remand that he never made such a ''prediction,'' and that his testimony regarding the so-called ''seesaw'' was limited to shifts in the share of the surplus to Copyright Owners and from sound recording companies as a consequence of an increase in the mechanical rate, holding all other factors unchanged (the *ceteris paribus* assumption).

Moreover, Professor Watt further explained that many other factors would likely impact the sound recording rate together with an increase in the mechanical rate, including ''a measure of oligopolistic interaction, different timings of different rate bargains, and the actual values of outside options.'' Watt RWRT ¶ 118. Professor Watt candidly acknowledged that he has not modeled these independent variables, and he further notes that the data may not exist to allow for such modeling. *Id.* But the inability to model the impact of independent variables does not mean that their potential to cause disruption can be ignored.

In particular, the purpose of the ''seesaw'' contention was that it prevented economic harm to the Services in connection with a rise in the mechanical rate. Although not of Professor Watt's design, that connection is intentionally built into the Majority's uncapped TCC rate. *See* Determination at 35 (''Incorporating an uncapped TCC metric into the rate structure permits the Judges to influence that ratio directly.'') But the ''measure of oligopolistic interaction'' referenced by Professor Watt was the very concern expressed by the Dissent, which cautioned that there was no evidence that the sound recording companies would be compelled to maintain the same industry structure and accept the loss of substantial royalty income. *See* Dissent at 4 (''[T]he record companies may decide to keep their rates high despite the increase in mechanical rates, or decide it is in their interest to avoid a reduction in royalty revenue by creating a completely different paradigm for streaming, by which the record companies move the streaming service in-house and effectively destroy the existing services.'').[92]

Also, the ''different timings of different rate bargains,'' another independent variable identified in Professor Watt's remand testimony, was an issue raised to him at the hearing by Judge Strickler. Professor Watt candidly agreed that the Judge was ''absolutely correct'' that there is a ''risk, then, of *disrupting the market* by having *a total royalty* that's greater than what is indicated by your Shapley testimony, simply because of *the disparity of times* in which the rates are . . . implemented.'' 3/27/17 Tr. 3091–92 (Watt) (emphasis added). However, this *admitted risk of disruption* was not addressed by sufficient record evidence.[93]

Third, disruption in the narrow sense of Factor D as applied by the Judges previously is not relevant to the present problem. An increase in total royalties is not a short-run immediate issue, but rather an ever-present possibility that the seesaw analysis does not sufficiently address. Rather, the uncapped nature of the TCC rate prong renders it unreasonable rather than narrowly disruptive.

Balancing the foregoing considerations, the Judges find that Copyright Owners' disruption-based argument lacks merit.

6. Conclusion Regarding Uncapped TCC Rate Prong

For the foregoing reasons, the Judges decline to adopt the uncapped TCC rate tier proposed on remand by Copyright Owners.

III. Rejection of Phonorecords II Settlement as a Benchmark

A. D.C. Circuit Ruling

Each of the Streaming Services advanced somewhat different rate plans, but all four proffered a benchmark that ''broadly sought to maintain the *Phonorecords II* rate structure,'' while lowering or eliminating the mechanical floor.[94] *Johnson,* 969 F.3d at 371. With regard to the Services' proposed benchmark based on the *Phonorecords II* rates, rate structure, and terms (hereinafter, PR II-based benchmark),[95] the Judges are guided by several rulings in *Johnson.*

In particular, the D.C. Circuit found the Judges' treatment of the PR II-based benchmark to be ''muddled.'' *Johnson,* 969 F.3d at 387. The D.C. Circuit emphasized that the Judges ''failed to

[92] The Dissent noted that this risk was speculative in nature because there was no evidence proffered at the hearing regarding the reactions of the sound recording companies. But no such evidence was forthcoming in the remand proceeding either, and, as noted *supra,* the burden of proof in this regard falls on Copyright owners as the proponents of the uncapped TCC rate prong. In fact, because the major publishers who are members of the NMPA (a constituent of Copyright Owners) are part of the same corporate structure as the sound recording Majors, the burden of producing evidence would fall on Copyright Owners as well regarding the sound recording companies' reaction to the ''seesaw'' effect.

[93] As noted *supra,* Copyright Owners did not call any sound recording industry witnesses, or provide evidence from sound recording companies, indicating that labels would even be amenable to considering such renegotiated rate reductions. Instead, at the hearing, Professor Watt merely *speculated* that the sound recording companies might renegotiate their rates downward to reflect the seesaw effect when mechanical rates increased. Tr.3/27/17 3093–94 (Watt) (''I'm not able to comment on how, you know, how possible it is to take an agreement that's in force and then change it.''). Not only was that mere speculation, it was provided by an economist who is neither a music industry executive nor an attorney, and the witness did not testify that he had spoken to anyone who would have industry knowledge regarding whether a label would even be amenable to considering such rate reductions.

[94] The ''mechanical floor'' refers to an alternative rate calculation. ''If the All-In Rate calculation results in a dollar royalty payment below the stated Mechanical Floor rate, then that floor rate would bind.'' Determination at 26 n.59.

[95] *See* Services' Joint Rate Proposal (in Services' Joint Written Direct Remand Submission at Tab C) (Apr. 1, 2021). According to the Services, their rate proposal in this proceeding is meant to ''update the *Phonorecords II* terms to include terms of the Determination, as amended during the implementation of the Music Modernization Act, that were upheld in *Johnson* . . . including terms relating to student and family plan products, or that were not challenged by either the Copyright Owners or the Services.'' *Id.* at 2. The Services include in their Joint Rate Proposal a chart summarizing the proposed rates for their offerings. That chart is attached as an Addendum to this Initial Ruling.

explain'' their rejection of the PR II-based benchmark. *Id.* at 367. *See also id.* at 376 (Judges ''failed to ''reasonably explain'' rejection).

In the appeal, Copyright Owners attempted to defend the Judges' reliance on the absence of evidence of the settling parties' subjective intent in reaching the *Phonorecords II* terms. *Id.* at 387. The D.C. Circuit dismissed Copyright Owners' *post hoc* attempt, noting that ''nowhere does the [ ] Determination explain why evidence of the parties' *subjective intent* in negotiating the *Phonorecords II* settlement is a prerequisite to its adoption as a benchmark.'' *Id.* at 387 (emphasis added).

The D.C. Circuit also criticized the attempt by the Judges' appellate counsel to ''change tack'' and argue that their rejection of the PR II-based benchmark was reasonable because: (1) evidence showed that the prior rates had been set far ''too low'' and (2) it was ''outdated''. The D.C. Circuit found that those arguments also were ''nowhere to be found in the [ ] Determination's discussion'' of the appropriateness of the *Phonorecords II* settlement as a potential benchmark. *Id.* at 387 (emphasis added).[96] In the end, the D.C. Circuit agreed with the Streaming Services that, *inter alia,* the Judges failed to reasonably explain their rejection of the benchmark and, for all of the reasons cited, vacated and remanded the adopted rate structure and percentages for further proceedings. *Id.* at 381.

B. Remand Procedure Regarding the PR II-Based Benchmark

On December 15, 2020, subsequent to the D.C. Circuit's decision, the Judges entered an Order Regarding Proceedings on Remand, in which the Judges stated:

> The Judges accept the parties' proposals to resolve the issues concerning the use of the Phonorecords II settlement as a benchmark. . . .
>
> . . .
>
> The Services and Copyright Owners also agree that the Judges should resolve this issue based on the existing record, after receiving two rounds of additional briefing from the parties.

Remand Order at 1–2.

Based on the ruling in *Johnson* the Judges reject Copyright Owners' position that they need not engage in a full analysis of the issue. The Judges conclude that they must engage in, and fully articulate, a reasoned analysis that adequately addresses ''*the issues concerning the use of the Phonorecords II settlement as a benchmark.*'' *Id.* (emphasis added). If the Judges determine that the Majority properly rejected the Services' proposed use of the PR II-based benchmark, the rejected portions will play no part in the Judges' remand ruling. On the other hand, if the Judges find, after engaging in that analysis, that the PR II-based benchmark was not properly rejected then, as a matter of law and logic, the Judges must weigh the Services' PR II-based benchmark for application, in whole or in part.

The Judges reject Copyright Owners' reading of *Johnson* as holding that the Judges cannot fully consider the PR II-based benchmark on remand. Copyright Owners argue that the D.C. Circuit ''did not suggest the [Judges] substantively erred'' in rejecting that benchmark, or that they ''needed to reconsider [their] decision,'' but had ''merely remanded for a 'reasoned analysis' . . . as to why it did so.'' CO Initial Submission at 10; *see also* Copyright Owners' Reply Remand Brief at 7–8. Because *Johnson* ruled that the Majority's reasoning was muddled, indiscernible, unexplained and lacking in reason, the D.C. Circuit obviously neither accepted nor rejected the Majority's disregard for the PR II-based benchmark—thus requiring the CRB Judges to take a comprehensive look at that benchmark. In this regard, the Judges agree with the Services that, pursuant to apposite case law, if the outcome of the remand as to this issue was preordained pending the further ''reasoned analysis,'' the D.C. Circuit would have expressed a desire simply to remand *without vacating* as to this issue. Services' Joint Remand Reply Brief at 7–8 (citing *Allied-Signal, Inc.* v. *NRC,* 988 F.2d 146, 150–51 (D.C. Cir. 1993) (''The decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'')).[97]

Because *Johnson* held that the Majority's reasoning was muddled, indiscernible, unexplained, and lacking in reason, the D.C. Circuit obviously neither accepted nor rejected the Majority's disregard for the PR II-based benchmark. Thus, the Judges take a comprehensive look at that benchmark's rates and rate structure to evaluate its usefulness in this proceeding.

Relatedly, the Judges also reject Copyright Owners' assertion that the Judges can only consider on remand the *Phonorecords II rates,* and cannot consider on remand the relative strengths and weaknesses of the *structure* in which those rates are embedded. *See* Copyright Owners' Reply Brief on Remand at 14. This distinction is impractical and unworkable. If the (non-''headline'' rates[98]) themselves can be reviewed and found acceptable (as they are *infra*) into what structure would they be placed? There are multiple provisions in the *Phonorecords II* rate structure providing for different rates, designed to balance (1) the ability of services to attract consumers with a low Willingness-to-Pay and/or a low Ability-to-Pay (the price discriminatory and differentiated features[99]) with (2) the revenue diminution protections for which Copyright Owners had successfully negotiated. Moreover, the D.C. Circuit has vacated the Determination, and in doing so did not make any rulings critical of the rate structure in the *Phonorecords II*-based benchmark that would suggest the cramped review advocated by Copyright Owners. Indeed, the D.C. Circuit explicitly stated, *without distinguishing between rates and structure,* that it ''agree[s] with the Streaming Services that the [Judges] . . . failed to reasonably explain [their] rejection of the Phonorecords II settlement as a benchmark . . .'' *See Johnson,* 969 F.3d at 376; *see also id.* at 389 (issues relating to ''rates'' and ''rate structure'' are ''intertwined'').

Further, the Judges emphasize that the rate structure of the PR II-based benchmark provides protection *sought by Copyright Owners* against revenue diminution by the Services—*protection they would otherwise lose*—because in this Initial Ruling the Judges are not adopting the vacated uncapped TCC prong for which Copyright Owners are now advocating, and which they claim

[96] In the present remand ruling, the Judges do not rely on their appellate counsel's *ad hoc* arguments that the D.C. Circuit found to be absent from the Determination. The Judges note though (as discussed in more detail *infra*) that in this Initial Ruling they are increasing the 10.5% royalty rate in the *Phonorecords II* rates by 44% to 15.1% (as phased-in by the Determination), thus addressing appellate counsel's *ad hoc* assertion that the *Phonorecords II* rates were ''too low.'' Similarly, as discussed *infra,* the Judges address the notion that the PR II-based benchmark is outdated.

[97] However, the Judges note that section 803(d)(3) may require the D.C. Circuit to remand rather than reverse when the issue concerns more than rates alone. Thus, the statute appears to require a remand in order for the Judges to apply their statutory authority and expertise *in toto.*

[98] As explained elsewhere in this Initial Ruling, the Judges are increasing the ''headline'' rate from 10.5% to 15.1%.

[99] Specifically, the PR II-based benchmark would incorporate the price discriminatory features for product differentiation as between: (1) subscription vs. ad-supported services; (2) portable and non-portable services; and (3) unbundled vs. bundled services. *See* Determination at 10; Dissent at 26. The third category—bundled vs. unbundled—is discussed *infra* in the context of the Bundled Revenue definition.

would have protected them in that regard. *Cf.* CO Additional Submission at 4–6 (acknowledging PR II-based benchmark provided some TCC provisions, allowing for protection against revenue diminution). Thus, the Judges' remand rulings on the PR II-based benchmark rates and on the uncapped TCC rate prong are inextricably interlaced. *See Johnson,* 969 F.3d at 381 (absence of ''reasoned explanation'' for rejecting PR II-based benchmark was problematic because it occurred ''*when*'' Judges adopted an alternative proposal that called for ''setting . . . total content cost and revenue rates.'') (emphasis added).

The Judges weigh each benchmark's *intrinsic* strengths and weaknesses, as well as its *comparative* advantages and disadvantages *vis-à-vis* other proffered benchmarks. On remand, the interrelationships of the competing benchmarks are of particular importance, given Copyright Owners' need for the aforementioned protections against revenue diminution via price discrimination.[100]

Through this approach, the Judges ultimately may adopt only one of the parties' benchmarks or other methodologies, or they may modify the proposals by combining them, provided such a modification is ''within a reasonable range of contemplated outcomes . . . piecing together a rate structure, the economic and policy consequences of which had already been explored and developed by the parties in the record.'' *Johnson,* 369 F.3d at 382.

In their consideration of the PR II-based benchmark, the Judges are not suggesting that this benchmark is the optimal tool to use in order to identify rates and terms among all approaches that *might* have been proffered (but were not). But the Judges are cabined by the evidence they receive. *See* 17 U.S.C. 803(a)(1) (''the Judges shall act . . . on the basis of a written record . . . .''); *see also* P. Wald, *supra,* (noting that parties' economic proposals made in an action ''impose[ ] a practical constraint'' on judge who will, ''for the most part, be limited by what the parties serve up to her.''). Based upon the available record evidence, the Judges find that the Services' PR II-based benchmark—although not necessarily perfect—is more than sufficient to satisfy the legal requisites for application, as well as a practical benchmark, when used in conjunction with the 15.1% headline revenue rate advocated by Copyright Owners. *See generally Nat'l Cable Television Ass'n* v. *Copyright Royalty Tribunal,* 724 F.2d 176, 182 (D.C. Cir. 1983) (rate-setting is an intensely practical affair).

C. Parties' Remand Arguments Regarding PR II-Based Benchmark [101]

1. Services' Arguments

The Services maintain that their PR II-based benchmark satisfies the ''reasonable'' rate requirement and is consistent with the four itemized factors set forth in section 801(b)(1). They make several arguments in favor of this position.

First, they aver that their PR II-based benchmark possesses all the characteristics of an ''ideal'' benchmark. Services' Joint Opening Brief at 19. In this regard, they argue that their proffered benchmark ''involves the same sellers, the same or similar buyers, and the same rights as at issue in this proceeding,'' and that there has been ''no material change in the economic circumstances of the marketplace that would warrant adjusting the rate levels or rate structure in the benchmark.'' *Id.* at 20.

Applying the facts to these benchmark characteristics, the Services assert that the first three elements—same sellers (here, licensors), same buyers (here, licensees) and same rights (the mechanical license for interactive streaming) are satisfied. In particular, they note that the majority of the participants in the present proceeding either directly participated in the *Phonorecords II* settlement process or were active in the market contemporaneous with that settlement. *Id.* at 20–21.

Turning to the next benchmark characteristic—the absence of a ''material change in the economic circumstances of the marketplace that would warrant adjusting the rate levels or rate structure in the benchmark''—they emphasize that the PR II-based benchmark contains different rate levels for different product offerings, to account for (a) consumers' varying willingness-to-pay (WTP) and (b) the zero marginal physical cost of digital reproductions of sound recordings containing musical works. *Id.* at 21–22 (citing multiple experts).

Next, the Services point to the fact that the ''headline'' [102] royalty rate is based on a percent-of-revenue, so that revenue growth (or decline) on this rate prong allows for royalty payments to directly adjust in tandem. *Id.* Further, the Services assert that the importance of streaming as ''the future of the music industry'' was known to the *Phonorecords II* negotiators, as evidence by the then-recent launch in the United

[100] The Judges categorically reject Copyright Owners' assertion that the PR II-based benchmark cannot be considered because the parties agreed in the *Phonorecords II* settlement that any future statutory mechanical rate determination would made ''*de novo*'' *vis-à-vis* that settlement determination. In fact, the industrywide representatives (NMPA and Digital Media Association (DiMA)) who entered into the settlement conspicuously did not agree that the existing rate structure or rates could not be considered as the bases for future rate determinations. By contrast, the *Phonorecords I* settlement agreement expressly stated ''[s]uch royalty rates shall not be cited, relied upon, or proffered as evidence or otherwise used in the [Phonorecords II] Proceeding.'' Trial Ex.6013, Ph*onorecords I* Agreement at sec. 3. *Compare* Trial Ex. 6014, *Phonorecords II* Agreement at sec. 5.5 (omitting clause precluding reliance on evidentiary value of *Phonorecords II* royalty rates and including full-integration clause). This change objectively demonstrates that the parties to the 2012 settlement understood the evidentiary value of the *Phonorecords II* settlement in the next section 115 proceeding, *i.e., this proceeding. See* Dissent at 15–16.

On the other hand, the Judges reject the Services' argument that the *Phonorecords II* rates and structure should be retained merely because the Services relied on their continuation to make investments in their business models. As Copyright Owners note, the applicable regulations provide that ''[i]n any future proceedings the royalty rates payable for a compulsory license shall be established *de novo.*'' 37 CFR 385.17; *see also* 37 CFR 385.26. A party may feel confident that past is prologue and that the parties will agree to roll-over the extant rates for another period; a party could be sanguine as to its ability to make persuasive arguments as to why the rates should remain unchanged; a party might even conclude that the mechanical rate is such a small proportion of the total royalty obligation that its increase would be unlikely to alter long-term business plans. But for sophisticated commercial entities to claim that they *simply assumed* the rates would roll-over—without the reasonable possibility of significant adjustment or outright abandonment—strikes the Judges as so irrational and reckless as to raise serious doubts about the credibility of that position. (If the Services had made a persuasive argument that certain fixed cost investments were ''sunk'' and had useful lives that substantially exceeded the five-year rate term, then such costs could be considered under Factor C of section 801(b)(1), but they did not make a persuasive argument in this regard. *Cf. SDARS II,* 78 FR 23054, 23069 (Apr. 17, 2013) (adjusting rates downward under Factor C, and distinguishing *internet* music transmissions, to reflect that—because Sirius XM needed to make ''unique and substantial'' investments in the form of ''sunk'' costs paid for satellites with a useful life of l2–15 years—''it is not unreasonable for Sirius XM to expect to recoup a certain amount of those costs over the expected useful life of the [s]atellites,'' which exceeded the five-year rate term.)

[101] The parties made arguments both in the original hearing and in this remand proceeding regarding the Services' proffer of the PR II-based benchmark. Each party's pre-remand and post-remand arguments overlap to some extent. Examination of the pre-remand arguments is also necessary because of the findings in *Johnson* and because the parties agreed that the evidentiary record on this remanded issue would not be enlarged.

[102] The Judges and the parties characterize the percent-of-revenue of revenue rate as the ''headline'' rate. *See Johnson,* 969 F.3d at 383 n.10.

States of the popular Spotify service. *Id.* at 23.

Beyond these benchmark requisites, the Services also emphasize that the PR II-based benchmark is the product of a settlement whose *negotiated* features burnish the value of this benchmark as reflective of effective competition. Specifically, they note:

- The settlement was negotiated in the same statutory context, concerning the identical rate standard and factors as applicable to the present proceeding.
- Neither side would have accepted a deal materially worse than what it expected from a section 115 proceeding applying the section 801(b)(1) considerations.
- The statutory alternative diminishes any additional licensor-side negotiating power arising from ''Must-Have'' complementary oligopoly of the licensors of the musical works publishers.

Id. at 22. Moving from the negotiating context to market performance under this standard, the Services aver that this approach has borne fruit for the industry as a whole. They point to the evidence of the licensors' consistent profitability and the licensees' ability to ''benefit'' from the *Phonorecords II* approach. *Id.* at 23.

The Services also maintain that the *Phonorecords II* structure ''addresses any concerns with bundling and the potential for revenue deferment.'' *Id.* at 24.[103] They assert that these issues were specifically addressed by Copyright Owners during the *Phonorecords II* negotiation, because ''multiproduct firms such as Yahoo and Microsoft'' that offered streaming services had the capacity to make bundled offerings to consumers. These concerns were addressed in the *Phonorecords II* rate structure, the Services note, through the use of ''multiple rate prongs, minima and floors,'' ensuring that ''the total musical works royalty for certain types of offerings does not fall below a specified level,'' thereby ''mitigat[ing] the effect of any potential revenue deferrals and appropriately address[ing] any concerns with bundling.'' *Id.*[104]

Finally, the Services maintain that ''[d]irect agreements between Copyright Owners and Services also support adoption of the PR II-based benchmark.'' *Id.* at 34. In particular, they note that many of the royalty rates (and terms) in these direct agreements apply the *Phonorecords II* rates. Moreover, the Services maintain, because these direct agreements are in the nature of blanket license of a publisher's entire catalog, they provide an added ''access'' value in the form of full-repertoire licensing. These direct agreements do not include a rate above *Phonorecords II* levels; thus, the Services contend, they underscore the reasonableness of the *Phonorecords II* rates. *Id.*[105]

Finally, the Services aver that the PR II-based benchmark satisfies the itemized four section 801(b)(1) factors. With regard to Factor A, they maintain that: (1) the *Phonorecords II* framework has corresponded with an increase in the supply of musical works; (2) the PR II-based benchmark will increase the likelihood that the Services will increase subscriber counts, generating profitability, which will make streaming available to more listeners; and (3) the price discriminatory aspects of this royalty rate structure allows the Services to afford to offer streamed music to listeners with a low willingness (or ability)-to-pay, at lower rates or through ad-supported services. Services' Joint Opening Brief at 25–27.

Regarding Factors B and C (the ''fair return'' and ''relative contributions'' objectives), the Services emphasize that the PR II-based benchmark satisfies these statutory elements because it: (1) was the result of negotiations between industrywide representatives who had every incentive to obtain a ''fair'' return and to receive recompense for their ''contributions'' to streaming; and (2) allowed interactive streaming to become ''a significant means for consumers to listen to music'' while simultaneously generating growth in annual royalties for Copyright Owners.'' *Id.* at 27–29.

Lastly on the subject of the statutory factors—regarding Factor D (minimizing disruptive impact)—the Services make a succinct argument: ''By renewing the rate levels and structure of *Phonorecords II,* there is minimal risk of disruption.'' *Id.* at 29–30.

The Services also address several further criticisms of the PR II-based benchmark contained in the Determination. Focusing first on an issue specifically addressed in *Johnson,* they assert the irrelevancy of the ''subjective intent'' of the parties that negotiated the *Phonorecords II* settlement—a factor on which the Majority relied in deciding not to adopt the PR II-based benchmark. In this regard, the Services are also responding to the D.C. Circuit's concern regarding this issue. *See Johnson,* 969 F.3d at 387 (''In rejecting that settlement as a possible benchmark, the [Judges] faulted the Streaming Services for failing to explain why the parties to the *Phonorecords II* settlement agreed to the rates in that settlement . . . [b]ut nowhere does the [ ] Determination explain why evidence of the parties' subjective intent in negotiating the *Phonorecords II* settlement is a prerequisite to its adoption as a benchmark.'').

The Services note that no benchmark evidence presented by any party is proffered with supporting evidence of the subjective intent of the bargainers who negotiated the benchmark. Moreover, they note that the Majority in fact acknowledged that ''[r]elying on a benchmark as *objectively* useful without [the need for] further inspection'' is ''typical and appropriate for the benchmarking method.'' *Id.* at 35 (quoting Determination at [55] & n.106 (emphasis added)).

With regard to other criticisms of the Majority's failure to use the PR II-based benchmark, the Services argue that the Majority misapplied their previous rulings that they ''cannot and will not set rates to protect any particular streaming service business model.'' *Id.* at 37 (quoting *Phonorecords III,* 84 FR 1945). The Services find this principle inapposite, because their point is that the multiple price-discriminatory aspects of the *Phonorecords II* approach made it ''a valuable benchmark . . . because it had allowed for different service types to emerge and grow, which benefits the entire market.'' *Id.* at 37. The Services also take issue with the Majority's assertion that the *Phonorecords II* rate structure was too complex, deriding it as a ''Rube-Goldberg-esque'' contraption. *Id.* at 38. Rather, the Services maintain that the structure was as complex as necessary to effectuate the parties' needs, particularly the price discriminatory features and the protections against

[103] The issue of bundling is addressed in this Initial Ruling *infra,* in connection with the Judges' definition of Service Revenue generated through the offering of sound recordings as part of a bundle containing other goods or services.

[104] The Services also reiterate their pre-remand argument that the *Phonorecords III* settlement of subpart A rates for sales of physical and digital download phonorecords (now reorganized in subpart B) confirms the appropriateness of the Phonorecords II-based benchmark. However, any further reliance by the Services on that argument is moot, because the D.C. Circuit affirmed the Majority's analysis of the subpart A rates. *Johnson,* 969 F.3d at 386 (noting that the Majority adequately explained treatment of the subpart A rates as '' 'at best' a floor'' below which the mechanical royalty rates paid by the Services for interactive streaming cold not fall).

[105] Under section 115—prior to the effective date of the 2008 Music Modernization Act—an interactive service was required to serve a ''Notice of Intent'' to use the copyright license (NOI) with the owner of a copyright for each musical work before streaming the sound recording embodying that musical work. By contrast, a direct license with a publisher covers more than an individual musical work by providing ''access'' value to an entire catalog, without the transaction cost burden of filing multiple individual NOIs.

revenue diminution. *Id.* at 38–39. Further, the Services note that the record is devoid of any testimony or evidence indicating any actual confusion caused by the *Phonorecords II* rate structure. *Id.* at 39. Finally in this regard, the Services maintain that the rate structure adopted by the Majority is essentially as complex as the structure in *Phonorecords II,* with the only major change being the replacement of the capped TCC rates with uncapped TCC rates.[106] *Id.*

The Services address another criticism—that the rates in the PR II-based benchmark are too low. This issue is largely moot, as the D.C. Circuit's affirmance of the Majority's expert ''line-drawing'' and ''reasoned weighing of the evidence'' confirmed that a rate increase was necessary. In this Initial Ruling, the Judges have acknowledged specifically the appropriateness of the 15.1% revenue rate—a 44% increase over the 10.5% headline rate in the PR II-based benchmark.[107]

2. Copyright Owners' Arguments

Copyright Owners assert that the record evidence overwhelmingly supports the Judges' rejection of the PR II-based benchmark. At the outset, they maintain that the Judges found—and the D.C. Circuit affirmed—that a rate increase was required in the *Phonorecords III* terms. CO Initial Submission at 13. (As noted, an increase in the headline rate by 44%, to 15.1%, is adopted in this Initial Ruling.)

Next, Copyright Owners maintain that the evidence established that ''market conditions'' were ''radically different'' at the time of the *Phonorecords III* proceeding compared with when the parties entered into their 2012 industrywide agreement in *Phonorecords II. Id.* at 17. In particular, Copyright Owners point to testimony describing the streaming industry as ''nascent'' in 2012, with fewer streams, subscribers, services, and choices of music; operating in a consumer environment when download purchases and Pandora's noninteractive service were the predominant means for consumers to listen digitally to music. *Id.* at 18–21. In sum, Copyright Owners maintain, that streaming was ''economically insignificant'' to the music industry when the PR II provisions were adopted. *Id.* at 20.

Copyright Owners particularly emphasize the substantial increase in streaming revenue during the *Phonorecords II* period. They point out that while ''total streaming revenue had ranged from approximately $150 million in 2005 to $212 million in 2010, . . . after 2012[,] annual [streaming] revenue exploded to reach approximately $1.6 billion by 2015.'' *Id.* at 23. Further, they note there is no evidence that the music publishers or anyone else had predicted this substantial rise in streaming and the revenues it generated, and that in no way could it be inferred that those rates had ''baked-in'' future growth. In fact, Copyright Owners assert at the hearing that the PR II rates were merely ''experimental''—consistent with the relatively nascent stage of the streaming industry. *Id.* at 25.

Additionally, Copyright Owners maintain that the identities of the parties involved in the *Phonorecords III* proceeding are different from those who established the *Phonorecords II* framework. Although they acknowledge the presence of current interactive services Spotify and Rhapsody in this market prior to the *Phonorecords II* framework agreed to by the trade associations for the interactive services and the music publishers, they point out that ''[n]one of the other participants in this proceeding even entered the streaming business until after the *Phonorecords II* settlement.'' *Id.* at 21.

Next, Copyright Owners assert that the Services' evidence is inadequate to support a finding that the rates in their PR II-based benchmark are suitable for use in setting royalty rates in this proceeding. First, they echo the Determination, which stated that the Services (1) did not examine in detail the particular rates within the existing rate structure; (2) relied on the 2012 rates as objectively useful without further inspection; and (3) did not call witnesses to testify regarding the 2012 settlement negotiations. *Id.* at 27 (citing Determination, 84 FR 1944 & n.106). Because of the absence of the foregoing evidence, Copyright Owners assert that the Services were left with ''no evidence explaining how the particular rates and percentages in those settlements were calculated or derived, how they were negotiated, or how they were reasonable in light of the explosive growth in the streaming marketplace between the time of those settlements and the *Phonorecords III* proceeding.'' *Id.* at 28. The absence of such evidence, according to Copyright Owners, meant that the Services had failed to carry their burden of proof under 5 U.S.C. 556(d) with respect to their proposal, a burden Copyright Owners assert the Services acknowledged they bore. *Id.* at 29–30.

Additionally, Copyright Owners claim that the D.C. Circuit found ''validity'' in Copyright Owners' assertion that the subjective intent of the parties to the *Phonorecords II* settlement is relevant because it would have revealed whether the agreed-upon rates were based on economic realities or instead were driven by other considerations. *Id.* at 30–31 (citing *Johnson,* 969 F.3d at 387). However, Copyright Owners acknowledge that, because this was not a reason given by the Majority, it carried no weight with the D.C. Circuit on appeal. *Id.* at 31.

3. Analysis and Decision Regarding PR II-Based Benchmark [108]

a. PR II-Based Benchmark Meets Most of the Requisites for a Useful Benchmark

The four classic characteristics of an appropriate benchmark are:

(1) the degree of comparability of the negotiating parties to the parties contending in the rate proceeding,

(2) the comparability of the rights in question,

(3) the similarity of the economic circumstances affecting the earlier negotiators and the current litigants, and

(4) the degree to which the assertedly analogous market under examination reflects an adequate degree of competition to justify reliance on agreements that it has spawned.

In re Pandora Media, 6 F.Supp.3d 317, 354 (S.D.N.Y. 2014, *aff'd sub nom Pandora Media Inc.* v. *ASCAP,* 785 F.3d 73 (2d. Cir. 2015). As discussed below, the PR II-based benchmark meets criteria (1), (2) and (4), but requires adjustment to fully satisfy criterion (3).

First, the PR II-based benchmark obviously pertains to the same rights at issue in this proceeding, as it reflects the licensing provisions from the immediately preceding mechanical license proceeding.

Second, the licensors (songwriters and music publishers) and licensees (interactive streaming services) are

[106] As discussed *infra,* the relative complexity or simplicity of the rate structure is not a statutory factor, nor is it a decisive element of a reasonable rate structure, when the details of that structure effectuate price discriminatory configurations that would increase the availability of music and streaming revenues and otherwise satisfy the statutory criteria.

[107] The Judges characterize this issue as largely moot because the PR II-based benchmark includes on its ''lesser of'' prongs price discriminatory rates, discussed *infra.* But those ''lesser of'' rates are overridden by the ''greater'' 15.1% rate. As also discussed *infra,* Mechanical Floors continue to bind at lower mechanical royalty levels (without reducing the songwriters' ''All-In'' musical works royalty that includes the performance royalties), because these floors were retained in the Determination and were not the subject of appeal.

[108] The setting of statutory royalty rates involves to a significant degree the application of economic analysis. Accordingly, the Judges find it appropriate to set forth certain key aspects of microeconomics that guide the application of the section 801(b)(1) standard in the present proceeding. That guidance is set forth more fully in the Dissent at 29–39.

comparable (albeit not identical). While Copyright Owners emphasize the different identities and market involvement of the licensees, particularly the greater market penetration of Amazon, Apple, and Google, the Services note that even prior to the more significant entry of these three entities, similar multiproduct firms, such as Yahoo and Microsoft, were active licensees. The Judges find that the changing identities of the large multiproduct technology firms does not demonstrate the absence of comparability between and among such firms in the *Phonorecords II* and *Phonorecords III* rate periods. The shifting market entries, exits, strategies, successes and setbacks of otherwise comparable firms are expected occurrences in a dynamic capitalist market system and are not factors that materially diminish the necessary comparability of the parties for benchmarking purposes.

Third, important economic fundamentals of the marketplace are sufficiently similar in crucial respects. First, the heterogeneity of the willingness-to-pay among subscribers and listeners in the downstream market continues to support price discrimination and thus differentiated royalty rates upstream pursuant to the concept of ''derived demand.'' *See* Determination at 19 (and record citations therein) (''Weighing all the evidence and based on the reasoning in this Determination, the Judges conclude that a flexible, revenue-based rate structure is the most efficient means of facilitating beneficial price discrimination in the downstream market.''); Dissent at 32, 51, 86, 121, 126 (and record citations therein).[109] Second, the items being licensed for transmission—''second copies'' of sound recordings (with embedded musical works)—have a marginal physical cost of zero, a critical economic point on which the experts for both parties concur, and as to which the Majority and the Dissent repeatedly and significantly rely. *See* Determination at 18, 21, 36, 59, 80 (and record citations therein); Dissent at 30–31, 33–34, 37, 47, 49–50, 59, 122, 127–128 (and record citations therein).[110]

Copyright Owners are clearly correct, however, in noting a substantial change in economic circumstances that distinguished the *Phonorecords II* negotiations from the current proceeding; *viz., the dramatic growth of interactive streaming revenues.*[111] The economic impact of this revenue growth is incorporated into the experts' Shapley Value Models and the Judges' analysis of same. This analysis has generated the 44% increase in the headline royalty rate, from 10.5% to 15.1% (as phased-in by the Majority and again in this Initial Ruling).[112]

Simply put, three economic principles co-exist. First, the downstream interactive streaming market remains differentiated among listeners with different willingnesses and abilities to pay, based on varied preferences (utility) and disparities in income. Second, streaming of the ''second copy'' of the sound recordings (with embedded musical works) remains physically costless (but generates potential ''opportunity costs''). But, third, streaming revenues have grown substantially. There is no incompatibility or inconsistency in the simultaneity of these economic principles. Each of them must be taken into account and they are in this Initial Ruling.

This economic context refutes the arguments made during oral argument at the D.C. Circuit that the PR II-based benchmark should be rejected *in toto* because it was supposedly ''outdated.'' The heterogeneity of the downstream demand of listeners and the zero physical cost of ''second copies'' are enduring features that affect the upstream market via the principle of derived demand. The substantial growth of streaming revenues, however, necessitated an increase in the headline rate from 10.5% to 15.1% (as phased-in), for the reasons discussed in the Judges' analysis in this Initial Ruling of the interrelationship among: (1) Shapley Value modeling; (2) Nash Bargaining; (3) complementary oligopoly power; and (4) effective competition.

Further, the foregoing analysis also undermines the pre-remand argument made by Copyright Owners that the PR II-based benchmark reflects a market that was not yet ''mature,'' or was only ''experimental.'' Markets are not ''mature'' as opposed to, say, ''adolescent.'' Indeed, the metaphor is strained because all economic models are subject to revision if the salient facts have changed, without rendering the prior models mere ''experiments.'' Markets simultaneously exhibit enduring characteristics—here, heterogeneous customers and zero marginal physical costs and dynamic change—here, significant revenue increases.[113]

And yet, Copyright Owners seek to deny the idea that these principles could exist simultaneously. In an attempt to disqualify the application of the PR II-based benchmark, Copyright Owners complain:

> [W]hile streaming activity and revenues grew under the Phonorecords II royalty rates, the [REDACTED]. For example . . . [REDACTED].

CO Initial Submission at 15–16 (emphasis added).

But as the Services explained, the economic defect in Copyright Owners' analysis, is that it ignores the principle of price discrimination and its beneficial effects:

> [A]s [Professor] Hubbard explained, it is ''meaningless'' to compare growth in streams to growth in royalties in the context of Prime Music in particular because the record showed that Prime Music brings ''new people into the market.'' . . . If not for the flexibility (and beneficial price discrimination) the

[109] The Determination asserts that it includes a price discriminatory feature because a revenue percentage-based rate is itself price discriminatory, in that it does not set royalties on a per-play basis. Determination at 35 n.71. But that ''blunt'' form of price discrimination does not capture the granular discriminatory features that the parties had negotiated. There is no sufficient basis for the Judges to substitute their own blunt conception of the appropriate form and extent of price discrimination for the structure generated in negotiations by the market participants. *See* Dissent at 37.

[110] It bears emphasis that the fact ''second copy'' reproductions are physically costless does not even suggest that the market price should be zero. Rather, in this ''second-best'' economic context, pricing above marginal physical costs is imperative in order for Copyright Owners to recover their ''first copy'' costs, avoid ''opportunity costs,'' and earn profits. *See* Dissent at 36–38.

[111] Copyright Owners also cite data demonstrating the increase in listeners and the number of streams. The Judges find those data to be causal for the key point in rate setting in this proceeding—the significant increase in revenues.

[112] At first blush it may seem that the increase in interactive revenues is not an economic fundament that would support an increase in a percentage-of-revenue based royalty formula. However, as more fully discussed herein, under the Shapley Value approach, the increase in revenues has generated an increased ''Shapley Surplus'' (roughly analogous to interactive streaming industry profits), which the two ''Must Have'' input suppliers (record companies and Copyright Owners) will essentially split equally. If this surplus increases faster than the interactive services' non-content costs (or if those costs remain stable or fall), the increased revenues would flow disproportionately to theses input suppliers, thus causing the increase in revenues to support an increase in the royalty rate, all other things held constant. And, because the ''Must Have'' input suppliers have complementary oligopoly power, the Majority relied on a Shapley model constructed by Spotify's expert, Professor Marx, that adjusted for this market power.

[113] If one were to indulge the ''maturity'' metaphor, the ongoing creative destruction in the streaming industry has only reinforced the fact that, according to one of Copyright Owners' own economic expert witnesses, the interactive streaming market (as of the *Phonorecords III* hearing) was not yet mature, but rather remained ''a relatively new enterprise.'' Watt WRT ¶¶ 39–40. Thus, it is hardly clear from the record that interactive streaming has ''matured'' in a manner that would render anachronistic the enduring marketplace characteristics.

existing Service Provider Revenue definition and rate structure facilitated, the Copyright Owners ''would have gotten zero'' from those new listeners. . . . ''So they're better off by that amount'' of royalty growth. . . . The undisputed fact that [REDACTED]—reflects that the existing rule enables beneficial price discrimination that expands the total royalty pool and benefits Copyright Owners.

Services' Reply at 58–59.

This rebuttal by Professor Hubbard is an example of the important distinction between ''increases in demand'' (when the demand curve shifts outward) and movements ''down the demand curve'' (when sellers use price discrimination to generate more revenue without additional cost to attract buyers with a lower willingness or ability to pay). The parties' otherwise dueling economists agreed on this point. *Compare* 4/3/17 Tr. 4373–74 (Rysman) (Copyright Owners' witness acknowledging that under the current rate regime overall revenues might be increasing because of movements ''down the demand curve'' (*i.e.,* changes in quantity demanded in response to lower prices), rather than because of, or in addition to, an outward shift of the demand curve (*i.e.,* increase in demand at every price)) *with* 3/13/17 Tr. 701 (Katz) (the Services' witness who likewise noted that the present structure enhances variable pricing that allows streaming services ''to work[ ][their]way down the demand curve.'').

Moreover, Copyright Owners baldly cherry-pick the data they present. [REDACTED] CO Initial Submission at 15–16. So, by their own data, presented in their own brief, they acknowledge that [REDACTED]. *See* Services' Reply at 57–58 (Copyright Owners have proven the ''opposite'' of what they intended). This is precisely what beneficial price discrimination is designed to accomplish.[114]

The appropriateness of adopting the price discriminatory rate provisions of the PR II-based benchmark is further underscored by Copyright Owners' candid acknowledgement at the hearing that they were essentially urging the Judges to adopt what is known as the ''Bargaining Room'' approach to rate setting. *See* Dissent at 24 (and record citations therein).[115]

In the present proceeding, the appropriateness, *vel non,* of the Bargaining Room approach boils down to the following:

Copyright Owners emphasize the inability of the Judges (or anyone) to identify present market rates precisely, let alone over the five-year rate period because the compulsory license set by the Judges cannot possibly contemplate every single business model that may develop in the ensuing time. . . . If the statutory rate is set *below* market rates, then the parties will *never* negotiate upward toward the market rates, because the licensees will always prefer to invoke the right to use the licensed work at the below-market statutory rates. However, if the Judges set the statutory rate *above* what they find to be market rates, different licensees who each have a maximum willingness to pay (WTP) *below* such a statutory rate would seek to negotiate lower rates with the licensors. In response to such requests to negotiate, according to this argument, Copyright Owners would respond by negotiating various lower rates for those licensees, provided lower rates were also in the self-interest of Copyright Owners.

Dissent at 24–25 (and record citations therein).

The Judges find no reason to depart from the policy decision in *Phonorecords I* that the rate setting policies made explicit in section 801(b)(1) are best discharged if the Judges eschew the Bargaining Room approach and continue to identify rate structures and rates that reflect the standards set forth in the statutory provision. To supplant the statutory factors with a Bargaining Room approach would essentially be to adopt a purely market-based rate-setting approach that is inconsistent with section 801(b)(1) and with the Judges' application of that statute to set rates, rate structures, and terms consonant with effective competition.

With this background in mind, the Judges turn specifically to the interrelationship between the price discrimination aspects of the rates in the PR–II benchmark and the Bargaining Room approach.

Copyright Owners have demonstrated (albeit tacitly) their understanding that, if the statutory provisions did not contain a price discriminatory rate structure to reflect the varying WTP, *they would have to invent it.* This finding is apparent from their advocacy for the adoption of a Bargaining Room approach to rate-setting. *See, e.g.,* 4/3/17 Tr. 4390, 4431 (Rysman) (lauding bargaining room approach as reflecting ''economical element of *price discrimination* . . . the [licensor] is picking its prices carefully.'') (emphasis added); *id.* at 4431 (explaining that under this approach, when negotiating with Spotify regarding a rate for ad-supported service, ''Must Have'' music publishers would ''have the right . . . to set that price.''); 4/4/17 Tr. 483–45 (Eisenach) (acknowledging Copyright Owners' approach was consistent with Bargaining Room theory because they were seeking rates so high as to force would-be licensees to negotiate for the ''Must Have'' mechanical license.).

Thus, the Judges find there to be no real dispute as to *whether* there is a market-based need for an upstream discriminatory rate structure.[116] Rather, the parties appear to be in disagreement as to *who* shall be in control of the setting of rates, the Judges, through their application of *law,* or Copyright Owners, through the exercise of their complementary oligopoly *power.* The resolution of this choice is clear; the Judges, not the licensors, are statutorily-charged with establishing provisions that are reasonable and otherwise properly reflect the itemized objectives of section 801(b)(1).

Fourth, the PR II-based benchmark reflect a rate structure with an adequate degree of competition, because there

[114] Further, [REDACTED] because: (1) the marginal physical cost of ''second-copy'' streams is zero; (2) royalties were calculated [REDACTED]; and (3) Copyright Owners' original proposed a per-play (*i.e.,* per-stream) metric, which was rejected by all three of the Judges.

[115] The Bargaining Room approach was first proposed for incorporation into the statutory license standard in 1967 by the NMPA, to be included in the predecessor section, later reorganized in section 801(b)(1) that governs this proceeding. *See* Dissent at 22–24 (and citations therein). Ultimately, Congress punted on the Bargaining Room approach, and adopted into law the four-factor language set forth in section 801(b)(1). A subsequent attempt by NMPA to have the Copyright Royalty Tribunal (CRT) (a predecessor to the Judges) adopt the Bargaining Room theory was rejected by the CRT, a rejection that was affirmed on appeal. *See Recording Industry Ass'n. of America* v. *Copyright Royalty Tribunal,* 662 F.2d 1, 37 (D.C. Cir. 1981), *aff'g* Adjustment *of Royalty Payable under Compulsory License for Making and Distributing Phonorecords,* 46 FR 10466, 10478 (1981). *See generally,* F. Greenman & A. Deutsch, *The Copyright Royalty Tribunal and the Statutory Mechanical Royalty: History and Prospect,* 1 Cardozo Arts & Ent. L.J. 1, 53, 64 (1982).

[116] The *Majority* recognized this point as well when—regarding the ''increase the total revenue that price discrimination enables—they ask (and answer) rhetorically: ''How could Copyright Owners and their economic experts argue against a rate structure that inures to their benefit as well? The answer is: They do not. . . . [T]hey advocate for a rate set under the bargaining room theory, through which mutually beneficial rate structures can still be negotiated, but not subject to the ''reasonable rate'' and itemized factor analysis required by law.'' Determination at 85 & n.153. The Judges also note that Copyright Owners' acknowledgement that they too would set price discriminatory rates and structures is not simply a feature of *this* market. Rather, ''discriminatory pricing . . . is the normal attribute of equilibrium . . . in a broad range of market types and conditions where consumers can be separated into distinct groups with different demand elasticities.'' W. Baumol, *Regulation Misled by Misread Theory: Perfect Competition and Competition-Imposed Price Discrimination* at 2 (2002). *See also* Dissent at 38, n.74. Given the ubiquity of discriminatory pricing, the Judges also find that the adoption into the statutory license of such pricing is not—as Copyright Owners contend—simply the inappropriate favoring of a particular business model, but rather a necessary reflection of the fundamental nature of market demand, particularly, the varied WTP among listeners.

was a balance of bargaining power between the two negotiating industrywide trade associations, offsetting the complementary oligopoly effects in place when a ''Must Have'' licensor bargains separately with each licensee. Recently, the Judges discussed in detail how the presence of countervailing bargaining power generates royalty rates at effectively competitive levels. *See Web V,* 86 FR 59452, 59457 (Oct. 27, 2021).

Further with regard to this fourth point, the parties have been operating over the past ten years under this basic rate structure, with profits accruing to the licensors and admittedly tolerable losses befalling the licensees. Moreover, after experience with these rates and this rate structure in the *Phonorecords I* period, they renewed and expanded this structure for use in the *Phonorecords II* period, when the alternative of a statutory rate proceeding was available to licensors and licensee alike. Their mutual willingness to continue in this manner is important evidence of the workability and reasonableness of this approach.

b. Evidence of Subjective Intent Not Prerequisite to Partial Adoption of the PR II-Based Benchmark [117]

The Judges rely on the PR II-based benchmark as an *objective* benchmark. Thus, the absence of testimony regarding what went through the minds of the negotiators of the *Phonorecords II* agreement (and the predecessor *Phonorecords I* agreement) does not diminish the objective value of this benchmark. The Judges view the provisions of the PR II-based benchmark as they would any benchmark, in the context of the requisite benchmarking elements identified and discussed *supra.* This approach allows the factfinder to analyze the benchmark through the lens of its service in the marketplace as an objective model for the market at issue, the *Phonorecords III* market. *See, e.g.,* 3/13/17 Tr. 550–51, 566 (Katz) (knowledge of why parties negotiated specific provisions is unnecessary, because objective results demonstrate satisfactory performances of market).

Both Professors Katz and Hubbard noted that the current rate structure remains useful, not based on consideration of the parties' subjective understandings at the time of its creation, but because the market has not since changed in a manner that would create a basis for departure. Katz WDT ¶ 80 (''My analysis has identified no changes in industry conditions since then [2012] that would require changing the fundamental structure of the percentage-of-revenue prong.''); 4/13/17 Tr. 5977–78 (Hubbard) (changes in market are ''not uncorrelated with the structure that was in place'' in 2012).[118]

In this regard, it bears emphasis that Copyright Owners' own witness, Dr. Eisenach, relied on several potential approaches that the Majority characterized as benchmarks for his rate analysis, without attempting to examine the subjective intent of the parties who negotiated those agreements. Indeed, the Majority found that the PR II Rates were properly considered as an objective benchmark, in the same manner as Dr. Eisenach's proffered benchmarks:

> The Services do not examine in detail the particular rates within the existing rate structure. Rather, they treat the rates within that structure as benchmarks, *i.e.,* generally indicative of a sufficiently analogous market that has ''baked-in'' relevant economic considerations in arriving at an agreement. Dr. Eisenach did not analyze *why* he chose the levels for the rates and ratios on which he relied as benchmarks or consider the subjective understandings of the parties who negotiated his benchmarks. Similarly, the Services' economists elected to rely on the 2012 rates as objectively useful without further inspection.
>
> This point is not made to be critical of Dr. Eisenach's approach, but rather to show that the Services' reliance on the 2012 settlement as a benchmark shares this similar analytical characteristic, typical and appropriate for the benchmarking method. (The factual wrinkle here is that, hypothetically, the Services could have called witnesses and presented testimony regarding the negotiations that led to the 2012 (and 2008) settlements, but did not, rendering the 2012 benchmark similar to other benchmarks taken from other markets.)

Determination at 55 & n.106.[119]

Copyright Owners also aver that they entered into the *Phonorecords II* settlement simply to avoid litigation costs. Copyright Owners' Reply Brief on Remand at 29. At the hearing, this assertion was presented by David Israelite, NMPA's President. Israelite WRT ¶ 28; 3/29/17 Tr. 3649–52 (Israelite) (claiming NMPA lacked financial position to fund rate litigation). The Services countered by noting that there was no evidence to support Mr. Israelite's testimony in this regard, or how it may have impacted the NMPA decision to participate. And, the Services pointed out, notwithstanding his testimony regarding financial constraints, NMPA had incurred the expense of a year-long negotiation with the Services to seek higher rates, create new service categories in subpart C, and change the TCC calculations. *Id.* at 159, 161–64; 3/29/17 Tr. 3856 (Israelite).

Further, as a general principle, a party's mere assertion that the *Phonorecords II* approach was the product of a settlement that was predicated on the avoidance of litigation costs savings does not invalidate its use as a benchmark in proceedings before the Judges, especially because, by statute, the Judges are authorized to consider such agreements. *See Music Choice* v. *Copyright Royalty Board,* 774 F.3d 1000, 1014–15 (D.C. Cir. 2014) (testimony alleging agreement was reached to avoid litigation costs does not invalidate evidentiary use of that agreement for rate setting purposes, absent other evidence demonstrating settlement was involuntary or otherwise unreasonable.). Thus, the Judges find that the evidentiary record does not support Copyright Owners' position that this ''litigation cost avoidance'' assertion constituted a separate, idiosyncratic value that diminishes the

[117] At the outset, the Judges reject Copyright Owners' contention that the D.C. Circuit found ''validity'' in their assertion that there was merit in Copyright Owners' assertion of the ''subjective intent issue.'' Rather, on this issue, *Johnson* first held: ''[N]owhere does the [ ] Determination explain why evidence of the parties' subjective intent in negotiating the Phonorecords II settlement is a prerequisite to its adoption as a benchmark.'' *Johnson,* 969 F.3d at 387. Then, when Copyright Owners' appellate counsel attempted to cure that failure by making their own ''subjective intent'' argument, the D.C. Circuit responded to that ''subjective intent'' argument with a single word: ''*Perhaps.*'' *Id.* (emphasis added). This does not in any way suggest that *Johnson* found ''validity'' in the ''subjective intent'' argument, but rather was a non-committal response, consistent with the D.C. Circuit's ruling finding that the Determination had not explained this point.

[118] As noted *supra,* the relevant material change since the *Phonorecords II* agreement was reached is the significant growth in streaming revenues. That change is reflected in the Judges' application of the Shapley Value analyses, by which the Judges increased the headline royalty rate by 44%, from 10.5% to 15.1% (phased-in).

[119] Copyright Owners do not deny that they did not offer evidence of subjective intent for Dr. Eisenach's benchmarks. Rather, they assert Dr. Eisenach's reliance on benchmarks without examining the subjective understandings of the negotiators of the benchmarks is irrelevant because: (1) Copyright Owners were not seeking the adoption *in toto* of the rates contained in any specific benchmark cited by Dr. Eisenach; (2) Dr. Eisenach analyzed multiple benchmarks to derive a reasonable range of rates; (3) his benchmarks were not adopted; and (4) his benchmarks and are not at issue on this remand. Copyright Owners Reply Brief on Remand at 28 n.19. But Copyright Owners confuse evidentiary *standards* with evidentiary *application.* Benchmarks are subject to the same evidentiary standards, regardless of the breadth of purpose for which they are proffered and regardless of whether they were adopted or rejected. Further, the fact that Dr. Eisenach's chosen benchmarks are ''not at issue on this remand'' does not render Copyright Owners' reliance on purely objective benchmarks uninformative as to their own understanding of the irrelevancy of the subjective thoughts of benchmark negotiators. *See generally Web IV,* 81 FR 26370 (proposed benchmark adjustment based on alleged ''additional value'' should be supported by ''record evidence . . . to provide a basis for such for such an adjustment.'').

Judges' partial reliance on the PR II Rates in this Initial Ruling.

Copyright Owners also mistakenly rely on the fact that the Services bore the burden of proof regarding the absence of any subjective idiosyncratic factors that hypothetically could have diminished the useful value of the PR II-based benchmark. *Id.* at n.21. The Services indeed bore the burden of *proof* (*i.e., persuasion*) with regard to their proffered benchmark PR II Rates, and they presented adequate objective evidence and testimony that this approach has worked in the marketplace to serve as *prima facie* proof to support the Judges'(partial) use of this benchmark in this remand proceeding. And, as explained above, such subjective intent was not a necessary element of their benchmark proofs. But, with regard to Copyright Owners' *rebuttal* to those proofs, Copyright Owners bore the burden of *production,* to present sufficient evidence and/or testimony that the Judges could rely on to reject the (partial) use of the PR II-based benchmark. This Copyright Owners failed to do.[120]

In fact, given Copyright Owners' reliance on the subjective intent of the parties to a benchmark, the Judges attempted to identify potential subjective evidence of how the capped TCC rates in the PR II-based benchmark [121] were derived, during the examination of Dr. Eisenach at the hearing:

> [JUDGE STRICKLER] Do you discuss, Dr. Eisenach, . . . in your written direct or written rebuttal testimony how the parties arrived . . . at the ratios for sound recording to musical works in [witness interrupts]
>
> [DR. EISENACH] That process is opaque to me, Your Honor.
>
> [JUDGE STRICKLER] Did you [witness interrupts]
>
> [DR. EISENACH] I know—I know there was a 2008 negotiation. I know there was a 2012 negotiation. I wasn't . . . present, and I'm not privy to any of the details.
>
> [JUDGE STRICKLER] You were not informed by your client or by any other source of information as to how they arrived at those particular ratios?
>
> [DR. EISENACH] *When I've asked the question, I've found people chuckle* and—and there doesn't seem to have been too much system—systematic thought that went into it, *but I don't really know that.* I just—when I ask the question, people say: *Nobody really knows.* . . . Someone may know, but that's what I've been told.

4/4/17 Tr. 4611 (Eisenach) (emphasis added). The Judges find it perplexing, to say the least, that Copyright Owners would ''chuckle'' when asked by their expert witness for the very subjective evidence which they claim to be relevant. But of perhaps greater relevance is Dr. Eisenach's further testimony, quoted above, that he was also told by Copyright Owners that ''nobody really knows'' how the parties arrived at those rate ratios. Copyright Owners' ''chuckle,'' in response to its expert's critical inquiry as to the derivation of rates—and that expert's understanding that his client *simply did not know how those rates were derived*—undercut Copyright Owners' claim that subjective understanding of those rates could undermine their usefulness in the benchmark.[122]

c. Substantial Evidence Demonstrates That PR II Rates, Other Than the Headline Rate, Are Not ''Too Low''

As noted *supra,* one reason the D.C. Circuit vacated and remanded the Determination was because it declined to entertain the argument made only by appellee's counsel that ''the prior rates had been set far too low, thus negating the usefulness of the prior settlement as a benchmark.'' *Johnson,* 969 F.3d at 387. The Judges have noted throughout this Initial Ruling their adoption of the Shapley Value modeling analysis undertaken by the Majority, and raised the headline royalty rate by 44% from 10.5% to 15.1% (as phased-in), rendering moot appellate counsel's suggestion regarding the rate level.

Here, the Judges further consider whether other rates within the PR II-based benchmark are reasonable, not only because they are part and parcel of the workable structure of that benchmark, but also to determine if they are supported by record evidence. To put this issue in context, those rates would apply on the second prong of the ''greater-of'' rate structure in the PR II-based benchmark. The first prong in the PR II-based benchmark rates is the 10.5% revenue rate—increased to 15.1% (as phased-in) by this Initial Ruling. The second prong consists of the ''lesser of'' a TCC rate or a per subscriber rate.[123] For certain delivery configurations, these rates also cannot fall below any applicable Mechanical Floor. *See Johnson,* 969 F.3d at 370.[124]

The Services describe the key feature of these non-headline rates as the fostering of beneficial price discrimination, *i.e.,* the adoption of ''different rate levels for different product offering,'' in order [t]to account for consumers' different willingness to pay [WTP] for music. Services' Joint Opening Brief (on Remand) at 21. As an example of how these price discriminatory rates impacted the market, the Services compare and contrast two Amazon offerings, Amazon Music Unlimited (for Echo) and Amazon Prime Music.

Amazon Music Unlimited, with more than 30 million available songs as of the *Phonorecords II* proceeding period, *see* Mirchandani WDT ¶ 41, [REDACTED].[125] By contrast, Amazon Prime Music, calculated as a ''bundled subscription'' configuration, makes available only an abridged repertoire of 2 million songs, see Mirchandani, supra, and [REDACTED]. *See id.* at § 385.13(a)(4).

Thus, Amazon pays [REDACTED] for listening by the more casual consumers who use the limited catalog Prime Music service at no additional charge beyond their Prime membership fee, compared to consumers who want the full repertoire provided by Amazon Music Unlimited on their Echo devices. *See* Services' Joint Opening Brief at 71. These royalty obligations demonstrate the combination of price discrimination, product differentiation and ''derived demand'' in action; that is, the [REDACTED] are derived from the lower demand of consumers of the limited Amazon Prime Music service compared with subscribers to Amazon Music

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[120] As described in this Initial Ruling, the Judges identified this same distinction between the burden of proof and the burden of production to find in favor of Copyright Owners' proffered expert testimony in support of their Nash Bargaining analysis, testimony which constituted *prima facie* proof that was not adequately rebutted by the production of sufficient testimony from the Services' expert economic witnesses.

[121] The ''capped'' TCC rates are elements of the *Phonorecords II* rates.

[122] The Judges also find Copyright Owners' assertion that they did not know how those rates were established is not credible, given that they and their representatives negotiated those rates.

[123] This second prong contains only a TCC rate (*i.e.,* an uncapped rate) for: (1) the ad-supported the service, because there are no subscribers to such a service; and for (2) bundled subscription service, for which there is a $0.25 per month floor but no per-subscriber cap, and Service Revenue for such bundles is calculated pursuant to 37 CFR 385.11 (''Service Revenue'' definition, ¶ 5).

[124] As *Johnson* explained, the CRB Judges ''retained the mechanical floor'' because, like so much of the PR II-based benchmark, it '''appropriately balances the [streaming service providers'] need for the predictability of an All-In rate with publishers' and songwriters' need for a failsafe to ensure that mechanical royalties will not vanish[.]'' *Id.* at 371–72. It is noteworthy that Copyright Owners urged the Judges (successfully) to maintain the Mechanical Floor provisions, which are the product of the *Phonorecords II* (and *Phonorecords I*) negotiations. Thus, it seems apparent that Copyright Owners as well as the Services consider provisions from the negotiated rates and rate structure to be in the nature of benchmarks, although differing as to which elements such be included or excluded. (The Services unsuccessfully argued for the elimination of the Mechanical Floors.) This perspective underscores the correctness of the Judges' decision on remand to treat the PR II-based benchmark as useful.

[125] [REDACTED].

Unlimited on their Echo devices, which in turn drive higher revenues.

It is also important to note that these differential rates on the second prong of the ''greater-of'' structure of the PR II Rates are overridden by the revenue percentage rate on the first prong if that first prong rate generates more revenue. For example, [REDACTED], *see* Dissent at 29 (Table) and 116; *see also* [REDACTED]. With the headline rate now increased on a phased-in basis, the price discriminatory royalty generated by this [REDACTED].

It is noteworthy that *Johnson* affirmed the Majority's setting of other price discriminatory features, *e.g.,* the family and student plan provisions, based on the Judges' reliance on the Services' expert testimony regarding the benefits of ''having a way . . . where low willingness to pay consumers can still access music in a way that still allows more monetization of that provision of that service.'' *Johnson,* 969 F.3d at 392–93. In similar fashion, the multi-tiered rates in the PR II-based benchmark likewise were supported by the same type of testimony; indeed, from expert testimony proffered by both parties, as considered below.

First, Professor Katz notes that the existing rate structure captures two important aspects of the economics of the interactive streaming market: (1) the variable WTP among listeners; and (2) the corollary variable demand for streaming services. *See* 3/13/17 Tr. 586–87 (Katz); *see also* Marx WRT ¶ 239 *et seq.;* 4/7/17 Tr. 5568 (Marx) (noting that the present structure serves differentiated products offered to customer segments with a variety of preferences and WTP). In more formal economic terms, Professor Katz notes that the present structure enhances variable pricing that allows streaming services ''to work [their] way down the demand curve,'' *i.e.,* to engage in price discrimination that expands the market, providing increased revenue to the Copyright Owners as well as the Services. 3/13/17Tr. 701 (Katz).

Second, in similar testimony, Professor Hubbard captures the interrelationship between the economics of this market and the existing rate structure:

> [F]rom an economic perspective, you can think of this market and this industry as being composed of different customer segments by tastes and preferences and willingness to pay. And so no rate structure can really work without understanding that, and no business model can really work without understanding that.
>
> [I]n terms of rate structures, the *Phonorecords II* framework from the previous proceeding does offer a benchmark to start because it provides for differences in distinct product categories in terms of music service offerings, pricing possibilities, and so on. And it has encouraged a very diverse digital music offering set from actual competitors.

3/21/17 Tr. 2175–76 (Hubbard). Moreover, Professor Hubbard [REDACTED] 4/13/17 Tr. 5978 (Hubbard); *see also* Hubbard WDT ¶ 4.7 (the 2012 rate structure provides the ''necessary flexibility to accommodate the underlying economics of Amazon's various digital music service offerings.''). *See also* 3/15/17 Tr. 1176 (Leonard) (notwithstanding changes and growth in the streaming marketplace over current rate period, underlying economic structure of marketplace, which made percent-of-revenue based royalty appropriate, has not changed).

Third, the Services' experts further assert that the multiple pricing structures necessary to satisfy the WTP and the differentiated quality preferences of downstream listeners relate directly to the upstream rate structure to be established in this proceeding. For example, Professor Marx opines that the appropriate *upstream* rate structure is derived from the characteristics of downstream demand. 3/20/17 Tr. 1967 (Marx) (agreeing that rate structure upstream should be derived from need to exploit willingness to pay of various users downstream via percentage of revenue because downstream listeners have varying willingness to pay that should be exploited for mutual benefit of copyright licensees and licensors). Professor Marx further acknowledged that this upstream:downstream consonance in rate structures represents an application of the concept of ''derived demand,'' whereby the demand upstream for inputs is dependent upon the demand for the final product downstream. *Id.* Moreover, Dr. Leonard notes that reliance on the Services to identify segmented demand and develop price discriminatory approaches is appropriate because ''the downstream company is going to have a lot more information about . . . the business, about what makes sense.'' 4/6/17 Tr. 5238 (Leonard).

Regarding a comparison of revenue growth to streaming growth, Professor Hubbard dismisses as economically ''meaningless'' Copyright Owners' argument that they have suffered *relative* economic injury under the current rate structure simply because the increase in their revenues from interactive streaming has been proportionately less than the growth in the number of interactive streams, leading mathematically to a lower implicit or effective per stream royalty rate. That is, he notes there is no evidence to rebut this *prima facie* indication of beneficial price discrimination, *i.e.,* no contrary evidence indicating that, if the Services had sought to increase the price of the services available to these low to zero WTP listeners because of higher royalties, they would have paid the higher price, rather than declined to utilize a royalty-bearing interactive streaming service. *See* 4/13/17 Tr. 5971–73 (Hubbard); *see also Dissent* at 52.

The Services also link their price discrimination argument to the fact that the marginal physical cost of streaming is zero to the need for a flexible rate structure such as now exists. In this regard, Professor Hubbard notes that, because ''[t]he marginal production cost at issue here is—is zero. . . . it's not clear why it's not better to bring new customers into the market on which royalties would be paid and, of course, zero marginal cost incurred.'' 4/13/17 Tr. 5917–18 (Hubbard). *See also* Marx WDT ¶ 97 (''Setting the price of marginal downstream listening at its marginal cost of zero induces more music consumption and variety than per-song or per-album pricing.'').

Professor Marx makes the same argument as to the salutary nature of price discrimination in this context with regard to Spotify's ad-supported approach. Focusing on the first purpose, Spotify is attracting ad-supported listeners who have a relatively low WTP, whether they have low incomes, (a budget constraint) or low interest in music (low ''utility,'' in the parlance of economists). These listeners, and the advertising revenue they generate are real and reflect the WTP of a large swath of all interactive listeners. *See* Marx WRT ¶ 115–16 & Fig. 9 (''While I agree that one aspect of the ad-supported service is to provide an on-ramp to paid services, it also has another important aspect, namely to serve low WTP customers. . . . Copyright Owners' economists err in not calculating the impact of the Copyright Owners' proposal on ad-supported services. Ad-supported services currently make up a majority of subscribers and [REDACTED]% of all streams in the industry.'').

Accordingly, a separate tier for an ad-supported service accounts for the different nature of the downstream listenership, allowing the upstream royalty to be based on that characteristic. This differentiation was essentially acknowledged by Copyright Owners late (*too late,* actually) when they proposed in their post-hearing filing that ''if the Judges intend to include the Spotify ad-supported

service in the rate structure and rate calculations, that they do so by establishing separate *rates and terms* for the ad-supported service. *See* COPCOL (Corrected) ¶ 228 & n.34. But the PR II-benchmark already incorporates separate rates for free/ad-supported services![126]

Another important evidentiary factor buttressing the need for price discriminatory rates and structures was the testimony of the Services' survey expert, Mr. Robert Klein, Chair and co-founder of Applied Marketing Systems, Inc. Mr. Klein surveyed 2,101 people (the Klein Survey) who were listeners to streamed music and found, *inter alia,* that: (1) the majority of listeners would not pay for a monthly streaming subscription; and (2) for those who do subscribe, their demand was elastic, with increases in subscription prices causing overall greater percentage reductions in quantity demanded, moving customers to free, ad-supported and non-streaming alternatives. *See Klein* WRT ¶¶ 60–67. By contrast, Copyright Owners did not present any survey testimony. The Determination fully credited the Klein Survey, finding as follows:

> It is important to note that Copyright Owners' attacks on the Klein Survey are not levelled by any witnesses, nor contradicted by their own survey expert, because Copyright Owners elected not to proffer such an expert in their direct (or rebuttal) cases. Rather, Copyright Owners elected to make a descriptive argument regarding the elasticity of demand among different segments of the market, as opposed to a survey-based or econometric study of price elasticity.
>
> [Although] Copyright Owners attack the Klein Survey on several fronts[,] [t]he arguments made by Copyright Owners are insufficient . . . to seriously weaken the probative value of the Klein Survey. In the end, the Judges are not persuaded by the Copyright Owners' revenue bundling arguments not to adopt a flexible, revenue-based royalty rate.

Determination at 22–23 & n.53; *see also* Dissent at 64–67 (including point-by-point rejection of Copyright Owners' non-expert criticisms of Klein Survey).

The Services also note that the existing rate structure has produced generally positive practical consequences in the marketplace. Their joint accounting expert, Professor Mark Zmijewski, testified that the [REDACTED] from the sale of product under (former) Subpart A since 2014 has been [REDACTED] over the same period. Expert Report of Mark E. Zmijewski February 15, 2017 ¶¶ 38, 40 (Zmijewski WRT); 4/12/17 Tr. 5783 (Zmijewski); *see also* 4/13/17 Tr. 5897 (Hubbard) (''the evidence that I reviewed suggests that the copyright holders have actually benefitted from this structure. . . .'').

More particularly, Professor Zmijewski testified that:

- Total revenues reported by the NMPA for NMPA members from all royalty sources [REDACTED]. Zmijewski WRT ¶ 41.
- This [REDACTED]. *Id.*
- The [REDACTED]. *Id.*
- Mechanical royalty revenue for the sale of downloads and physical phonorecords [REDACTED]. *Id.* ¶ 38.[127]

In sum, the foregoing analysis demonstrates the economic reasonableness and appropriateness of the price discriminatory *Phonorecords II rate structure* and its negotiated safeguards to address the real possibility of revenue diminution. As discussed below, the record evidence also supports royalty *rates* within the PR II-based benchmark.[128]

The PR II-based benchmark contain several alternate rates explicitly calculated as a percentage of payments made by interactive streaming services to the record companies for sound recording rights. *See* Addendum to this Initial Ruling. In the Subpart relating to streaming, the (former) subpart B category, the TCC is 22% for ad-supported services and 21% for portable subscriptions. *Id.; see also* 37 CFR 385.13(b)(2) and (c)(2). These percentage figures correspond to sound recording: musical works royalty ratios of 4.55:1 and 4.76:1, respectively.

With regard to these ratios, Copyright Owners' economic expert witness, Dr. Eisenach, stated: ''In my opinion, the evidence . . . indicates that the relative valuation ratios implied by the current Section 115 compulsory license . . . represent *an upper bound on the relative market valuations* of the sound recording and musical works rights.'' *Id.* ¶ 92 (emphasis added). (As an ''upper bound,'' these ratios would represent the *lower bound on the relative market valuations* of the reciprocal percentage of the value musical works rights relative to sound recording rights, again, 22% and 21%.[129]) Thus, there appears to be consensus between Copyright Owners' witness and the Services (who advocate for applying these rates on the price discriminatory tier of their benchmark) that these rates constitute ''relative *market* valuations'' (even if they are not Dr. Eisenach's preferred market valuations within the bounded zone of such values).

Dr. Eisenach's testimony regarding the ''bounds'' of useful market valuations is noteworthy because his acknowledgement is consonant with judicial precedent. The Judges' setting of reasonable rates often requires them to identify a ''zone of reasonableness,'' within which they identify appropriate statutory rates. *See, e.g., Intercollegiate Broadcasting System, Inc.* v. *Copyright Royalty Board,* 684 F.3d 1332, 1340 (D.C. Cir. 2012) (The CRB Judges' rate setting can necessitate the finding of a ''zone of reasonableness [because] ''[s]tatutory reasonableness is an

[126] Copyright Owners also belatedly proposed that the Judges establish specific functionality limits on a separate ad-supported prong to avoid cannibalization of subscriber-based streaming with fuller functionality. *Id.* [REDACTED].

[127] By contrast, Copyright Owners assert that the appropriate approach would only consider interactive service payment of mechanical royalties, and exclude performance royalties. On that basis, revenue, for the sale of digital downloads and physical phonorecords mechanical royalty revenue [REDACTED] from [REDACTED] in 2014 to [REDACTED] (as noted in (4) above, whereas mechanical royalty from streaming [REDACTED] from [REDACTED] in 2014 to [REDACTED] in 2015. Thus, the [REDACTED] in mechanical royalty revenue from streaming [REDACTED] in mechanical royalty revenue from the sale of digital and physical phonorecords. The Judges do not agree with Copyright Owners. Performance royalty and mechanical royalty payments made by the Services are for perfect complements—neither license has any value to the Services unless they acquire both. Indeed, that is a critical reason why the mechanical rate is calculated on an ''All-In'' basis. Thus, it makes sense to make the comparison in the manner undertaken by Professor Zmijewski.

[128] Again, to be clear, the Judges are substituting the 15.1% revenue rate for the 10.5% revenue rate as the headline rate in the ''greater-of'' structure of the *Phonorecords II* benchmark. Thus, the price discriminatory royalty rates discussed below would apply only if they generated a ''greater'' level of revenue than the headline 15.1% revenue rate. And, although the Mechanical Floor rate is not tied *directly* as an alternative to the ''greater-of'' revenue rate (now 15.1% as phased-in), it is not a floor that ignores the effect of that ''greater of'' rate. For example, assume the popular standalone portable subscription streaming service that people access on their mobile phones would pay an ''All-In'' musical works royalty of 15.1% based on the application of the two ''greater-of'' prongs. However, assume also the ''Performance Royalty'' that must be subtracted is 12%. That would leave 3.1% of service revenue attributable to the mechanical right. However, if that revenue rate of 3.1% yielded mechanical royalty revenue that was less than the royalty revenue generated by the applicable monthly mechanical floor of $0.50 per subscriber, then the mechanical floor would control. This application, like any other application of the mechanical floor, does not diminish the value of the 15.1% right, but rather limits *its reduction* under the ''All-In'' calculation. Recall also that the Determination, Dissent and *Johnson* do not disturb the All-In and Mechanical Floor features of the *Phonorecords II* benchmark.) And finally, with regard to the actual per subscriber monetary values in the mechanical floors, no party suggested changes from rate levels in the PR II-based benchmark, including in the mechanical floor rates. The Judges recognize, as did Dr. Katz, Pandora's economic expert witness, that alternate values might have been preferable for rates contained in the PR II-based benchmark, but none were in the record. *See* 4/15/17 Tr. 5056–58 (Katz).

[129] 1 ÷ 4.55 = .219, or 22% (rounded); 1 ÷ 4.76 = .210 (21%).

abstract quality represented by an area rather than a pinpoint.'').

The 21% and 22% TCC rates within section 115 identified by Dr. Eisenach as generating the ''lower bound on the relative market valuations'' imply certain approximate percent-of-revenue rates, *i.e.,* percent of total service revenue (not percent of sound recording revenue). *See Dissent* at 91, n.133 (sound recording rates clustered between [REDACTED]% and [REDACTED]% of revenue). For example, if the sound recording royalty rate for interactive streaming is [REDACTED]% of revenue, then the musical works rate would be calculated as 0.21 × [REDACTED], which equals [REDACTED]%, (or as .22 × [REDACTED] which equals [REDACTED]%). At the low end of the range, if the sound recording royalty rate is [REDACTED]%, then, applying these TCC figures, the implied musical work royalty rate would be calculated as [REDACTED]% (.21 × [REDACTED]) or [REDACTED]% (.22 × [REDACTED]).[130]

It is important to emphasize and detail the context of these price discriminatory rates. These capped TCC rates are on the ''greater of prong'' that is compared with the headline 15.1% revenue rate (phased-in) that the Judges are also adopting in this Initial Ruling. As phased in, the headline rate is greater than all the capped TCC-based rates identified in Dr. Eisenach's testimony, *supra,* [REDACTED]. For 2019, the phased-in headline percentage rate, 12.3%, is [REDACTED] the [REDACTED]% and [REDACTED]% revenue rates derived if the sound recording rates was [REDACTED]%. For 2018, the phased-in headline percentage rate, 11.4%, is [REDACTED] all the rates derived from the capped TCC rates Dr. Eisenach identified as ''market valuations'' (albeit the lower bound in his opinion). But that is of no negative consequence for Copyright Owners, because they would get paid on the ''greater-of'' metric (capped TCC or headline rate) under the *Phonorecords II*-based rate structure the Judges are adopting (For the portable subscriptions, even though the 80 cents/subscriber ''lesser-of'' portion of the non-headline prong would apply on that prong if it was lower than the capped TCC rate, the actual rate could not be lower than the phased-in headline rate.)

Dr. Eisenach also examined direct agreements between record companies and interactive streaming services that contain rates for sound recordings and mechanical royalties, respectively. *See, e.g., id.* ¶¶ at 84–91. In such cases, the ratio of sound-recording to musical-works royalties ranged tightly between [REDACTED] and [REDACTED], closely tracking the regulatory ratios implicit in the section 115 TCC. *Id.* ¶ 92. (The [REDACTED] ratio equates to a TCC rate of [REDACTED]%, and the [REDACTED] ratio equates to a mechanical rate of [REDACTED]%.). He concluded, as he did with regard to the actual section 115 license rates: ''In my opinion, the evidence presented . . . indicates that the relative valuation ratios implied by the . . . negotiations under [the statutory] shadow—ranging from [REDACTED] [[REDACTED]%] to [REDACTED] [[REDACTED]%]—represent an *upper bound on the relative market valuations of the sound recording and musical works rights.*'' Eisenach WDT ¶ 92 (emphasis added).

Dr. Eisenach also identified several additional useful benchmarks. First, he identified what was coined the ''Pandora Opt-Out Agreement'' benchmark,[131] which reflected a ratio of [REDACTED] of sound-recordings to musical-works in a comparable benchmark setting. This ratio translates to a TCC percent of [REDACTED]%. With sound recording royalty rates of approximately [REDACTED]% to [REDACTED]%, this TCC reflects an effective percentage of total revenue equal to [REDACTED]% to [REDACTED]%.

Second, Dr. Eisenach identified YouTube agreements with music publishers that relate to the combination of a commercial sound recording and a ''static image.'' The YouTube agreements contain an explicit royalty of [REDACTED].[132] That [REDACTED]% royalty is a denominator in the ratio concept utilized by Dr. Eisenach, and the numerator is the [REDACTED] sound recording royalty paid to the record companies. YouTube had agreed to pay [REDACTED]% of its revenues, and had agreed to pay [REDACTED] and other record companies [REDACTED]% of revenues. The [REDACTED] ratio reduces to [REDACTED], implying a TCC ([REDACTED]) of [REDACTED]%. The [REDACTED] ratio reduces to [REDACTED], implying a TCC ([REDACTED]) of [REDACTED]%. *See* Dissent at 101–102.

These additional rates identified in Dr. Eisenach's testimony further confirm the reasonableness of the non-headline rates within the PR II-based benchmark.

Finally, the Judges look at the effective rates paid by Spotify, the largest interactive streaming service in terms of in terms of the number of subscriber-months and the number of plays. *See* Marx WRT ¶¶ 37–38 & Figs. 8 & 9. Under the PR II based benchmark, Spotify paid on its *subscription* service an effective ''All-In'' royalty rate of [REDACTED]% of its total revenues. *See* Dissent at 80, 115, 149 (and record citations therein). Spotify paid this effective percent-of-revenue rate [REDACTED]. *See id.* at 29 (Table).

Turning to Spotify's free/ad-supported offering (and as noted *supra*), Spotify paid royalties under the PR II Rates at an effective ''All-In'' royalty rate of [REDACTED]%. Spotify paid this effective percent-of-revenue rate [REDACTED]. *See id.* When Spotify's two tiers are blended and averaged, the effective percent-of-revenue rate is [REDACTED]% of revenue. *See id.* at 116. The average rate has salience in this proceeding because Spotify's two

[130] Dr. Eisenach's identification of the 21%–22% TCC as within the bounds of market valuations may appear surprising at first in light of the higher 26.2% uncapped TCC rate pursued (unsuccessfully) on remand by Copyright Owners. But in the context of his testimony, Dr. Eisenach's opinion is understandable. The former headline rate of 10.5%, when sound recording rates ranged from approximately [REDACTED]% to [REDACTED]% of streaming revenues, yielded TCC rates between [REDACTED]% and [REDACTED]%. Thus, Dr. Eisenach was identifying a market valuation [REDACTED] (at his lower bound) between [REDACTED]% (the difference between 21% and [REDACTED]%) and [REDACTED]% (the difference between 22% and [REDACTED]%). Again, for context, this Initial Ruling raises the percentage rate by *44%* when fully phased-in (based on the experts' Shapley analyses, significantly above the TCC rates advocated by Dr. Eisenach, even assuming the [REDACTED]%–[REDACTED]% sound recording rates on which he relied.

[131] Pandora was only a noninteractive service at that time, and thus only paid the performance right royalty, not the mechanical right royalty, for the right to use musical works. Because the parties agree that the performance right and the mechanical right are perfect complements, Pandora's payments for the performance right are thus relevant and probative, as they reflect the full value of the musical works royalty to a noninteractive service. These factors became relevant because major music publishers had negotiated direct licensing agreements with Pandora for its *noninteractive* service covering the period from 2012 through 2018. Eisenach WDT ¶ 103. They negotiated these direct agreements after certain publishers had decided to ''opt-out,'' *i.e.,* to withdraw their digital music performance rights from PROs, and asserted the right to negotiate directly with a digital streaming service. Pandora thus negotiated several such ''Opt-Out'' Agreements with an understanding that the rates contained in those direct agreements might not be subject to rate court review and thus could reflect market-based rates. Given this unique circumstance, and given that the markets and parties involved in the Pandora Opt-Out agreements are somewhat comparable to the markets and parties at issue in this proceeding, Dr. Eisenach concluded that *these agreements provided* ''significant insight into the relative value of the sound recording and musical works rights in this proceeding.'' *Id.* (emphasis added). (The Judges did not adopt Dr. Eisenach's speculation that this performance royalty would continue to grow after 2018. *See* Determination at 51; Dissent at 102–103.)

[132] Dr. Eisenach preferred to use YouTube agreements that included [REDACTED], but the Judges relied on [REDACTED] as more comparative. Determination at 50; Dissent at 102.

tiers are interrelated, in that free/ad-supported listeners constitute a pool of potential converts to the subscription tier under this ''freemium'' model, even as this offering generates royalties under the PR II-based benchmark.

d. Copyright Owners' Concern Regarding Revenue Diminution Is Insufficient To Reject the PR II-Based Benchmark

Copyright Owners argue that what the Services tout as beneficial price discrimination generates an ''incredible'' level of revenue diminution, including displacement, resulting in a ''major problem'' that reduces reportable revenues and thus the royalty base. *See, e.g.,* 3/7/22 Tr. 193 (Copyright Owners' counsel). This argument is based upon documents and evidence that demonstrated the following:

- [REDACTED];
- [REDACTED].
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED]
- [REDACTED];
- [REDACTED];
- [REDACTED]; and
- Copyright Owners' expert, Dr. Rysman, testified that interactive services often elect to forgo current profit maximization, *e.g.,* by charging lower prices, in order to build a customer base and greater long-run profitability or value, from selling music and non-music products or services to its customers.

CO Initial Submission at 40–42 (and record citations herein).

The Services' economic experts do not ignore the fact that there can be revenue attribution problems when interactive streaming is combined with other products or services. They acknowledge that, even absent any wrongful intent with regard to the identification and measurement of revenue, attribution of revenue across product/service lines of various services can be difficult and imprecise. *See, e.g.,* 4/5/17 Tr. 5000 (Katz) (problem of measuring revenue ''certainly a factor that goes into thinking about reasonableness.'').

However, Professor Katz testified that the existing rate structure agreed to by the parties accommodates these bundling, deferral, and displacement issues via the use of an alternative rate prong that would be triggered if the royalty revenue resulting from the headline rate of 10.5% of streaming revenue fell below the royalty revenue generated by that second prong. Katz WDT ¶¶ 82–83; 3/13/17 Tr. 670 (Katz). Moreover, Professor Katz concluded that, because the marketplace appears to be functioning (in the sense that publishers are earning profits and new and existing interactive streaming services continue to operate despite accounting losses), these revenue-measurement issues are being adequately handled by the alternative rate prong, even if an altered second prong might work better. *Id.* at 738–39. More generally, Professor Katz further noted that, the existing rates within the PR II-based benchmark were performing well, and even if alternative minima might be preferable, no such alternative rates were in the record. *See* 4/15/17 Tr. 5056–58 (Katz) (under the PR II-based benchmark ''the industry . . . was performing well,'' but ''if someone had a proposal [with] a specific reason why we should adjust this minimum that's something I would have examined,''). But Copyright Owners did not propose alternative rates or minima within the PR II-based benchmark, but instead urged the Judges to disregard the benchmark *writ large.* Accordingly, there were no alternative rates or minima in the record.

Professor Katz further noted that the PR II-based benchmark rates were established when ''ecosystem'' entities such as Yahoo—akin to Amazon, Apple, and Google—were in the marketplace. 4/5/17 Tr. 5055–57 (Katz); see also Determination at 31 (and record citations therein) (noting the presence of Microsoft as well as Yahoo as licensees in the interactive market during the *Phonorecords II* negotiations).

More broadly, the Services' position regarding the use of the two prongs and their alternate rates to ameliorate the revenue-measurement problems is summed up by Professor Katz as follows:

> [T]he primary reason [for the two rate prongs] . . . is because of the measurement issues that can come up when having royalties based on a . . . percentage of revenues because there can be issues about how to appropriately assign revenues to a service. And so I think the minim[a] can play an important role when those—you know, when those measurement problems are severe, you can turn to the minimum instead. . . . [W]hat I have in mind, right, is that what would happen if you could imagine an entrepreneur coming along and saying we want to have a service and have some incredibly low price and not a very good monetization model, where a copyright owner would say—in an effectively competitive market, would say, wait a minute, I don't want to license to you on those terms. It's—I just think the possibility of getting a return is so low, I'm not going to do it, even though you, as an entrepreneur, are willing to try this. I as the copyright owner want some sort of, you know, return on it. And that's what the minimum also helps to do.

3/13/17 Tr. 599 (Katz.); *see also* 3/20/17 Tr. 1900–01 (Marx) (minima protect against revenue measurement problems); 4/7/17 Tr. 5584 (Marx) (statutory minima play ''two roles''—*protecting the Copyright Owners* from ''revenue mismeasurement'' by creating the ''greater of'' prong,'' but incorporating per subscriber rate prong in ''lesser of'' component *to protect services* from the record companies' use of their market power to engage in ''manipulation of the sound recording royalties'' on which the TCC prong is calculated).

After considering the record, the Judges determine that the Majority had not found—as Copyright Owners claim—that the activities and strategies by the Services were ''incredible'' or a ''major problem. Rather, the Majority's characterization was measured, stating repeatedly that the Services engaged ''*to some extent*'' in revenue diminution because they ''*might* focus on long-term profit maximization to promote their long-term growth strategy, which occurs ''even absent wrongful intent.'' Determination at 20–21, 36, 90; *accord,* Dissent at 59. In fact, the Majority specifically stated: ''The Judges agree that there is *no support for any sweeping inference that cross-selling has diminished the revenue base.*'' *Id.* at 21 (emphasis added). The Majority (and the Dissent) thus acknowledged the reasonableness of both sides of this issue, recognizing both the Services' use of price discriminatory approaches that can lower per user or per-stream revenues but grow royalties, market share and revenue, as well as Copyright Owners' concomitant desire to protect themselves from reductions in the royalty revenue base, however limited in extent, that would only serve to diminish royalties.

One way the input supplier can avoid this impact is to refuse to accept a percent of revenue form of payment and move to a fixed per-unit input price. This is what Copyright Owners originally and unsuccessfully sought in this proceeding, subject to a bargaining room approach by which they could switch back to the old approach (or any other approach) through purely market-based negotiations, unbounded by the statutory and regulatory standards of ''fairness'' and ''effective competition.'' *See* Dissent at 60.

The Judges must reconcile the parties' competing considerations. A way by which they are both accommodated is through a pricing structure with

alternate rate prongs and floors, below which the royalty revenue cannot fall. This is precisely the bargain struck between Copyright Owners and services in 2008 and 2012, and that has been the rate structure through 2017. And, because the Majority and the Dissent found that revenue diminution occurred only ''to an extent,'' rather than in the pervasive (sweeping'') manner averred by Copyright Owners, there is no sufficient reason in the record to depart from the bargained-for multi-tiered rate structure in *Phonorecords II* that allows for price discrimination but tempers its impact on royalties through the use of minima and floors.

e. Copyright Owners' Claim of ''Inherent'' Economic Value Is Belied by the Record, Including Their Own Arguments

Pre-remand, Copyright Owners approached this rate setting process with an overarching premise: A musical work has an ''inherent value'' that must be reflected in the royalty rates. As the NMPA's president, Mr. Israelite testified, when asked how ''inherent'' value is defined:

> [W]hoever owns an individual copyright is the one to define it. I think that would be the most appropriate definition of it. What someone is willing to license it for would be that inherent value to that owner . . . That would be market value.

3/29/17 Tr. 3707 (Israelite).

If the market for musical works was as atomistic as the above quote assumes, the songwriter of an individual musical work could indeed set his or her own royalty rate, and refuse to license to any streaming service or other distributor who refused to pay that royalty. But that is not how the licensing market works.[133] Songwriters typically assign their licensing rights to music publishers (to avoid ruinous transaction costs). These music publishers control huge ''Must Have'' repertoires that are offered under blanket licenses to streaming services. (The musical works market of course is subject to a compulsory license, but this is precisely how the unregulated market works for the licensing of sound recordings by labels to interactive streaming services.) It is acknowledged even by Copyright Owners' own expert witness, Professor Watt that the creation of these large collectives generates market power that necessitates rate regulation. *See* R. Watt, *Copyright and Economic Theory: Friends or Foes* at 163, 190 (2000) (quoted in Dissent at 35).

Further, this ''inherent'' market value notion is antiquated as a matter of economics. Although an individual Copyright Owner can announce his or her ''asking'' royalty, that is not sufficient to generate a ''market'' royalty, unless and until a licensee agrees to pay it. In market-based economics. that is to say, the economic consensus that has governed economics since the ''marginal revolution'' in the mid to late 19th century, value is ascertained through the intersection of supply and demand, with the price established at the margin representing the market value of the good or service bought and sold.[134] If there is no demand for a product, be it a musical work or anything else, it has no economic value. Even though costs have been incurred to produce the product, those costs cannot be recovered (or profit earned) absent a sufficient WTP in the market. And, as noted *supra,* the product being offered and at issue here is comprised of ''second copies'' of sound recordings (with embedded musical works), which are costless to reproduce for streaming purposes. Of course, these ''second copies'' do have actual value when they are in demand, and the royalties that their licensing generates must cover: (1) the first copy (creative) costs; (2) the ''opportunity cost'' (measured by the next best alternative for royalty earnings if the ''second copies'' could have been supplied through another distribution channel that paid higher royalties to attract the end-user/consumer at issue); and (3) profits to induce the creation of musical works.

Second, the fact that Copyright Owners originally proposed a per-subscriber alternative rate to their per-play rate itself belies their conviction that some ''inherent'' economic value exists. When the metric of value switches from ''per-play'' to ''per-subscriber,'' the focus of value likewise shifts from an emphasis on producer value to consumer value. That is, if there is truly an ''inherent'' value for a product or service, that singular value cannot divide into two distinct values with the ''greater-of'' the two controlling. Such an argument gives away the game, so to speak, demonstrating, perhaps unsurprisingly, that economic arguments (not unlike legal advocacy) are often situational—designed to support maximalist positions and the exercise of market power, however acquired. *See also* Determination at 28 n.64 (rejecting the ''inherent value'' argument).

f. PR II-Based Benchmark Not ''Too Complex''

Copyright Owners and the Majority complained that the PR II-based benchmark is too complex. *See* Copyright Owners' PFF ¶ 12 (criticizing complexity of PR II Rates as lacking ''transparency''); Determination at 36 (characterizing parties' negotiated, renewed, and expanded rate structure as Rube-Goldberg-esque in complexity and impenetrability.'')

After considering this issue on remand, the Judges disagree. If some songwriters or lyricists have been confused by their royalty statements, their confusion of course should be resolved. However, one of the benefits of a collective is that it possesses the expertise and resources to identify and explain how royalties are computed and distributed. Moreover, this claim of complexity cannot serve as a basis to override the multi-part negotiated benchmark that the parties, through their respective trade associations, negotiated and implemented. As the Dissent stated: ''There is no good reason why the rate structure that is consonant with the parties' ten-year history and with the relevant economic model should be sacrificed on the slender

[133] The record does not include evidence of self-marketing by songwriters through social media or via negotiation of individual royalty contracts by the exercise of overwhelming star power, whether through traditional payment mechanisms or new methods, such as the murky mechanism of non-fungible tokens (NFTs). The absence of incidents of such self-marketing from the record evidence in this proceeding suggests that they likely constitute but a small segment of the songwriter/publisher market. Accordingly, such self-marketing and individual negotiations do not impact the Judges' setting of statutory rates in this proceeding.

[134] As one scholar has summarized the 19th century transition from classical to neoclassical economics: ''By the early 1870s, economics reached a tipping point, and it ushered in a revolution in thought, signaling the beginning of the ''modern,'' or ''neoclassical'' era. Marginalists flipped classical economics on its head. Instead of focusing on the production side of economics, they turned to consumption. It is the satisfaction of the wants of consumers that matters for value, not the labor required for production. What established the overall value of a good is the value fetched by the final unit of that item on the market. As more units of a good are produced, the marginal value of the last unit tends to decrease. . . . According to marginal utility, the consumer, not the producer, therefore drives the valuation process.'' J. Wasserman, *The Marginal Revolutionaries* at 28 (2019). This transformation reflected the abandonment of the ''labor theory of value''—the cornerstone of Marxian economics. *See* E.R. Canterbury, *A Brief History of Economics* at 111 (2001) (''Marx's devotion to a labor theory of value was complete.''). It initially appears as irony that Copyright Owners espouse a Marxian approach to value while preaching the virtues of unregulated markets. The initial whiff of irony dissipates when one appreciates that a collective licensor with the market power of control over a ''Must Have'' input has every incentive to urge a pricing or valuation method that takes the focus away from the force of consumer demand in an effectively competitive market, which is a hallmark of neoclassical economics.

argument that ''simpler is better than complicated.'' Dissent at 88.[135]

Further, section 801(b)(1) does not identify ''simplicity'' as a statutory goal for the setting of rates, rate structure, and terms. Although there is certainly no need for gratuitous complexity, the price discriminatory structure and the associated levels of rates in the PR II-based benchmark that were eliminated by the Majority (while maintaining all the remaining complexity) were most certainly not gratuitous, but rather designed, after negotiations, to establish a structure that would expand the revenues and royalties to the benefit of Copyright Owners and Services alike, while also protecting Copyright Owners from potential revenue diminution by the Services. Moreover, when the market itself is complex—in that the WTP across consumer groups is heterogeneous and the offerings reflect that fact—it is unsurprising that the regulatory provisions would resemble the complex terms in a commercial agreement negotiated in such a setting. For the Judges to demand simplicity in this context would be to sacrifice the specificity that an effectively competitive market requires. *See* Dissent at 88 (rejecting the simplicity argument by invoking the advice attributed to Albert Einstein that ''[e]verything should be made as simple as possible, *but no simpler.*''

g. So-Called Statutory ''Shadow'' Does Not Diminish Value of the PR II-Based Benchmark Rates

Copyright Owners maintain that the rates in the PR II-based benchmark are infirm because, like any benchmark for which a statutory rate is the default, they are not actual market rates. That is, such a rate is said to exist in the so-called ''shadow'' of the statutory rate. *See* Dissent at 70 (and citations therein).

The Judges reject this argument for several reasons. First, the argument is undercut by the explicit language of section 115 of the Copyright Act, which states: ''In addition to the objectives set forth in section 801(b)(1), in establishing such rates and terms, the Copyright Royalty Judges may consider rates and terms under voluntary license agreements described in subparagraphs (B) and (C).'' 17 U.S.C. 115(c)(3)(D). Subparagraphs (B) and (C), respectively, refer to agreements on ''the terms and rates of royalty payments under this section'' by ''persons entitled to obtain a compulsory license under [17 U.S.C. 115(a)(1)]; and ''licenses'' covering ''digital phonorecord deliveries.'' *Id.* Thus, it is beyond dispute that Congress has authorized the Judges, in their discretion, to consider such agreements as evidence, irrespective of—or perhaps because of—the shadow cast by the compulsory license. Thus, the appropriate question is *how much weight* the Judges, in their discretion, should afford such benchmarks in any particular proceeding.

There is no basis to find, as Copyright Owners suggest, that statutorily-based or influenced benchmarks, including specifically the PR II-based benchmark in this proceeding, are *per se* inferior to other benchmarks or alternative economic evidence (*e.g.,* from models, surveys or experiments) that may be unaffected by the shadow. Those other benchmarks or forms of evidence will also be subject to their own imperfections and incompatibilities with the target market and must be identified and weighed accordingly.[136] Thus, the Judges must not only consider (i) the importance, *vel non,* of any potential so-called ''shadow-based'' distortionary effects from a benchmark derived from a *regulated* statutory benchmark market, but also (ii) how any such purported ''shadow'' effects compare to any distortions generated by other proffered benchmarks and competing alternative economic evidence, *e.g.,* distortions based on complementary oligopoly power, bargaining constraints and product differentiation in other benchmarks, models, surveys or experiments.[137]

The Services' experts discount the foregoing shadow-based criticism. Moreover, the Services laud a statutorily-influenced benchmark in general, and the specific PR II-based benchmark in particular, because the latter reflects more equal bargaining power between licensors and licensees. In this regard, one of the Services' economic expert witnesses, Professor Katz, points out that rates set voluntarily by the parties in a settlement under the ''shadow'' provide two important benefits. First, with a statutory rate-setting proceeding as a backstop, large licensors cannot credibly threaten to ''hold out'' and ''walk away'' from the negotiations without an agreement, thereby negating their ability to use their ''must have'' status to obtain rates above effectively competitive levels. Second, when, as here, such negotiations are conducted with *all the parties* at the figurative table—including here, trade associations—no single party has disproportionate market power in the negotiations. *See* 3/13/17 Tr. 661 (Katz).

The Judges agree that settlement agreements reached in the statutory shadow are useful. Although imperfect when considered in *isolation,* in that the statutory proceeding is the default backstop, in *context* they negate the power of any entity simply to refuse to strike a deal. The negation of that power blunts the complementary oligopoly power of licensors of ''Must Have'' repertoires (whether musical works or sound recordings), making a benchmark agreement reached in the so-called ''shadow'' advantageous in establishing an effectively competitive rate. *See Web IV, supra,* 26,316, 26,330–31 (May 2, 2016) (noting counterbalancing effect of statutory license in establishing effectively competitive rates). Further, when such settlement agreements are industrywide, they tend to eliminate disproportionate market power, *See* Dissent at 72; *Web III,* 79 FR 23102, 23111 (Apr. 25, 2014), *aff'd Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Bd.,* Case No. 14–1098 (D.C. Cir. Aug. 11, 2015) (relying on two settlement agreements).

Nonetheless, Copyright Owners are correct to note that, hypothetically, some licenses might have otherwise been negotiated at rates higher than the settlement rate that was affected by the so-called shadow. But that is simply the tradeoff that the statutory scheme makes in its identification of settlement rates as evidentiary benchmarks. Such a theoretical problem cannot serve to override the salutary aspects of benchmark settlement agreements. *See Web IV, supra* at 26,630 (rejecting same argument as speculative and ''too untethered from the facts to be predictive or useful in adjusting for the supposed shadow of the existing statutory rate.'').

Lastly, with regard to a benchmark affected by the so-called ''shadow,'' the Judges find that, with regard to the application of the itemized factors in

[135] Copyright Owners' concern for transparency has apparently evaporated in connection with its eagerness to adopt the proffered uncapped TCC rates. Under that approach, the definition of revenue, the handling of bundled products and the exclusion of certain consideration from the royalty base will remain opaque to songwriters—and to the Judges.

[136] It has been famously and wisely said that ''all models are wrong, but some are useful.'' G. Box & N. Draper, *Empirical Model-Building* at 424 (1987). Benchmarks, Shapley, and Nash models, surveys and experiments are all models, in that ''[a] model is a representation of something beyond itself . . . being used as a representative of that something, and in prompting questions of resemblance between the model and that something . . . substitute systems . . . directly examined . . . to indirectly acquire information about their target systems.''). U. Maki, *Models are Experiments, Experiments are Models,* 12 J. Econ. Meth. 303 (2005).

[137] It is also important to note that the reasonable rate and rate structure identified under the section 801(b)(1) standard (before considering the four itemized statutory factors) need not be a market-based rate, as discussed *infra.*

section 801(b)(1), they have the same duty to independently weigh those factors as they do for all otherwise reasonable rates. Thus, the Judges reject the idea that rates and terms reached through a settlement must be understood to supersede—or can be *assumed* to embody—the Judges' current thinking as to the application of the statutory elements set forth in section 801(b)(1). The Judges are obliged to conduct the four-factor analysis anew when considering a previously adopted settlement in a subsequent proceeding—and they do so *infra.* Of course, if on such further analysis, the Judges find that the provisions in an otherwise useful benchmark agreement (including those in a benchmark influenced by the so-called ''shadow'') *do* appropriately reflect the four itemized statutory factors in section 801(b)(1), then the Judges may adopt the provisions of that settlement without a factor-based adjustment.

h. Conclusion Regarding PR II-Based Benchmark

Accordingly, the Judges find the PR II Rates to be a useful benchmark. However, this benchmark is modified by the Judges' substitution of the 15.1% headline percentage rate for the 10.5% headline percentage rate in the benchmark.

D. Precedent Permits Judges To Apply Elements of PR II Rates, Rate Structure and Terms Even if Those Are Not Proffered as Benchmarks

The D.C. Circuit has previously held that the Judges have the authority to adopt elements from the existing rate provisions, if they find that those prevailing provisions better satisfy the statutory requisites than any other proposed structures and rates discernible from the record evidence. *Music Choice* v. *Copyright Royalty Bd.,* 774 F.3d 1000, 1009 (D.C. Cir. 2014). This authority exists even when no party has proffered those provisions in the form of a benchmark.

In *Music Choice* (concerning the setting of satellite radio royalty rates under the same section 801(b)(1) standard), the CRB Judges rejected the parties' proffered benchmarks and instead relied on a percent-of-revenue rate (13%) that was neither a benchmark nor even the prior statutory rate, but merely ''a component of a prior determination.'' *Id.* at 1009. The licensor-party, SoundExchange, argued, like Copyright Owners here, that this component of a prior rate was ''stale,'' ''outdated,'' or ''obsolete.'' Rejecting this argument as ''erroneous,'' the D.C. Circuit stated that ''the Judges did not consider the 13% rate as a current benchmark,'' but rather used it to ''bridge the gap'' caused by the inadequacies of the parties' rejected benchmarks. *Id.* In so doing, the D.C. Circuit held that the Judges properly resolved ''serious problems'' with the licensor's proposal, even as it had ''partially credited it'' and also ''used permissible indicia of reasonableness to help fix the rate.'' *Id.*

Music Choice is highly instructive. Here, on remand, the Judges adopt a modified version of the prior rate structure and rates in *Phonorecords II.* The fact that it was also proffered as a benchmark, in another modified form by the Services, does not render *Music Choice* inapposite. Rather, because the *Phonorecords II* provisions were proffered as benchmark evidence, these provisions were placed squarely into the record, allowing the parties and the Judges to address the relative merits. *A fortiori, Music Choice* underscores the propriety of the Judges approach in this proceeding. That is, even if the Services had not proffered this approach as a benchmark, *Music Choice* allows the *Phonorecords II* approach to serve as a guidepost for establishing the rates and rate structure in this proceeding.

Further, here the Judges are adopting actual elements from the prior rate provisions, rather than, as in *Music Choice,* a mere ''component'' used to generate the prior rate. *A fortiori* yet again, *Music Choice* allows the Judges to prudently utilize the prior rate and rate structure regulations to synthesize a determination in this proceeding. The analogous nature of *Music Choice* is also seen in the Judges' use in the present case of the ''headline'' 15.1% revenue rate proposed by Copyright Owners on remand *combined with* elements from the PR–II regulatory provisions, including its price discriminatory rates. In *Music Choice,* the Judges likewise ''partially credited'' the licensor's proposal, which, as noted *supra,* the D.C. Circuit affirmed.

Finally, the Judges take note that *Music Choice* also addressed the Judges' findings regarding the setting of another statutory license, for Preexisting Subscription Services (PSS), by using a rate in a settlement from a prior period. This context is also analogous here, because Copyright Owners object to the use of the *Phonorecords II* rate structure and rates as the product of a settlement. It is instructive to consider how the arguments of the licensor (SoundExchange) in *Music Choice* mirror those of Copyright Owners in this proceeding:

- SoundExchange notes that this rate ''is *the product of settlement negotiations* that occurred in *SDARS I* between Music Choice and SoundExchange.''
- SoundExchange argues that the Judges arbitrarily rejected . . . more recent data points in favor of the ''outdated'' settlement rate.
- SoundExchange maintains that the Judges conceded that the prevailing rate had limited value, as the settlement rate ''was negotiated in the shadow of the statutory licensing system and cannot properly be said to be a market benchmark rate.''
- SoundExchange also argues that simply reciting that ''nothing in the record persuades the Judges'' that the prevailing rate is unreasonable . . . does not show that [it] is reasonable, or that it is supported by the written record.
- [G]iven the lack of creditable benchmarks in the record, the Judges did not err when they used the prevailing rate as the starting point of their Section 801(b) analysis.
- The Copyright Act contemplates that the Judges would . . . consider ''prior determinations'' and rates established ''under voluntary license agreements.''
- [T]he Judges did not err when relying on the settlement rate. The Judges conceded that the settlement rate does not represent a market rate. . . . But . . . the relevant portion of the Copyright Act does not use the term ''market rates,'' nor does it require that the term '''reasonable rates'' be defined as market rates. . . . The Act authorizes the Judges to consider rates set ''under voluntary license agreements.''
- Music Choice complains that it agreed to a higher rate to avoid litigation costs, but has not introduced evidence that the settlement was involuntary or otherwise unreasonable. It was not arbitrary, then, for the Judges to consider the voluntary settlement rate.

Music Choice, 774 F.3d at 1012–15. These aspects of *Music Choice* are highly instructive, considering the Judges' parallel findings regarding the same and similar arguments as discussed *supra* regarding prior settlement agreements and the so-called ''shadow'' of the statutory rates.

In sum, *Music Choice* provides ample support for the conclusion that, even if the Services had not proffered their PR II-based benchmark, the Judges would have acted well within their authority to give the same weight to the PR II rates and structure as they have in this Initial Ruling.[138]

[138] This ruling is in no way conflicts with the Judges' duty to set rates, rate structures, and terms *de novo* in each rate proceeding, as discussed supra.

E. Four Itemized Factors in Section 801(b)(1)

The Judges have considered the application of the four itemized statutory factors A through D, in connection with their application of the 15.1% revenue rate and their partial use of the PR II-based benchmark.

1. Factor A

The Judges have explained *supra* that price discrimination is a ''win-win'' for Copyright Owners and the Services. By serving low WTP listeners, it brings in new listeners and subscribers who increase royalty payments as well as revenues. Any licensor would prefer to increase its royalties, rather than ''leave money on the table,'' and a rate structure that effects such an increase (through the concept of ''derived demand'') is appropriate. Moreover, for purposes of applying Factor A, a rate structure that increases royalties, *ceteris paribus,* would induce more production of musical works, a result that Copyright Owners should desire.

This point appears to raise a question: How could Copyright Owners and their economic experts object to a rate structure that inures to their benefit as well? The answer is: They do not object. They are not economic naifs. As stated *supra,* they advocate for a rate set under the bargaining room theory, through which rate structures can still be negotiated, but not subject to the ''reasonable rate'' and itemized factor analysis required by law. In those negotiations, as Dr. Eisenach candidly acknowledged, Copyright Owners would have a different threat point to use in order to obtain better rates and terms. 4/4/17 Tr. 4845–46 (Eisenach).

Second, given a heterogeneous downstream WTP, it would not be more profitable simply to equate ''availability'' with a higher rate. As noted *supra,* any product that is priced beyond the WTP of a significant portion of the public is *unavailable* to that segment.[139] Royalties that are aligned with the varying WTP of different classes of listeners will make downstream price discrimination more affordable to the services, driving new revenue and royalties—precisely as the PR II-based benchmark allows.[140] In this regard, Copyright Owners have taken a cramped and unrealistic view of such incentives. In particular, the Judges disagree with Copyright Owners' expert economic witness, Professor Rysman, who startlingly asserted in response to a hypothetical from the bench that even a $10,000 per month subscription price would increase ''availability.'' 4/3/17 Tr. 4397 (Rysman).

The Judges find Professor Rysman misapprehends the nature of a price signal. If the price is so high as to eliminate or reduce total revenue to creators, in no way will higher rates simply induce the supply of creative works over time. Indeed, even monopolists do not seek the highest price possible, but rather seek to maximize profits. *See* E. Mansfield & G. Yohe, *Microeconomics* at 362–63 (11th ed. 2004) (''Monopolies maximize profits by producing where marginal cost equals marginal revenue.''). Thus, even monopolists, who have the most market power, are constrained in their pricing by the demand curve and the marginal revenue it creates. Simply put, although a higher royalty *rate* might have an immediate superficial appeal, if the consequence will be lower revenues, the high per-play rate would reveal itself as a form of fool's gold.

In sum, the Judges find that the Factor A objective of ''maximizing the availability of creative works'' is furthered by an upstream rate structure that contains multiple royalty rates reflective of and derived from downstream variable WTP, because it will facilitate beneficial price discrimination. Such price discrimination allows for access to be afforded ''down the demand curve,'' making musical works available to more members of the public. However, there is no evidence to suggest that the price discriminatory rates should be changed, in order to address the connection between price discrimination and the objective of Factor (A). Accordingly, the Judges find no basis to adjust either the rate structure or the rates based on Factor (A).

2. Factors B and C

The concepts of ''fair income,'' ''fair return'' and recompense for costs and other contributions was considered in connection with the setting of the 15.1% revenue rate. In that context, the Judges analyzed the Shapley Value modeling that was designed to generate ''fair'' rates that allowed the parties to recover their costs and to share the surplus (over and above costs) in a manner that: (1) prevented the ''Must Have'' Input Suppliers (the record companies and Copyright Owners) from using the essential aspect of their inputs to engage in hold-up by threatening to withhold their respective repertoires; and (2) allocated surplus shares according to each party's contribution to the surplus (as calculated though the ''arrival orderings'' in the Shapley model).[141]

The PR II-based benchmark was the product of an *industrywide* negotiation, with the music publishers represented by the NMPA and the interactive streaming services represented by DiMA, their respective trade associations. As explained in the Dissent, *supra,* at pp. 137–39, when an industrywide settlement is reached, particularly when the default procedure is a contested rate proceeding before the Judges, it contains the same benefits with regard to the avoidance of the ''hold-out'' effect and the equalizing of bargaining power as produced by Professor Marx's Shapley value modeling. *See* 3/13/17 Tr. 577 (Katz) (''I think of the shadow as balancing the bargaining power between the two

The *de novo* process requires the Judges to weigh new evidence regarding potential new rates, rate structures, and terms, but that is not inconsistent with the Judges' ability, as explicated by the D.C. Circuit in *Music Choice,* to adopt prior rates, rate structures, and terms in whole or in part if, in their discretion, the new evidence is deficient. *See Music Choice, supra,* at 1012 (''The Judges were under no obligation to salvage benchmarks they found to have fundamental problems.'').

[139] The concept of willingness-to-pay (WTP) as used by economists is an antiseptic phrase, because it includes not merely people who do not value a music streaming subscription highly, but also individuals and families who are ''income constrained'' (yet another antiseptic phrase, read ''low income'' people and families) who lack the ''ability-to-pay'' for an interactive subscription. That segment of the population likely reflects a significant portion of the nation, because ''40% of Americans would struggle to come up with even $400 to pay for an unexpected bill,'' let alone pay for a music streaming service. See *https://www.minneapolisfed.org/article/2021/what-a-400-dollar-emergency-expense-tells-us-bout-the-economy.* When the royalty rates paid by interactive services enable streaming services to satisfy the demand of these low-income consumers (through the principle of ''derived demand'') that segment of American society can enjoy the benefits of listening to interactive streamed music, even if the offerings they can afford lack the large catalogs and ''bells and whistles'' of a pricier service.

[140] To be sure, royalties will not increase in equal proportions with increases in the number of streams or listeners, but that is a feature of price discrimination, not a bug. The goal is to generate revenues from low WTP listeners who otherwise would be lost as sources of revenues and royalties to both the interactive services and Copyright Owners.

[141] As noted elsewhere in this Initial Ruling, Professor Marx, Spotify's economic expert witness, reduced the relative market power of the input suppliers in her model which she claimed would be consonant with the ''fairness'' objectives in Factor B. On behalf of Copyright Owners, Professor Watt disagreed, arguing that the Shapley approach takes the existing market power as reflective of the parties' market contributions, and thus needs no adjustment. The Majority utilized Professor Marx's Shapley-based calculation of a total royalty payment of [REDACTED]% of service revenue in setting a 15.1% revenue rate (phased-in), which the Judges are adopting in this Initial Ruling. The Majority also used Professor Marx's calculation to find that Factors B and C were satisfied without further adjustment. *See* Determination at 68 & n.120, 75, 86–87. But this issue is not relevant to the present discussion of Factors B and C with regard to the application of the PR II-based benchmark.

parties.''); Katz CWRT 136, n.236 (''there are market forces that promote the achievement of the statutory objectives in private agreements, such as the 2012 Settlement, when the parties are equally matched (it was an industry-wide negotiation) and the negotiations are conducted in the shadow of a pending rate-setting proceeding that can be expected to set reasonable rates in the event that the private parties do not reach agreement.'').

Accordingly, this benchmark already incorporates the dynamics of a negotiation between parties with mutually countervailing power (although those dynamics required updating of the headline rate to 15.1% to account for the higher revenues, as undertaken by the Majority's Shapley analysis). *See Web V,* 86 FR 59452, 59456 (Oct. 27, 2021) (''the licensor-side complementary oligopoly power could be ameliorated by the ''*countervailing power*'' of a licensee'').

Therefore, the Judges do not make any adjustment in their application of the PR II-based benchmark pursuant to Factors B and C.

3. Factor D

As noted *supra,* the Judges understand that a Factor D adjustment is warranted if the rate the Judges would otherwise establish

> directly produces an adverse impact that is substantial, immediate and irreversible in the short-run because there is insufficient time for either [party] to adequately adapt to the changed circumstance produced by the rate change and, as a consequence, such adverse impacts threaten the viability of the music delivery service currently offered to consumers under this license.

Determination at 87.

There is no record evidence to suggest that the Services' PR II-based benchmark, as utilized by the Judges in this Initial Ruling, would create the requisite ''adverse impact'' to trigger Factor D. The Services certainly do not assert that their own proffered benchmark would be disruptive. With regard to Copyright Owners, the Judges cannot identify any aspect of the PR II-based benchmark that would cause the type of disruption that can serve as an adjustment under the statutory language of Factor D or the Judges' application of same, as quoted above. The Judges understand Copyright Owners' complaint to be principally that [REDACTED] during the *Phonorecords II* period, [REDACTED] the number of musical works streamed via sound recordings performed on interactive services. However, that is most certainly not any sort of disruption, let alone a disruption cognizable under section 801(b)(1) and under the Judges' application of that provision.

F. Subpart C Offerings Covered by Foregoing Analysis

The *Phonorecords II* parties also negotiated several new service types—paid locker services, purchased content locker services, mixed service bundles, music bundles and limited offerings. These service configurations were described in subpart C of 37 CFR 385 under the *Phonorecords II* regulatory provisions.[142] Parness WDT ¶ 13; Levine WDT ¶¶ 38–39; Israelite WDT ¶¶ 28–30. These negotiations spanned more than a year. *See* 3/29/17 Tr. 3652–55 (Israelite) (involved protracted bargaining, in which NMPA rejected some categories, while others were accepted and became part of subpart C). *Id.* at 3654–56. The parties ultimately agreed on a structure for subpart C that resembled the subpart B structure, including a headline percentage of revenue royalty rate and per-subscriber and TCC minima. Parness WDT ¶ 14; *see also* 37 CFR 385.22. As with the bundling negotiations relating to subpart B, the parties negotiated and created a bundled service category under subpart C (with certain adjustments to the definition of ''revenue.'') 3/8/17 Tr. 161–64 (Levine); 37 CFR 385.21.

Copyright Owners urge the elimination of the subpart C provisions as essentially obsolete because locker services for ''purchased content'' (new download purchases) and for ''paid'' downloads (already owned) have largely disappeared, as listeners transitioned away from ownership models to access models. *See* 3/8/17 Tr. 159–160 (Levine); 3/16/17 Tr. 1458–1461 (Mirchandani); Mirchandani WDT ¶ 33; 3/22/17 Tr. 2523 (Dorn). Copyright Owners also re-assert the same arguments with respect to subpart C as they have for interactive streaming in subpart B. *See* CORPFF–JS at p.2.

The Services argue that Copyright Owners do not point to any evidence to show that locker services have *completely* disappeared, emphasizing that Apple and Amazon continue to offer locker service. Joyce WDT ¶ 5; Mirchandani WDT ¶¶ 16–17; 3/22/17 Tr. 2523–25 (Dorn); Ramaprasad WDT, Table 3. More generally, the Services urge the Judges to use the subpart C rate structure as the benchmark for rates in the forthcoming period for the same reasons as they urge the use of the subpart B rates as an appropriate benchmark. *See* Mirchandani WDT ¶¶ 58–62.

The Judges find no reason on remand to treat the subpart C offerings differently than the manner in which they are treating the subpart B interactive streaming offerings, for the reasons set forth in the Dissent at 118–119. That means, however, that the various ''headline'' rates for these subpart C offerings must also adjust to 15.1%,[143] whereas the alternative rates (identified in subpart C as ''minima'' and ''subminima)'' rates shall remain unchanged.

IV. Change in Definition of Service Revenue for Bundles [144]

The Judges analyze the definition of ''Service Revenue'' for bundled offerings in the context of the partial adoption of the PR II-based benchmark. As discussed *supra,* the Judges have found that the PR II-based benchmark is a useful benchmark, particularly because of its features that incentivize beneficial downstream price discrimination that generates more listeners, revenues, and royalties.

A. Background

In their Initial Determination, the Judges adopted a definition of ''Service Revenue'' (*i.e.,* a royalty base) for a ''Bundle'' [145] that provided, in pertinent part:

> Service Revenue shall be the revenue recognized from End Users for the Bundle less the standalone published price for End Users for each of the other component(s) of the Bundle . . .

Initial Determination, Attachment A at 7 (§ 382.2 therein).[146]

[142] The interactive steaming (and limited download) provisions that are the principal subject of this proceeding were contained in subpart B of the *Phonorecords II* (and *Phonorecords I*) regulations. (These subparts were reorganized pursuant to the now vacated Determination.)

[143] Accordingly, in the PR II-based benchmark, the subpart C ''headline'' rates that shall adjust to 15.1% are: 11.35% for Mixed Service Bundles; 11.35% for Music Bundles; 10.5% for Limited Offerings; 12% for Paid Locker Services; and 12% for Purchased Content Locker Services. *See* 37 CFR 385.22(a)(1) (*Step 1*); 385.23(a)(1) through (5).

[144] Judge Strickler disagrees with the *procedural* analysis of a different majority by which they readopt the Bundled Revenue definition from the Initial Determination, and he dissents on that specific issue. However, Judge Strickler concurs and joins with the Majority regarding the *substantive* re-adoption of that definition from the Initial Determination. Judge Strickler has drafted a separate opinion on this Bundled Revenue issue.

[145] For interactive streaming, the Judges' Initial Determination defined a ''bundle'' (in pertinent part) as an offering which combined the delivery of streamed music: ''together with one or more non-music services . . . or non-music products . . . as part of one transaction without pricing for the music services or music products separate from the whole offering. . . .'' Initial Determination, Attachment A at 2 (§ 385.2 therein).

[146] The definition added: ''[I]f there is no standalone published price for a component of the Bundle, then the Service shall use the average

After the Judges issued their Initial Determination, Copyright Owners submitted a Motion for Clarification or Correction of Typographical Errors and Certain Regulatory Terms which disclaimed any intent to seek rehearing, but sought ''clarification or correction'' of certain regulatory terms to conform them to what Copyright Owners claimed to be the apparent intent of the Initial Determination. (Motion for Clarification).[147] Copyright Owners purported to bring their motion under the Judges' general regulations governing motions. *See* 37 CFR 303.3 and 303.4 (formerly codified at 37 CFR 350.3 and 305.4).

The Motion for Clarification argued, among other things, that the definition of Service Revenue as applied to bundled offerings should be reworked. Copyright Owners argued that defining the revenue as the total price of the bundle, minus the standalone published prices for the non-streaming offerings in the bundle, undervalued the revenue created by the streaming offerings. They proposed that ''Service Revenue'' for bundled offerings be defined as the standalone price of the offering (or comparable offerings).

The Services objected to Copyright Owners' styling of their motion as something other than a motion for rehearing. The Services also objected that Copyright Owners had not previously proposed a definition of ''Service Revenue'' for bundled offerings, and that their ''late-proposed'' definition was unsupported by the record.

On October 29, 2018, the Judges issued an Order concluding neither party had met the exceptional standard for granting rehearing motions,[148] stating that the parties had failed to present ''even a *prima facie* case for rehearing under the applicable standard''. Amended Order Granting in Part and Denying in Part Motions for Rehearing (Order on Rehearing) (Jan. 4, 2019).[149]

The Judges explained that they nevertheless found it appropriate to resolve the issues that the parties had raised. Order on Rehearing at 2. The Judges added that, to the extent such resolution could be considered a rehearing under 17 U.S.C. 803(c)(2), the Judges resolved the motions on the papers without oral argument. *Id.*

Regarding the definition of ''Service Revenue'' for bundled offerings, the Judges summarized the parties' competing arguments:

> Copyright Owners presented evidence that the existing approach led, *in some cases,* to an inappropriately low revenue base—but did so in service to their argument that the Judges should reject revenue-based royalty structures. *They did not present evidence to support a different measure of bundled revenue* because their rate proposal was not revenue-based. The Services rely on the fact that the approach to bundled revenue in the extant regulations is derived from the 2012 Settlement. The Judges have, however, *declined to rely on the 2012 Settlement as a benchmark,* as the basis for the rate structure, or, therefore, as regulatory guidance.
>
> The Services have observed *correctly* that the evidentiary records in *Web IV* and *SDARS III* differ from the record in this proceeding.[150]

Order on Rehearing at 17 (emphasis added).

Despite these arguments, the Judges found that neither party presented evidence adequate to support the approach advocated in post-determination filings, because ''the 'economic indeterminacy' problem inherent in bundling'' remained unresolved.'' *Id.*[151] The Judges stated that the Services were the party in possession of the relevant information, and concluded that the Services bore the burden of providing evidence that might mitigate the ''indeterminacy problem'' inherent in bundling. Because the Judges concluded that the Services had not met that burden, they ruled that they must adopt an approach to valuing bundled revenue that is in line with what the Copyright Owners proposed. As a result, the Judges discarded the formula in the Initial Determination and ruled, instead, that streaming service providers will use their own standalone price (or comparable) for the music component (not to exceed the value of the entire bundle) when allocating bundled revenue. *Id.* at 16–18.

Consistent with the Judges' Order on Rehearing, the Judges' replaced the definition of ''Service Revenue'' for a ''Bundle'' that they had included in the Initial Determination with a new definition in the Determination. The final definition provided, in pertinent part:

> Service Revenue shall be the lesser of the revenue recognized from End Users for the bundle and the aggregate standalone published prices for End Users for each of the component(s) of the bundle that are Licensed Activities . . . [or] if there is no [such] standalone price, then the average standalone . . . price . . . for the most closely comparable product or service . . . or . . . the average of standalone prices for comparables.

Determination, Attachment A at 8.

The Services, Copyright Owners and George Johnson appealed the Judges' Determination to the D.C. Circuit. *See Johnson,* 969 F.3d 363. The Services challenged both the Judges' legal authority and the substantive soundness of the decision to reformulate the definition of ''Service Revenue'' for bundled offerings, after the Judges had issued the Initial Determination.

The D.C. Circuit examined several authorities under which the Judges may revisit and amend a determination. It addressed the three ways identified in the statute: ''(i) order rehearing 'in exceptional cases' in response to a party's motion, 17 U.S.C. 803(c)(2)(A); (ii) correct 'technical or clerical errors,' *id.* § 803(c)(4); and (iii) 'modify the terms, but not the rates' of a royalty payment, 'in response to unforeseen circumstances that would frustrate the proper implementation of [the] determination.' '' *Johnson,* 969 F.3d at 390. The D.C. Circuit found that the Judges' reformulation of the definition of ''Service Revenue'' fit none of those categories.

The D.C. Circuit noted that the Judges were explicit that they did not treat the Motion for Clarification as a motion for rehearing under 17 U.S.C. 803(c)(2). *Id.* Furthermore, the D.C. Circuit noted the Judges' own findings that the Motion for Clarification did not meet the exceptional standard for granting rehearing motions under section 803(c)(2) and that the Copyright Owners failed to make even a *prima facie* case under the rehearing standard.

In *Johnson,* the D.C. Circuit found that the change to the definition of Service Revenue for bundled offerings was not an exercise of the Judges' authority under section 803(c)(4) to ''correct any technical or clerical errors in the determination[.]'' 17 U.S.C. 803(c)(4).

standalone published price for End Users for the most closely comparable product or service in the U.S. or, if more than one comparable exists, the average of standalone prices for comparables.'' *Id.* at 7–8.

[147] Streaming Services submitted a motion for rehearing that was limited to fixing clerical errors and clarifying existing ambiguities in the proposed regulatory terms appended to the Initial Determination.

[148] The standard is set forth in the Order on Rehearing at 2 n.3. The Judges discuss and apply this standard *infra,* pursuant to *Johnson,* and in the context of this remand proceeding.

[149] Judge Strickler, who had dissented from the Initial Determination and the Determinations, did not join in this Order on Rehearing.

[150] In Web IV and SDARS III, unlike under the Phonorecords II-based benchmark, there were no minima or floors to provide licensors with royalties in the event bundled offerings would otherwise fail to generate royalties.

[151] The ''economic indeterminacy'' problem was described in SDARS III: ''Such bundling [for full quotation, see eCRB no. 27063 n.140].'' *SDARS III,* 83 FR 65264. As discussed in this Initial Ruling, this indeterminacy problem was addressed by the Phonorecords II-based benchmark through negotiated alternative royalty provisions for bundled offerings.

The D.C. Circuit observed the substantive nature of the change to the definition and determined that there was nothing technical or clerical about the amendment. The D.C. Circuit found that the Judges did not even purport to modify the terms in response to unforeseen circumstances that would frustrate the proper implementation of the Initial Determination. The D.C. Circuit observed that the Judges never mentioned section 803(c)(4) or unforeseen circumstances as the basis for revamping the Service Revenue definition.

Beyond the explicit statutory authorities for amendments to determinations, the D.C. Circuit addressed arguments for inherent authority to make *sua sponte* any appropriate substantive or fundamental changes after the Initial Determination. The D.C. Circuit foreclosed reliance on inherent authority, finding that Congress's decision to limit rehearing to exceptional cases, and to confine other *post hoc* amendments to cases involving technical or clerical errors, would be a nullity if the Judges also had plenary authority to revise their determinations whenever they thought appropriate. The D.C. Circuit noted that the Judges' decision to amend the definition said nothing of the sort, and prior decisions are silent on that topic.

In sum, the D.C. Circuit found that the Judges failed to explain the legal authority for reformulating the definition of ''Service Revenue.'' In relevant part, the D.C. Circuit ruled

> we must vacate the [ ] Determination's bundled offering Service Revenue definition and remand for the [Judges] . . . either to provide 'a fuller explanation of the agency's reasoning at the time of the agency action[,]' or to take 'new agency action' accompanied by the appropriate procedures.

Id. at 392 (citing *Regents,* 140 S.Ct. at 1908).

Because the D.C. Circuit determined that the Judges failed to identify any legal authority for adopting the new Service Revenue definition, it found no occasion to address the Streaming Services' separate argument that the definition was arbitrary, capricious, or unsupported by substantial evidence. *Id.*

The Services and Copyright Owners agreed that the Judges should resolve the definitional issue based on the existing record, after receiving two rounds of additional briefing from the parties.[152] *See* Services' Proposal for Remand Proceedings (Dec. 10, 2020) (Services' Proposal) at 5–6, 9–10; Proposal of the Copyright Owners for Conduct and Resolution of the Remand (Public) (Dec. 10, 2020) (Copyright Owners' Proposal) at 4–6. The Judges issued an Order Regarding Proceedings on Remand, which, in part, opened briefing on the issue of the adoption of a revised definition of ''service revenue'' for bundled offerings between issuing the Initial Determination and the Determination. Order Regarding Proceedings on Remand (Dec. 15, 2020). The Judges received the following relevant briefing.

- CO Initial Submission
- Services' Initial Submission
- CO Reply
- Services' Reply

On December 9, 2021, the Judges requested additional briefing. Dec. 9 Order. The Dec. 9 Order sought additional briefing setting forth the parties' views on whether this proceeding constitutes the type of new agency action addressed by the D.C. Circuit, which would allow adoption of a Service Revenue definition without limitation to the definition expressed in the Initial Determination. Additionally, the Judges requested additional evidence that the parties might offer to support adoption of the Service Revenue definitions expressed in either the Initial Determination or the Determination. In response to the Dec. 9 Order, the Judges received the following relevant briefing.

- CO Additional Submission
- Services' Additional Submission

On February 9, 2022, the Judges solicited further briefing on ''Whether the D.C. Circuit's *Johnson* decision permitting the Judges to engage in new agency action in this remand proceeding allows the Judges to engage in new agency action through a reconsideration of Copyright Owners' February 12, 2018 Motion for Clarification as a Motion for 'rehearing' pursuant to 17 U.S.C. 803(c)(2)(A) and 37 CFR 353.1.'' *Sua Sponte* Order Regarding Additional Briefing (Feb. 9 Order). In response to the Feb. 9 Order, the Judges received the following relevant briefing.

- Copyright Owners' Brief Responding to Judges' February 9, 2022 *Sua Sponte* Order Regarding Additional Briefing on New Agency Action Question, and Replying to Services' New Agency Action Arguments in their Joint Supplemental Brief Addressing the Judges' Working Proposal (in Additional Materials Rebuttal Submission of Copyright Owners at Tab B) (Feb. 24, 2022) (''CO Further Briefing'')
- Services' Joint Response to the Judges' February 9, 2022 *Sua Sponte* Order Regarding Additional Briefing and Rebuttal Regarding ''New Agency Action'' (Feb. 24, 2022) (''Services' Further Briefing'')

B. Authority for Modification to the Initial Determination

1. Copyright Owners' Position

Copyright Owners assert that this remand proceeding offers a straightforward path to take new agency action and that the law makes clear that new agency action can consist of issuing a new determination on remand. CO Initial Submission at 71. Copyright Owners maintain that:

> [T]the new agency action here is a determination after remand proceedings, the Board is largely free to chart its own procedural course, and the Board has done so in its December 15 Order. The Board is not required to undertake any of the procedural steps set forth in 17 U.S.C. 803(b) in order to take such ''new agency action.'' See 17 U.S.C. 803(d)(3) (requiring only that on remand further proceedings be taken ''in accordance with subsection (a)''); 37 CFR 351.15; *Intercollegiate Broad. Sys., Inc.,* 796 F.3d at 125 (''[N]either the Copyright Act nor the Board's regulations prescribe any particular procedures on remand.'') The Circuit's instruction that the action be ''accompanied by the appropriate procedures[,]'' *Johnson,* 969 F.3d at 392, does not dictate what those ''appropriate procedures'' must be but instead plainly refers to these flexible rules. See also *Oceana, Inc.,* 321 F. Supp. 3d at 136 (explaining that when remanding to an agency, a court generally ''may not dictate to the agency the methods, procedures, or time dimension, for its reconsideration'').

CO Initial Submission at 71, FN 33.

Copyright Owners acknowledge the Services' position that the asserted procedural error is an ''absence of authority'' that can never be cured. *Id.* at 74 (citing Services' Proposal for Remand Proceedings at 10). They note that the D.C. Circuit did not say the Judges lacked the authority to revisit the service revenue definition for bundles on remand. Nor, they observe, did it say the Judges have no authority to review the record evidence and the parties' arguments and reach the same conclusion or a different conclusion on remand. Copyright Owners opine that if the only possible outcome were for the Judges to reinstate a definition that lacked any explanation or evidentiary support solely because it was present in the Initial Determination, then the D.C. Circuit would not have remanded the issue but would have simply reversed and reinstated the Initial Determination definition. But instead, they note, the D.C. Circuit remanded and said the

[152] As indicated below, during the remand proceedings, the Judges solicited two rounds of additional briefing addressing specific issues.

Judges could take new agency action precisely to cure the asserted procedural defect. Copyright Owners assert that the remand allowed the parties to present the record evidence and their arguments so that the Judges can address the definition ''afresh'' in the remand determination. *Id.* at 74.

Copyright Owners argue that 17 U.S.C. 803(d)(3) states only that proceedings on remand must be in accordance with 17 U.S.C. 803(a). They contend that remand proceedings need not be confined to procedures the Services claim are too late in the game for the Judges to follow. The Copyright Owners point to the D.C. Circuit's ruling in *Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Bd.,* that ''neither the Copyright Act nor the Board's regulations prescribe any particular procedures on remand.'' 796 F.3d 111, 125 (D.C. Cir. 2015) (citing 17 U.S.C. 803(a), (d)(3)). Accordingly, they argue, the Judges can reaffirm the adopted bundled service revenue definition following their review of the parties' submissions without regard to section 803(c)(2) or 803(c)(4). CO Reply at 65–66.[153]

Copyright Owners further argue that the Judges may properly justify the changed definition under section 803(c) as a fuller explanation of the agency's reasoning at the time it was made. They urge that the Judges could explain that, especially in light of the evidence of how the Services misused the prior definition to make service revenue completely disappear, carrying over the prior bundle service revenue from *Phonorecords II* into the Initial Determination was unintended and inadvertent.[154] CO Reply at 69. Copyright Owners also assert that the Judges could explain that Copyright Owners had, in their Motion for Clarification, identified an ''exceptional case'' under section 803(c)(2) because the prior definition failed to comport with Judges' precedent and economic principles, and was unsupported by evidence.[155] In addition,

Copyright Owners note that the Judges reheard the evidence and legal arguments as presented in the parties' briefs on the issue and, as a result, may choose to adopt the revised definition. Copyright Owners maintain that for the Judges to do so would not be impermissible *post-hoc* reasoning, because the D.C. Circuit remanded precisely because the Judges did not provide any reason in the Determination for revising the bundle revenue definition. CO Reply at 69–71.

2. Services' Position

The Services assert that the D.C. Circuit found only ''three ways in which the Board can revise Initial Determinations'' and that the Judges had failed to establish that the change to the service revenue definition fit any of those three categories. Services' Initial Submission at 64–65 (citing *Johnson* at 390).

According to the Services the *first* way the Judges may revise an Initial Determination is to ''order rehearing 'in exceptional cases' in response to a party's motion, 17 U.S.C. 803(c)(2)(A).'' Services' Initial Submission at 65 (citing *Johnson* at 390).[156] The Services argue that the D.C. Circuit held in *Johnson* that the Judges' ''material revision of the 'Service Revenue' definition for bundled offerings does not fall within the Board's rehearing authority under section 803(c)(2)(A)'' because ''the Board itself . . . was explicit that it 'did not treat the [Copyright Owners'] motion[ ]' . . . 'as [a] motion[ ] for rehearing under 17 U.S.C. 803(c)(2).' '' The D.C. Circuit also noted that ''as the Board found, the Copyright Owners' motion did 'not meet [the] exceptional standard for granting rehearing motions' under section 803(c)(2).'' *Id.* (citing *Johnson* at 390). The Services assert that the Judges were not able to make ''a volte-face'' and justify on appeal their revision to the definition as an exercise of rehearing authority. As the D.C. Circuit held, agency action must be justified by ''reasons invoked by the agency at the time it took the challenged action,'' and post-hoc rationalizations are insufficient. *Id.* (citing *Johnson* at 390).

The Services add their view that the Judges cannot revisit the decision to deny rehearing without engaging in impermissible *post-hoc* reasoning. They note that the Supreme Court has explained that, while an agency may ''elaborate later'' on its ''initial explanation'' of the reason (or reasons) for its action, it ''may not provide new ones.'' Services' Initial Submission at 66 (citing *e.g., Regents,* 140 S. Ct. at 1908). The Services offer that the Judges, having stated that they did not consider the Copyright Owners' motion to revise the definition to be a motion for rehearing, cannot now conclude that the motion qualified as one for rehearing and that the Judges in fact engaged in rehearing. Id.

The Services add that under section 803(c)(2)(A), the Judges can only use their rehearing authority '' 'in exceptional cases' in response to a party's motion.'' *Id.* (citing *Johnson* at 390). The Services argue that the Motion for Clarification cannot be found to have satisfied that standard. The Copyright Owners did not argue that their motion satisfied the ''exceptional cases'' standard before the Judges or the D.C. Circuit, and have therefore waived that argument. *Id.*

According to the Services, the *second* way the Judges may revise an Initial Determination, *viz.* action to correct a technical or clerical error under section 803(c)(4), cannot be used now to justify any modification of the Service Revenue definition in the Initial Determination. The Services note that the D.C. Circuit held specifically that the Judges' change to the Service Revenue definition could not be construed as correcting a technical or clerical error because it involved a substantive rewrite of the Service revenue definition. *Id.* at 67 (citing *Johnson* at 391).

The Services aver that the *third* way the Judges may revise the terms in an Initial Determination is in response to unforeseen circumstances that would frustrate the proper implementation of the determination. *Id.* at 67. The Services note that the D.C. Circuit held in *Johnson* that this authority did not justify the Judges' change to the Service Revenue definition because the Judges did not invoke this authority and ''the need to ground the original definition in the record'' could not credibly be described as ''an unforeseen circumstance.'' *Id.* (citing *Johnson* at 391).

The Services also note that the D.C. Circuit rejected the argument that the Judges have ''inherent authority'' to make changes to the Initial

[153] Copyright Owners reiterate this argument in the CO Additional Submission. Copyright Owners added that the parties in this remand were afforded the opportunity for further briefing and, if they wished, to submit additional evidence on this issue, thus providing broader opportunity for submission than in *Fisher* v. *Pension Benefit Guaranty Corp.,* 994 F.3d 664, 670 (D.C. Cir. 2021), in which the D.C. Circuit upheld new agency action after remand even though the agency did not provide appellant the opportunity to submit new briefing or exhibits. CO Additional Submission at 35–36; 38.

[154] Copyright Owners assert that the definition in the Initial Determination conflicted with, the Board's findings in the Initial Determination, including its findings that the adopted rates and terms would afford copyright owners a fair return for their creative works, thereby satisfying factor B of the 801(b) standard and thus needed to be revised so as to not ''frustrate the proper implementation of'' the Final Determination. CO Reply at 69 (citing 17 U.S.C. 801(b) and 803(c)(4)).

[155] In response to an Order by the Judges, Copyright Owners provided additional briefing regarding reconsideration of the motion for clarification as a motion for ''rehearing'' which is addressed separately *infra.*

[156] In response to an Order by the Judges, the Services provided additional briefing regarding reconsideration of the motion for clarification as a motion for ''rehearing'' which is addressed separately *infra.*

Determination. The D.C. Circuit explained that the specific restrictions Congress placed on the Judges' authority in section 803 ''would be a nullity if the Board also had plenary authority to revise its determinations whenever it thought appropriate.'' *Id.* (citing *Johnson* at 391–92). The Services add that even if the Judges offered a new source of authority capable of justifying substantive changes to the Service Revenue definition now, the Judges would be unable to rely on this ''uninvoked authority'' without engaging in impermissible *post-hoc* reasoning. *Id.*

The Services counter Copyright Owners' position that the Judges need not respond to the error the D.C. Circuit identified with this aspect of the Determination and that the Judges' ''new agency action'' may consist of issuing a new determination on remand. The Services argue that failure to address the legal and factual issues on which the D.C. Circuit remanded would violate the D.C. Circuit's order and would result in a second remand. The Services surmise that the issue of authority to make the changes to the Initial Determination are particularly important in this context, where the D.C. Circuit recognized that the Copyright Act places limits on the Judges' authority to alter an initial determination by defining conditions for rehearing and the types of changes that are permitted absent a rehearing. In this regard, the Services maintain that the Judges cannot do on remand what they lacked authority to do in the first instance. The Services assert that the Judges must resolve the legal question whether there is authority to alter the revenue definition in the Initial Determination. They urge that the remanded issue is not what the substance of the service revenue definition should be as a matter of first impression, but instead is whether the Judges have properly exercised authority to alter the Initial Determination's definition. Services Reply at 52–54.[157]

The Services assert that the Judges have two paths available to them: (1) to provide a ''fuller explanation'' of the prior conclusion that the Judges had legal authority to revise the Service Revenue definition in the Initial Determination or (2) answer that threshold question through new agency action. The Services maintain that, if they pursue the ''fuller explanation'' path, the Judges are limited to elaborating on what they said previously, and that they cannot add new reasons they did not initially provide. With regard to what may constitute new agency action, the Services assert that path gives the Judges freedom to consider new reasons that the Copyright Act provided the Judges with the authority to make this change to the Initial Determination. The Services argue, however, that undertaking a new agency action does not, as Copyright Owners claim, obviate the need for the Judges to identify proper legal authority before substantively changing the Initial Determination, such authorities being limited to the authority of section 803(c)(4) or the rehearing authority of section 803(c)(2). *Id.* at 54–55.

The Services address Copyright Owners' position that if the only possible outcome were for the Judges to reinstate a definition that lacked any explanation or evidentiary support solely because it was present in the Initial Determination, then the D.C. Circuit would not have remanded the issue but would have simply reversed and reinstated the Initial Determination definition. The Services urge that the D.C. Circuit could not reverse because the Department of Justice raised for the first time on appeal new justifications for the Judges' decision to change the Initial Determination. Instead, the Services maintain, the D.C. Circuit had to remand and give the Judges the opportunity to address the Department of Justice's new justifications in the first instance, as the D.C. Circuit could not rule them out given the posture of the appeal. *Id.* at 56.

In the Services' Additional Submission, they concede that this remand proceeding is new agency action and that the Judges have provided the parties with sufficient procedural opportunities to present any new evidence and raise any additional arguments regarding the question the D.C. Circuit remanded. Services' Additional Submission at 38. But the Services still insist that the Judges may not alter the Service Revenue definition without first identifying legal authority in the Copyright Act for modifying the Initial Determination. In the Services' view the new agency action avenue provided by the D.C. Circuit merely offers a singular path beyond the Judges' ability to offer a ''fuller explanation'' of their previous reasoning for revisiting the definition in the Rehearing Order. According to the Services' argument, the new agency action provided for in this remand only offers the additional opportunity to offer new reasons supporting any legal authority for altering the Initial Determination's Service Revenue definition, beyond those that were raised in the appeal. Services' Additional Submission at 38–42

C. Reconsideration of Motion for Clarification as Motion for ''Rehearing'' [158]

1. Copyright Owners' Position

Copyright Owners argue that the Judges have the authority to engage in new agency action in this remand proceeding through a reconsideration of the Motion for Clarification as a motion for rehearing, pursuant to 17 U.S.C. 803(c)(2)(A) and 37 CFR 353.1. Copyright Owners urge, however, that proceeding in that fashion would add an entirely unnecessary and complicating step. They again suggest that there is no need to reconsider or recharacterize the Motion for Clarification as a motion for rehearing because the remand itself affords the opportunity for the Judges to take new agency action, which, as in a rehearing, permits them to reconsider evidence and arguments, but, unlike a rehearing, is not limited by the constraints of section 803(c)(2). CO Further Briefing, Tab B at 7–8.

Copyright Owners posit that if the Judges engage in new agency action to reconsider the Motion for Clarification as a motion for rehearing under 803(c), and to decide that motion based on all of the evidence in the record supporting the adopted bundle revenue definition and showing the prior bundle revenue definition to be unsupported and unreasonable, they may properly do so. They assert that the while they did not make a request for rehearing on the face of the Motion for Clarification, that is not the same as a finding that the standard could not have been met. The Judges may consider whether, based on the evidence in the record, the rehearing standard has been satisfied on this remand. In Copyright Owners' view, the Judges could conclude, revisiting on remand the question of whether the rehearing standard has now been met, that Copyright Owners have satisfied the ''exceptional case'' standard for granting rehearing motions under

[157] The Services agree that this remand proceeding qualifies as ''new agency action'' but again urge that failure to address the legal and factual issues on which the court remanded would nonetheless violate the D.C. Circuit's order. Services' Additional Submission at 38–42.

[158] The Judges consider the briefs filed in response to the Feb. 9, 2022 Order only to the extent that they are responsive to the Feb. 9, 2022 Order, which requested briefing on the specific matter of whether the D.C. Circuit's *Johnson* decision permitting the Judges to engage in new agency action in this remand proceeding allows the Judges to engage in new agency action through a reconsideration of Copyright Owners' February 12, 2018 Motion for Clarification as a Motion for ''rehearing,'' pursuant to 17 U.S.C. 803(c)(2)(A) and 37 CFR 353.1.

section 803(c)(2). Copyright Owners note that if the Judges do engage in new agency action that reconsiders the Motion for Clarification as a motion for rehearing, the Judges should fully explain their reasoning. *Id.* Tab B at 8–10.[159]

2. Services' Position

The Services assert that the Judges cannot invoke their rehearing authority by construing the Motion for Clarification as a rehearing motion. They maintain that the D.C. Circuit expressly found that the revision of the Service Revenue definition for bundled offerings does not fall within the Judges' rehearing authority under section 803(c)(2)(A). The Services assert that Copyright Owners did not satisfy either prong of section 803(c)(2)(A), which authorizes rehearing only ''upon motion of a participant'' and ''in exceptional cases.'' They note that the D.C. Circuit agreed with the Judges' decision not to treat Copyright Owners' motion as one for rehearing and that the D.C. Circuit also agreed with the Judges' further finding that ''Copyright Owners' motion did not meet the exceptional standard for granting rehearing motions.'' Services' Further Briefing at 7 (citing *Johnson* at 390).

The Services add their view that the Judges are bound by the D.C. Circuit's conclusions on this issue. They maintain that because the Judges' section 803(c)(2)(A) rehearing authority is among the grounds that *Johnson* addressed and determined, the Judges cannot rely on that authority on remand. *Id.* at 8–9. The Services urge that the Judges already correctly concluded that the Motion for Clarification was not a motion for rehearing, and note that Copyright Owners never presented their motion as one for rehearing. The Services add that because Copyright Owners did not challenge that decision on appeal, it is too late for them to do so now.[160] *Id.* at 9–10.

The Services argue that Copyright Owners' Motion did not make any attempt to satisfy the exceptional cases standard set out in 17 U.S.C. 803(c)(2)(A). They argue that Copyright Owners did not purport to identify any new evidence, new legal authority, or even a substantive error in the Judges' reasoning in the Initial Determination, but instead the motion asserted that the Judges' inclusion of the definition of service revenue in the Initial Determination was supposedly inadvertent. The Services add that Copyright Owners did not identify any specific evidence in the *Phonorecords III* record or any aspect of the Initial Determination that suggested the inclusion of this definition was a mistake. *Id.* at 10.

The Services point out that Copyright Owners' motion did not comply with the procedural requirements for a motion for rehearing. They then urge that the Judges cannot invoke their section 803(c)(2)(A) authority by rewriting a participant's motion to say it is seeking rehearing when that participant specifically and unambiguously disclaimed any intent to seek rehearing. *Id.* at 11.

The Services note that the Judges previous conclusion that even if the Motion for Clarification had requested rehearing, that motion would not and does not meet that exceptional standard for granting rehearing and failed to make even a *prima facie* case for rehearing. The Services observe that the Judges apply a strict standard to rehearing motions to prevent parties from using the rehearing process to seek a second bite at the apple by advancing theories and arguments that could have been advanced earlier during the proceeding. *Id.* at 12. The Services reiterate their view that Copyright Owners' motion did not point to any evidence in the *Phonorecords III* record at all, and, that the only evidence in the *Phonorecords III* record concerning bundles supports the longstanding definition of Service Revenue which has been effective in encouraging the Services to offer bundles that benefit Copyright Owners by growing the market for music streaming services. *Id.* at 14.

The Services finally assert that this is not an extraordinary case where a party has identified an error that, if left uncorrected, would result in manifest injustice. *Id.* at 15–16. The Services conclude by urging that given this procedural history and the unchanged state of the record since the initial hearing, any claim that Copyright Owners have somehow now satisfied the exceptional case standard would be clear error. *Id.* at 17.

D. Record Evidence Regarding Definition of Service Revenue

1. Copyright Owners' Position

Copyright Owners assert that the prior bundle revenue definition (published in the Initial Determination) failed to address the '' 'economic indeterminacy' problem inherent in bundling'' appropriately and in a way consistent with Judges' precedent. CO Initial Submission at 75 (citing Order on Rehearing at 16–18). Copyright Owners proceeded to cite several portions of testimony from the Services' economic experts who acknowledged this problem. *Id.* They then point to hearing testimony in which Copyright Owners repeatedly raised the ''economic indeterminacy'' problem and demonstrated what they characterized as the absurd results to which the prior definition had led. *Id.* at 76. They point out that under the prior definition, service revenue for bundled subscriptions started with revenues recognized from the bundle (*i.e.,* the price paid by the subscriber) and subtracted ''the standalone published price'' for all non-music components of the bundle. [REDACTED]. *Id.*

Copyright Owners point out that the Judges already found with respect to other licenses that such an approach is not only fundamentally unfair, but ''absurd.'' *Id.* (citing 81 FR 26316, 26382 (May 2, 2016) (webcaster licenses)); *see also* 83 FR 65210, 65264 (Dec. 19, 2018) (SDARS licenses) (rejecting proposed deductions by service for bundle revenues because of the ''acknowledged 'economic indeterminacy' problem inherent in bundling''). The Copyright Owners concur with the Judges' correct conclusion that the same reasoning applies to *Phonorecords III. Id.* at 76–77 (citing Order on Rehearing at 18) (''the 'economic indeterminacy' problem inherent in bundling is common to all three proceedings.''). The Copyright Owners offer that Spotify conceded to this flaw in the definition in the Initial Determination, but offered an alternative that contained the same loophole. *Id.* at 77–78.

Copyright Owners point out that the proponent of a term bears the burden of proof as to adoption. The Judges made clear that the licensee who wishes to offer bundles must bear the burden of providing evidence that might mitigate the acknowledged economic indeterminacy problem inherent in bundling, because any such evidence would be in its possession, not in the possession of the licensors. *Id.* at 79 (citing *SDARS III* Determination, 83 FR 65210, 65264) (''bundling [is] undertaken to increase [the Services']

[159] With regard to the obligation to fully explain their reasoning for any reconsideration, the Copyright Owners point to *United Food & Com. Workers Union, Loc. No. 663* v. *U.S. Department of Agriculture.,* 532 F. Supp. 3d 741, 769 (D. Minn. 2021) (''When an agency takes a new course of action, it must 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.' ''), quoting *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009) (emphasis in original).

[160] In fact, the issue of whether to recharacterize the Motion for Clarification as a motion for rehearing is not one raised by Copyright Owners, but by the Judges *sua sponte.* The Services' estoppel argument as to the Copyright Owners cannot apply to the Judges' action.

revenues and it would be reasonable to assume that [the Services have] information relevant to the economic allocation of the bundled revenue.''). The Copyright Owners contend they presented unrebutted evidence showing the unreasonableness of the Services' proposed definition while the Services offered no evidence to support their definition. *Id.* at 78, 79 (citing Order on Rehearing at 18). Copyright Owners maintain that no Service offered evidence concerning the separate values of the constituent parts of the bundles, or any other evidence concerning the economic allocation of bundled revenue, let alone the reasonableness of the definition in the Initial Determination. *Id.* at 80. Copyright Owners assert that in the absence of evidence to support the proposed definition, the Judges may adopt or fashion a definition of service revenue for bundled offerings that comports with the record evidence, which is precisely what the Judges did and can, through new agency action, do again. *Id.* at 81.

Copyright Owners dispute the Services' assertion that there is support for the *Phonorecords II* approach to bundles in the record of this proceeding. Instead, Copyright Owners argue, the Services' purported evidence at most supports the benefits of the practice or strategy of bundling. They maintain that the strategy of bundling covered music services with other products or services has nothing to do with whether the Services should be free to reduce the revenue allocable to music to zero. They offer that the definition in the Initial Determination has nothing to do with such benefits, and that those benefits may be equally served by a definition that ensures value is apportioned to the music component in the bundle. CO Reply at 73–76.

2. Services' Position

The Services argue that the evidence in the existing written record addressing bundles shows both that this definition is supported by the *Phonorecords II* benchmark and that it has proven, industry-wide benefits. Services' Initial Submission at 68. They offer that the Copyright Owners did not propose an alternative definition of service revenue until after the Judges issued the Initial Determination and that any definition they propose now would fail the basic requirement that the Judges must adopt rules ''on the basis of a written record.'' *Id.* (citing 17 U.S.C. 803(a)(1) and 803(c)(3)).

Addressing the merits of the definition contained in the Initial Determination, the Services argue that it best serves the goals of the Copyright Act; that as a bright-line, easily administered rule, it continues the broad industry agreement from *Phonorecords II.* The Services contend the prior definition increases output and incentivizes beneficial price discrimination to reach listeners who would otherwise not pay for music. They argue that the record evidence confirms that the prior treatment of bundles enabled experimentation and variation in the distribution of music with long-term benefits for all parties. They state that Copyright Owners' argument that Services [REDACTED] also demonstrates the broad benefits of the definition of Service Revenue in *Phonorecords II* because the record showed that arrangement enabled funneling of many of listeners into full-priced, full-catalog services—such treatment of bundles enabled the flexibility and price discrimination that yielded beneficial growth of the royalty pool.[161] The Services allege that Copyright Owners also ignore the extensive royalties that were generated. They add that with the per-subscriber minimum guarantees that the Copyright Owners will still be paid a fair royalty. The Services then cite several portions of testimony from various Services' economic experts who point out the realization of an expanded royalty pool, which the Services offer as proving a functioning marketplace. *Id.* at 68–74.[162]

The Services then assert that no other definition of service revenue for bundles that has been before the Judges combines both the administrative simplicity of the Initial Determination's definition and the broad price discrimination benefits of promoting discounted bundles. They maintain that while neither the Services nor Copyright Owners submitted evidence specifically addressing the way that customers, Services, or Copyright Owners might value the component parts of bundles, such subjective valuations are unnecessary for the Judges to find ample support for the *Phonorecords II* approach to bundles in the record. *Id.* at 75–76.

The Services also argue that while the Judges' decision in *SDARS III* did involve valuation of the music and non-music components of a bundle, the resolution in *SDARS III* is inapposite because, here, the rate structure has a way of ensuring that Copyright Owners are fairly compensated for bundles: the statutory minimum payment. Services Reply at 62.

E. Analysis and Conclusions Regarding Definition

1. Remand Proceeding as New Agency Action

Having considered the entirety of the record of this proceeding, a majority of the Judges (Definition Majority) conclude that this remand constitutes ''new agency action'' and meets all of the criteria to qualify as new agency action. The Judges thus have the opportunity to consider the issue afresh consistent with their procedural rules regarding remands.

The Definition Majority finds that it is unnecessary to attempt to distinguish new ''agency action'' from ''new agency action.'' Neither approach is endorsed clearly by the varied judicial interpretations of a new agency action. *See* R.J. Krotoszynski, Jr., *Administrative Law Discussion Forum: ''History Belongs to the Winners'': the Bazelon-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action,* 58 Admin. L. Rev. 995 (Fall 2006). As noted by Judge Bazelon, the D.C. Circuit ''believed in process-based review, [but] he argued that it was improper for judges to prescribe specific procedures.'' *Id.* at 1001. Judge Bazelon's remand orders focused on providing ''genuine opportunities to participate in a meaningful way'' and ''genuine dialogue'' with interested parties, while leaving the agency ''free to decide which specific procedures to undertake.'' *Id.*

Several reported cases point to new action as an alternative to a fuller explanation. But few define ''new agency action'' other than to say, as did the *Johnson* court, that the agency must take it ''accompanied by the [unspecified] appropriate procedures.'' *Johnson,* 969 F.3d at 392. Parties to the original action, already familiar with the issue and the factual and legal background, recognized that the D.C. Circuit identified the adoption of a modified definition in the Determination as one of three issues on remand. In repeated rounds of remand submissions, both the Services and the Copyright Owners included the definition issue. The Judges were not satisfied with the parties' lack of focus on the issue, however, and ordered expressly further briefing on the new agency action issue and sub-issues relating to the adoption of a definition of Service Revenue as it relates to

[161] Notably, the Services do not deny that the former definition did, in fact, [REDACTED].

[162] The Services' Reply reiterates this point and offers that the testimony cited by the Copyright Owners also shows why the Initial Determination's Service Revenue definition works for bundles and grows royalties. Services Reply at 57–58.

bundled service offerings. *See* (Dec. 9 Order) at 4; *Sua Sponte* Order Regarding Additional Briefing (Feb. 9, 2022).

New agency action is not synonymous with justification, or confirmation, of the prior action. New agency action is a procedural mechanism for reconsideration of the record, reopening the record for additional evidence and argument, and adoption of a conclusion based on the expanded record. In this instance, the presentations, written and oral, of participants on remand, together with a re-examination of the original record, support reversion to the definition originally announced in the Initial Determination. Ultimately, given repeated opportunities for legal analysis on the issue, both sides agreed that the remand proceeding itself, with ample notice and multiple opportunities for input was sufficient to constitute new agency action. *See* CO Further Briefing at 3, 7.

The Services argued, however, that notwithstanding this appropriate new agency action, the Judges remained without authority to adopt the revised definition as a term governing the royalty rates determined in this proceeding. Their arguments regarding procedures undertaken in the Determination are superseded by the Judges' conduct of extensive remand proceedings.[163] The gravamen of the Administrative Procedure Act is transparency in agency [164] rulemaking. Agencies must publish notice of their intentions, provide opportunities for interested parties to comment and object, and finalize regulations only after reconciling objections with the policies and purposes of proposed regulations. The adjudication of this remand proceeding was conducted openly. Interested parties had ample opportunity to object, to comment, and to brief legal and factual issues relating to the Judges' approach to promulgating an appropriate definition of bundled service revenue.

The present analytic approach merely takes the position that the Judges engaged in new agency action by conducting a fully open and broadly explored remand proceeding. Unlike a rehearing or exercise of continuing jurisdiction, this remand proceeding is not limited by the constraints of sections 803(c)(2) or 803(c)(4). Contrary to the Services' assertion, the Judges address the issue on which the D.C. Circuit remanded, the need to exercise authority within the lines drawn by the authorizing statute. This remand proceeding does not, therefore, violate the D.C. Circuit's order.

The *Johnson* opinion clearly states the two paths by which the Judges may address the issues presented to them on remand; they may either (1) provide ''a fuller explanation of the agency's reasoning at the time of the agency action[,]'' *or* (2) to take ''new agency action'' accompanied by the appropriate procedures. *Johnson,* 369 F.3d at 392. The Judges chose to pursue the second option: this new agency action. The Judges reiterate: the Services concede that, through this proceeding the Judges have provided the participants with adequate procedural opportunities to present any new evidence on the proper Service Revenue definition for bundles. The Judges also acknowledge, but disagree with, the Services' position that that they must return to the issues as they were presented after issuance of the Initial Determination, regardless of the admittedly complete and valid remand procedure, which constitutes new agency action.

The Judges (the majority on this issue) determine that any confining action on remand to the provisions of sections 803(c)(2)(A) or 803(c)(4) would misconstrue the clear expression of the ''new agency action'' alternative presented by the D.C. Circuit,[165] as well as chapter 8 of title 17. As the Copyright Owners correctly observed, in a remand proceeding, the Judges are not required to undertake any of the procedural steps set forth in section 803(b) nor are the Judges compelled to consider or be limited by sections 803(c)(2)(A) or 803(c)(4). The statute only requires that the Judges' remand proceedings are in accordance with section 803(a).[166]

The D.C. Circuit observed that the Judges have ''considerable freedom to determine [their] own procedures.'' *SoundExchange* v. *CRB,* 904 F.3d 41 at 61. The D.C. Circuit also cautions that such flexibility must be exercised within the lines drawn by the authorizing statute. Here, the Judges operate within the lines drawn with respect to remand proceedings set forth in chapter 8 of title 17.

2. ''Fuller Explanation'' of Modification to Initial Determination

Case law regarding development of a ''fuller explanation'' of an agency's action emphasizes that the agency cannot adopt *post hoc* reasoning on the same record. *See, e.g., SEC* v. *Chenery Corp.,* 332 U.S. 194, 201 (1947) (after remand, agency bound to ''deal with the problem afresh . . . .''). Certainly, adopting a *post hoc* argument of appellate counsel, just because it offers a rationale for the agency's original action is impermissible.[167] On the other hand, if the record in the initial proceeding is sufficiently robust to support a reinterpretation or additional reasoning, the agency may justify its initial action with that ''fuller explanation'' without considering any new evidence. *See, Fisher* v. *Pension Benefit Guar. Corp.,* 468 F.Supp.3d 7, 20 (D.C.D.C. 2020), aff'd *Fisher* v. *Pension Benefit Guar. Corp.,* 994 R.3d 664 (D.C. Cir. 2021), rehearing *en banc denied, Fisher* v. *Pension Ben. Guar. Corp.,* 2021 U.S. App. LEXIS 18793 (D.C. Cir., June 23, 2021) (requirement of new evidence a ''novel proposition of law'' without precedent). On remand, an agency may elaborate on its prior reasoning, but it may not provide new reasons for the original decision. *Fisher,* 994 F.3d at 669. If the Judges had chosen in this remand to rest on their Determination regarding the service revenue definition, they might have done so only if they could elaborate on the existing record.[168] In the alternative, the Judges issue a new decision after new agency action. *Id.*

The Judges, having engaged in new agency action to settle on the definition of service revenue for bundled offerings, do not find a need to address the statutory avenues or the confines that are provided for rehearing or continuing jurisdiction, nor do the Judges pursue the propriety of reconsideration of the

[163] Furthermore, the issue of the Judges' authority to take an action in issuing the Determination is moot. The Judges, after new agency action, have chosen not to defend the definition in the Determination but rather to conclude, following that new agency action, that the definition in the Initial Determination is more appropriate in these circumstances. Whether the Judges had the authority in the first instance is not at issue, as they are not repeating the former action.

[164] The proceedings of the Copyright Royalty Board (CRB) are subject to the standards of the Administrative Procedure Act. *See* 17 U.S.C. 803(a)(1).

[165] The case that the D.C. Circuit points to for the new agency action path clarifies that ''An agency taking this [new agency action] route is not limited to its prior reasons but must comply with the procedural requirements for new agency action.'' *Regents,* 140 S. Ct. at 1908).

[166] ''The court [United States Court of Appeals for the District of Columbia Circuit] may also vacate the determination of the Copyright Royalty Judges and remand the case to the Copyright Royalty Judges for further proceedings in accordance with subsection (a).'' 17 U.S.C. 803(d)(3).

[167] A rationalization is not *post hoc* simply because it is iterated by counsel. Denomination of a rationalization as *post hoc* is a matter of timing, not of the offeror.

[168] In this instance, had the Judges decided to keep the definition in the Determination, they probably could have given a fuller explanation based on the record in the underlying proceeding. Because the Judges have opted to rely on the fresh-look approach in the ''new agency action'' alternative and because the prior definition is appropriate given adoption of the PR II rate structure, development of that fuller explanation based on the record is unnecessary.

Motion for Clarification as a motion for rehearing.[169]

3. Substantive Analysis of Dueling Definitions of Bundled Revenue

The fundamental difference between the impact of the two alternative definitions is simply stated:

Under the Initial Determination: downstream bundling and its price discriminatory effect *would* be incentivized by a royalty structure that reflects the lower WTP of consumers who subscribe by paying for a Bundle;

Under the Determination: downstream bundling and its price discriminatory effect *would not* be incentivized by a royalty structure that reflects the lower WTP of consumers who subscribe by paying for a Bundle.

To explain this difference, the Judges find it helpful to describe (as in the Determination and Dissent) how bundling facilitates price discrimination and how lower royalties for bundled streaming services incentivize such bundling.

Price discrimination occurs when a seller offers different units of output at different prices. *See, e.g.,* H. Varian, *Intermediate Economics* at 462 (8th ed. 2010). The benefit to the seller arises from attempting to ''charge each customer the maximum price that the customer is willing to pay for each unit bought.'' R. Pindyck & D. Rubinfeld, *Microeconomics* at 401 (8th ed. 2013). For all goods, and intellectual property goods such as copyrights in particular,[170] the social benefit is that price discrimination more closely matches the quantity sold with the competitive quantity as the seller or licensor better aligns the price with the WTP of different categories of buyers or licensees. *See* W. Fisher, *Reconstructing the Fair Use Doctrine,* 101 Harv. L. Rev. 1659, 1701 (1988).

A seller can engage in price discrimination in several ways. One form is known as ''second-degree price discrimination,'' by which buyers self-sort the packages and quantities they purchase.[171] *See* W. Adams & J. Yellen, *Commodity Bundling and the Burden of Mo*nopoly, 90 Q. J. Econ. 470, 476 (1976) (the profitability of bundling ''stem[s] from its ability to sort customers into groups with different reservation price [WTP] characteristics.''). Bundling, *i.e.,* the ''practice of selling two or more products as a package,'' *Pindyck & Rubinfeld, supra* at 419, is thus a type of second-degree price discrimination. *See* A. Boik & H. Takahashi, *Fighting Bundles: The Effects of Competition on Second Degree Price Competition,* 12 a.m. Econ. J. 156, 157 (2020).

The applicability of these basic economic principles was understood and explained by the parties' experts at the hearing. *See, e.g.,* 3/15/17 Tr. 1224–25 (Leonard) (Google's economic expert testifying that price discrimination through bundling is ''very, very common . . . even by pretty competitively positioned firms . . . to sort out customers into willingness-to-pay groups.''); 3/30/17 Tr. 3983 (Gans) (Copyright Owners' economic expert acknowledging that bundling is a form of price discrimination); *see also* Dissent at 69 (same).

How does this downstream (retail level) benefit of price discrimination impact the setting of upstream royalty rates? As the Majority explained (in summarizing the Services' expert testimony) the linkage is explained by the economic concept of ''derived demand'':

> [M]ultiple pricing structures necessary to satisfy the WTP and the differentiated quality preferences of downstream listeners relate directly to the upstream rate structure to be established in this proceeding. Professor Marx opines that the appropriate *upstream* rate structure is derived from the characteristics of downstream demand. 3/20/17 Tr. 1967 (Marx) (rate structure upstream should be derived from need to exploit WTP of users downstream via a percentage of revenue). This upstream to downstream consonance in rate structures represents an application of the concept of ''derived demand,'' whereby the demand upstream for inputs is dependent upon the demand for the final product downstream. *Id.; see* P. Krugman & R. Wells, *Microeconomics* at 511 (2d ed. 2009) (''[D]emand in a factor market is . . . *derived demand* . . . [t]hat is, demand for the factor is derived from the [downstream] firm's output choice'').
>
> Determination at 19; *accord* Dissent at 32 (noting that ''the upstream demand of the interactive streaming services for musical works (and the sound recordings in which they are embodied)—known as ''factors'' of production or ''inputs''—is derived from the downstream demand of listeners to and users of the interactive streaming services . . . This interdependency causes upstream demand to be characterized as ''derived demand.'').

In the present proceeding, the PR II-based benchmark embodies the parties' negotiated definition of Bundled Revenue for purposes of calculating royalties on bundled interactive offerings. This is definition in the Initial Determination. Copyright Owners' preferred definition for Bundled Revenue—the Determination's definition—would not only ignore this agreed-upon definition, but would also de-link the royalty rate from the WTP of purchasers of bundles.[172] The Judges recognize that Copyright Owners have expressed concern the Services could use such bundling in order to diminish revenue otherwise payable on a higher royalty tier. However, the Majority noted that the evidence indicated such diminishment only occurred ''in some cases.'' Clarification Order at 17. Thus, the Judges find that eliminating the incentive for price discrimination via bundling would be a disproportionate response and inconsistent with the broad price discriminatory PR II-based benchmark they find useful in this proceeding.

Expert testimony in this regard is ''substantial evidence'' on which the Judges can rely. For example, the D.C. Circuit also relied in *Johnson* on the testimony of the same witness, Spotify's economic expert witness, Professor Marx, who explained how a downstream ''lower willingness (or ability) to pay'' among some cohorts of consumers supports definitional terms, for student and family subscribers, that lower royalty rates in order to further ''economic efficiency'' in a manner that

[169] The Judges also find no need to consider any inherent authority that may remain for consideration.

[170] Streamed copies of intellectual property, such as musical works and sound recordings, have a marginal production cost of essentially zero, making price discrimination particularly beneficial, because charging any positive price, even to a buyer with the lowest WTP, still exceeds the zero marginal production costs. *See* Dissent at *passim.*

[171] ''First-degree'' price discrimination is a hypothetical construct by which a seller can identify the WTP of every buyer. ''Third-degree'' price discrimination occurs when the seller offers different prices to buyers based on their different characteristics (*e.g.,* a senior citizen discount). *See Pindyck & Rubinfeld, supra,* at 402, 404–05.

[172] To see the incentivizing effect of the link between the royalty level and variable WTP, consider the following example. Assume a hypothetical bundle consists of a subscription to the ''Acme'' interactive music streaming service and the sports service NFL Sunday Ticket. Assume also that Acme and NFL Sunday Ticket have standalone monthly subscription prices of $9.99/month and $149.99/month respectively, so that purchasing both separately would cost $159.98/month. But assume the bundle price is only $140/month. Acme's purpose in bundling its interactive music streaming service subscription offering with NFL Sunday Ticket would be to attract customers who had a WTP for the standalone Acme service below $9.99/month, but a WTP at or above the $140/month for the bundle.

Under the definition in the Determination, royalties would be paid on the standalone $9.99/month Acme price. But the purpose of the bundling was to attract subscribers *who would not pay the standalone $9.99/month price,* so no such would-be subscribers would sign-up, and *no royalties would be generated by them.*

By contrast, under the Initial Determination, the standalone price of NFL Sunday Ticket, $159.98/month, would be subtracted from the $140/month bundle price. Although that would preclude a payment of royalties on a *revenue* prong, *royalties still would be paid, under a different tier or on the mechanical floor.*

''still allows more monetization of that provision of that service.'' *Johnson* at 392–93. Broadening her lens, Professor Marx also explained that this price discriminatory approach is appropriate ''across all types of services and subscribers,'' as in ''[t]he current law [and in the PR II-based benchmark]'' which ''accommodates . . . ad-supported services . . . and '*bundled services'* through different rate provisions.'' Marx WRT ¶ 41 (emphasis added). *See also* 3/21/17 2182–83 (Hubbard) (Amazon's expert witness testifying that ''Prime Music, which is *bundled* with an Amazon Prime service . . . sort[s] out customers' willingness to pay, with an idea of trying to maximize the number of customers,'' and agreeing that this approach constitutes ''sorting by way of bundling.'') (emphasis added). Further, Professor Hubbard opined that, given the revenue attribution ''measurement problem'' associated with bundled products, the ''Phonorecords II'' approach ''with the different categories and the minima . . . address this sort of problem [in] a very good way.'' 3/15/17 Tr. 1221 (Hubbard).

As in the case of family and student price discrimination, the beneficial effect of such differential pricing was supported by industry witnesses as well as expert witnesses. *See, e.g.,* Mirchandani WDT ¶ 71 (Amazon executive citing the Phonorecords II-based benchmark provisions regarding bundling that ''allowed Amazon to bundle Prime Music with Amazon Prime, enabling Amazon to bring a limited catalog of music [REDACTED]''). In sum, the same type of witness testimony that the D.C. Circuit found sufficient to support price discriminatory student and family plans also supports the use of the price discriminatory bundled definition contained in the Initial Determination.

Given the overall benefits from price discrimination, at first blush it is curious that Copyright Owners would risk ''leaving money on the table'' by removing the royalty-based incentive for price discrimination via bundling. The Judges have identified this problem earlier in this Initial Ruling, in connection with the broader issue of the overall beneficial price discriminatory structure of the PR II-based benchmark. As the Judges noted in that general price discrimination context, Copyright Owners' own expert economic witnesses acknowledged that they would not irrationally ''leave money on the table.'' In fact, Copyright owners' aim, according to that testimony, is to create an unregulated space—per the Bargaining Room theory—and to use their complementary oligopoly power to negotiate price discriminatory rates (in bundles or otherwise), which would free them from the section 801(b)(1) requirements of reasonableness and fairness.

The Judges further find that their prior ruling on this issue in *SDARS III* is distinguishable. There, a proffered bundled revenue definition eliminated the payment of any royalty at all. Copyright Owners quite correctly describe that result as ''absurd,'' but that is not the result here. Rather, in the present case, the parties' negotiated an approach that the Judges adopted in the Initial Determination requiring royalties to be paid on interactive services bundled with other products or services.

Even more distinguishable is Copyright Owners' assertion that *Web IV* provides support for their preferred definition of service revenue. The argument is immediately suspect, because *Web IV* involved per-play royalty rates—not percent-of-revenue rates, making the definition of revenue wholly inapposite. Further, the discussion of the price of an ''ice cream cone'' in *Web IV*—on which Copyright Owners rely—had nothing to do with bundling or isolating the WTP for different products or services. Rather, there the Judges criticized a bizarre argument made by a licensee (who had a quantity discount for plays steered in its direction), that was tantamount to arguing that if a vendor sells one ice cream cone for $1.06 but a buyer could buy two for $1.06, that the market price of an ice cream cone is thus only $.06. This argument was indeed fallacious, because the price of an ice cream cone would be the average of the total cost for the two cones, *i.e.,* $.53/cone. Here, the issue is how to address the WTP of different classes of buyers with heterogeneous WTP, not the pricing of a discount for all purchasers buying the same quantity. The parties utilized the Bundled Revenue definition from the PR II-based benchmark (and in the Initial Determination) to address the indeterminacy inherent in the variable WTP among purchasers of the bundles, by setting floors and minima, rather than attempt to sort out the WTP of individual (or individual blocs) of subscribers.[173]

For the foregoing reasons, the Judges find that the definition in the Initial Determination (unlike the definition in the Determination) is consistent with the Judges' other substantive rulings herein. That is, just as the Majority abandoned its Bundled Revenue definition in its Initial Determination because it refused to credit the PR II-based benchmark (even as ''guidance''), the Judges here do partially rely on the PR II-based benchmark, and thus find that it supports the Bundled Revenue definition contained in the Initial Determination.

4. Application of Four Itemized Statutory Factors

As the forgoing analysis explains, bundling is a form of price discrimination. Accordingly, the Judges' explanation of how price discriminatory rates in the PR II-based benchmark interrelate with the Factor (A) through (D) objectives in section 801(b)(1) are equally applicable here. Accordingly, the Judges adopt by reference their discussion of those four factors set forth *supra* in connection with the PR II-based benchmark, and find that there is no basis pursuant to those four factors to adjust the PR II-based benchmark definition of Bundled Revenue.

V. Conclusion

On the basis of the foregoing analyses, and in consideration of the entirety of the record, the Judges make the following determination relating to the issues on remand from the D.C. Circuit.

[173] Accordingly, Copyright Owners' assertion that the Services did not satisfy their burden of proof with regard to the Bundled Revenue definition misses the point. The Services' burden was to show the reasonableness of utilizing the Bundled Revenue definition in the PR II-based benchmark, not to show that their proffered approach measured the WTP of individual subscribers (or blocs of subscribers). Such an alternative approach might have had merit but no alternative approach was presented to the Judges.

To be clear, the Judges are not declaring that an alternative Bundled Revenue definition and/or alternative rates and structures for bundle, might not have been preferable. *See* 4/15/17 Tr. 5056–58 (Katz) (''[I]f someone had a proposal [with] a specific reason why we should adjust this minimum that's something I would have examined''); *see also* 3/15/17 Tr. 1227–28 (Leonard) (Google's economic expert testifying that ''if somebody had . . . suggest[ed] . . . a different sort of bucket that should be created . . . that's a good idea.''). But Copyright Owners did not propose such alternatives at the hearing, and the alternative in their Motion for Clarification simply eviscerated the ''derived demand''-based link between royalties and bundled offerings. As the Judges have noted *supra,* in the words of Judge Patricia Wald, all judges are cabined by the record evidence introduced by the parties. Therefore (in the absence of a way in which to synthesize the parties' proposals in a manner that does not ''blindside'' the parties) the Judges must choose between the proposals that are in the record, not potentially superior proposals that are not in the record. Here, the Judges favor the Bundled Revenue definition in the Initial Determination that was negotiated by the parties, incentivizes price discrimination and pays royalties on the bundled music, over the substituted definition in the Determination pursued by Copyright Owners that would eliminate price discrimination, except under the terms Copyright Owners could impose via their complementary oligopoly power, and without regard to the statutory requirements of a ''reasonable rate'' and a ''fair income'' for the Services.

As noted at the outset, the headline rate for all offerings throughout the *Phonorecords III* period shall be as follows:

2018–2022 ALL-IN HEADLINE ROYALTY RATES

	2018	2019	2020	2021	2022
Percent of Revenue	11.4%	12.3%	13.3%	14.2%	15.1%

In all other respects, the rates and rate structure of the PR II-based benchmark shall be effective as the rates and structure throughout the *Phonorecords III* period.

The definition of Service Revenue for bundled offerings throughout the *Phonorecords III* period shall be the definition contained in the Initial Determination.

VI. Order

In light of the foregoing analyses and conclusions, the Judges hereby *order* that the participants in this remand proceeding prepare and submit regulatory provisions consistent with this ruling.[174] The participants shall file agreed regulatory language within ten days of the date of this ruling.

The Judges *further order* that if the participants cannot agree on a joint submission, the Judges will accept separate submissions respectively from (1) Copyright Owners and (2) Services, jointly. In absence of an agreed submission, the participants shall file separate submissions not later than 15 days after the date of this ruling.[175]

The Judges *further order* that parties shall not file, and the Judges shall not consider, briefing or legal argument beyond necessary explanatory notes to the proposed language, section by section, not to exceed 250 words per proposed section.[176] The Judges specifically admonish the parties that they shall not use these submissions as a basis to object to this Initial Ruling, either explicitly or implicitly by proposing regulatory provisions inconsistent with this Initial Ruling.

The Judges *further order* that, within 30 days of the date of this Initial Ruling and the attendant dissenting documents, the parties shall file an agreed redacted version of this Initial Ruling, and the dissents, for *public* viewing.

After the Judges have reviewed the parties' regulatory submissions, the Judges shall adopt and format the necessary regulatory language format terms relevant to this ruling and issue a *restricted* Initial Determination after Remand, which shall embody their determination of rates and terms. The parties will have an opportunity to suggest redactions from the Initial Determination after Remand before it is issued as a public version.

The parties shall not file any motions seeking rehearing or reconsideration of this Initial Ruling. Subsequent to the Judges' issuance of their Initial Determination after Remand as identified in the immediately preceding paragraph, any party may file a Motion for Rehearing within 15 days of the issuance of said Initial Determination after Remand.

After ruling on any and all Motions for Rehearing as identified in the immediately preceding paragraph, the Judges shall issue a Final Determination after Remand.

So ordered.

Issue Date: July 1, 2022.

Stephen S. Ruwe,

Copyright Royalty Judge.

David R. Strickler,

Copyright Royalty Judge.

Suzanne M. Barnett,

Chief Copyright Royalty Judge.

ADDENDUM TO FINAL RULING AND ORDER

Offering	% of Service provider revenue (percent)	TCC % or TCC amount	"Mechanical-only" royalty floor
Standalone Non-Portable Subscription Offering—Streaming Only.	10.5	The lesser of 22% of TCC for the Accounting Period or 50 cents per subscriber per month.	15 cents per subscriber per month.
Standalone Non-Portable Subscription Offering—Mixed.	10.5	The lesser of 21% of TCC for the Accounting Period or 50 cents per subscriber per month.	30 cents per subscriber per month.
Standalone Portable Subscription Offering	10.5	The lesser of 21% of TCC for the Accounting Period or 80 cents per subscriber per month.	50 cents per subscriber per month.
Bundled Subscription Offering	10.5	21% of TCC for the Accounting Period	25 cents per month for each Active Subscriber during that month.
Mixed Service Bundle	11.35	21% of TCC for the Accounting Period	n/a.
Limited Offering	10.5	21% of TCC for the Accounting Period	n/a.
Paid Locker Service	12	20.65% of TCC for the Accounting Period	n/a.
Purchased Content Locker Service	12	22% of TCC for the Accounting Period	n/a.
Free nonsubscription/ad-supported services free of any charge to the End User.	10.5	22% of TCC for the Accounting Period	n/a.

[174] The Judges adopt this process in order to avoid a dispute regarding the regulatory provisions issued in connection with their ruling. Because this is a remanded proceeding, the Judges are not restricted to the procedures that would control in an original proceeding, and are exercising their authority to ''make any necessary procedural . . . rulings in any proceeding under this chapter.'' 17 U.S.C. 801(c).

[175] In their agreed upon or separate submissions, the parties shall address the issue identified in note 135 *infra,* regarding Copyright Owners' assertion that the Services omitted from their proposed subpart C rates a portion of the *Phonorecords II* rates.

[176] A section of the regulations is designated by a number following the decimal after the part number, for example, § 385.5. The regulations relevant to this proceeding are found in part 385.

B. Order 43 on Phonorecords III Regulatory Provisions (Public Version With Federal Register Naming and Formatting Conventions)

Introduction

The present Order concerns a single issue in dispute among the parties [177] regarding regulatory language implementing the Judges' Initial Ruling and Order after Remand (''Initial Ruling'') entered in this proceeding.[178] Subsequent to filing dueling submissions (*see* footnote 2 *infra*), the parties filed a Joint Submission, informing the Judges that they had ''agree[d] on all of the regulatory language'' except for certain rate percentages contained in Table 2 of the proposed § 385.21. Joint Submission . . . Regarding Regulatory Provisions Following Initial Ruling and Order (after Remand) at 1 (Nov. 30, 2022) (''Joint Submission'') (eCRB no. 27337).

The Regulatory Language in Dispute

The dispute between the parties is whether the Judges should adopt in the Phonorecords III regulations: (1) the several ''Total Content Cost'' (''TCC'') rates [179] set forth in the Phonorecords II-based benchmark; or (2) the single 26.2% TCC rate discussed in the Initial Ruling. This dispute relates to nine offerings made by interactive streaming services, as detailed below:

Offering	Copyright owners' proposal (percent)	Services' proposal
Standalone Non-Portable Subscription Offering—Streaming Only.	26.2	The lesser of 22% of TCC for the Accounting Period or 50 cents per subscriber per month.
Standalone Non-Portable Subscription Offering—Mixed	26.2	The lesser of 21% of TCC for the Accounting Period or 50 cents per subscriber per month.
Standalone Portable Subscription Offering	26.2	The lesser of 21% of TCC for the Accounting Period or 80 cents per subscriber per month.
Bundled Subscription Offering	26.2	21% of TCC for the Accounting Period.
Free nonsubscription/ad-supported services free of any charge to the End User.	26.2	22% of TCC for the Accounting Period.
Mixed Service Bundle	26.2	21% of TCC for the Accounting Period.
Purchased Content Locker Service	26.2	22% of TCC for the Accounting Period.
Limited Offering	26.2	21% of TCC for the Accounting Period.
Paid Locker Service	26.2	20.65% of TCC for the Accounting Period.

Sources: Offering column text from Exhibit A to Joint Submission . . . Regarding Regulatory Provisions Following Initial Ruling and Order (after Remand) at 17 (Nov. 30, 2022) (eCRB no. 27338); Services' Proposal column text from Services' Joint Submission of Regulatory Provisions Ex. A at 11 (July 18, 2022) (eCRB no. 27005).

The Issue

At a high level, the remaining regulatory issue is the following:

Whether a 26.2% TCC rate identified in the hearing record, and discussed both on appeal and on remand by the D.C. Circuit, should substitute for TCC rates in the Phonorecords III period, or whether these uncapped TCC rates should be set at the specific levels ranging between 20.65% and 22% set forth in the Phonorecords II-based benchmark adopted by the Judges in the Initial Ruling.

To frame, address, and rule on this issue, in this Order the Judges place the parties' dispute in the context of the prior rulings by the D.C. Circuit and the Judges in connection with this proceeding.

Background

On January 5, 2016, the Judges initiated proceedings to determine the appropriate mechanical license royalty rates and terms for the January 1, 2018 to December 31, 2022 period. *See* Notice Announcing Commencement of Proceedings in Phonorecords III, 81 FR 255 (Jan. 5, 2016). After the parties filed their written and rebuttal testimonies and engaged in discovery, they participated in a five-week evidentiary hearing presided over by the Judges. *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords, 84 FR 1918, 1920, 1923–1925 (Feb. 5, 2019).[180]

In the Majority Opinion, the Judges adopted a ''greater-of'' royalty rate structure for the mechanical license, which contained a TCC rate applicable to all categories of offerings.[181] *See* 84 FR 1963; *see also Johnson* v. *Copyright Royalty Board,* 969 F.3d 363, 372 (D.C. Cir. 2020) (summarizing the Majority Opinion). More particularly, the Majority adopted the following rates and rate structure:

[177] The parties who have joined on this dispute (through filings after the issuance of the Initial Ruling) are the National Music Publishers' Association and Nashville Songwriters Association International (collectively, ''Copyright Owners'') and *Amazon.com* Services LLC, Google LLC, Pandora Media, LLC, and Spotify USA Inc. (collectively, the ''Services''). (Copyright Owners have informed the Judges that another party, George Johnson, joins in Copyright Owners' position with respect to the issue considered in this Order.)

[178] The Judges instructed the parties to ''prepare and submit regulatory provisions consistent with this ruling.'' Initial Ruling and Order after Remand at 114 (July 1, 2022) (eCRB nos. 26938, 27063). The Judges further instructed that, ''if the participants cannot agree on a joint submission, the Judges will accept separate submissions respectively from (1) Copyright Owners and (2) Services, jointly.'' *Id.* The parties did not initially file an agreed-upon joint submission as to regulatory provisions, but rather filed the permitted separate submissions.

[179] TCC is defined in the Initial Ruling as ''a shorthand reference to the extant regulatory language describing generally the amount paid by a service to a record company for the section 114 right to perform digitally a sound recording.'' Initial Ruling at 4 n.8 (citations omitted).

[180] The Determination was not unanimous. Judge David Strickler dissented from the Majority's setting of the TCC rate, and he proposed that the appropriate rates should essentially be those proposed in the Phonorecords II-based benchmark proposed by several of the Services. Thus, for clarity, this Order refers to the ''Majority Opinion'' and the ''Dissenting Opinion,'' rather than the ''Final Determination,'' when discussing the respective opinions.

[181] The other prong in the ''greater-of'' rate structure is the percent-of-revenue generated by the interactive streaming service, *i.e.,* ''service revenue.''

2018–2022 ALL-IN ROYALTY RATES: THE GREATER OF:

	2018	2019	2020	2021	2022
Percent of Revenue	11.4%	12.3%	13.3%	14.2%	15.1%
Percent of TCC	22.0%	23.1%	24.1%	25.2%	26.2%

Majority Opinion at 1918, 1960.

The Services appealed.[182] Among their arguments were the assertions—pertinent to this Order—that the Majority: (i) violated the Services' procedural right to fair notice by choosing a structure that was not advanced by any party; (ii) acted arbitrarily and capriciously by simultaneously combining a TCC prong (phased-in to 26.2% of TCC) with an increase in the percentages on the revenue prong (phased-in to 15.1%); and (iii) failed to reasonably explain its rejection of the Phonorecords II settlement as a benchmark. *Johnson, supra,* at 376, 380–81.[183]

Copyright Owners argued in opposition that: (i) the Services' procedural rights were not violated because ''every component'' of the Majority's approach was contained in the hearing record; (ii) the Majority's rate and rate structure rulings were well-reasoned, factually supported and, therefore, not arbitrary and capricious; and (iii) sufficient reasons existed in the record to support the Majority's rejection of the Phonorecords II-based benchmark. *Johnson, supra,* at 382–383; 387.

The D.C. Circuit vacated and remanded. More particularly, *Johnson* holds as follows:

1. The Majority Determination ''failed to provide adequate notice of the drastically modified rate structure [they] ultimately adopted,'' which was beyond ''a reasonable range of contemplated outcomes'' in ''the parties' pre-hearing proposals, the arguments made at the evidentiary hearing, and the preexisting rate structures.'' *Johnson* at 381–82. Accordingly, as to this issue, ''[i]f the [Judges] wish[ ] to pursue [their] novel rate structure, [they] will need to reopen the evidentiary record.'' *Id.* at 383.

2. The appellate issue of whether the Majority's adoption of the (phased-in) 26.2% TCC royalty rate was ''arbitrary and capricious'' could not be addressed—given the absence of ''adequate notice'' cited in point (1) above. *Id.*

3. The Majority's derivation, calculation *and application* of the royalty rate of 15.1% on the revenue prong was proper.[184] The D.C. Circuit explained that, as to *this* issue, the Majority had engaged in the ''type of line-drawing and reasoned weighing of the evidence [that] falls squarely within the [Judges'] wheelhouse as an expert administrative agency.'' *Johnson* at 386. More particularly, the D.C. Circuit approved of the Judges' reliance on ''substantial evidence'' in the form of expert testimony to set the 15.1% service revenue rate. *Johnson,* at 384–85 (emphasis added). *See also id.* at 388 (finding ''substantial evidence'' for the Judges' finding that an increase in the mechanical royalty rate was necessary to address a ''marked decline in mechanical royalty income. . . .'').

4. The Majority's rejection of the Phonorecords II-based benchmark is remanded because the D.C. Circuit ''cannot discern the basis on which the [Judges] rejected the Phonorecords II rates as a benchmark in [their] analysis, that issue is remanded to the [Judges] for a reasoned analysis.'' *Johnson* at 387.

On remand, the Judges adopted procedures that mainly followed the parties' requests. More particularly, the Judges followed the D.C. Circuit's directive and reopened the evidentiary record to receive evidence and testimony relating to the TCC issues. *See* Order Regarding Proceedings on Remand at 2 (Dec. 15, 2020). The post-remand supplementary record added: (1) rate evidence for the 33-months from January 2018 through September 2020, when the parties operated under the Majority's new (but subsequently vacated) regulations including the TCC rates; and (2) new testimony from economic expert witnesses on behalf of Copyright Owners and the Services. *See* Initial Ruling, *passim.* However, none of the post-remand evidence submitted and relied upon by the parties *specifically* addressed as a separate issue the rates for the nine offerings that are the subject of the present Order.

On July 1, 2022, the Judges issued their Initial Ruling[185]—applying *Johnson* and considering the entire record developed pre-remand and post-remand. In their Initial Ruling, the Judges made several findings that bear upon the issue at hand, *viz.,* whether to adopt in the Phonorecords III regulations the 26.2% TCC rate or the TCC rates (ranging from 20.65% to 22%) from the Phonorecords II-based benchmark. In particular, in the Initial Ruling, the Judges stated the following:

1. The Phonorecords II-based benchmark incorporates price discriminatory features for product differentiation as between: (a) subscription and ad-supported services; (b) portable and non-portable services; and (c) unbundled and bundled services. *See* Initial Ruling at 67–68 (noting the salutary price discriminatory nature of the Phonorecords II-based benchmark).

2. The Phonorecords II-based benchmark ''reflect[s] a rate structure with an adequate degree of competition, because there was a balance of bargaining power [''countervailing power''] between the two negotiating industrywide trade associations, offsetting the complementary oligopoly effects in place when a ''Must Have'' licensor bargains separately with each licensee.'' Initial Ruling at 69.

3. Based upon the available record evidence, the Judges find . . . the Services' Phonorecords II-based benchmark . . . ''more than sufficient to satisfy the legal requisites for application, as well as a practical benchmark, when used in conjunction with the 15.1% headline revenue rate advocated by Copyright Owners.'' Initial Ruling at 59.

4. ''Substantial evidence demonstrates that the Phonorecords II-based benchmark rates, other than the headline rate, are not 'too low.' '' Initial Ruling at 73.

5. A Copyright Owner expert witness opined that ''the evidence . . . indicates that the relative valuation ratios implied by the current Section 115 compulsory license [*i.e.,* the Phonorecords II-based benchmark] implies a ''*lower bound on the relative market valuations* of the reciprocal percentage of the value musical works rights relative to sound recording rights [*i.e.,* TCC rates] [of] 22% and 21%.'' Initial Ruling at 78 (emphasis therein).

6. The royalty rates and terms within subpart C of the Phonorecords II-based benchmark—*which include the rates and term for the offerings at issue in this Order*—

[182] The Copyright Owners and George Johnson also appealed; all three parties' appeals were consolidated by the D.C. Circuit. *Johnson* at 375.

[183] The annual phased-in rates are set forth in the Table *supra.*

[184] The italicization of the word ''application'' serves to foreshadow a critical point discussed *infra:* The D.C. Circuit did not affirm any application of the 26.2% TCC rate, *except* for the use of that 26.2% rate as an *input* derived from a specific dataset, to set the 15.1% service revenue-based royalty rate. *Johnson, supra,* at 385–86; *see also* at 386 n.11.

[185] The findings and conclusions in the Initial Ruling were adopted by a majority of the Judges, but two Judges filed separate opinions. *See* Initial Ruling at 2 n.5. One Judge, former Chief Judge Suzanne Barnett, dissented from the Majority's adoption in the Initial Ruling regarding the *Phonorecords II* rate structure (section II of the Initial Ruling), though not from the exception to that benchmark with regard to the headline rate of 15.1% and the imposition of a cap on the TCC rate prong. *See* Chief Judge Barnett's ''Dissent re Benchmark'' (July 1, 2022) (eCRB no. 26943). The other opinion was issued by Judge Strickler, who dissented from the *reasoning* relating to the adoption of the definition of Service Revenue (section V), but concurred in the *adoption* of that definition. *See* Judge Strickler's ''Dissent in Part as to Section IV of the Initial Ruling and Order after Remand'' (July 1, 2022) (eCRB no. 26965).

are expressly ''covered by [the] foregoing analysis.'' Initial Ruling at 93. In rejecting all of Copyright Owners' arguments for different treatment of Phonorecords II-based benchmark rates in Subpart C therein, the Judges declined to adopt Copyright Owners' ''re-assert[ion] [of] the same arguments with respect to subpart C'' that Copyright Owners advanced in opposing the Phonorecords II-based benchmark ''for interactive streaming in subpart B.'' *See* Initial Ruling at 93–94 (''The Judges find no reason on remand to treat the subpart C offerings differently than the manner in which they are treating the subpart B interactive streaming offerings . . . . That means, however, that the various ''headline'' rates for these subpart C offerings must also adjust to 15.1%, 131 *whereas the alternative rates (identified in subpart C as* ''*minima*'' *and* ''*submininma*'') *rates shall remain unchanged.*'') (emphasis added).

7. The D.C. Circuit had affirmed that: (a) the ''headline'' percentage royalty rate (not a TCC rate) of 10.5% was too low; and (b) that the Majority had not improperly exercised its authority when it increased that revenue royalty rate to 15.1% (as phased-in over the five-year rate term). Accordingly, on remand, the Judges maintained the 15.1% (phased-in) percentage royalty rate. *See, e.g.,* Initial Ruling at 4, 17.

8. The D.C. Circuit affirmed the Majority's *derivation and calculation* of the 26.2% TCC rate for use as an input in calculating the 15.1% (phased-in) service revenue percentage royalty rate. However, *Johnson* vacated and remanded the Majority's *application and inclusion* of the 26.2% TCC rate. Initial Ruling at 19–20.

For these reasons, the Judges decided in the Interim Ruling that: (1) the overall Phonorecords II rates comprise a ''useful benchmark,'' when the 15.1% headline percentage rate replaces the 10.5% headline percentage rate for the offerings in Subparts B and C of the Phonorecords II-based benchmark; and (2) ''[t]he (phased-in) 26.2% rate [is] unreasonable.'' Initial Ruling at 50 n.77; 88; and 93–94.

Procedures Following the Post-Remand Initial Ruling

In the Initial Ruling, the Judges directed the parties to attempt to submit jointly agreed-upon regulatory provisions implementing the Initial Ruling, for the Judges to consider. The Judges further ruled that, if the parties could not agree on all the regulatory language, they should make separate submissions regarding regulatory provisions in dispute. *See* Initial Ruling at 114.

The parties agreed to many regulatory provisions but disagreed as to several such provisions. Accordingly, they filed separate submissions and respective replies, regarding the regulatory provisions. Services' Joint Submission of Regulatory Provisions (July 18, 2022); Copyright Owners' Submission of Regulatory Provisions to Implement the Initial Ruling (July 18, 2022); Services' Joint Response to Copyright Owners' Submission of Regulatory Provisions (Aug. 5, 2022); Copyright Owners' Response to Judges' July 27, 2022 Order Soliciting Responses Regarding Regulatory Provisions (Aug. 5, 2022).

The Judges considered those submissions and entered an order addressing the disputed regulatory provisions. *See* Corrected Order regarding Regulatory Provisions following Initial Ruling and Order (After Remand) (Nov. 10, 2022) (''November 10th Order'').[186]

In the November 10th Order, the Judges directed the parties once more to file a joint submission ''of regulatory provisions that embody the rulings set forth in *Johnson,* the Initial Ruling and this [November 10th] Order, and any aspects of the [Majority] Determination (pre-remand) that the parties understand to remain effective after the foregoing rulings.'' November 10th Order at 31.

On November 30, 2022, the parties made the Joint Submission (as also identified at the outset of the present Order), in which they provided joint regulatory language no longer in dispute that applied the binding rulings of the Judges and the D.C. Circuit. However, as also noted above, the parties identified the single issue in dispute that relates to the nine service offerings described *supra*.[187]

The Parties' Respective Arguments in Their November 30th Joint Submission

Copyright Owners' Arguments

According to Copyright Owners, the Initial Ruling ''appears to plainly acknowledge that, in light of *Johnson,* the derivation and calculation of the (phased-in) 26.2% TCC rate percentage cannot be changed.'' Joint Submission at 6. More particularly, Copyright Owners aver that, according to the Judges' Initial Ruling, ''the D.C. Circuit affirmed the Majority's derivation and calculation of the 26.[2]% . . . TCC rate'' and further that ''both rate prongs''—the service revenue rate and the TCC rate—were ''derived from the same analyses.'' Initial Ruling at 19; Joint Submission at 6–7 (quoting Initial Ruling at 19 (emphasis removed)). Further to this point, Copyright Owners rely on the Judges' additional language in the Initial Ruling that the pre-remand Final Determination's ''*derivation and calculation* of the TCC rate [*i.e.,* the 26.2% rate] . . . is not subject to further consideration on remand by the Judges.'' Joint Submission at 7 (quoting Initial Ruling at 20 (emphasis in Initial Ruling)).[188]

According to Copyright Owners, the foregoing points are consistent with the limited scope of the remand, which ''was not opened for new evidence concerning TCC rate percentages.'' Joint Submission at 7 (citations omitted). Accordingly, Copyright Owners emphasize that ''there is no evidence in the record after remand to support changing the (phased-in) 26.2% TCC rate percentage.'' Joint Submission at 7. Copyright Owners—characterizing the former Phonorecords II TCC rates now at issue as newly derived and calculated—maintain that these ''new'' TCC rate percentages therefore are ''foreclosed'' by the Initial Ruling and post-remand orders cited above. Joint Submission at 7–8.

Copyright Owners also assert that the TCC rate at issue here—''was not appealed by the Services or challenged during the remand, nor called into question by the Circuit in *Johnson.*'' Joint Submission at 8 (emphasis removed). The absence of an appeal as to this issue, according to Copyright Owners, means that the only TCC rate supported by *Johnson* is the 26.2% TCC rate. Joint Submission at 8.

The Services' Arguments

According to the Services, the Judges should adopt in the regulations the TCC percentage rates—ranging from 20.65% to 22%—because those rates are contained in the Phonorecords II-based benchmark adopted by the Judges and thus essentially have been ''expressly set out by the Judges'' in two prior decisions. Joint Submission at 2 (citing Initial Ruling at 2; November 10th Order at 6 n.13). In light of these prior Orders, the Services characterize *Copyright Owners' position as the new argument,* improperly seeking regulatory provisions that ''reflect the 26.2% rate

[186] The November 10th Order corrected an otherwise substantively identical order issued two days earlier, on November 8, 2023, which had inadvertently included a small amount of text. See November 10th Order at 1.

[187] On January 10, 2023, Spotify USA Inc., *Amazon.com* Services LLC, Google LLC, Pandora Media, LLC, National Music Publishers' Association, Inc. and the Nashville Songwriters Association International filed a joint Motion (eCRB no. 27418) requesting modification of the previously proposed language for 37 CFR 385.3, which governs fees owed for late payment. There was no opposition to the January 10, 2023 joint Motion. The Judges find good cause to adopt the modified language, which provides that ''where payment is due to the mechanical licensing collective under 17 U.S.C. 115(d)(4)(A)(i), late fees shall accrue from the due date until the mechanical licensing collective receives payment.''

[188] However, Copyright Owners disregard the Initial Ruling's observation that *Johnson* vacated and remanded the Majority's *application and inclusion* of the 26.2% TCC rate. Initial Ruling at 19.

previously imposed by the [M]ajority in the now-vacated pre-remand Final Determination.'' *Id.*

More pointedly, the Services argue that the Judges' Initial Ruling already expressly considered and rejected application of the 26.2% TCC rate. *Id.* (citations omitted). Further, the Services maintain that it is because the Judges rejected the 26.2% TCC rate in the Initial Ruling that the Judges had no need to ''substantively address the topic of TCC rates'' in their November 10th Order. *Id.* at 4.

The Services further maintain that ''*Johnson* does not compel the Judges to simply reinstate their original pre-remand TCC rates.'' *Id.* To this point, the Services rely on the Judges' post-remand finding that, although the error made by the Majority in adopting the 26.2% TCC rate in the pre-appeal Phonorecords III Determination was procedural, the ''consequence . . . was *substantive.*'' *Id.* (emphasis herein).

For the above reasons, the Services maintain that the Judges could not possibly be required on remand to adopt an express 26.2% in any portion of the Phonorecords III regulations.

Turning from their argument that the 26.2% TCC rate was rejected by the Judges, the Services focus on the Judges' finding in the post-remand Initial Ruling that the ''*Phonorecords II* benchmark . . . is the 'better of the benchmarks proposed by the parties . . . one that satisfies the requirements of 17 U.S.C. 801(b)(1) in all respects,' '' Joint Submission at 5 (quoting Initial Ruling at 2). Because the Phonorecords II benchmark includes the TCC rates now at issue—ranging from 20.65% to 22%—the Services maintain that those rates should properly be included in the Phonorecords III regulations. *Id.*[189]

The Judges' Analysis and Ruling

Having considered the parties' submissions, the Initial Ruling and all other pertinent material, the Judges rule that the 26.2% TCC rate cannot and shall not be applied in the regulatory provisions now at issue. Rather, the Judges rule that the TCC rates set forth in the Phonorecords II-based benchmark shall be applied in the nine regulatory provisions now at issue, because they are consistent with and give effect to the Judges' Initial Ruling. The more particular bases for this ruling are set forth below.

Most fundamentally, the Judges note at the outset that in the Initial Ruling they expressly *did not apply* the 26.2% TCC rate in any manner other than as an input—using that TCC rate only as the D.C. Circuit directed—to calculate the 15.1% of service-revenue royalty rate. *See, e.g.,* Initial Ruling at 41 (''[A] careful reading of the remand testimony by Copyright Owners' economists, Professors Watt and Spulber, reveals that *neither of them actually testifies that there is sufficient theoretical and empirical evidence to support the . . . 26.2% TCC rate . . . .*'') (emphasis in original). *See also id.* at 40–41 n.69 (contrasting the improper application of the 26.2% TCC as a separate statutory rate from the use of the 26.2% TCC rate as input from a ''bargaining model'' solely to increase the service revenue rate to 15.1%.).[190]

In this regard, the Initial Ruling has relied upon the clear distinction made in *Johnson* between the 15.1% service revenue rate and the 26.2% TCC rate. *Compare Johnson, supra,* at 385 (affirming the Majority's *application* of the ''revenue rate of 15.1%'' as ''the type of line-drawing and reasoned weighing of the evidence falls squarely within the[ir] wheelhouse as an expert administrative agency'') *with id.* at 382–83 (vacating the Majority's decision for ''significantly hiking the TCC rate to 26.2% from approximately 17% to 22%'' without allowing the Services an opportunity to address the issue—an error that was even ''worse'' than the elimination of caps on certain other TCC offerings.).

Further, the offerings now at issue were contained in the Phonorecords II-based benchmark, and the Judges' application of that benchmark in the Initial Ruling is unambiguous: Other than the new and increased headline rate of 15.1%, ''the rates and rate structure of the *Phonorecords II*-based benchmark proposed by the Services . . .) shall constitute the rates and rate structure for the *Phonorecords III* period.'' Initial Ruling at 2. Accordingly, with regard to the single remaining issue, pertaining to the nine offerings listed *supra,* the regulatory provisions proposed by the Services in the Joint Submission are fully consistent with the Initial Ruling.

By contrast, Copyright Owners' proposed language introduces a change in the Phonorecords II-based benchmark rates that was never the subject of an evidentiary proceeding pre-or post-remand, whether through live or written testimony. But perhaps more importantly, as a matter of *substance,* Copyright Owners' proposed regulatory provisions are inconsistent with the language and a key purpose of the Initial Ruling, which is to adopt the Phonorecords II-based benchmark rates, the basis of which were generated consensually by the parties, through negotiations between industrywide trade associations, which prevented unwarranted and disproportionate complementary oligopoly market power from affecting the royalty rates. See Initial Ruling at 69–70.[191]

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[189] The Services also argue that Copyright Owners' assertion *at this time* that the 26.2% TCC rate should substitute for the Phonorecords II-based benchmark rates is *procedurally* untimely and improper. The Judges only partially agree with Services' argument in this regard. If Copyright Owners had wanted to timely make this argument, they should have done so during the post-remand period *before* the Judges entered their Initial Ruling (or, of course, during the initial proceeding pre-appeal). In that sense, Copyright Owners failed to avail themselves procedurally of the right to make this substantive challenge. However, the Judges have afforded the parties the procedural right to propose regulatory language that they claim would implement the Initial Ruling; a procedural right exercised by both parties, as evidenced by, for example, their arguments in the Joint Submission. In that narrow sense, Copyright Owners' present argument is not procedurally improper. As a matter of *substance* though, as explained in ''The Judges Analysis and Ruling'' *infra,* the Judges have considered herein Copyright Owners' present arguments and found them inconsistent with the Initial Ruling.

Finally, with regard to subsequent substantive challenges to the Initial Ruling, the parties correctly understand that such challenges can be made after the Judges issue their post-remand ''Initial Determination'' (a statutorily-mandated ruling). *See* Joint Submission at 9 (Services agreeing with Copyright Owners' understanding that they continue to properly ''reserve all rights with respect to the Initial Ruling, any implementing regulations and any Initial and Final Determination, including the right to challenge any of the foregoing.'').

[190] The Services claim that this distinction constitutes a semantic twisting of words. *See* Joint Submission at 7. The Judges reject that characterization. Rather, their ruling is substantive, not semantic, because they have relied upon the testimony of several economic expert witnesses, including one of Copyright Owners' own economic experts, who identified five reasons that the Judges found to preclude adoption of the 26.2% TCC rate as a separate statutory rate. *See, e.g.,* Initial Ruling at 41. Moreover, not a single economist who testified at the hearing proposed that the Judges adopt the 26.2% TCC rate as a statutory rate, *see* Initial Ruling at 38, further supporting the Judges' adoption in the Initial Ruling of the consensual negotiated TCC rates contained in the Phonorecords II-based benchmark for the nine offerings at issue.

[191] The Judges also note that their adoption of these 20.65% through 22% TCC rates in the Phonorecords II-based benchmark—because they are lower than the 26.2% rate proposed by Copyright Owners—is consistent with their rationale for adopting that benchmark. As the Judges explained *repeatedly and throughout the Initial Ruling,* their adoption of the Phonorecords II-based benchmark purposefully incorporates into the Phonorecords III regulations the beneficial price discriminatory features that are hallmarks of that benchmark. *See, e.g.,* Initial Ruling at 65 n.98 (''[T]the granular discriminatory features that the parties had negotiated . . . reflect an ''appropriate form and extent of price discrimination . . . .'' The Judges emphasized this point repeatedly. *See generally* Initial Ruling, *passim.*

Further, as the Services note, Copyright Owners themselves—even when advocating for an otherwise across-the-board 26.2% TCC prong—had continued to propose the 20.65% to 22% TCC rates for the nine offerings at issue now. *See* Copyright Owners' Submission of Regulatory Provisions to

The Judges also reject Copyright Owners' argument that by maintaining the 20.65% through 22% TCC rates in the Phonorecords II-based benchmark they would be violating their prior rulings regarding the scope of the remand. Citing to the Judges' Order Regarding Proceedings on Remand at 1 (eCRB no. 23390) (''Remand Order''), Copyright Owners state in their Joint Submission that that the remand ''was not opened for new evidence concerning TCC rate percentages.'' Joint Submission at 7. But the decision to re-open the existing, and robust, evidentiary record only as to rate *structure,* did not limit the *scope* of the remand itself, nor consideration of evidence from the underlying proceeding.

Moreover, the Judges find no language in either the Remand Order or the Remand Scheduling Order, and no other basis, that would support Copyright Owners' characterization of the 20.65% through 22% TCC rates in the Phonorecords III-based benchmark as new evidence, given that they were expressly included in that benchmark which had been proffered at the hearing *prior to the remand.*

Further, the present issue of whether the regulatory provisions implementing the Initial Ruling should apply the Phonorecords II-based benchmark TCC rates or the 26.2% TCC rate is *not* a dispute regarding the derivation or calculation of a *new* TCC rate. The Phonorecords II-based benchmark rates are self-evidently *not new rates,* because they existed in that *prior* benchmark. Moreover, the present dispute relates to whether the language and reasoning in the Initial Ruling are consistent with maintaining the rates contained in the Phonorecords II-based benchmark for the nine offerings at issue, or whether the Initial Ruling calls for abandoning those benchmark rates and replacing them with the 26.2% TCC rate proffered by Copyright Owners. As explained *supra,* the 26.2% TCC rate was properly utilized by the Majority as an *input* (combined with other evidence) in order to calculate the 15.1% service revenue royalty rate. The record reflects no other context in which the 26.2% TCC rate can be utilized, let alone must be utilized. Indeed, as explained *supra,* the record reflects the Judges' rejection of the 26.2% TCC rate as a stand-alone statutory royalty rate.

The Judges also reject Copyright Owners' argument that the Services somehow waived their argument for maintaining the 20.65% through 22% TCC Phonorecords II-based benchmark rates. More particularly, Copyright Owners incorrectly assert that these rates were ''not appealed by the Services. . . .'' Joint Submission at 8. Rather, the D.C. Circuit stated unambiguously: ''[T]he Streaming Services object to the [Judges'] . . . rejection of the Phonorecords II . . . settlement[ ] as [a] rate benchmark[ ].'' *Johnson,* 969 F.3d at 384; *see also id.* at 386 (''The Streaming Services argue . . . that the [Judges] arbitrarily rejected . . . [a] potential rate benchmark[ ] . . . the Phonorecords II settlement—without adequate explanation.'').

Moreover, the D.C. Circuit repeatedly noted that it was vacating and remanding the Majority's Determination with regard to, *inter alia,* the Majority's improper decision to reject the Phonorecords II-based benchmark *writ large, i.e.,* without qualification by the appellate panel that some parts of that proffered benchmark might have been correctly rejected. *See Johnson,* 969 F.3d at 367, 376, 381, 387. Obviously, virtually all the elements of the Phonorecords II-based benchmark—including the offerings now at issue—were appealed, and not waived, foregone or forfeited by the Services.

Likewise, Copyright Owners are wrong in their claim that the Services had never ''challenged'' these rate issues ''during the remand.'' Joint Submission at 8. Rather, the Services argued on remand for the Phonorecords II-based benchmark to be applied *comprehensively,* without itemizing every element of that proffered benchmark. *See* Services' Joint Opening Brief (post-remand) at 19–44 (Apr. 1, 2021) (detailing why ''the Services' proposal based on the *Phonorecords II* settlement is reasonable . . . .''); *see also* Services' . . . Submission of Regulatory Provisions at 2 (July 18, 2022) (''Services' July 18th Submission'') (''[T]he Services have faithfully implemented the task at hand—to use the rates and rate structure of the ''Phonorecords II-based benchmark'' proposed by the Services during the remand proceeding . . . .'').[192]

Finally, the Judges find and conclude that their ruling in this Order sets forth reasonable rates satisfying the four objectives in the then-applicable (but now superseded) statutory rate standard contained in 17 U.S.C. 801(b)(1).[193] First, with regard to Factor (A),[194] the Judges recognize and follow the D.C. Circuit's ruling that the Majority's decision to increase in the ''headline'' service revenue royalty rate by 44% from 10.5% to 15.1% was supported by substantial evidence. *Johnson* at 387–88.

Further with regard to Factor (A), the Judges understand their analysis and reasoning in the Initial Ruling—applying the Phonorecords II-based benchmark and thus rejecting the 26.2% TCC rate—to be applicable to the present dispute regarding the adoption of regulations to implement the Initial Ruling. Accordingly, the Judges adopt by reference herein their analysis and reasoning set forth at pages 90–91 of the Initial Ruling. For those reasons, the Judges decide, as they did in the Initial Ruling, that there is no basis for yet a *further* increase in the royalty rate based on Factor (A), finding ''no evidence to suggest that the price discriminatory rates should be changed, in order to address the connection between price discrimination and the objective of Factor (A).'' *Id.* at 91.

Next, in considering Factors (B) and (C),[195] the Judges' Initial Ruling adopts the Majority's reasoning that the 15.1% service revenue royalty rate provided a ''*fair* allocation of revenue between copyright owners and services'' and it would be ''substantively unwarranted to engage in any new consideration on remand of the impact, if any, of Factors

Implement the Initial Ruling at 15–16) (July 18, 2022); see also Joint Submission at 6.

[192] The decision in *Johnson* could be construed as rejecting *one* element of the Phonorecords II-based benchmark, viz., the 10.5% headline rate, because the appellate panel affirmed the higher Majority's adoption of the (phased-in) 15.1% headline royalty revenue rate. The Initial Ruling is consistent with that ruling, and this rate is not now in dispute. *See* Services' July 18th Submission at 2 (the Services acknowledge that in their proposed regulatory provisions they ''replac[ed] the headline rate'' of 10.5% with the headline royalty rate ''set by the Judges [15.1%] in the Initial Ruling.'').

[193] The D.C. Circuit expressly declined to adopt most of the Majority's application of the explicit statutory objectives. As to Factor (A), regarding the objective of ''maximiz[ing] the availability of creative works to the public,'' the D.C. Circuit held that the Majority's finding that ''an increase in the royalty rates for mechanical licenses was necessary to ensure the continued viability of songwriting as a profession'' was ''supported by substantial evidence.'' *Johnson* at 387–388. However, with regard to the remaining statutory factors, *Johnson* instead vacated and remanded consideration of those matters to the Judges. *See Johnson* at 389. The Initial Ruling after remand considered these statutory objectives in detail. *See* Initial Ruling at 90–93. (The parties made no express argument regarding the application of these statutory objectives in their Joint Submission.).

[194] Factor (A) provides that rates shall be calculated to achieve the objective of ''maximize[ing] the availability of creative works to the public.'' 17 U.S.C. 801(b)(1)(A).

[195] The Factor (B) objectives (providing a ''fair return'' and a ''fair income'' to the licensors and licensees respectively) and Factor (C) objectives reflecting their relative roles in making the streamed music available to the public) are typically considered jointly, because of their overlapping concerns. *See* Initial Ruling at 15 n.31 (citing *Johnson,* 969 at 388). In this Order, the Judges likewise jointly address Factors (B) and (C).

(B) and (C) on the otherwise reasonable 15.1% revenue rate.'' *Id.* at 15–16.

In their Joint Submission, the parties have presented no arguments specifically addressing how Factors (B) or (C) might support their proposed TCC rates now at issue. Examining the record, the Judges find and conclude that maintaining the Phonorecords II-based rates ranging from 20.65% to 22% embodies the fairness associated with rates negotiated between industrywide trade associations wielding relatively comparable bargaining power, as discussed *supra* and in the Initial Ruling.[196] This notion of fairness is embodied in the determination of the reasonable rate and, as can be the case, when one of the four itemized statutory objectives of section 801(b)(1) is bound-up and appropriately addressed within the broader context of setting a reasonable rate, no further adjustment is necessary through an invocation of an itemized statutory factor. *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III) 84 FR 1918, 1955, 2015 (Feb. 5, 2019) (Majority and Dissenting Opinions agreeing that ''to the extent market factors may implicitly address any (or all) of the four itemized factors, the reasonable, market-based rates may remain unadjusted.'').

Finally, the Judges see no reason to alter their adoption of the Phonorecords II-based benchmark rates for the nine offerings at issue in this Order based upon the final listed statutory objective, Factor (D).[197] In the Joint Submission, Copyright Owners did not make an express argument relating to this factor (nor did the Services). Independently considering the potential application of Factor (D), the Judges find no evidence that the continuation of the Phonorecords II-based benchmark rates for the offerings at issue in this Order would cause any disruption that Factor (D) is intended to address. Further, as noted *supra,* the Judges have phased-in an *increase* in the headline service revenue royalty rate from 10.5% to 15.1%—a 44% increase—rendering unreasonable any argument that the present decision to maintain the Phonorecords II-based TCC rates is ''disruptive'' to Copyright Owners under the statutory Factor (D) standard.

Moreover, the Judges reassert their point in the Initial Ruling that there is no need to independently consider any potential disruption under the Factor (D) standard because the Judges have already found an application of that rate to be unreasonable. *See* Initial Ruling at 50 n.77. Further, the D.C. Circuit was aware of the existence of the 20.65% to 22% TCC rates in the Phonorecords II-based benchmark for these nine offerings now at issue, and not only declined to affirm the Majority's increase in those rates to 26.2%—a significant increase of 19% to 27% [198]—but also condemned that increase. *See Johnson* at 383 (''Worse still . . .the [Judges] also raised the total content cost [TCC] rate to 26.2%. . . .That rate previously fell between approximately 17% and 22%''). Nothing in the record suggest that the Judges can or should utilize the narrow statutory ''disruption'' standard in Factor (D) of section 801(b)(1) as a basis to override the position of the D.C. Circuit or the Judges' analysis in the Initial Ruling as to the inapplicability of the proffered 26.2% royalty rate.

Order

For the foregoing reasons, the Judges shall adopt in the regulatory provisions [199] the several ''Total Content Cost'' (''TCC'') rates set forth in the Phonorecords II-based benchmark as proposed by the Services.[200]

Within two days of the date of issuance of this Restricted Order, the parties shall file an agreed proposed redacted version for public viewing.

Issue Date: April 26, 2023.

David P. Shaw
Chief Copyright Royalty Judge

[196] In this regard, the Judges agree with the Services' argument. *See* Initial Ruling at 61 (summarizing the Services' position as to Factors (B) and (C)).

[197] ''Factor (D) . . . instructs the Judges to consider the 'competing priority' of 'minimiz[ing] any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.'" Initial Ruling at 16. More particularly, ''disruption'' potentially remediable under Factor (D) requires that the contemplated rate ''directly produce[ ] an adverse impact that is substantial, immediate and in the short-run because there is insufficient time for either [party] to adequately adapt to the changed circumstance produced by the rate change . . . .'' Initial Ruling at 53–54.

[198] An increase from 20.65% to 26.2% is a 5.55 percentage point increase, which is an increase of 27% (rounded). An increase from 22% to 26.2% is a 4.2 percentage point increase, which is an increase of 19% (rounded).

[199] As addressed herein, the Judges find good cause to adopt the joint proposal for modified language regarding late fees, in 37 CFR 385.3.

[200] The Initial Determination shall issue forthwith.

C. Dissent in Part as to Section IV of the Initial Ruling and Order After Remand by Judge David R. Strickler [201] (Redacted Version With Federal Register Naming and Formatting Conventions)

I. The Contours of This Partial Dissent

I respectfully Dissent from Section IV of the Initial Ruling and Order after Remand (Initial Ruling). As explained herein, I conclude that the D.C. Circuit's rulings in *Johnson* preclude the Judges from engaging in ''new 'agency action.' '' [202] See *Johnson* v. *Copyright Royalty Board,* 969 F.3d 363, 386 (D.C. Cir. 2020). Accordingly, I cannot join with the present Majority in its determination that this remand proceeding constitutes ''new 'agency action' '' consistent with *Johnson.* That argument is circular and renders useless the D.C. Circuit's careful analysis of the procedures that are and are not available to the Judges after they have issued their Initial Determination.

As further explained herein, the argument is *circular* because it begins with the D.C. Circuit's ruling that the Determination [203] was improper because it invented a new procedure to change

[201] I am concurring in the Majority's *substantive* re-adoption of the Bundled Service Revenue definition from the Initial Determination. As explained herein, I disagree with the Majority regarding the *procedural* manner in which the Judges may reach this result. Thus, it would be more accurate to describe this ''Dissent'' as a ''Concurring Opinion'', or an ''Opinion Concurring in Part and Dissenting in Part.'' However, the Copyright Act does not expressly authorize Judges to issue a ''concurring opinion,'' but rather references the issuance of a ''dissenting opinion.'' *See* 17 U.S.C. 803(a)(3). Accordingly, I identify this opinion as a ''Dissent in Part as to Section IV of the Initial Ruling and Order after Remand.''

[202] I place the phrase *agency action* within quotation marks inside the broader phrase *new agency action* to avoid potential ambiguity and inconsistency with the directives in *Johnson.* There, the D.C. Circuit held that the Judges cannot assert ''plenary authority to revise [their] determinations whenever [they] thought appropriate,'' because such a power grab would render ''a nullity . . . the lines drawn by the authorizing statute . . . to confine . . . post hoc amendments'' to statutorily identified circumstances.'' *Johnson* at 392. So, ''new'' means the new application of an *existing* statutorily available ''agency action'' that had not previously been invoked—not ''new'' in the sense of a form of action conjured up to meet the moment. (When this phrase is used in a quotation I do not use the double quotation marks.) This distinction is important because the Majority and Copyright Owners advance new *forms* of (extra-statutory) agency action, not merely new applications of statutorily-authorized agency actions.

[203] *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III),* 84 FR 1918 (Copyright Royalty Board Feb. 5, 2019) (final rule and order) (''Determination''); *See also* Final Determination, 16–CRB–0003–PR (2018–2022) (Nov. 5, 2018) (citations to the Determination and to the Dissent in this Dissent in Part are found in this document). The Dissent is appended to and part of the same document as the Determination.

the Bundled Revenue definition that was in the Initial Determination,[204] only to circle back to where it started by creating—through the D.C. Circuit's own remand no less—a further and extra-statutory ''new 'agency action'''.

The Majority also renders Johnson *useless,* by adopting a process by which—after the D.C. Circuit has remanded an issue because the Judges lacked procedural authority to rule—the procedural error is essentially honored in the breach, because the remand neuters the effect of the D.C. Circuit's ruling.[205]

I join with the Majority though on its *substantive* decision to re-adopt the definition of Bundled Revenue set forth in the Initial Determination. As explained *infra,* I too find that it is clearly preferable to the definition that was swapped into the (Final) Determination. But as explained herein, I reconcile the procedural and substantive points differently. I apply what I believe to be the proper understanding of the D.C. Circuit's ruling—finding, contrary to the Majority, no avenue for ''new 'agency action''' post-remand. Rather, the Judges must *revert* to the original—and substantively appropriate—definition of Bundled Revenue in the Initial Determination.

To explicate the bases of this Dissent, my opinion as to this issue is set forth below.

II. Introduction

The Majority and I analyze the definition of ''Service Revenue'' from ''Bundled Offerings'' (henceforth ''Bundled Revenue'' definition) in the context of our partial adoption of the PR II-based benchmark. As discussed *supra,* the Remand Majority found that the PR II-based benchmark is a useful benchmark, particularly because of its features that incentivize beneficial downstream price discrimination and generate more listeners, revenues, and royalties. As explained below, the Bundled Revenue definition—itself an element within the PR II-based benchmark—also embodies such price discriminatory incentives. Thus, the Judges' analysis of the PR II-based benchmark and the Bundled Revenue definition are connected.

In the Determination, the earlier Majority likewise found the issues relating to the PR II-based benchmark to be bound-up with the question of the appropriate Bundled Revenue definition. But because that earlier Majority *rejected* the PR II-based benchmark, it likewise rejected the Bundled Revenue definition contained in the Initial Determination. The definition in the Determination thus eliminated the royalty-based incentive to engage in price discrimination via bundling.

In the interregnum between the Initial Determination and the (Final) Determination, the Judges considered Copyright Owners' post-hearing motion which sought, *inter alia,* to strike the Bundled Revenue definition in the Initial Determination. The Majority agreed with Copyright Owners that the definition in the Initial Determination should be replaced. An important rationale—highly relevant in the present context—was as follows: ''The Judges have . . . declined to rely on the 2012 . . . benchmark . . . as the basis for the rate structure, or, therefore, as regulatory guidance.'' Amended Order Granting in Part and Denying in Part Motions for Rehearing at 17 (Jan. 4, 2019) (Clarification Order).[206]

Unlike in the Determination, in this Initial Remand Ruling the Judges *do* rely on the PR II-based benchmark in part because of its price discriminatory aspects. More particularly, because the bundling of interactive services also constitutes a form of price discrimination, the Judges find the PR II-based benchmark definition of Bundled Revenue set forth in the Initial Determination to be substantively reasonable and otherwise consistent with the four itemized factors in section 801(b)(1).

As a *procedural* matter though, I can neither: (1) offer any further or fuller explanation for why the Majority made this change in the Bundled Revenue definition nor (2) identify any ''new 'agency action''' that would permit this definitional switch. And contrary to present Majority on remand, I also cannot identify a ''new 'agency action''' that the Judges can now take to return to the definition in the Initial Determination. But, as explained *infra,* the Judges need not identify such action, because the absence of a justification for the definitional switch requires the Judges to *revert back* to the definition in the Initial Determination.

As a *substantive* matter though, the Judges unanimously agree to replace the post-hearing definition of Bundled Revenue in the Determination and reinstate the definition set forth in the Initial Determination.

III. Background

In this remand proceeding, the parties propose two starkly different definitions of Bundled Revenue. Each has a dramatically different impact on the use of the royalty structure and levels to incentivize price discrimination in the downstream market.

The Services argue in favor of the language contained in the Initial Determination, *i.e.,* in their PR II-based benchmark, which defines Bundled Revenue, in pertinent part, as

> the revenue recognized from End Users [*i.e.,* consumers] for the Bundle less the standalone published price for End users for each of the other component(s) of the Bundle . . . .

Initial Determination, Attachment A at 7 (§ 382.2 therein).

By contrast, Copyright Owners support the Majority's substituted language contained in the Determination, which defines Bundled Revenue, in pertinent part, as

> the lesser of the revenue recognized from End Users [*i.e.,* consumers] for the bundle and the aggregate standalone published prices for End Users for each of the component(s) of the bundle that are License Activities . . . .

Determination, Attachment A at 8 (§ 382.2 therein).

In *Johnson,* the D.C. Circuit succinctly summarized these conflicting definitions as follows:

> In its Initial Determination, the [Judges] directed that the revenue from streaming services that are included in bundled offerings would generally be measured by the value remaining after subtracting the prices attributable to the other products in the bundle.
>
> When the Copyright Owners objected to the substance of that definition in their motion for ''clarification,'' the Board adopted an entirely new definition of Service Revenue for bundled offerings. . . . This new definition generally measured the value of the streaming component of a bundle as the standalone price of the streaming component.

[204] Initial Determination, 16–CRB–0003–PR (2018–2022) (Jan. 27, 2018).

[205] The Initial Ruling suggests that the Judges *could* have utilized a ''further explanation'' for the switched Bundled Revenue definition, as opposed to using ''new 'agency action.''' I do not dissent from that general point. However, even though the Majority did not utilize this alternative approach on remand, I dissent to the extent that section could be read to allow a fuller explanation that would conflict with *Johnson.*

[206] This January 4, 2019 Order was issued in response to two motions; the Services' ''Joint Motion for Rehearing to Clarify the Regulations'' and Copyright Owners' ''Motion for Clarification or Correction of Typographical Errors and Certain Regulatory Terms.'' As explained *infra,* Copyright Owners did not style their motion as a ''rehearing'' motion and expressly declined to argue that their motion met the statutory and regulatory requisites for rehearing. This remand issue pertains only to the post-hearing switch in the Bundled Revenue definition sought and obtained by Copyright Owners via their motion. Accordingly, it is clearer to refer herein to the Judges' January 4, 2019 Order as the ''Clarification Order,'' rather than as a ''Rehearing Order,'' because the semantic distinction carries substantive overtones. (I had dissented from the Initial Determination and the Determination, and thus did not join in the Clarification Order.)

Johnson at 389.[207]

In the Clarification Order, the Judges succinctly summarized the parties' respective positions. *Id.* at 17. They noted that Copyright Owners had presented evidence that the PR II-based benchmark definition contained in the Initial Determination ''led *in some cases* to an inappropriately low revenue base,'' although the Judges ''agree that there is *no support for any sweeping inference that cross-selling has diminished the revenue base.*'' *Id.* at 17, 21 (emphasis added). The Judges further noted the Services' assertion that the Bundled Revenue definition in the Initial Determination is consistent with the Judges' ''endorsement of the classic price discrimination enabled by bundling strategies.'' *Id.*[208]

The Majority resolved this issue in the Clarification Order in favor of Copyright Owners. Specifically, the Majority found that, because of the ''indeterminacy problem'' [209] inherent in bundling, ''the Services—not the Copyright Owners—. . . are in a position to provide evidence of how they price bundles and value the component parts thereof.'' *Id.* at 17–18. However, according to the Majority, although the Services ''bore the burden of providing evidence concerning the proper economic allocation of bundled revenue,'' they ''failed to do so,'' and ''[b]y default . . . the Judges must adopt an approach to valuing bundled revenue that is in line with what the Copyright Owners have proposed.'' *Id.* at 18.

IV. The Rulings in Johnson Regarding the Bundled Revenue Definition

The Services appealed the Majority's abandonment of the Bundled Revenue definition in their Initial Determination. Their appeal ''challenge[s] both the legal authority and the substantive soundness'' of this switch.

First, the Services argued that the Majority failed to identify and explain the *procedural* basis for making the switch after the hearing had concluded. Second, the Services argued that, *substantively,* the replacement definition in the Determination ''was arbitrary, capricious, or unsupported by substantial evidence.'' *Johnson* at 389, 392.

The D.C. Circuit agreed with the Services regarding the *procedural* issue and therefore vacated and remanded that aspect of the Bundled Revenue definitional switch. In light of its procedural ruling, the D.C. Circuit explicitly declined to rule on the Services' *substantive* argument relating to the definitional switch. *Id.* at 392. (''Because the Board failed to explain the legal authority for its late-breaking rewrite, we vacate and remand that aspect of the decision [and] we have no occasion to address the Streaming Services' separate argument that the definition was arbitrary, capricious, or unsupported by substantial evidence.'').

The D.C. Circuit's rulings in *Johnson* pertaining to this Bundled Revenue Definition were clearly articulated. The D.C. Circuit found that the Majority ''failed to explain under what authority'' it made a material change to the definition ''so late in the game.'' *Johnson* at 389, 392. The D.C. Circuit noted that the Judges expressly declined to treat the Clarification Motion as a motion for rehearing; consequently, the motion did not request and the Judges did not reconsider either evidence or legal argument. *Id.* at 390. Although appellate counsel offered rationales, the D.C. Circuit rejected counsel's *post hoc* reasoning. *Id.* and 391–92. Ultimately, the D.C. Circuit remanded the adopted regulation ''either to provide 'a fuller explanation of the [Judges'] reasoning at the time of the agency action[,]' or to take 'new agency action' accompanied by the appropriate procedures.'' *Id.* at 392, citing *Dep't of Homeland Sec.* v. *Regents of Univ. of Cal.* 140 S.Ct. 1891, 1908 (2020).

To be precise, I take note of the following specific rulings in *Johnson:*

1. ''The problem is that the [Majority] has completely failed to explain under what authority it was able to materially rework that definition so late in the game.'' *Id.* at 389.

2. ''The [Majority] did not treat Copyright Owners' motion to have the definition changed as a motion for rehearing . . . [because] Copyright Owners' motion did not request a literal rehearing of evidence or legal argument.'' *Id.* at 390 (cleaned up).

3. ''The [Majority] nowhere in its order or the [ ] Determination explains the source of its power to make 'fundamental' changes under the authorizing statute . . . .'' *Id.* at 392. [same as #1]

4. ''[I]t should go without saying that we may not sustain the Board's action based on its attorney's theorizing at oral argument . . . vacillating gestures to uninvoked authority will not do.'' *Id.* at 391–92 (the D.C. Circuit alluding to its rejection of arguments also made only by appellate counsel in support of the Majority's rejection of the PR II-based benchmark earlier in the decision).[210]

''We must vacate the [ ] Determination's bundled offering Service Revenue definition and remand for the [CRB Judges] either to provide 'fuller explanation of the agency's reasoning at the time of the agency action[,]' or to take 'new agency action' accompanied by the appropriate procedures.'' *Id.* at 392.

V. Remand Procedure Regarding Bundled Revenue Definition

Post-remand, the Judges stated their understanding, as well as the parties' understanding, of the issue on remand with respect to the Bundled Revenue definition:

> The Services and Copyright Owners agree that the proceedings on remand should be limited to three issues: * * * [3] the adoption of a revised definition of ''service revenue'' for bundled offerings between issuing their Initial Determination and [their] Determination.

Order Regarding Proceedings on Remand at 1 (Dec. 15, 2020) (Remand Order).

The parties proposed, and the Judges agreed, that the record would not be re-opened with regard to the Bundled Revenue definitional issue. Rather, the Remand Order permitted the parties only to provide further briefing on this matter. *Id.* Specifically, the Judges subsequently permitted each party to file simultaneous Initial Remand Submissions and simultaneous Reply Remand Submissions. *See* Order Adopting Schedule for Proceedings on Remand (Dec. 20, 2020). Thereafter, seeking further analysis on the question of ''new agency action,'' the Judges solicited, and received, further briefing on this issue. *See* Notice and *Sua Sponte* Order Directing the Parties to Provide Additional Materials (Dec. 9,

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[207] As explained *infra* (including by way of an example), the Bundled Revenue definition in the Initial Determination aligns with and incentivizes price discrimination in the downstream market, but the definition in the Determination does not.

[208] The parties' substantive arguments are discussed in more detail *infra.*

[209] The ''economic indeterminacy arises when ''the input suppler . . . is paid as a percent of retail revenue, and the bundled revenue consists of some revenue attributable to the royalty base and other revenue excluded from the royalty base, the economic indeterminacy of the revenue attributable to each bucket creates a measurement problem, absent further information regarding the WTP [Willingness-to-Pay] of buyers/subscribers to the bundle.'' *SDARS III,* 83 FR 65264. As explained *infra,* the PR II-based benchmark addresses this informational uncertainty with the parties' negotiated alternative rate prongs and floors that guarantee royalties are paid, whereas the definition in the Determination eliminated the alignment of royalties to price discriminatory bundles designed to increase downstream access to musical works.

[210] Going beyond the Majority's actual rulings, the CRB Judges' appellate counsel argued that the Majority's authority for this definitional switch fell under either or both of the ''inherent'' statutory powers of the Judges or their ''rehearing power.'' *Id.* at 392. (The D.C. Circuit rejecting appellate counsel's argument that it was unnecessary ''for this Court to address which one it is because . . . it could properly be understood as both.'').

2021) (Feb. 9, 2021); *Sua Sponte* Order Regarding Additional Briefing (Feb. 9, 2021).

VI. The Parties' Submissions Regarding Bundled Revenue Definition

In their respective briefing, Copyright Owners and the Services made arguments relating to: (1) the *procedural* issue, *i.e.,* the Judges' authority, *vel non,* to switch to a new Bundled Revenue definition in the Determination; and (2) the *substantive* issue, *i.e.,* the relative merits of the two conflicting Bundled Revenue definitions. *See* Initial Remand Submission of Copyright Owners at 7–10 (Apr. 1, 2021) (CO Initial Submission); Services' Joint Opening Brief (in Services' Joint Written Direct Remand Submission at Tab D) at 64–76 (Apr. 1, 2021) (Services' Initial Submission); Copyright Owners' Reply Brief on Remand (in Reply Remand Submission of Copyright Owners, Vol. 1) at 64–88 (CO Reply); Services' Joint Reply Brief at 52–63 (Services' Reply).

A. The Procedural Issue

1. Copyright Owners' Arguments

Copyright Owners assert first that the Judges can preserve their post-hearing switch of the Bundled Revenue definition by sidestepping the D.C. Circuit's holding and rationale in *Johnson.* That is, Copyright Owners maintain that this remand proceeding itself constitutes the necessary form of ''new 'agency action''' that *Johnson* invites, while also liberating the Judges from the consequences of the procedural infirmities identified by the D.C. Circuit. More particularly, Copyright Owners argue:

> [T]he new agency action here is a determination after remand proceedings[.] [T]he [Judges are] largely free to chart [their] own procedural course, and [they] ha[ve] done so in [their] [Remand] Order. The [Judges are] not required to undertake any of the procedural steps set forth in 17 U.S.C. 803(b) in order to take such ''new agency action.'' See 17 U.S.C. 803(d)(3) (requiring only that on remand further proceedings be taken ''in accordance with subsection (a)''); 37 CFR 351.15; *Intercollegiate Broad. Sys., Inc.,* 796 F.3d at 125 (''[N]either the Copyright Act nor the [Judge's] regulations prescribe any particular procedures on remand.'') The Circuit's instruction that the action be ''accompanied by the appropriate procedures[,]'' *Johnson,* 969 F.3d at 392, does not dictate what those ''appropriate procedures'' must be but instead plainly refers to these flexible rules. *See also Oceana, Inc.,* 321 F. Supp. 3d at 136 (explaining that when remanding to an agency, a court generally ''may not dictate to the agency the methods, procedures, or time dimension, for its reconsideration'').
>
> CO Initial Submission at 71 n.33.

Copyright Owners reject the Services' position that the asserted procedural error is an ''absence of authority'' that can never be cured. *Id.* at 74 (citing Services' Proposal for Remand Proceedings at 10). They note that the D.C. Circuit did not say the Judges lacked the authority to revisit the service revenue definition from bundles on remand. Nor, they observe, did it say the Judges have no authority to review the record evidence and the parties' arguments and reach the same conclusion or a different conclusion on remand.

Copyright Owners further opine that if the only possible outcome were for the Judges to reinstate a definition that lacked any explanation or evidentiary support solely because it was present in the Initial Determination, then the D.C. Circuit would not have remanded the issue but would have simply reversed and reinstated the Initial Determination definition. But instead, they note, the D.C. Circuit remanded and said the Judges could take ''new agency action'' precisely to cure the asserted procedural defect. Copyright Owners assert that the remand allowed the parties to present the record evidence and their arguments so that the Judges can address the definition ''afresh'' in the remand determination. *Id.* at 74.

Further, Copyright Owners argue that 17 U.S.C. 803(d)(3) states only that proceedings on remand must be in accordance with 17 U.S.C. 803(a). They contend that remand proceedings need not be confined to procedures the Services claim are too late in the game for the Judges to follow, again relying on the holding in *Intercollegiate Broad. Sys., supra,* that ''neither the Copyright Act nor the Board's regulations prescribe any particular procedures on remand.'' *Id.* at 125. Accordingly, they argue, the Judges can reaffirm the adopted bundled service revenue definition following their review of the parties' submissions without invoking section 803(c)(2) or 803(c)(4) that were ruled inapplicable in *Johnson.* CO Reply at 65–66.

Also, Copyright Owners argue that the Judges may properly justify the changed definition under section 803(c) as a fuller explanation of the agency's reasoning at the time it was made. They urge that the Judges could explain that, especially in light of the evidence of how (in Copyright Owners' characterization) the Services misused the prior definition to make service revenue completely disappear, the Judges carry-over of the prior Bundled Revenue definition from *Phonorecords II* into the Initial Determination was unintended and inadvertent.[211] CO Reply at 69.

Copyright Owners also assert that, on remand, the Judges could explain that Copyright Owners had, in their Motion for Clarification, identified an ''exceptional case'' under section 803(c)(2) because the prior definition failed to comport with Judges' precedent and economic principles, and was unsupported by evidence. In addition, the Judges reheard the evidence and legal arguments as presented in the parties' briefs on the issue and, as a result, chose to adopt the revised definition. Copyright Owners maintain that for the Judges to do so would not be impermissible *post-hoc* reasoning. They note that the D.C. Circuit remanded precisely because the Judges did not provide any reason in the Determination for revising the Bundled Revenue definition. Copyright Owners note that it was the Services, not Copyright Owners, who appealed the Judges' modification of the bundled service revenue definition; thus, Copyright Owners cannot be penalized for not making every possible argument for affirmance. CO Reply at 70.

Further, and again notwithstanding the holding in *Johnson,* Copyright Owners argue that the Judges have the authority to engage in new agency action in this remand proceeding through a recasting of the Motion for Clarification as a motion for rehearing, pursuant to 17 U.S.C. 803(c)(2)(A) and 37 CFR 353.1. In this regard, Copyright Owners dismiss the point, raised by the D.C. Circuit, that their Motion for Clarification could not be recast as a motion for rehearing because Copyright Owners had explicitly disavowed that their motion sought rehearing under the statute, and that the Judges agreed. Rather, Copyright Owners maintain that the foregoing is not the same as a finding that the standard could not have been met. In Copyright Owners' view, the Judges could revisit on remand the question of whether the rehearing standard has now been met, and find that Copyright Owners have satisfied the ''exceptional case'' standard for granting rehearing motions under section 803(c)(2).[212] Copyright Owners

[211] Copyright Owners assert that the definition in the Initial Determination conflicted with the CRB Judges' finding in the Initial Determination that the adopted rates and terms would afford Copyright Owners a fair return for their creative works, thereby satisfying Factor B of the 801(b) standard. Thus, they maintain that the definitional switch was necessary so as to not ''frustrate the proper implementation of'' the Determination. CO Reply at 69 (*citing* 17 U.S.C. 801(b) and 803(c)(4)).

[212] The Majority set forth the rehearing standard in the *Clarification Order:* ''According to the

Continued

add that if the Judges do engage in new agency action that reconsiders the Motion for Clarification as a motion for rehearing, the Judges should fully explain their reasoning. *Id.* at 8–10.

However, Copyright Owners urge that proceeding in that fashion would add an entirely unnecessary and complicating step. They again suggest that there is no need to reconsider or recharacterize the Motion for Clarification as a motion for rehearing because the remand itself affords the opportunity for the Judges to take new agency action, which, as in a rehearing, permits them to reconsider evidence and arguments, but, unlike a rehearing, is not limited by the constraints of section 803(c)(2). *See* Copyright Owners' . . . Additional Briefing on New Agency Action . . . Question, etc., Tab B at 7–8 (Feb. 24, 2021).

2. The Services' Arguments

The Services' arguments are based on the reasoning of the D.C. Circuit in *Johnson.* Specifically, they assert that the D.C. Circuit found only ''three ways in which the [Judges] can revise Initial Determinations'' via ''new agency action,'' and the Judges failed to establish that the change to the service revenue definition fit any of those three categories. Services' Initial Submission at 64–65 (citing *Johnson* at 390).[213]

According to the Services, the *first* statutory way the Judges may revise an Initial Determination is to ''order rehearing 'in exceptional cases' in response to a party's motion, 17 U.S.C. 803(c)(2)(A).'' Services' Initial Submission at 65 (citing *Johnson* at 390). The Services argue that the D.C. Circuit held in *Johnson* that the Judges' ''material revision of the '[Bundled] Revenue' definition . . . does not fall within the [Judges'] rehearing authority under section 803(c)(2)(A)'' because ''the [Judges] [themselves] . . . w[ere] explicit that [they] 'did not treat the [Copyright Owners'] motion[ ]' . . . 'as [a] motion[ ] for rehearing under 17 U.S.C. 803(c)(2).'" *Id.* The D.C. Circuit also noted that ''as the [Judges] found, . . . Copyright Owners' motion did 'not meet [the] exceptional standard for granting rehearing motions' under section 803(c)(2).'' *Id.* (citing *Johnson* at 390). The Services assert, quoting *Johnson* once more, that the Judges were not able to make ''a volte-face'' and justify on appeal their revision to the definition as an exercise of rehearing authority. As the D.C. Circuit held, agency action must be justified by ''reasons invoked by the agency at the time it took the challenged action,'' and post-hoc rationalizations are insufficient. *Id.* (citing *Johnson* at 390).

The Services add their view that the Judges cannot revisit the decision to deny rehearing without engaging in impermissible *post-hoc* reasoning. They note the Supreme Court has explained that, while an agency may ''elaborate later'' on its ''initial explanation'' of the reason (or reasons) for its action, it ''may not provide new ones.'' Services' Initial Submission at 66, citing *e.g., Regents at* 1908. The Services offer that the Judges, having stated that they did not consider the Copyright Owners' motion to revise the definition to be a motion for rehearing, cannot now conclude that the motion qualified as one for rehearing and that the Judges in fact engaged in rehearing. *Id.*[214]

The Services next argue, relatedly, that the Judges cannot simply recast the Services Motion for Clarification as a rehearing motion in an attempt to satisfy the rehearing standard. In this regard, they maintain that Copyright Owners did not argue before the Judges or the D.C. Circuit that their Motion for Clarification satisfied the ''exceptional cases'' standard, and have therefore waived that argument. *Id.*

The Services assert that the *second* statutory way the Judges may revise an Initial Determination, *viz.* taking ''new agency action'' to correct a technical or clerical error under section 803(c)(4), cannot be used to justify the modification of the Bundled Revenue definition in the Initial Determination. The Services note that the D.C. Circuit held specifically that the Judges' change in the Bundled Revenue definition could not be construed as correcting a technical or clerical error because it involved a substantive rewrite of the Service revenue definition. *Id.* at 67 (citing *Johnson* at 391).

The Services argue that the *third* and final statutory justification for the Judges to engage in ''new agency action'' is to revise the terms in an Initial Determination is in response to ''unforeseen circumstances'' that would frustrate the proper implementation of the determination. *Id.* at 67. The Services note that the D.C. Circuit held in *Johnson* that this authority did not justify the Judges' change to the Bundled Revenue definition because the Judges did not invoke this authority and ''the need to ground the original definition in the record'' could not credibly be described as ''an unforeseen circumstance.'' *Id.* (citing *Johnson* at 391).

The Services also note that the D.C. Circuit rejected the argument that the Judges have an ''inherent authority''—unmentioned in the statute—to make changes to the Initial Determination. The D.C. Circuit explained that the specific restrictions Congress placed on the [Judges'] authority in section 803 ''would be a nullity if [they] also had plenary authority to revise [their] determinations whenever [they] thought appropriate.'' *Id.* (citing *Johnson* at 391–92). The Services add that even if the Judges offered a new source of authority capable of justifying substantive changes to the [Bundled] Revenue definition now, the Judges would be unable to rely on this ''uninvoked authority'' without engaging in impermissible *post-hoc* reasoning. *Id.*

The Services also reject Copyright Owners' position that the Judges may sidestep the D.C. Circuit's ruling by issuing a new determination on remand and simply arguing that *any* ruling after remand qualifies as new agency action pursuant to *Johnson.* The Services argue that failure to address the legal and factual issues on which the court remanded would violate the D.C. Circuit's decision and would result in yet another remand. The Services emphasize that the issue of authority to make the changes to the Initial Determination are especially important in this context, because the D.C. Circuit recognized that the Copyright Act places limits on the Judges' authority to alter an initial determination by defining conditions for rehearing and the types of changes that are permitted absent a rehearing. In this regard, the Services maintain that the Judges cannot do on remand what they lacked authority to do in the first instance. The Services assert that the Judges must resolve the legal question of whether authority exists to alter the revenue definition in

Copyright Act, the Judges may grant a motion for rehearing in exceptional circumstances, provided the moving party shows that an aspect of the determination is ''erroneous.'' *See* 17 U.S.C. 803(c)(2); 37 CFR 353.1. The moving participant must identify the aspects of the determination that it asserts are ''without evidentiary support in the record or contrary to legal requirements.'' 37 CFR 353.2. In general, the Judges grant rehearing only ''when (1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct a clear error or prevent manifest injustice.'' *See, e.g.,* Order Denying Motion for Reh'g at 1, Docket No. 2006–1 CRB DSTRA (Jan. 8, 2008) (*SDARS I* Rehearing Order) (applying federal district court standard under Fed. R. Civ. P. 59(e)).'' Clarification Order at 2, n.3.

[213] The Services acknowledge that the Judges could alternatively have attempted to provide on remand a fuller explanation of their prior reasoning (in lieu of engaging in ''new 'agency action''). That issue is considered *infra.*

[214] In fact, the issue of whether to characterize Copyright Owners' Motion for Clarification as a motion for rehearing is not one raised by Copyright Owners, but rather by the Judges *sua sponte.*

the Initial Determination. Services' Reply at 52–54.[215]

The Services also take note of the alternative path available to the Judges: to provide a ''fuller explanation'' of the prior conclusion that the Judges had legal authority to revise the Service Revenue definition. The Services maintain that if the Judges pursue the ''fuller explanation'' path, the Judges are limited to elaborating on what they said previously, and that they cannot add new reasons they did not initially provide. *Id.* at 54–55; *see also* Services' Joint Rebuttal Brief Addressing the Judges' Working Proposal at 38–42 (Feb. 24, 2022) (''Services' Additional Submission'').

The Services address Copyright Owners' position that if the only possible outcome were for the Judges to reinstate a definition that lacked any explanation or evidentiary support solely because it was present in the Initial Determination, then the D.C. Circuit would not have remanded the issue but would have simply reversed and reinstated the Initial Determination definition. The Services urge that the D.C. Circuit could not reverse because the CRB's appellate counsel had raised—for the first time on appeal—new justifications for the Judges' decision to change the Initial Determination. Instead, the Services maintain, the D.C. Circuit had to remand and give the Judges the opportunity to address appellate counsel's new justifications in the first instance, as the D.C. Circuit could not rule them out given the posture of the appeal. Services' Reply at 56.

VII. Analysis and Decision

A. The Procedural Issue: Is There ''New Agency Action'' Available to the Judges?

Having considered the parties' arguments, I conclude that the rulings in *Johnson,* which clearly rejected all of the Majority's procedural arguments seeking to justify their switch in the Bundled Revenue definition, foreclose any avenue for procedurally justifying this definitional switch. More particularly, I conclude that none of the procedural avenues proffered by Copyright Owners would constitute ''new 'agency action''' consonant with the holdings in *Johnson.* Further, I cannot identify any other procedural device (*i.e.,* an extra-statutory form of agency action) that would permit the switched definition in a manner consistent with *Johnson.*[216] In addition, I cannot identify any further or fuller explanation that might support the Majority's procedural reasoning for swapping out the Bundled Revenue definition in the Initial Determination and substituting the definition in the Determination.

In reaching this conclusion, I take note of the following specific language in *Johnson:*

> Section 803 identifies three ways in which the Board can revise Initial Determinations. It can (i) order rehearing ''in exceptional cases'' in response to a party's motion; (ii) correct ''technical or clerical errors,''; and (iii) ''modify the terms, but not the rates'' of a royalty payment, ''in response to unforeseen circumstances that would frustrate the proper implementation of [the] determination.''

Johnson at 390 (citations omitted). After identifying these three alternatives, the D.C. Circuit concluded that the CRB Judges ''rollout of an entirely new manner for calculating the streaming service revenue from bundled offerings fit none of those categories.'' *Id.*

First, I consider whether in the present case they can engage in ''new 'agency action''' pursuant to 17 U.S.C. 803(c)(2)(A) by recasting Copyright Owners' Motion for Clarification as a Motion for Rehearing. I conclude that this avenue has been unambiguously cut-off by *Johnson* and, indeed (as noted in *Johnson*), by the Judges' own prior ruling:

> The [CRB Judges'] material revision of the Bundled Revenue definition . . . does not fall within [their] rehearing authority under Section 803(c)(2)(A). We have that on no less an authority than the [CRB Judges themselves], [who were] explicit that [they] ''did not treat the Copyright Owners' motion'' to have the definition changed ''as a motion] for rehearing under 17 U.S.C. 803(c)(2).'' That is because the Copyright Owners' motion did not ''request[ ] a literal rehearing of evidence or legal argument.''
>
> Nor could they have because, as the [CRB Judges] found, the Copyright Owners' motion did ''not meet [the] exceptional standard for granting rehearing motions'' under Section 803(c)(2). . . . [The CRB Judges] explain[ed] that . . . Copyright Owners ''failed to make even a *prima facie* case for rehearing under the [rehearing] standard''.

Johnson, 369 F.3d at 390.

Further cutting off this ''rehearing'' approach, *Johnson* also expressly holds that it is a ''forceful'' principle that the D.C. Circuit ''cannot sustain action on grounds that the agency itself specifically disavowed. *Id.* Moreover, in this Initial Remand Ruling I echo the Majority's ruling in the Clarification Order that Copyright Owners had failed to present ''even a *prima facie* case for rehearing under the applicable standard''. Clarification Order at 2.[217]

Next, I consider whether the Judges can engage in ''new 'agency action''' by recharacterizing their switch of the Bundled Revenue definition as an attempted correction of ''technical or clerical errors,'' pursuant to their ''continuing jurisdiction'' under section 803(c)(4). Once again, they cannot, and the D.C. Circuit has effectively explained why this is so:

> The [Judges] do[ ] not even try to squeeze [their] substantive rewrite of the Service Revenue definition into that [§ 803(c)(4)] category. Quite the opposite, the [Judges] admit[ ] that the new definition ''represent[s] a departure'' from the definition in the Initial Determination, and was a substantive swap designed to ''mitigate'' the alleged ''problem'' of the original definition leaving the interactive streaming service providers free to ''obscure royalty-based streaming revenue by offering product bundles that include music service offerings with other goods and services[.]'' . . . To that same point, the order itself labels the initial and new definitions ''diametrically-opposed approaches to valuing bundled revenues.'' . . . . Nothing technical or clerical about that.

Johnson at 391.

On remand, I am unable to ascertain any basis for describing or justifying the changed Bundled Revenue definition as a technical or clerical correction. Thus, I conclude that the Judges cannot engage in ''new 'agency action''' pursuant to this section.

Next, I consider whether the Judges can engage in ''new 'agency action'''—

[215] In The Services agree that this remand proceeding qualifies as *a* ''new agency action'' but do not maintain that a ruling on remand that is inconsistent with *Johnson* would be the type of ''new 'agency action''' that *Johnson* permits. *See* Services Additional Submission at 38–42.

[216] In this section, Copyright Owners' arguments regarding recasting their Motion for Clarification as a request for rehearing, a correction for technical or clerical errors, or for unforeseen circumstances would constitute a new application of an *existing* ''form of agency action'' that the D.C. Circuit had rejected. But Copyright Owners' argument in favor of the Judges' supposed ''inherent authority'' to enlarge their post-hearing jurisdiction is an argument creating a *new form* of agency action, not an argument in favor of new application of an existing form of authority. Likewise, the next approach proffered by Copyright Owners, *i.e.* construing the remand itself as generating the requisite agency action, which is also the Majority's approach, is an example of an agency action that is not statutorily specified and, as explained *infra,* is inconsistent with section 803(a).

[217] The first two bases for rehearing under the statute, *viz.,* change in the controlling law and the availability of new evidence, clearly do not apply. The third basis, *i.e.,* to correct a clear error or prevent manifest injustice, also does not apply. As explained herein, the substantive difference between the conflicting Bundled Revenue definitions should be resolved consistent with the Judges' adoption of the PR II-based benchmark and the parties' negotiated compromise of the ''price discrimination vs. revenue diminution'' dilemma. This resolution does not constitute an ''error,'' let alone a ''clear error,'' and maintaining the parties' rate architecture from the Initial Determination does not generate any ''injustice,'' ''manifest'' or otherwise.

by trying to squeeze the square peg of their definitional swap into the round hole that is the ''unforeseen circumstances'' clause in section 803(c)(4). That provision permits the Judges to exercise ''continuing jurisdiction'' if necessary to modify a regulatory term in a determination in response to ''unforeseen circumstances,'' if the absence of modification would frustrate the proper implementation of the determination. Once again, *Johnson* shuts the door:

> Come oral argument, the [Judges] attempted to explain that ''the unforeseen circumstances would be that [they] initially adopted a definition that was not supported by the record, and that was in fact substantively unreasonable and would frustrate the proper implementation of their determination.'' . . . It is hard to see how the need to ground the original definition in the record was an unforeseen circumstance. That is Administrative Law 101. *See also* 17 U.S.C. 803(c)(3) (''A determination of the [Judges] shall be supported by the written record.'').

Johnson at 391 (cleaned up). I agree. The present panel of Judges is bound by the D.C. Circuit's ruling that the overlooking of the need to ground in the factual record the Bundled Revenue definition in the Initial Determination cannot constitute an ''unforeseen circumstance.'' Accordingly, I am unable to ascertain any basis for describing or justifying the changed Bundled Revenue definition as an ''unforeseen circumstance'' that would justify their invocation of ''continuing jurisdiction.''

I further consider the argument (made by the Judges' appellate counsel and by Copyright Owners) that the Judges have the ''inherent authority *sua sponte* to make any 'appropriate' substantive . . . or 'fundamental' changes after the Initial Determination . . . that [they] believe[ ] serve 'the interests of enhancing the clarity and administrability of the regulatory terms accompanying the [ ] Determination.''' *Johnson* at 391. The D.C. Circuit made short work of this argument as well, stating that, although the CRB Judges have ''considerable freedom'' with regard to determining their own procedures

> that flexibility must be exercised within the lines drawn by the authorizing statute. Congress's decision to limit rehearing to ''exceptional cases,'' and to confine other *post hoc* amendments to cases involving ''technical or clerical errors,'' would be a nullity if the [Judges] also had plenary authority to revise [their] determinations whenever [they] thought appropriate. The [Judges] nowhere in [their] order or the [ ] Determination explain[ ] the source of [their] power to make ''fundamental'' changes under the authorizing statute . . . any time [they] deem such changes ''appropriate'' . . . even after the Initial Determination.

Johnson at 392.[218]

As with regard to the proffered rationales discussed *supra,* I cannot identify any authority that would allow the Judges to declare for themselves in the present factual and legal context an ''inherent'' authority to override the Copyright Act and declare their right to engage in ''new 'agency action.'''

Finally, I consider Copyright Owners' suggestion that the *remand itself* by the D.C. Circuit permits the Judges, pursuant to the Copyright Act, to engage in any procedure necessary to support their switch in the Bundled Revenue definition. The present Majority essentially adopts this procedural approach. However, I reject that argument as meritless.

The argument begins with a correct premise but seriously veers off course. Copyright Owners correctly note (and the Services do not disagree) that this remand proceeding constitutes ''new 'agency action.''' Copyright Owners then maintain that, because the Copyright Act does not provide for procedures that govern remand proceedings, the Judges are statutorily unconstrained with regard to the procedures they may adopt. This premise, although perhaps correct in other contexts, is most definitely incorrect in this specific context, given the clear holding in *Johnson.*

Here, the D.C. Circuit has been unequivocal in identifying the statutory limitations that precluded the Judges from switching out the Bundled Revenue definition in their Initial Determination and replacing it with a different definition in the Determination that was, to use the Majority's phrase, ''diametrically opposed'' to the prior definition, in that it would eliminate the royalty-based incentive to price discriminate via bundling.[219] *But Copyright Owners assert that the remand itself clothes the Judges with the procedural authority to make the very switch that Johnson forbids!* I do not understand the D.C. Circuit to have admonished the Majority for its failure to respect the boundaries of its jurisdiction, only to provide them, via remand, with a back-door through which they may circle-back and exceed those very boundaries.

A reading of section 803(a), upon which Copyright Owners rely, provides a further demonstration of the error in this argument. This subsection lists the authorities whose pronouncements the Judges must ''act in accordance with,'' including, quite unsurprisingly, ''the decisions of the court of appeals under this chapter.'' 17 U.S.C. 803(a). In the instant case, the D.C. Circuit has unambiguously held that the Judges lacked the statutory authority to make the definitional switch at issue. For the Judges to construe that clear ruling as an implicit invitation to create new extra-statutory remand procedures that contradict the D.C. Circuit's rationale for the remand would be inexplicable and would render useless the procedural ruling in *Johnson.*[220]

In sum, I cannot and do not understand that the D.C. Circuit intended in *Johnson* simply to write a meaningless procedural opinion that the Judges could not merely ignore, but use to cleanse the very procedural error the D.C. Circuit had condemned.[221]

Accordingly, the Bundled Revenue definition in the Initial Determination should be reinstated. As explained in the portion of the Initial Remand Ruling in which I join, this reinstatement is harmonious with the entirety of the Judges' findings and conclusions regarding the other remanded issues.

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[218] By the same reasoning, *Johnson* also rejected the Judges' explanation in the *Determination* that they were permitted to treat Copyright Owners' request as a general motion under § 350.4) of their regulations. *Id.*

[219] This substantive impact of the definitional switch is discussed *infra.*

[220] In fact, this argument is dangerous. The CRB Judges or any administrative agency, could willfully engage in extra-statutory procedures to obtain a particular substantive result. If there is no appeal, the extra-statutory procedure would be successful. But if the extra-statutory procedure was the subject of a successful appeal resulting in a remand, the CRB Judges (or any agency) could declare the remand as license to engage once more in extra-statutory procedures in order to obtain the same substantive result. This is a ''heads-I-win, tails-you-lose'' strategy.

[221] Copyright Owners also argue that if the D.C. Circuit had intended in *Johnson* to prohibit the Judges from engaging in ''new 'agency action''' on remand, they would have reversed and reinstated the Initial Determination, rather than vacated and remanded that aspect of the Determination. But that argument confuses prudence with uncertainty. The D.C. Circuit prudently allowed the Judges, who are presumed to have particular knowledge of their duties, to consider whether there exist further explanations of their reasoning or ''new 'agency actions''' they could invoke to support their definitional switch. That prudence hardly suggests that the D.C. Circuit was sanguine about the existence of further explanations or additional actions that might support the switch.

Also, 17 U.S.C. 803(d)(3) explicitly allows the D.C. Circuit to ''vacate [a] determination of the . . . Judges and remand the case to the . . . Judges for further proceedings,'' but only expressly allows the court to ''enter its own determination''' in connection with ''the amount or distribution of royalty fees and costs, and order the repayment of any excess fees, the payment of any underpaid fees and the payment of interest pertaining respectively thereto . . . .'' *Id.* Thus, it is hardly clear that the D.C. Circuit understood it had any choice upon vacating, save to remand for further proceedings.

B. The Substantive Issue: The Dueling Definitions of Bundled Revenue

1. Introduction: The Issue as Framed in the Clarification Order

Regarding the definition of ''Service Revenue'' from bundled offerings, the Judges summarized the parties' competing arguments:

> Copyright Owners presented evidence that the existing approach led, *in some cases,* to an inappropriately low revenue base—but did so in service to their argument that the Judges should reject revenue-based royalty structures. *They did not present evidence to support a different measure of bundled revenue* because their rate proposal was not revenue-based.
>
> The Services rely on the fact that the approach to bundled revenue in the extant regulations is derived from the 2012 Settlement. The Judges have, however, *declined to rely on the 2012 Settlement as a benchmark,* as the basis for the rate structure, or, therefore, as regulatory guidance. The Services have observed *correctly* that the evidentiary records in *Web IV* and *SDARS III* differ from the record in this proceeding.[222]

Clarification Order at 17 (emphasis added).

Despite these arguments, the Judges found that neither party presented evidence adequate to support the approach advocated in post-determination filings, because the ''economic indeterminacy problem inherent in bundling'' remained unresolved. *Id.* The Judges stated that the Services were the party in possession of the relevant information, and concluded that the Services bore the burden of providing evidence that might mitigate the ''indeterminacy problem'' inherent in bundling. Because the Judges concluded that the Services had not met that burden, they ruled that they must adopt an approach to valuing bundled revenue that is in line with what the Copyright Owners proposed. As a result, the Judges discarded the formula in the Initial Determination and ruled, instead, that streaming service providers will use their own standalone price (or comparable) for the music component (not to exceed the value of the entire bundle) when allocating bundled revenue. *Id.* at 16–18.

On remand, the parties have made the following arguments regarding the substance of the Bundled Revenue definition:

2. Copyright Owners

According to Copyright Owners, the prior Bundled Revenue definition in the Initial Determination failed to address the '' 'economic indeterminacy' problem inherent in bundling'' appropriately and in a way consistent with Judges' precedent. CO Initial Submission at 75 (citing Clarification Order at 16–18). Copyright Owners proceeded to cite several portions of testimony from the Services' economic experts who acknowledged this problem. *Id.* They then point to hearing testimony in which Copyright Owners repeatedly raised the ''economic indeterminacy'' problem and demonstrated what they characterized as the absurd results to which the prior definition had led. *Id.* at 76. They pointed out that under the Initial Determination, the first step in computing Bundled Revenue was to identify revenues recognized from the entire bundle (*i.e.,* the price paid by the subscriber). The second step was to subtract ''the standalone published price'' for all non-music components of the bundle. According to Copyright Owners, [REDACTED]. *Id.* at 76, 83.

Copyright Owners point out that the Judges already found with respect to other licenses that such an approach is not only fundamentally unfair, but ''absurd.'' *Id.* (citing *Web IV,* 81 FR 26316, 26382 (May 2, 2016) (webcaster licenses); *see also SDARS III,* 83 FR 65210, 65264 (Dec. 19, 2018) (SDARS licenses) (rejecting proposed deductions by service from bundle revenues because of the ''acknowledged 'economic indeterminacy' problem inherent in bundling''). Copyright Owners concur with the Judges' conclusion that the same reasoning applies to *Phonorecords III. Id.* at 76–77 (citing Clarification Order at 18 (''the 'economic indeterminacy' problem inherent in bundling is common to all three proceedings.'')). Copyright Owners offer that Spotify conceded to this flaw in the definition in the Initial Determination, but offered an alternative that contained the same loophole. *Id.* at 77–78.

Copyright Owners also point out that the proponent of a term bears the burden of proof as to adoption. The Judges made clear that the licensee who wishes to offer bundles must bear the burden of providing evidence that might mitigate the acknowledged economic indeterminacy problem inherent in bundling, because any such evidence would be in its possession, not in the possession of the licensors. *Id.* at 79 (citing *SDARS III,* 83 FR 65264 (''bundling [is] undertaken to increase [the Services'] revenues and it would be reasonable to assume that [the Services have] information relevant to the economic allocation of the bundled revenue.'')). Copyright Owners contend they presented unrebutted evidence showing the unreasonableness of the Services' proposed definition while the Services offered no evidence to support their definition. *Id.* at 78, 79 (citing Clarification Order at 18). Copyright Owners maintain that no Service offered evidence concerning the separate values of the constituent parts of the bundles, or any other evidence concerning the economic allocation of bundled revenue, let alone the reasonableness of the definition in the Initial Determination. *Id.* at 80. Copyright Owners assert that in the absence of evidence to support the proposed definition, the Judges may adopt or fashion a definition of service revenue for bundled offerings that comports with the record evidence, which is precisely what the Judges did and, through new agency action, do again. *Id.* at 81.

They further argue that the hearing record and the Judges' precedent and reasoning further explain the unreasonableness of the prior definition and support the adopted bundle revenue definition. *Id.* at 82. Copyright Owners offer that in contrast to the Services' evidentiary failure, they have provided sufficient evidence showing the unreasonableness of the Services' proposed definition. They maintain that the definition adopted by the Judges in the Determination was consistent with the statutory factors and the evidence in the proceeding showing how the prior definition had been manipulated and ''led, in some cases, to an inappropriately low revenue base.'' *Id.* at 83 (citing Clarification Order at 17–18).

Copyright Owners dispute the Services' assertion that there is support for the *Phonorecords II* approach to bundles in the record of this proceeding. Instead, Copyright Owners argue, the Services' purported evidence at most supports the benefits of the practice or strategy of bundling. They maintain that the strategy of bundling covered music services with other products or services has nothing to do with [REDACTED]. They offer that the definition in the Initial Determination has nothing to do with such benefits, and that those benefits may be equally served by a definition that ensures value is apportioned to the music component in the bundle. CO Reply at 73–76.

3. The Services

The Services argue that the evidence in the existing written record addressing bundles shows both that this definition is supported by the *Phonorecords II* benchmark and that it has proven industry-wide benefits. Services' Initial Submission at 68. They emphasize that

[222] In *Web IV* and *SDARS III,* unlike under the Phonorecords II-based benchmark, there were no minima or floors to provide licensors with royalties in the event bundled offerings would otherwise fail to generate royalties.

Copyright Owners did not propose an alternative definition of service revenue until after the Judges issued the Initial Determination and that any definition they propose now would fail the basic requirement that the Judges must adopt rules ''on the basis of a written record.'' *Id.* (citing 17 U.S.C. 803(a)(1) and 803(c)(3)).

Addressing the merits of the definition contained in the Initial Determination, the Services argue that it best serves the goals of the Copyright Act; that as a bright-line, easily administered rule, it continues the broad industry agreement from *Phonorecords II,* which ''was negotiated voluntarily between the Services and . . . Copyright Owners—strong evidence that its terms are mutually beneficial.'' Services' Initial Submission at 69.

The Services contend the prior negotiated definition increases output and incentivizes beneficial price discrimination to reach casual and passive listeners who would otherwise not pay for music and thus would not generate revenue from which royalties could be paid. With regard to [REDACTED]. *Id.* at 71 (and record citations therein).

They further state that the definition of Bundled Revenue in Phonorecords II also enabled funneling of many of listeners into full-priced, full-catalog services. The Services allege that Copyright Owners also ignore the extensive royalties that were generated. They add that, for casual/passive listeners and those who may be funneled to subscription services, the per-subscriber minimum guarantees that the Copyright Owners will still be paid a fair royalty. The Services then cite several portions of testimony from various Services' economic experts who point out the realization of an expanded royalty pool, which the Services offer as proving a functioning marketplace. *Id.* at 68–74.[223]

The Services maintain that while neither the Services nor Copyright Owners submitted evidence specifically addressing the way that customers, Services, or Copyright Owners might value the component parts of bundles, such subjective valuations are unnecessary—given that the parties' negotiated handling of the bundling issues provides the Judges with ample support for the PR II-based benchmark definition in the Initial Determination. See *id.* at 75–76.

The Services also argue that while the Judges' decision in SDARS III did involve valuation of the music and non-music components of a bundle, the resolution in SDARS III is inapposite because, here, the rate structure has a way of ensuring that Copyright Owners are fairly compensated from bundles: the statutory minimum payment. Services' Reply at 62.

C. Analysis and Decision

The fundamental difference between the impact of the two alternative definitions is simply stated:

Under the Initial Determination: downstream bundling and its price discriminatory effect *would* be incentivized by a royalty structure that reflects the lower WTP of consumers who subscribe by paying for a Bundle;

Under the (Final)Determination: downstream bundling and its price discriminatory effect *would not* be incentivized by a royalty structure that reflects the lower WTP of consumers who subscribe by paying for a Bundle.

To explain this difference, the Judges find it helpful to describe (as in the Determination and Dissent) how bundling facilitates price discrimination and how lower royalties for bundled streaming services incentivize such bundling.

Price discrimination occurs when a seller offers different units of output at different prices. *See, e.g.,* H. Varian, *Intermediate Economics* at 462 (8th ed. 2010). The benefit to the seller arises from attempting to ''charge each customer the maximum price that the customer is willing to pay for each unit bought.'' R. Pindyck & D. Rubinfeld, *Microeconomics* at 401 (8th ed. 2013). For all goods, and intellectual property goods such as copyrights in particular,[224] the social benefit is that price discrimination more closely matches the quantity sold with the competitive quantity as the seller or licensor better aligns the price with the WTP of different categories of buyers or licensees. *See* W. Fisher, *Reconstructing the Fair Use Doctrine,* 101 Harv. L. Rev. 1659, 1701 (1988).

A seller can engage in price discrimination in several ways. One form is known as ''second-degree price discrimination,'' by which buyers self-sort the packages and quantities they purchase.[225] *See* W. Adams & J. Yellen, *Commodity Bundling and the Burden of Monopoly,* 90 Q. J. Econ. 470, 476 (1976) (the profitability of bundling ''stem[s] from its ability to sort customers into groups with different reservation price [WTP] characteristics.''). Bundling, *i.e.,* the ''practice of selling two or more products as a package,'' *Pindyck & Rubinfeld, supra* at 419, is thus a type of second-degree price discrimination. *See* A. Boik & H. Takahashi, *Fighting Bundles: The Effects of Competition on Second Degree Price Competition,* 12 a.m. Econ. J. 156, 157 (2020).

The applicability of these basic economic principles was understood and explained by the parties' experts at the hearing. *See, e.g.,* 3/15/17 Tr. 1224–25 (Leonard) (Google's economic expert testifying that price discrimination through bundling is ''very, very common . . . even by pretty competitively positioned firms . . . to sort out customers into willingness-to-pay groups.''); 3/30/17 Tr. 3983 (Gans) (Copyright Owners' economic expert acknowledging that bundling is a form of price discrimination); *see also* Dissent at 69 (same).

How does this downstream (retail level) benefit of price discrimination impact the setting of upstream royalty rates? As the Majority explained (in summarizing the Services' expert testimony) the linkage is explained by the economic concept of ''derived demand'':

> [M]ultiple pricing structures necessary to satisfy the WTP and the differentiated quality preferences of downstream listeners relate directly to the upstream rate structure to be established in this proceeding. Professor Marx opines that the appropriate *upstream* rate structure is derived from the characteristics of downstream demand. 3/20/17 Tr. 1967 (Marx) (rate structure upstream should be derived from need to exploit WTP of users downstream via a percentage of revenue). This upstream to downstream consonance in rate structures represents an application of the concept of ''derived demand,'' whereby the demand upstream for inputs is dependent upon the demand for the final product downstream. *Id.; see* P. Krugman & R. Wells, *Microeconomics* at 511 (2d ed. 2009) (''[D]emand in a factor market is . . . *derived demand* . . . [t]hat is, demand for the factor is derived from the [downstream] firm's output choice'').

Determination at 19; *accord* Dissent at 32 (noting that ''the upstream demand of the interactive streaming services for musical works (and the sound recordings in which they are embodied)—known as 'factors' of

[223] The Services' Reply reiterates this point and offers that the testimony cited by the Copyright Owners also shows why the Initial Determination's Service Revenue definition works for bundles and grows royalties. Services' Reply at 57–58.

[224] Streamed copies of intellectual property, such as musical works and sound recordings, have a marginal production cost of essentially zero, making price discrimination particularly beneficial, because charging any positive price, even to a buyer with the lowest WTP, still exceeds the zero marginal production costs. *See* Dissent, *passim.*

[225] ''First-degree'' price discrimination is a hypothetical construct by which a seller can identify the WTP of every buyer. ''Third-degree'' price discrimination occurs when the seller offers different prices to buyers based on their different characteristics (*e.g.,* a senior citizen discount). *See Pindyck & Rubinfeld, supra,* at 402, 404–05.

production or 'inputs'—is derived from the downstream demand of listeners to and users of the interactive streaming services . . . This interdependency causes upstream demand to be characterized as ''derived demand.'').

In the present proceeding, the PR II-based benchmark embodies the parties' negotiated definition of Bundled Revenue for purposes of calculating royalties on bundled interactive offerings. This is the definition in the Initial Determination. Copyright Owners' preferred definition for Bundled Revenue—the Determination's definition—would not only ignore this agreed-upon definition, but would also de-link the royalty rate from the WTP of purchasers of bundles.[226] The Judges recognize that Copyright Owners have expressed concern the Services could use such bundling in order to diminish revenue otherwise payable on a higher royalty tier. However, the Majority noted that the evidence indicated such diminishment only occurred ''in some cases'' and that such practices were not ''sweeping.'' Clarification Order at 17, 21. Thus, the Judges find that eliminating the incentive for price discrimination via bundling would be a disproportionate response and inconsistent with the broad price discriminatory PR II-based benchmark they find useful in this proceeding.

Expert testimony in this regard is ''substantial evidence'' on which the Judges can rely. For example, the D.C. Circuit also relied in *Johnson* on the testimony of the same witness, Spotify's economic expert witness, Professor Marx, to affirm the inclusion of the price discriminatory structure for student and family plans. *Johnson,* 969 F.3d at 392–94. Professor Marx explained how a downstream ''lower willingness (or ability) to pay'' among some cohorts of consumers supports definitional terms, for student and family subscribers, that lower royalty rates in order to further ''economic efficiency'' in a manner that ''still allows more monetization of that provision of that service.'' *Johnson* at 392–93. Broadening her lens, Professor Marx also explained that this price discriminatory approach is appropriate ''across all types of services and subscribers,'' as in ''[t]he current law [and in the PR II-based benchmark]'' which ''accommodates . . . ad-supported services . . . and '*bundled services*' through different rate provisions.'' Marx WRT ¶ 41 (emphasis added). *See also* 3/21/17 2182–83 (Hubbard) (Amazon's expert witness testifying that ''Prime Music, which is *bundled* with an Amazon Prime service . . . sort[s] out customers' willingness to pay, with an idea of trying to maximize the number of customers,'' and agreeing that this approach constitutes ''sorting by way of bundling.'') (emphasis added). Further, Professor Hubbard opined that, given the revenue attribution ''measurement problem'' associated with bundled products, the ''Phonorecords II'' approach ''with the different categories and the minima . . . address this sort of problem [in] a very good way.'' 3/15/17 Tr. 1221 (Hubbard).

As in the case of family and student price discrimination, the beneficial effect of such differential pricing was supported by industry witnesses as well as expert witnesses. *See, e.g.,* Mirchandani WDT ¶ 71 (Amazon executive citing the Phonorecords II-based benchmark provisions regarding bundling that ''allowed Amazon to bundle Prime Music with Amazon Prime, enabling Amazon to bring a limited catalog of music [REDACTED]''). In sum, the same type of witness testimony that the D.C. Circuit found sufficient to support price discriminatory student and family plans also supports the use of the price discriminatory bundled definition contained in the Initial Determination.

Given the overall benefits from price discrimination, at first blush it is curious that Copyright Owners would risk ''leaving money on the table'' by seeking to remove the royalty-based incentive for price discrimination via bundling. The Judges have identified this problem earlier in this Initial Remand Ruling, in connection with the broader issue of the overall beneficial price discriminatory structure of the PR-based benchmark. As the Judges noted in that general price discrimination context, Copyright Owners' own expert economic witnesses acknowledged that they would not irrationally leave money on the table. In fact, Copyright owners' aim, according to that testimony, is to create an unregulated space—per the Bargaining Room theory—and to use their complementary oligopoly power to negotiate price discriminatory rates (in bundles or otherwise), which would free them from the section 801(b)(1) requirements of reasonableness and fairness.

The Judges further find that their prior ruling on this issue in *SDARS III* is distinguishable. There, a proffered bundled revenue definition eliminated the payment of any royalty at all. Copyright Owners quite correctly describe that result as ''absurd,'' but that is not the result here. Rather, in the present case, the parties' negotiated an approach that the Judges adopted in the Initial Determination requiring royalties to be paid on interactive services bundled with other products or services.

Even more distinguishable is Copyright Owners' assertion that *Web IV* provides support for their preferred definition of service revenue. The argument is immediately suspect, because *Web IV* involved per-play royalty rates—not percent-of-revenue rates, making the definition of revenue wholly inapposite. Further, the discussion of the price of an ''ice cream cone'' in *Web IV*—on which Copyright Owners rely—had nothing to do with bundling or isolating the WTP for different products or services. Rather, there the Judges criticized a bizarre argument made by a licensee (who had a quantity discount for plays steered in its direction), that was tantamount to arguing that if a vendor sells one ice cream cone for $1.06 but a buyer could buy two for $1.06, that the market price of an ice cream cone is thus only $.06. This argument was indeed fallacious, because the price of an ice cream cone would be reasonably identified as the average of the total cost for the two cones, *i.e.,* $.53/cone, and never as $.06 per cone.

Here, the issue, is how to address the WTP of different classes of buyers with heterogeneous WTP, not the pricing of a quantity discount. The parties addressed this issue by utilizing the Bundled Revenue definition contained in the PR II-based benchmark (and in the Initial Determination) to address the indeterminacy inherent in the variable WTP among purchasers of the bundles, by setting floors and minima, rather than attempt to sort out the WTP of individual (or individual blocs) of

[226] To see the incentivizing effect of the link between the royalty level and variable WTP, consider the following example. Assume a hypothetical bundle consists of a subscription to the ''Acme'' interactive music streaming service and the sports service NFL Sunday Ticket. Assume also that Acme and NFL Sunday Ticket have standalone monthly subscription prices of $9.99/month and $149.99/month respectively, so that purchasing both separately would cost $159.98/month. But assume the bundle price is only $140/month. Acme's purpose in bundling its interactive music streaming service subscription offering with NFL Sunday Ticket would be to attract customers who had a WTP for the standalone Acme service below $9.99/month, but a WTP at or above the $140/month for the bundle.

Under the definition in the Determination, royalties would be paid on the standalone $9.99/month Acme price. But the purpose of the bundling was to attract subscribers *who would not pay the standalone $9.99/month price,* so no such would-be subscribers would sign-up, and *no royalties would be generated by them.*

By contrast, under the Initial Determination, the standalone price of NFL Sunday Ticket, $159.98/month, would be subtracted from the $140/month bundle price. Although that would preclude a payment of royalties on a *revenue* prong, *royalties still would be paid, under a different tier or on the mechanical floor.*

subscribers. The ''ice cream cone'' issue in *Web IV* is wholly unrelated, and the *SDARS III* situation, as explained *supra,* is also distinguishable.[227]

For the foregoing reasons, I find that—even if the Judges had a procedural mechanism by which to support the switch in the Bundled Revenue definition—I would decline to utilize it in this Initial Remand Ruling, because the definition in the Initial Determination (unlike the definition in the Determination) is consistent with the Judges' other substantive rulings herein. That is, just as the Majority abandoned its Bundled Revenue definition in its Initial Determination because it refused to credit the PR II-based benchmark (even as ''guidance''), the Judges here do partially rely on the PR II-based benchmark, and thus find that it supports the Bundled Revenue definition contained in the Initial Determination.

VIII. Application of the Four Itemized Statutory Factors

As the forgoing analysis explains, bundling is a form of price discrimination. Accordingly, the Judges' explanation of how price discriminatory rates in the PR II-based benchmark interrelate with the Factor A through D objectives in section 801(b)(1) are equally applicable here. Accordingly, the Judges incorporate by reference here their discussion of those four factors set forth *supra* in connection with the PR II-based benchmark, and find that there is no basis pursuant to those four factors to adjust the PR II-based benchmark definition of Bundled Revenue.

IX. Conclusion

This Dissent in part is issued as a RESTRICTED document. Within 30 days of the date of issuance, the participants shall file a version of this Dissent with agreed redactions to permit viewing by the public.

Issue Date: July 2, 2022.[228]

DAVID R. STRICKLER,
Copyright Royalty Judge

D. Dissent in Part Re Benchmark (Redacted Version With Federal Register Naming and Formatting Conventions)

The Copyright Royalty Judges (Judges) sit as a panel in all determination proceedings. *See* 17 U.S.C. 803(a)(2). A majority of two Judges is sufficient to issue a determination. *See* 17 U.S.C. 803(a)(3). If any Judge dissents from the majority determination, that dissenting Judge may issue a dissenting opinion and file it with the majority's determination. *Id.* The Judges accept this same standard with regard to their issuance of the present Initial Ruling and Order after Remand (Initial Ruling).

The undersigned Judge, author of this dissent in part (Benchmark Dissent) respectfully dissents [229] from the Initial Ruling of the majority (Remand Majority) on the issue of adopting as a benchmark for current rates and terms the rates and terms adopted after a settlement by the parties to the preceding phonorecords proceeding.[230] It should be noted that the Remand Majority adopts the rate structure from *Phonorecords II,* but retains the headline percent-of-revenue rate adopted in the Determination.[231]

I. Areas of Concurrence

A. Background Statements

The Benchmark Dissent adopts the statements regarding the background and procedural posture of this remand proceeding. *See* Initial Ruling at 1–2.

B. Percent of Revenue Rate

The Benchmark Dissent agrees with the Remand Majority's retention of the headline percent-of-revenue rate and its phase-in over the period at issue.

C. Definition of Service Revenue for Bundled Offerings

For the reasons articulated in the Initial Ruling and the reasoning of the judge dissenting from that portion of the Initial Ruling, the definition of Service Revenue for bundled offerings contained in the Initial Determination must be adopted. *See* Initial Determination (Jan. 27, 2018). Adoption of the *Phonorecords II* (PR II) rate structure requires that the original definition pertain.

II. Area of Dissent

The first function of the Judges is ''to make determinations . . . of reasonable terms and rates of royalty payments. . . .'' 17 U.S.C. 801(b)(1). Under the statute in effect during the captioned proceeding, the rates shall be calculated to achieve four statutory objectives. *Id.* The terms of payment of the rates, however, are not subject to any particular statutory restrictions or guidelines. *See, e.g., Live365* v. *Copyright Royalty Bd.,* 698 F. Supp. 2d 25, 29–30 (D.D.C. 2010) (''In performing their duties, the [Judges have] broad discretion to . . . impose regulations

[227] The foregoing analysis also explains why Copyright Owners' assertion that the Services did not satisfy their burden of proof with regard to the Bundled Revenue definition misses the point. The Services' burden was to show the reasonableness of utilizing the Bundled Revenue definition in the PR II-based benchmark, not to show that their proffered approach measured the WTP of individual subscribers (or blocs of subscribers). Such an alternative approach might have had merit but no alternative approach was presented to the Judges.

To be clear, the Judges are not declaring that an alternative Bundled Revenue definition and/or alternative rates and structures for bundle, might not have been preferable. *See* 4/15/17 Tr. 5056–58 (Katz) (''[I]f someone had a proposal [with] a specific reason why we should adjust this minimum that's something I would have examined,''). *See also* 3/15/17 Tr. 1227–28 (Leonard) (Google's economic expert testifying that ''if somebody had . . . suggest[ed] . . . a different sort of bucket that should be created . . . that's a good idea.''). But Copyright Owners did not propose such alternatives at the hearing, and the alternative in their Motion for Clarification simply eviscerated the ''derived demand''-based link between royalties and bundled offerings. As the Judges have noted *supra,* in the words of Judge Patricia Wald, all judges are cabined by the record evidence introduced by the parties. Therefore (in the absence of a way in which to synthesize the parties' proposals in a manner that does not ''blindside'' the parties) the Judges must choose between the proposals that are in the record, not potentially superior proposals that are not in the record. Here, the Judges favor the Bundled Revenue definition in the Initial Determination that was negotiated by the parties, incentivizes price discrimination and pays royalties on the bundled music, over the substituted definition in the Determination pursued by Copyright Owners that would eliminate price discrimination, except under the terms Copyright Owners could impose via their complementary oligopoly power, and without regard to the statutory requirements of a ''reasonable rate'' and a ''fair income'' for the Services.

[228] Technical difficulties on July 1 caused the delay in filing of this Dissent until July 2.

[229] The dissenting Judge does not fault the economic analysis of the Remand Majority on this issue. The dissenting Judge is not the Judge selected for ''a significant knowledge of economics.'' *See* 17 U.S.C. 802(a)(1). This Benchmark Dissent is based on a broader reading of the requirements of section 801 of the Copyright Act, *viz.* ''to make determinations of reasonable terms and rates. . .'' consistent, of course, with the record evidence and sound legal and economic analysis. The role of the Judge is to weigh evidence; two Judges might rightfully and respectfully disagree on where that scale balances. The Remand Majority's analysis led those Judges to conclude that they were bound to re-introduce the rate structure devised in the *Phonorecords II* proceeding. The Benchmark Dissent concludes that the economic analysis outlined in the Initial Ruling supports, but does not dictate, that result, but that the goal of reasonableness can be met with different structure(s). The Benchmark Dissent does not construct or propose a detailed, different structure. To do so would be an inefficient application of judicial resources at this late stage of this proceeding. The Benchmark Dissent finds, however, that both licensor and licensee participants agreed in this proceeding that a less complex rate structure is warranted.

[230] The preceding proceeding, referred to as *Phonorecords II,* consisted of a final rule adopting the participants' settlement agreement as regulatory terms and rates. *See* Final Rule, Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords, Docket No. 2011–3 CRB Phonorecords II, 78 FR 67938 (Nov. 13, 2013), Technical Amendment at 78 FR 76987 (Dec. 20, 2013). In this partial dissent, references to *Phonorecords II,* PR II, and PR II-based benchmark are references to this final rule.

[231] *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III),* 84 FR 1918 (Copyright Royalty Board Feb. 5, 2019) (final rule and order) (Determination); *See also* Final Determination, 16–CRB–0003–PR (2018–2022) (Nov. 5, 2018).

governing the rates and terms of copyright royalties. . . .'').[232]

In general, in promulgating regulations the Judges aim to effect efficient and effective payment of royalty license fees. Regulations relating to license royalty rates describe the rates the Judges determine to be reasonable, whether presented by agreement of the affected parties or after adjudication. The regulations include, where necessary, methods of calculation of the payable royalties. The regulations also include such provisions as recordkeeping requirements, late fee assessments, and audit authority. As the Remand Majority points out, simplicity and clarity were not among the statutory factors applicable to determining royalty rates in the captioned underlying proceeding. Simplicity and clarity should, however, be paramount among the Judges' considerations in governing rate payment procedures.

In recent proceedings, the Judges have emphasized that the statute requires that they set both rates and terms. At the end of a different royalty rate proceeding, having been confronted with competing proposed regulations, or even with largely agreed regulatory terms, upon which the parties had proffered no evidence, the Judges cautioned counsel in this proceeding:

> Please be reminded that the Judges have an obligation to set both rates and terms. . . . In any proceeding, just because a regulation is in the current Code of Federal Regulations does not mean that the Judges are adopting that term. . . . The Judges cannot determine rates or terms without an evidentiary record. . . . The Judges cannot adopt any terms of royalty administration unless the parties present evidence to support their proposed terms.
>
> Tr. 03/08/2017 (Barnett, J.) While chapter 8 of the Copyright Act encourages settlement, the Judges are not mandated to adopt parties' settlements if they find they face opposition that discounts reasonableness or if the proposed regulations are contrary to law. *See, e.g., Determination of Royalty Rates and Terms . . . (Phonorecords IV),* 87 FR 18342, 18347, 18349 (Mar. 30, 2022).

In the proceeding underlying the Determination, the parties proffered a variety of proposed regulations.[233] Copyright Owners contended that the extant rate structure ''should be modified and simplified.'' Copyright Owners' Amended Proposed Rates and Terms (5/17/2017) at 2. Copyright Owners argued that the ten different rate categories should be ''no longer applicable'' as Copyright Owners proposed application of the same rates and rate structure to ''all interactive streams and/or limited downloads [except bundles], regardless of the business model employed.'' *Id.* at 3. Copyright Owners' rate proposal hinged on a per-unit calculation across the board: the greater of a per-play amount or a per end user amount.

Amazon proposed retaining the PR II rate structure. *See* Proposed Findings . . . of Amazon (May 13, 2017) ¶ AM–F–25. Amazon argued that the PR II rate structure ''enabled Amazon to develop a varied assortment of services. . . .'' *Id.* Amazon contended that the different royalty rates permit price discrimination by the Services. *Id.* ¶¶ AM–F–47, 49. Amazon conflates price discrimination with provision of heterogenous musical tastes and preferences. *Id.* ¶ AM–F–48. Amazon's proposal mimicked the regulations adopted by agreement in the immediately prior proceeding.

Apple proposed a per-play rate calculation, which would render the PR II rates and rate structure obsolete. Notwithstanding the different structure, however, Apple offered valid criticisms of the PR II rate structure. Apple termed the PR II rate structure ''problematic.'' *See* Apple Inc.'s Findings . . . and Conclusions . . . (May 11, 2017) at 30. Apple argued that the PR II rate structure was ''overly complex, economically unsound, and unpredictable.'' *Id.* ¶ APL–F65. Apple acknowledged that these shortcomings resulted in ''a loss of trust and overall dissatisfaction with interactive streaming among songwriters. . . .'' *Id.*

Apple noted that across the ten rate categories in the PR II rates, ''there are roughly 79 different calculations that can be made.'' *Id.* ¶ APL–F67. Apple argued that the PR II rate structure was ''not transparent or easy to understand'' for copyright owners and created ''uncertainty for services, who may find it difficult to predict which prong . . . will kick in in any given month.'' *Id.* ¶¶ 68–69. Apple opined that, rather than encouraging new business models, the PR II rate structure ''tends to stifle innovation around new pricing or distribution models, as services are incentivized to create businesses that fit into the ten pre-defined 'boxes.' '' *Id.* ¶ 70. Apple further argued that the PR II rates were economically unsound because they are based on revenue, which is unrelated to demand for a given copyright owner's song. *Id.* ¶ 71.

Google's proposal, from which the Majority derived the uncapped TCC rate prong of the Determination, contended that the ''fragmented service categories are unnecessary under [its] proposal. . . .'' Google, Inc.'s Proposed Findings . . . and Conclusions. . . (May 11, 2017) ¶ GPFF58. Google acknowledged questions regarding the complexity of the PR II rate structure. Google, therefore proposed a rate structure that would both streamline the regulations and protect Copyright Owners' concerns regarding Services' revenue deferment and displacement. *Id.* ¶ GPFF57.

In the captioned underlying proceeding, the Judges heard little evidence offered in resounding support or vehement objection to the regulations the parties proffered. No party argued or supported the proposition that the PR II rate structure was the only way, or even the best way, to achieve license fee payment.[234]

In this remand proceeding, no party argued against the all-in approach to rate calculation. The parties disagreed regarding retention of ''mechanical floors'' for configurations for which the Services must pay mechanical royalties both to Copyright Owners in this proceeding under section 115 and to Performing Rights Organizations (PROs) according to the determinations of the ''Rate Court.'' [235] The parties disagreed over imposition of a cap on the TCC prong [236] in the greater-of percent-of-revenue calculation. They also disagreed over retention or elimination of the per subscriber sub-minima that were featured in the PR II rates.

The Remand Majority cites with approval the remand parties' criticism of the simplified rate structure in the Determination, *viz.,* that it is ''virtually as complex as'' the PR II rate structure. *See* Services' Joint Opening Brief (Apr. 1, 2021) at 39. This characterization is

[232] The Judges' regulations are, of course, subject to approval by the Librarian of Congress. 17 U.S.C. 802(f)(A)(i); *see Live365* v. *Copyright Royalty Bd.,* 698 F. Supp. 2d 25, 29–30 (D.D.C. 2010).

[233] Spotify, as the only pure-play service, offered simplified regulations, but only because it did not propose any rates or terms for bundled or locker services. Spotify advocated elimination of the per-subscriber stop-gap alternative in the greater-of percent-of-revenue/percent-of-TCC calculation.

[234] The Benchmark Dissent does not argue that the PR II rate structure did not achieve its purpose. Indeed, the all-in, greater-of, lesser-of scheme with payment minima and mechanical floors achieved the goals of (1) supporting increased absolute revenue through downstream price discrimination and (2) protecting creators from potential loss resulting from licensees' revenue deferral or displacement. The Judges have never denied the value of price discrimination in these or other rate setting proceedings.

[235] The District Court of the Southern District of New York determines performing rights royalties. Parties to those rate proceedings refer to that court, when engaged in the rate-setting cases, as the ''Rate Court.''

[236] ''TCC'' refers to a streaming services' costs of content, referring in this proceeding to the cost of sound recording royalties the streaming services pay to record companies.

a bit of hyperbole. The rate structure in the Determination is an all-in rate with ''mechanical floors'' where those are warranted. Except for the fundamentally different configurations included in subpart B, it does not set out separate calculations for different delivery configurations. On remand, the Remand Majority chooses to reinstate the PR II rate structure in its entirety, with all of its 79 permutations, changing only the headline percent-of-revenue rate and adding a cap on the TCC rate prong (which is an element of the structure itself). The Benchmark Dissent does not dispute the necessity and propriety of the increased headline percent-of-revenue rate or the cap on the TCC rate prong. Indeed, as noted in the Remand Majority, the D.C. Circuit endorsed the rate increase as well-reasoned and determined well within the Judges' discretion. The D.C. Circuit also found fault with ''yoking'' the TCC rate alternative to sound recording royalty rates, not subject to the Judges' control, without reins. The basis of this Benchmark Dissent is simply that the regulatory scheme is not efficient, transparent, or mandated by credible evidence; nor is the structure necessary to achieve the purposes of reasonableness and equity.[237]

A. Acceptance of Phonorecords II Settlement as a Proper Benchmark

This is a Dissent in Part. The undersigned Judge does not disagree with the headline rate being retained at 15.1% or with the imposition of a TCC cap, for the reasons elucidated by the Remand Majority. Nonetheless, the Benchmark Dissent continues to disagree with adoption of the entirety of the rate *structure* adopted by *Phonorecords II.* As noted above, the Judges solicited evidence to support adoption of regulatory language to effect payment of the rates they established. Copyright Owners, Google, and Apple submitted rate proposals that greatly simplified the rate structure. Their rate structure regulation proposals were crafted to support their varying approaches to rate calculations not adopted by the Judges. Their criticisms of the PR II rate structure are valid, nonetheless, and support the Benchmark Dissent's analysis.

In the underlying proceeding, the Majority declined to label the rate structure and resulting rates incorporated in the regulations promulgated after the *Phonorecords II* proceeding (rates and rate structure) as a benchmark, or starting point, for determination of new rates and terms in that proceeding. In the Determination in the extant proceeding, the Majority alluded to reasons they found the PR II rates to be inadequate to serve current circumstances.[238] The D.C. Circuit noted that appellate counsel offered further explanation on appeal for the rejection of the PR II rates and rate structure as a benchmark. *See Johnson* v. *Copyright Royalty Board,* 969 F.3d 363, 387 (D.C. Cir. 2020). Nevertheless, the D.C. Circuit faulted the Majority for not providing adequate explanation of their rejection of a PR II-based benchmark in the first instance. *See id.* Indeed, the D.C. Circuit found the Majority's reasoning on the issue in the Determination to be ''muddled.'' *Id.* at 386–87.

Copyright Owners argue that the D.C. Circuit's remand for further explanation did not equate to finding error in the Judges' rejection of the PR II-based benchmark. *See* Initial Remand Submission of Copyright Owners (Apr. 1, 2021) 1, 10 (CO Initial Submission). Notably, the Services did not address the question of a finding of error, but proposed on remand a rate structure substantially similar to that in PR II and offered a benchmark analysis therefor. *See* Services' Joint Opening Brief (in Services' Joint Written Direct Remand Submission at Tab D) (Apr. 1, 2021) at 19 (Services' Initial Submission).

While the Copyright Owners' parsing of *Johnson* might be technically correct, the Benchmark Dissent nonetheless accepts the wisdom of revisiting the analysis of the PR II rates and rate structure, focusing on the intricacies of the structure that ultimately come into play in determining the amount of royalty payable. The Benchmark Dissent disagrees that the record in this case demands adoption of the PR II rate structure as a suitable benchmark. The Benchmark Dissent hereby provides a full analysis of this issue, which includes a fuller explanation of the conclusions in the Determination and supports and justifies rejection of the *Phonorecords II* rate structure.

B. Attributes of a Useful Benchmark

As repeated by the parties in the initial proceeding and in their remand submissions, for an exemplar to serve as a useful benchmark, it must be compared to the target market. The hallmarks of a useful benchmark are: (1) unity of products, (2) unity of sellers, and (3) unity of buyers. In addition, (4) economic circumstances and market conditions can influence the value of a benchmark. *See* Services' Initial Submission at 20 (citing *Determination of Royalt[ies] for Transmission of Sound Recordings. . .,* 83 FR 65210, 65214 (Dec. 19, 2018) (*SDARS III*).

In the Remand Majority opinion, the Judges argue that the PR II rate structure meets ''most of the requisites for a useful benchmark.'' *See* Initial Ruling, section III. C. 3. Assuredly, in the real world one is unlikely to find a perfect benchmark; consequently, the Judges in these proceedings look to the best available benchmark(s) and make adjustments to compensate for their shortcomings when compared to the attributes and circumstances of the target rates. The Benchmark Dissent is not so sanguine about one's ability to reconcile the PR II rate structure with current market circumstances pertaining to music streaming (including participants and volumes of sales) almost a decade after the parties agreed to that structure. Because of the recognized gulf in market conditions between *Phonorecords II* and this *Phonorecords III* proceeding, the Benchmark Dissent rejects attempts to fit that square peg into the current round hole.

1. Unity of Products—the Same Rights

The PR II rates regulated ''sales'' of the same licensing rights as those at issue in the current underlying proceeding, *viz.,* the statutory license to utilize musical works embodied in the sound recordings that are the lifeblood of the music streaming services. This factor was not and is not in controversy. In this respect, the Judges could look to the PR II rates as a benchmark.

2. Unity of Sellers—Rightsholders

The songwriter or songwriters own the copyright for musical works, that is, the musical notes and lyrics. In general, songwriters sell or license their works to publishers who fix the works to a physical medium, for example, piano rolls or sheet music. Music publishers also market the musical works licenses to record companies for their sound recordings. In today's market,

[237] As part of the Judges' discretion to promulgate regulations to effect license rate collection, the Majority reorganized the regulations in part 385. This reorganization was completed to further the goal of clarity and conciseness. No party objected to or sought to overturn that reorganization of the regulations. Apparently, the perceived sanctity of the PR II rate structure is not unassailable. Reorganization can perhaps be seen as a first step to toward clarity, transparency, and simplicity for licensors and licensees.

[238] The D.C. Circuit found that the Majority articulated a reasoned and reasonable rejection of the negotiated rates applicable to the categories of phonorecords included in ''Subpart A'' of the regulations as a benchmark in this proceeding. The issue on remand is articulation of a reason for not using the other subparts of 37 CFR 385 as a benchmark in this proceeding. *See Johnson* v. *Copyright Royalty Board,* 969 F.3d 363, 386 (D.C. Cir. 2020).

publishers and songwriters exist in a symbiotic relationship. Without new works, the publishers have no new product to market.[239] To ensure a flow of new product, publishers often subsidize songwriters by providing working space or monetary advances on future sales of licensed work, or publishers might purchase outright the songwriters' copyrights. Whether the rightsholder is a writer, composer, or publisher, the rights are the same, those derived from 17 U.S.C. 106 and limited by 17 U.S.C. 115. *See* 17 U.S.C. 106(1), (3) (exclusive rights); sec. 115 (compulsory licensing). The sellers' interests are aligned.

3. Unity of Buyers—Streaming Services

The Services argue unity of rights and sellers between the time of the PR II rates and the current proceeding. With respect to buyers, the Services allege that the current buyers are ''the same or similar. . . .'' Services' Initial Submission at 20. The Services argue that the PR II rates involved ''either the same type of buyers or the very same buyers as this proceeding.'' *Id.* The license delimits the users it binds. It is axiomatic that current licensees are ''of the same type'' as licensees in 2012. Describing participants as ''similar to those currently in the market'' or ''of the same type'' as current participants is sufficiently imprecise to call into question the unity of buyers required to give great weight to a potential benchmark.

The Services allege that ''[m]ost of the participants in Phonorecords III were either directly involved in the Phonorecords II settlement or operated in the market at the time of the settlement.'' *Id.* ''Most of the participants'' does not reveal which participants were active in *Phonorecords II* or the reasons for their participation. Amazon began an MP3 digital music service in 2004; it launched steaming in mid-2014. *See* Written Direct Testimony of Jeffrey Eisenach (Nov. 3, 2016) (Eisenach WDT) ¶ 51. Tab. 2. Apple launched its streaming service in 2019. During the Phonorecords II negotiations, Apple's primary interest was digital downloads from the iTunes store. According to one of its witnesses, Google was, at the time of the Phonorecords II negotiations, ''planning to launch a store, a locker, and a subscription service.'' Google's participation in the Phonorecords II negotiations was ''primarily designed to make sure that our interests were met in—for our forthcoming music service.'' 3/8/17 Tr. 157:2–158:2 (Zahavah Levine).

Although the Services argue that the buyers in the current market are the same as, or similar to, buyers at the time of adoption of the PR II rates, the Services then and now advocate differing rate calculations for each music delivery configuration. Indeed, between 2008 and 2012, the delivery configurations multiplied and the parties negotiated different rate structures for those multiple configurations. Acknowledging participation by a service with one configuration—or a plan to launch one configuration—is insufficient to establish a unity of buyers for purposes of rate setting. Almost a decade after the effectuation of the 2012 rates, with new businesses tacking music streaming onto their digital ecosystems, the development of new and different delivery configurations continues to evolve.[240] Nonetheless, the Services would have the Judges adopt a rate structure that specifies current delivery configurations but excludes some current innovations and cannot encompass the next innovations, whatever form they might take.

The Benchmark Dissent acknowledges that buyers of the musical works for which licenses are at issue in this proceeding are of the ''same type'' as the *Phonorecords II* buyers. In some instances, they are the same participants. In the current landscape, however, the interests of those buyers are vastly different. The extent to which Apple, Amazon, and Google, were involved in Phonorecords II negotiations bears no resemblance to the interests of those services and their current service configurations. Without greater unity of buyers, the Benchmark Dissent must discount the viability of the PR II rates or rate structure as a useful benchmark in this proceeding.

4. Economic and Market Conditions

The Services argue that the music streaming industry in 2018 was essentially unchanged from 2008 or 2012.[241] *See* Services' Initial Submission at 20–21. The evidence in this proceeding compels a contrary conclusion. In 2008, musical works distribution consisted primarily of sound recordings reproduced in physical formats (vinyl and CDs) and digital downloads. *See* Eisenacht WRT ¶ 33 (Feb. 13, 2017). The record reflects that in 2008, of record labels' revenues 96% were derived from sales of physical and digitally downloaded sound recordings; 2.5% from interactive streaming.[242] By 2012, at the inception of the rates that were re-adopted as the PR II rates, musical works sales were beginning to shift from physical media to digital forms. In 2012, 8.1% of record label revenues were attributable to interactive streaming. *Id.* By 2015, evidence available in this proceeding showed that record labels' revenues from digital downloads approximately equaled revenues from streaming and digital sales were more than double the sales of physical configurations, such as vinyl and CDs. *Id.* ¶¶ 44–45 and accompanying tables.

Spotify, the dominant pure play streaming service in the U.S., did not enter the U.S. market until mid-2011. *See* CO Initial Submission at 20–21 (Apr. 1, 2021) *and evidence cited therein.* Spotify did not participate in the negotiations leading up to the adoption of the 2012 musical works royalty rates. *See* Eisenacht WRT ¶ 35, n.38. In fact, the record contains evidence that music streaming was not a major factor in setting mechanical license rates in 2008 or 2012.[243] *See* CO Initial Submission at 19–21, *and evidence cited therein.* As more and larger streaming services entered the market, music consumption changed in character. Music consumption in the 2018 market had changed character completely from an ownership model to an access model. *See* Determination at 6.

Further, three of the Services participating in the current proceeding are not pure play streaming services but are multidimensional marketing firms for whom music streaming is only one small facet of the business. From the perspective of those current licensees, the music streaming license is relatively insignificant to their overall financial

[239] Publishers may retain rights to songs no longer considered ''new'' or ''popular'' that might nonetheless still be subject to the section 115 license. The Services' revenue is driven, however, by streaming new music. They understand that reselling older music, even in new packaging (covers) would lower their desirability and decrease the sources of revenue, their end users.

[240] Some services offer different levels of access to consumers using their proprietary devices, *e.g.,* Amazon Echo. Some (non-satellite) music streaming services are now available directly via a button on a vehicle dashboard.

[241] The PR II rates and rate structure were the product of a negotiated settlement that began and ended with reference to the negotiated rates adopted in 2008. Some additional categories of service were added to the 2008 structure, *e.g.* locker services. Of those categories added in 2012, few remain a significant part of the current streaming industry.

[242] The difference is attributable to sound recording revenues from non-interactive streaming.

[243] The Services argue that only Mr. Israelite testified that the 2008 and 2012 rates were ''experimental'' and that the market is significantly changed since 2012. The Majority found, based upon the totality of the evidence, that Mr. Israelite's testimony was credible and accorded it due weight.

health. The Judges must, therefore, value the license objectively to assure the conglomerate licensees do not manipulate their revenues so as to reduce music streaming rights below what is fair and reasonable to the rightsholders.

The Services further advocate use of the PR II rates and rate structure as a benchmark because they assert that the multifaceted rate structure is reflective of the Services' own price discriminatory services. The Majority noted the Services' price discrimination as a way to optimally monetize segments of the market with a lesser willingness to pay.[244] Greater accommodation of users less willing to pay results in more streaming and more revenue for the Services at minimal to no marginal cost. A rate determined as a percentage of a service's revenue allows that price discrimination to continue, resulting in additional royalties. The Benchmark Dissent contends, however, that the Judges need not adopt a rate structure with ten different service categories to allow the Services to continue their price discriminatory downstream sales. The payable royalties are a percent of revenue. If the Services receive relatively less revenue by marketing a family plan, for instance, that reduced revenue is the basis for the royalty calculation. Nothing in a simplified rate structure would inhibit price discriminatory service plans. The PR II rates' multi-category structure might encompass the price discrimination the Services employ, but that does not make it a mandatory benchmark for current rates, especially if the target rate structure permits the same flexibility.

C. Adoption of PR II Rates and Rate Structure in Direct Licenses

The Services assert that the PR II rates and rate structure have been adopted in negotiated direct licenses they have signed with rightsholders rendering those rates and that rate structure a valuable benchmark. The Services' witnesses analyzed direct licenses and concluded that the *rates* closely matched the rates in the PR II regulations. [REDACTED].[245] Analysis of direct licenses executed belie the Services' assertion that the PR II rates *structure* is embraced by rightsholders.[246]

D. Additional Shortcomings of PR II Rates as a Benchmark

The D.C. Circuit dismissed the Majority's argument on appeal that (1) the PR II rates were too low and (2) the PR II rates were outdated. The D.C. Circuit noted that these two reasons might support the Majority's conclusions, but they could not be asserted in the first instance on appeal. *See Johnson* at 386.

1. Rates Too Low

The D.C. Circuit found that the Judges' finding that the PR II rates were too low was not fully articulated until the matter was on appeal. As a result, the D.C. Circuit could not evaluate that reason as support for the final rates. Indirectly, however, the D.C. Circuit nonetheless accepted that underlying reason for the rate changes when it approved the higher rates themselves. *See Johnson* at 384–86. The adopted rates were soundly grounded in the record evidence. *See id.* By implication, acceptance of increased rates means the PR II rates were too low to be continued. With or without the ''too low'' rationale, the final adopted rates prove the point.[247]

2. Rate Structure Outdated

In the Determination, the Majority cited several factors that implied the inadequacy of the PR II rates and rate structure as a compelling benchmark for *Phonorecords III.* As discussed above, the music streaming industry in 2018 was completely transformed from 2008 or 2012. Both the buyers and the economic market conditions were markedly changed. Referring to the PR II rates as ''outdated'' encompasses both a temporal element and a structural component.

a. Significance of the Passage of Time

Music streaming in the earlier rate setting periods was in its infancy. Listeners had not yet fully embraced the subscribed access model for music consumption. By 2018, listeners could choose from ''a diverse array of streaming offerings.'' *See* WDT of Rishi Mirchandani ¶ 63. Such industry shifts alone could render the PR II rates ''outdated.''

b. Clarity and Simplicity

Another salient factor the Majority addressed is the rate structure itself. To understand the PR II rate structure, one needed ten separate full-page flow chart diagrams, each featuring three formulae for calculating greater-of and lesser-of rate components. *See* Trial Ex. 846. The rates for some consumption configurations included a per-subscriber ''mechanical floor'' as a failsafe against overreaching by PROs, should the Rate Court increase their rates to an extent that all of the section 115 all-in percent of revenue royalty be consumed by the PROs. *See, e.g.,* [FORMER] 37 CFR 385.13(a)(1) (Standalone non-portable subscription—streaming only [$.15 per subscriber]); [FORMER] 385.13(a)(2) (Standalone portable subscription—mixed use [$.50 per subscriber]) (2018).[248] Other consumption configurations included ''minima;'' that is a lesser-of calculation comparing a percent of sound recording license costs (TCC) and a per subscriber amount. *See, e.g.,* [FORMER] 37 CFR 385.13(b) (2018). Further, rate calculations differed depending upon, for example, whether the listener streamed on a portable device or a non-portable device; or whether the listener purchased access to the music alone from a pure-play streaming service or as part of a bundled offering, such as ''free'' streaming for a limited period included in the purchase price of the streaming device.[249]

The rationale for these convoluted rate calculation differences is

[244] The adopted *Phonorecords III* rate regulations acknowledged price discrimination by, *inter alia,* permitting Services to account for discounted subscriptions in different ways. *See* Determination at 34.

[245] The [REDACTED] direct licenses reportedly adopt the rates in part 385, which open-ended adoption could indicate acceptance of both rates and rate structure.

[246] [REDACTED] *See* AWDT Leonard ¶¶ 63–64.
[REDACTED]. *See* Leonard AWDT ¶ 70–71.
[REDACTED]. *See* AWDT Leonard ¶ 54. (calculation is ''effectively simplified'').
[REDACTED].
[REDACTED].

[247] The Services argue that an agreed continuation of the Subpart A (now Subpart B) rates for, *inter alia,* physical phonorecords and permanent downloads, proves that the Phonorecords II rates are appropriate. *See* Services' Initial Submission at 30. This argument asserts a false equivalency. Physical Phonorecords and permanent downloads are fundamentally different in character from streamed music. Further, the evidence indicates that the prominence of streaming access over ownership of recordings is waning. The parties' agreement to maintain the *Phonorecords II* rates for this declining segment of the market does not equate to a mandate to adopt the entirety of the PR II rate structure.

[248] The Majority reintroduced these ''mechanical floor'' safeguards, notwithstanding a lack of evidence to explain, let alone justify, the difference between $0.15 and $0.50 per subscriber (the latter being 300% greater than the former) simply because one consumer listened to a song on a standalone non-portable device and another consumer listened to a song on a standalone portable device.

[249] The Services have not offered convincing, substantive evidence or argument to support the fractured structure of the PR II rates. Tellingly, the user's choice of consumption device is not a factor in license rates for other services. *See, e.g.,* 17 CFR 380.10 (Webcasters rates differentiate between commercial and non-commercial licensees, not based on users' reception devices); §§ 382.3, 382.12 (rates for satellite radio and pre-existing subscription services do not differentiate based on users' reception devices).

unknown.[250] They were the product of confidential negotiations among the parties involved in the music streaming business in the first decade of the 21st century. One side of the negotiating table sought reconsideration of those rates. The current licensees are not the same as those who negotiated the 2012 rollover of the 2008 rate scheme. Music streaming business models have witnessed significant growth and change. Meanwhile, the business models employed by songwriters and publishers remain largely unchanged—and not realizing a proportionate capture of the stream of dollars realized by the Services' monetization of ever-more consumption configurations. The marginal cost to the Services of additional streams, regardless of the business configuration or the user's reception device, is zero. The Services, therefore, are in a position to capture increased revenue without an increase in cost of goods sold.

In the end, a sound recording embodying a licensed musical work is being delivered to an end ''user'': one song; one listener. The calculation of what royalty the songwriter is entitled to should not rest on the medium of transmission or the location of the listening. *See* WDS Steve Bogard ¶ 34 (''Streaming music anytime, any place, on any device is the way today's music fans want to enjoy their music. Notwithstanding that the inherent value of a song is the same whether the consumer chooses to buy an album, permanently download an album or a single, or stream music on demand. . . .''). The incremental difference in value to the listener of hearing a song in the car as opposed to through earbuds during a workout is not likely measurable. Certainly, no participant in this proceeding presented any evidence of the relative value of a song to a listener depending on the delivery configuration.[251]

In the interest of making government more transparent and accessible to interested citizens, less is more. Opaque systems and formulae are or should be, in a word, outdated. The fact of settlement does not cure or even address the unnecessary complication of paying a royalty for the use of a statutory license under the PR II rates structure. More importantly, owners of the copyrights being licensed should be able to comprehend, calculate, and verify the sources and amounts of their royalty payments.

3. Not Business Model Neutral

The Services contend that the PR II rate structure is preferable as it is business model neutral. Nothing in the record supports that assertion. In fact, Apple argued that the PR II rate structure stifled innovation as streaming services sought to fit any new business into a business model already defined as one of the ten identified models in the *Phonorecords II* regulations. The statute does not require that rate structures be business model neutral. The reasonableness requirement demands, however, that the Judges find and adopt *reasons* for differentiation in rates based on business models.

4. No Evidence of Settling Parties' Subjective Intent

Copyright Owners participating in the current proceeding argued that the Judges should consider the subjective intent of the parties in agreeing to ''roll over'' the 2008 rates and rate structure into the PR II regulations. The Services countered that subjective intent is irrelevant, as the product of those negotiations serves as objective evidence of the parties' intents. On this question, the Services are correct. The negotiated rates show, objectively, that the negotiating parties agreed to a certain rate structure. The D.C. Circuit criticized the Majority for not including in the Final Determination an explanation of why the subjective intent of the parties to the settlement was a ''prerequisite'' to adoption of that settlement as a benchmark. *See Johnson* at 387. The Judges need not, however, accept that objective evidence uncritically.

Negotiating parties' subjective state of mind can serve as convincing evidence of the economic circumstances and the state of the market at the time of the negotiations. While ascertaining the parties' subjective intent in reaching the settlement is not a ''prerequisite'' to examination of the terms as a benchmark, the Benchmark Dissent finds subjective intent informative and useful as one factor in weighing the value of the settlement as a benchmark.

E. Statutory Factors

The Services argued to the D.C. Circuit that the Majority's rejection of the PR II rates and rate structure was erroneous because the Majority failed to evaluate that structure and those rates under the statutory factors delineated in 17 U.S.C. 801(b)(1). Evaluation under section 801(b)(1) is required by the statute applicable to this proceeding.[252] Nothing in section 801(b)(1) compels the Judges to evaluate compliance with the statutory factors of every proposed potential rate or rate structure. Neither are the Judges required to evaluate every potential benchmark or past rate structure under section 801(b)(1). The Judges are obliged to evaluate any rate structure they intend to adopt against the requirements of section 801(b)(1). If the Judges' promulgated rate structure meets the section 801(b)(1) standard, then the promulgated rate structure can be adopted. Whether other possible proposals might also meet the section 801(b)(1) standard is not at issue in a proceeding.

1. Maximize the Availability of Creative Works to the Public

The Services argue that the PR II rates and rate structure support and contribute to the maximization of musical works. As evidence, they cite the growth of music streaming overall, the profitability of all segments of the music industry.[253] It is beyond question that music consumption has grown exponentially since the co-incident

[250] Prof. Katz asserted that ''economic analysis'' indicates that varying rates based on the characteristics of the service ''facilitates continuing innovation, experimentation, and differentiation in means of making music accessible to consumers.'' Katz WDT ¶ 85. Prof. Katz did not identify that economic analysis. He asserted that the fractured rates allow services to benefit despite different consumers' willingness to pay. Nothing in the PR III rate structure at issue in any way inhibited services adapting to meet consumers' willingness to pay. The rates are, in the main, revenue based—even if the services choose to market the service at a lower rate to a particular segment of the market.

[251] The Remand Majority dubs analysis of value based on the cost of production rather than willingness to purchase as old-fashioned economic analysis. So it may be. In the modern economist's widget market, if buyers are unwilling to pay enough to cover the cost of widget components, then widget production ceases. But in the old-fashioned creativity market, the goods are not fungible. The inputs to a hit song are ephemeral; sometimes plentiful, sometimes elusive; they either coalesce or they do not. Songwriters will persevere because they cannot do otherwise. The demand for music continues to grow with each new innovation in delivery methods. The United States Constitution provides for protection of art and the creators of art. U.S. Const. art. I, sec. 8. Congress has specified how to protect, *inter alia,* the copyrights of songwriters. The Judges' small part in that effort is to continue to assure that royalty rates are reasonable—for both creators and exploiters. In the music streaming industry, the evidence supports devoting a greater share of licensees' increased wealth to the ''widget makers.'' The Dissent contends that the increase in the percent-of-revenue headline rate is a good step forward, but only the first step to assuring equity in the market. Streamlining, simplifying, and generally ''cleaning up'' payment calculations would go a long way in the right direction by removing twists and turns and confusing signals along the path of the royalty dollar from end user to creator.

[252] With the passage of the Orrin G. Hatch—Bob Goodlatte Music Modernization Act, Congress eliminated the four statutory factors for evaluating license royalty rates. *See* Public Law 115–264, 132 Stat. 3676 (2018) (codified in scattered sections of title 17, U.S.C.

[253] According to the Services, all segments of the music industry are thriving [REDACTED].

introduction of portable devices and streaming services. Growth continues as those devices and services become increasingly easy to actuate in vehicles.

No participant alleged, however, that music industry success is caused by or even correlated to the PR II rate structure. Coincidence is not probative evidence.

2. Assure Fair Return to Copyright Owner and Fair Income to the Licensee

The Services argued they were receiving a fair income and copyright owners were receiving a fair return under the PR II regulations. Although the Services argued that overall music royalties absorbed an inordinate portion of their revenues, none expressly laid that lack of available revenue at the door of mechanical royalties. Amazon's witness, Dr. Glenn Hubbard described a growing increase in streaming industry revenues and forecasts of continuing growth. *See* WRT of Glenn Hubbard (Feb. 15, 2017) ¶ 2.23–24 (Hubbard WRT). Dr. Hubbard deconstructed Amazon's increased revenues and concluded that the growth in streaming services' revenue resulted in increased royalty payments to music publishers and other rights holders. *Id.* ¶ 3.10. When royalty rates are calculated on a percent-of-revenue, the royalty payments increase when revenues increase.

The difficulty with this tautological argument is that revenue growth as between services and rightsholders has not been proportional. And, as Copyright Owners have argued, the *rate* at which the services share with mechanical rightsholders is the issue in this proceeding. The Judges are not called upon to set annual royalty payment dollar amounts; rather they are mandated to set the rates that drive those dollar amounts. And to adopt regulations that most closely effectuate actual payment to rightsholders, minimizing revenue deferral and other such loopholes. For all of the reasons provided in the Determination and in this Benchmark Dissent, the PR II-based rates and the controlling rate structure do not balance the section 115 fair income-fair return scale appropriately and reasonably.

3. Weigh Relative Roles of Licensors and Licensees in Making the Works Available to the Public

No participant presented evidence to elucidate specifically the relative roles of the parties relating to musical works. Economic evidence assumed that the marginal cost of streaming more music is minimal. This does not discount the services' sunk costs, such as the original technological or capital investments. With respect to the contributions of the copyright owners, the contribution is clear. It all begins with a song. Without new music, the Services could continue by streaming unregulated works, new arrangements or covers of existing works, and non-music content. Whether they would continue to enjoy the growth they have enjoyed over the last decade is unknown. The PR II rates might be a contributing factor to both stability and growth of the industry, but based on the totality of the evidence, the Dissent concludes that with regard to musical works, the relative role of the creator of the musical works, and to a lesser extent, the music publisher, is undervalued.

4. Minimize Disruption

The language for the fourth statutory factor requires the Judges to establish a rate structure in such a way as ''[t]o minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.'' [FORMER] 17 U.S.C. 801(b)(1)(D). The Services argue that the change in rate structure determined by the Majority in this proceeding is massively, and potentially fatally, disruptive to music streaming services.

Ironically, the music industry has been in a constant state of disruption since the introduction of digital music. From peer-to-peer sharing, to purchased permanent downloads, to interactive and non-interactive streaming, the history of modern music consumption has been a model of disruption. Entry into the streaming market by multifaceted digital ecosystem providers is just the latest significant change in music delivery to consumers. Innovation in music delivery is constant.

Allegedly to minimize disruption, the Services advocated retention of the PR II rates and rate structure.[254] While every aspect of the music industry is experiencing explosive growth, maintenance of the inadequate rates for mechanical licenses is unfathomable. Some change, phased in over time, might be uncomfortable for the licensees, but failure to change rates to acknowledge the music delivery revolution is not an option. With such a dynamic history and uncertain future, a change in mechanical license rates is not just inevitable, but mandatory.

Indeed, the Benchmark Dissent's approach in this proceeding advances the notion that streamed music is streamed music. This is certainly true from the viewpoint of the songwriters and publishers, and of music consumers. Rather than introduce separate rate structures for each new delivery technology or streaming business model, the Judges need to establish a rate that will fairly compensate Copyright Owners for the use of their works and permit a fair return to licensees, regardless of what next technological disruption they might choose to introduce to the industry. In the captioned proceeding, the Majority declined to label the rate structure and resulting rates incorporated in the regulations promulgated after the *Phonorecords II* proceeding as a benchmark, or starting point, for determination of new rates and terms in this proceeding.

In the Determination, the Majority alluded to reasons they found the PR II rates to be inadequate to serve current circumstances.[255] Nevertheless, the D.C. Circuit faulted the Majority for not providing adequate explanation of their rejection of the PR II benchmark in the first instance. *See Johnson* at 386–87. Indeed, the D.C. Circuit found the Majority's reasoning on the issue in the Determination to be ''muddled.'' *Id.*

F. Rate Structure

For all of the reasons outlined above, the Remand Majority's acceptance and adoption of the *Phonorecords II* rate structure results in a rate structure in this proceeding that suffers from the same deficits the Benchmark Dissent believes to be inherent in that rate structure. Changing the headline rate and capping the TCC rate prong do not cure the ills of the rate structure itself. True, the PR II-based rates permit price discrimination, which increases revenue, and therefore royalties, in absolute terms. Reinstatement of minima in the TCC prong introduces a failsafe to runaway TCC-based rates. The mechanical floors adopted in the Determination continue, protecting mechanical license rightsholders from runaway performance royalties.

The Benchmark Dissent maintains that all these goals could be met equally well with a streamlined, transparent, fair, and reasonable rate structure, as several of the participants in this proceeding advocated.

[254] Tellingly, on remand, the Services did not pursue any argument that the changes in the rates or rate structure in the Determination were disruptive.

[255] The D.C. Circuit found that the Majority articulated a reasoned and reasonable rejection of the negotiated rates applicable to the categories of phonorecords included in [FORMER] subpart A of the regulations as a benchmark in this proceeding. The issue on remand is articulation of a reason for not using the other subparts of 37 CFR part 385 as a benchmark in this proceeding. *See Johnson* at 386.

III. Conclusion

This Dissent in part is issued as a RESTRICTED document. Within 30 days of the date of issuance, the participants shall file a version of this Dissent with agreed redactions to permit viewing by the public.

Issue Date: July 1, 2022.

Suzanne M. Barnett

Chief Copyright Royalty Judge

List of Subjects in 37 CFR Part 385

Copyright, Phonorecords, Recordings.

For the reasons set forth in the preamble, the Copyright Royalty Judges amend 37 CFR part 385 as follows.

PART 385—RATES AND TERMS FOR USE OF NONDRAMATIC MUSICAL WORKS IN THE MAKING AND DISTRIBUTING OF PHYSICAL AND DIGITAL PHONORECORDS

■ 1. The authority citation for part 385 continues to read as follows:

Authority: 17 U.S.C. 115, 801(b)(1), 804(b)(4).

■ 2. Add appendix A to read as follows:

Appendix A to Part 385—Part 385 Applicable to the Period January 1, 2018, through December 31, 2022, as clarified on August 10, 2023

Note: Cross-references to part 385 in this appendix are to those provisions as contained within this appendix.

PART 385—RATES AND TERMS FOR USE OF MUSICAL WORKS UNDER COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHYSICAL AND DIGITAL PHONORECORDS

Subpart A—Regulations of General Application

Subpart B—Physical Phonorecord Deliveries, Permanent Downloads, Ringtones, and Music Bundles

Subpart C—Eligible Interactive Streaming, Eligible Limited Downloads, Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Locker Services, and Other Delivery Configurations

Subpart D—Promotional Offerings, Free Trial Offerings and Certain Purchased Content Locker Services

Subpart A—Regulations of General Application

§ 385.1 General.

(a) *Scope.* This part establishes rates and terms of royalty payments for the use of nondramatic musical works in making and distributing of physical and digital phonorecords in accordance with the provisions of 17 U.S.C. 115. This subpart contains regulations of general application to the making and distributing of phonorecords subject to the license under 17 U.S.C. 115 (section 115 license).

(b) *Legal compliance.* Licensees relying on the compulsory license detailed in 17 U.S.C. 115 shall comply with the requirements of that section, the rates and terms of this part, and any other applicable regulations. This part describes rates and terms for the compulsory license only.

(c) *Interpretation.* This part is intended only to set rates and terms for situations in which the exclusive rights of a Copyright Owner are implicated and a compulsory license pursuant to 17 U.S.C. 115 is obtained. Neither this part nor the act of obtaining a license under 17 U.S.C. 115 is intended to express or imply any conclusion as to the circumstances in which a user must obtain a compulsory license pursuant to 17 U.S.C. 115.

(d) *Relationship to voluntary agreements.* The rates and terms of any license agreements entered into by Copyright Owners and Licensees relating to use of musical works within the scope of those license agreements shall apply in lieu of the rates and terms of this part.

§ 385.2 Definitions.

For the purposes of this part, the following definitions apply:

Accounting Period means the monthly period specified in 17 U.S.C. 115(c)(2)(I) and (d)(4)(A)(i), and any related regulations in this chapter, as applicable.

Active Subscriber means an End User of a Bundled Subscription Offering who has made at least one Play during the Accounting Period.

Affiliate means an entity controlling, controlled by, or under common control with another entity, except that an affiliate of a Sound Recording Company shall not include a Copyright Owner to the extent it is engaging in business as to musical works.

Bundled Subscription Offering means a Subscription Offering providing Licensed Activity consisting of Eligible Interactive Streams or Eligible Limited Downloads that is made available to End Users with one or more other products or services (including products or services subject to other subparts) as part of a single transaction without pricing for the subscription service providing Licensed Activity separate from the product(s) or service(s) with which it is made available (*e.g.,* a case in which a user can buy a portable device and one-year access to a subscription service providing Licensed Activity for a single price).

Copyright Owner(s) are nondramatic musical works copyright owners who are entitled to royalty payments made under this part pursuant to the compulsory license under 17 U.S.C. 115.

Digital Phonorecord Delivery has the same meaning as in 17 U.S.C. 115(e)(10).

Eligible Interactive Stream means a Stream in which the performance of the sound recording is not exempt from the sound recording performance royalty under 17 U.S.C. 114(d)(1) and does not in itself, or as a result of a program in which it is included, qualify for statutory licensing under 17 U.S.C. 114(d)(2).

Eligible Limited Download means a Limited Download as defined in 17 U.S.C. 115(e)(16) that is only accessible for listening for—

(1) An amount of time not to exceed one month from the time of the transmission (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the End User made through a live network connection, reauthorizes use for another time period not to exceed one month), or in the case of a subscription plan, a period of time following the end of the applicable subscription no longer than a subscription renewal period or three months, whichever is shorter; or

(2) A number of times not to exceed 12 (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the End User made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.

End User means each unique person that:

(1) Pays a subscription fee for an Offering during the relevant Accounting Period; or

(2) Makes at least one Play during the relevant Accounting Period.

Family Plan means a discounted Subscription Offering to be shared by two or more family members for a single subscription price.

Free Trial Offering means a subscription to a Service Provider's transmissions of sound recordings embodying musical works when:

(1) Neither the Service Provider, the Sound Recording Company, the Copyright Owner, nor any person or entity acting on behalf of or in lieu of any of them receives any monetary consideration for the Offering;

(2) The free usage does not exceed 30 consecutive days per subscriber per two-year period;

(3) In connection with the Offering, the Service Provider is operating with appropriate musical license authority and complies with the recordkeeping requirements in § 385.4;

(4) Upon receipt by the Service Provider of written notice from the Copyright Owner or its agent stating in good faith that the Service Provider is in a material manner operating without appropriate license authority from the Copyright Owner under 17 U.S.C. 115, the Service Provider shall within 5 business days cease transmission of the sound recording embodying that musical work and withdraw it from the repertoire available as part of a Free Trial Offering;

(5) The Free Trial Offering is made available to the End User free of any charge; and

(6) The Service Provider offers the End User periodically during the free usage an opportunity to subscribe to a non-Free Trial Offering of the Service Provider.

GAAP means U.S. Generally Accepted Accounting Principles in effect at the relevant time, except that if the U.S. Securities and Exchange Commission permits or requires entities with securities that are publicly traded in the U.S. to employ International Financial Reporting Standards in lieu of Generally Accepted Accounting Principles, then that entity may employ International Financial Reporting Standards as ''GAAP'' for purposes of this subpart.

Licensee means any entity availing itself of the compulsory license under 17 U.S.C. 115 to use copyrighted musical works in the making or distributing of physical or digital phonorecords.

Licensed Activity, as the term is used in subpart B of this part, means delivery of musical works, under voluntary or statutory license, via physical phonorecords and Digital Phonorecord Deliveries in connection with Permanent Downloads, Ringtones, and Music Bundles; and, as the term is used in subparts C and D of this part, means delivery of musical works, under voluntary or statutory license, via Digital Phonorecord Deliveries in connection with Eligible Interactive Streams, Eligible Limited Downloads, Limited Offerings, mixed Bundles, and Locker Services.

Limited Offering means a Subscription Offering providing Eligible Interactive Streams or Eligible Limited Downloads for which—

(1) An End User cannot choose to listen to a particular sound recording (*i.e.,* the Service Provider does not provide Eligible Interactive Streams of individual recordings that are on-demand, and Eligible Limited Downloads are rendered only as part of programs rather than as individual recordings that are on-demand); or

(2) The particular sound recordings available to the End User over a period of time are substantially limited relative to Service Providers in the marketplace providing access to a comprehensive catalog of recordings (*e.g.,* a product limited to a particular genre or permitting Eligible Interactive Streams only from a monthly playlist consisting of a limited set of recordings).

Locker Service means an Offering providing digital access to sound recordings of musical works in the form of Eligible Interactive Streams, Permanent Downloads, Restricted Downloads or Ringtones where the Service Provider has reasonably determined that the End User has purchased or is otherwise in possession of the subject phonorecords of the applicable sound recording prior to the End User's first request to use the sound recording via the Locker Service. The term *Locker Service* does not mean any part of a Service Provider's products otherwise meeting this definition, but as to which the Service Provider has not obtained a section 115 license.

Mixed Service Bundle means one or more of Permanent Downloads, Ringtones, Locker Services, or Limited Offerings a Service Provider delivers to End Users together with one or more non-music services (*e.g.,* internet access service, mobile phone service) or non-music products (*e.g.,* a telephone device) of more than token value and provided to users as part of one transaction without pricing for the music services or music products separate from the whole Offering.

Music Bundle means two or more of physical phonorecords, Permanent Downloads, or Ringtones delivered as part of one transaction (*e.g.,* download plus ringtone, CD plus downloads). In the case of Music Bundles containing one or more physical phonorecords, the Service Provider must sell the physical phonorecord component of the Music Bundle under a single catalog number, and the musical works embodied in the Digital Phonorecord Delivery configurations in the Music Bundle must be the same as, or a subset of, the musical works embodied in the physical phonorecords; provided that when the Music Bundle contains a set of Digital Phonorecord Deliveries sold by the same Sound Recording Company under substantially the same title as the physical phonorecord (*e.g.,* a corresponding digital album), the Service Provider may include in the same bundle up to 5 sound recordings of musical works that are included in the stand-alone version of the set of digital phonorecord deliveries but not included on the physical phonorecord. In addition, the Service Provider must permanently part with possession of the physical phonorecord or phonorecords it sells as part of the Music Bundle. In the case of Music Bundles composed solely of digital phonorecord deliveries, the number of digital phonorecord deliveries in either configuration cannot exceed 20, and the musical works embodied in each configuration in the Music Bundle must be the same as, or a subset of, the musical works embodied in the configuration containing the most musical works.

Offering means a Service Provider's engagement in Licensed Activity covered by subparts C and D of this part.

Paid Locker Service means a Locker Service for which the End User pays a fee to the Service Provider.

Performance Royalty means the license fee payable for the right to perform publicly musical works in any of the forms covered by subparts C and D this part.

Permanent Download has the same meaning as in 17 U.S.C. 115(e)(24).

Play means an Eligible Interactive Stream, or a play of an Eligible Limited Download, lasting 30 seconds or more and, if a track lasts in its entirety under 30 seconds, an Eligible Interactive Stream or a play of an Eligible Limited Download of the entire duration of the track. A Play excludes an Eligible Interactive Stream or a play of an Eligible Limited Download that has not been initiated or requested by a human user. If a single End User plays the same track more than 50 straight times, all plays after play 50 shall be deemed not to have been initiated or requested by a human user.

Promotional Offering means a digital transmission of a sound recording, in the form of an Eligible Interactive Stream or an Eligible Limited Download, embodying a musical work, the primary purpose of which is to promote the sale or other paid use of that sound recording or to promote the artist performing on that sound recording and not to promote or suggest promotion or endorsement of any other good or service and:

(1) A Sound Recording Company is lawfully distributing the sound recording through established retail channels or, if the sound recording is not yet released, the Sound Recording Company has a good faith intention to lawfully distribute the sound recording or a different version of the sound recording embodying the same musical work;

(2) For Eligible Interactive Streams or Eligible Limited Downloads, the Sound Recording Company requires a writing signed by an authorized representative of the Service Provider representing that the Service Provider is operating with appropriate musical works license authority and that the Service Provider is in compliance with the recordkeeping requirements of § 385.4;

(3) For Eligible Interactive Streams of segments of sound recordings not exceeding 90 seconds, the Sound Recording Company delivers or authorizes delivery of the segments for promotional purposes and neither the Service Provider nor the Sound Recording Company creates or uses a segment of a sound recording in violation of 17 U.S.C. 106(2) or 115(a)(2);

(4) The Promotional Offering is made available to an End User free of any charge; and

(5) The Service Provider provides to the End User at the same time as the Promotional Offering Stream an opportunity to purchase the sound recording or the Service Provider periodically offers End Users the opportunity to subscribe to a paid Offering of the Service Provider.

Purchased Content Locker Service means a Locker Service made available to End User purchasers of Permanent Downloads, Ringtones, or physical phonorecords at no incremental charge above the otherwise applicable purchase price of the Permanent Downloads, Ringtones, or physical phonorecords acquired from a qualifying seller. With a Purchased Content Locker Service, an End User may receive one or more additional phonorecords of the purchased sound recordings of musical works in the form of Permanent Downloads or Ringtones at the time of purchase, or subsequently have digital access to the purchased sound recordings of musical works in the form of Eligible Interactive Streams, additional Permanent Downloads, Restricted Downloads, or Ringtones.

(1) A qualifying seller for purposes of this definition is the entity operating the Service Provider, including Affiliates, predecessors, or successors in interest, or—

(i) In the case of Permanent Downloads or Ringtones, a seller having a legitimate connection to the locker service provider pursuant to one or more written agreements (including that the Purchased Content Locker Service and Permanent Downloads or Ringtones are offered through the same third party); or

(ii) In the case of physical phonorecords:

(A) The seller of the physical phonorecord has an agreement with the Purchased Content Locker Service provider establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service; or

(B) The Service Provider has an agreement with the entity offering the Purchased Content Locker Service establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service.

(2) [Reserved]

Relevant Page means an electronic display (for example, a web page or screen) from which a Service Provider's Offering consisting of Eligible Interactive Streams or Eligible Limited Downloads is directly available to End Users, but only when the Offering and content directly relating to the Offering (*e.g.,* an image of the artist, information about the artist or album, reviews, credits, and music player controls) comprises 75% or more of the space on that display, excluding any space occupied by advertising. An Offering is directly available to End Users from a page if End Users can receive sound recordings of musical works (in most cases this will be the page on which the Eligible Limited Download or Eligible Interactive Stream takes place).

Restricted Download means a Digital Phonorecord Delivery in a form that cannot be retained and replayed on a permanent basis. The term Restricted Download includes an Eligible Limited Download.

Ringtone means a phonorecord of a part of a musical work distributed as a Digital Phonorecord Delivery in a format to be made resident on a telecommunications device for use to announce the reception of an incoming telephone call or other communication or message or to alert the receiver to the fact that there is a communication or message.

Service Provider means that entity governed by subparts C and D of this part, which might or might not be the Licensee, that with respect to the section 115 license:

(1) Contracts with or has a direct relationship with End Users or otherwise controls the content made available to End Users;

(2) Is able to report fully on Service Provider Revenue from the provision of musical works embodied in phonorecords to the public, and to the extent applicable, verify Service Provider Revenue through an audit; and

(3) Is able to report fully on its usage of musical works, or procure such reporting and, to the extent applicable, verify usage through an audit.

Service Provider Revenue, as used in this part:

(1) Subject to paragraphs (2) through (5) of this definition and subject to GAAP, *Service Provider Revenue* shall mean:

(i) All revenue from End Users recognized by a Service Provider for the provision of any Offering;

(ii) All revenue recognized by a Service Provider by way of sponsorship and commissions as a result of the inclusion of third-party ''in-stream'' or ''in-download'' advertising as part of any Offering, *i.e.,* advertising placed immediately at the start or end of, or during the actual delivery of, a musical work, by way of Eligible Interactive Streaming or Eligible Limited Downloads; and

(iii) All revenue recognized by the Service Provider, including by way of sponsorship and commissions, as a result of the placement of third-party advertising on a Relevant Page of the Service Provider or on any page that directly follows a Relevant Page leading up to and including the Eligible Limited Download or Eligible Interactive Stream of a musical work; provided that, in case more than one Offering is available to End Users from a Relevant Page, any advertising revenue shall be allocated between or among the Service Providers on the basis of the relative amounts of the page they occupy.

(2) Service Provider Revenue shall:

(i) Include revenue recognized by the Service Provider, or by any associate, Affiliate, agent, or representative of the Service Provider in lieu of its being recognized by the Service Provider; and

(ii) Include the value of any barter or other nonmonetary consideration; and

(iii) Except as expressly detailed in this part, not be subject to any other deduction or set-off other than refunds to End Users for Offerings that the End Users were unable to use because of technical faults in the Offering or other bona fide refunds or credits issued to End Users in the ordinary course of business.

(3) Service Provider Revenue shall exclude revenue derived by the Service Provider solely in connection with activities other than Offering(s), whereas advertising or sponsorship revenue derived in connection with any Offering(s) shall be treated as provided in paragraphs (2) and (4) of this definition.

(4) For purposes of paragraph (1) of this definition, advertising or sponsorship revenue shall be reduced by the actual cost of obtaining that revenue, not to exceed 15%.

(5) In instances in which a Service Provider provides an Offering to End Users as part of the same transaction with one or more other products or services that are not Licensed Activities, then the revenue from End Users deemed to be recognized by the Service Provider for the Offering for the purpose of paragraph (1) of this definition shall be the revenue recognized from End Users for the bundle less the standalone published price for End Users for each of the other component(s) of the bundle; provided that, if there is no standalone published price for a component of the bundle, then the Service Provider shall use the average standalone published price for End Users for the most closely comparable product or service in the U.S. or, if more than one comparable exists, the average of standalone prices for comparables.

(6) In the case of a Mixed Service Bundle, the revenue deemed to be recognized from End Users for the Offering for the purpose of paragraph (1) of this definition shall be the greater of—

(i) The revenue deemed to be recognized pursuant to paragraph (5) of this definition; and

(ii) Either—

(A) In the case of a Mixed Service Bundle that either has 750,000 subscribers or other registered users, or is reasonably expected to have 750,000 subscribers or other registered users within 1 year after commencement of the Mixed Service Bundle, 40% of the standalone published price of the licensed music component of the bundle (*i.e.,* the Permanent Downloads, Ringtones, Locker Service, or Limited Offering); provided that, if there is no such standalone published price for the licensed music component of the bundle, then the average standalone published price for End Users for the most closely comparable licensed music component in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used; and further provided that in any case in which royalties were paid based on this paragraph (6)(ii)(A) due to a reasonable expectation of reaching 750,000 subscribers or other registered users within 1 year after commencement of the Mixed Service Bundle and that does not actually happen, applicable payments shall, in the accounting period next following the end of such 1-year period, retroactively be adjusted as if paragraph (6)(ii)(B) of this definition applied; or

(B) Otherwise, 50% of the standalone published price of the licensed music component of the bundle (*i.e.,* the Permanent Downloads, Ringtones, Locker Service, or Limited Offering); provided that, if there is no such standalone published price for the licensed music component of the bundle, then the average standalone published price for End Users for the most closely comparable licensed music component in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used.

Sound Recording Company means a person or entity that:

(1) Is a copyright owner of a sound recording embodying a musical work;

(2) In the case of a sound recording of a musical work fixed before February 15, 1972, has rights to the sound recording, under 17 U.S.C. chapter 14, that are equivalent to the rights of a copyright owner of a sound recording of a musical work under title 17, United States Code;

(3) Is an exclusive Licensee of the rights to reproduce and distribute a sound recording of a musical work; or

(4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of the Copyright Owner of the sound recording.

Standalone Non-Portable Subscription Offering—Mixed means a Subscription Offering through which an End User can listen to sound recordings either in the form of Eligible Interactive Streams or Eligible Limited Downloads but only from a non-portable device to which those Eligible Interactive Streams or Eligible Limited Downloads are originally transmitted.

Standalone Non-Portable Subscription Offering—Streaming Only means a Subscription Offering through which an End User can listen to sound recordings only in the form of Eligible Interactive Streams and only from a non-portable device to which those Eligible Interactive Streams are originally transmitted while the device has a live network connection.

Standalone Portable Subscription Offering means a Subscription Offering through which an End User can listen to sound recordings in the form of Eligible Interactive Streams or Eligible Limited Downloads from a portable device.

Stream means the digital transmission of a sound recording of a musical work to an End User—

(1) To allow the End User to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction;

(2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction; and

(3) That is subject to licensing as a public performance of the musical work.

Streaming Cache Reproduction means a reproduction of a sound recording embodying a musical work made on a computer or other receiving device by a Service Provider solely for the purpose of permitting an End User who has previously received a Stream of that sound recording to play the sound recording again from local storage on the computer or other device rather than by means of a transmission; provided that the End User is only able to do so while maintaining a live network connection to the Service Provider, and the reproduction is encrypted or otherwise protected consistent with prevailing industry standards to prevent it from being played in any other manner or on any device other than the computer or other device on which it was originally made.

Student Plan means a discounted Subscription Offering available on a limited basis to students.

*Subscription Offering m*eans an Offering for which End Users are required to pay a fee to have access to the Offering for defined subscription periods of 3 years or less (in contrast to, for example, a service where the basic charge to users is a payment per download or per play), whether the End User makes payment for access to the Offering on a standalone basis or as part of a bundle with one or more other products or services.

Total Cost of Content or *TCC* means the total amount expensed by a Service Provider or any of its Affiliates in accordance with GAAP for rights to make Eligible Interactive Streams or Eligible Limited Downloads of a musical work embodied in a sound recording through the Service Provider for the Accounting Period, which amount shall equal the Applicable Consideration for those rights at the time the Applicable Consideration is properly recognized as an expense under GAAP. As used in this definition, *Applicable Consideration* means anything of value given for the identified rights to undertake the Licensed Activity, including, without limitation, ownership equity, monetary advances, barter or any other monetary and/or nonmonetary consideration, whether that consideration is conveyed via a single agreement, multiple agreements and/or agreements that do not themselves authorize the Licensed Activity but nevertheless provide consideration for the identified rights to undertake the Licensed Activity, and including any value given to an Affiliate of a Sound Recording Company for the rights to undertake the Licensed Activity. Value given to a Copyright Owner of musical works that is controlling, controlled by, or under common control with a Sound Recording Company for rights to undertake the Licensed Activity shall not be considered value given to the Sound Recording Company. Notwithstanding the foregoing, Applicable Consideration shall not include in-kind promotional consideration given to a Sound Recording Company (or Affiliate thereof) that is used to promote the sale or paid use of sound recordings embodying musical works or the paid use of music services through which sound recordings embodying musical works are available where the in-kind promotional consideration is given in connection with a use that qualifies for licensing under 17 U.S.C. 115.

§ 385.3 Late payments.

A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment owed to a Copyright Owner and remaining unpaid after the due date established in 17 U.S.C. 115(c)(2)(I) or (d)(4)(A)(i), as applicable and detailed in part 210 of this title. Late fees shall accrue from the due date until the Copyright Owner receives payment, except that where payment is due to the mechanical licensing collective under 17 U.S.C. 115(d)(4)(A)(i), late fees shall accrue from the due date until the mechanical licensing collective receives payment.

§ 385.4 Recordkeeping for promotional or free trial non-royalty-bearing uses.

(a) *General.* A Licensee transmitting a sound recording embodying a musical work subject to section 115 and subparts C and D of this part and claiming a Promotional Offering or Free Trial Offering zero royalty rate shall keep complete and accurate contemporaneous written records of making or authorizing Eligible Interactive Streams or Eligible Limited Downloads, including the sound recordings and musical works involved, the artists, the release dates of the sound recordings, a brief statement of the promotional activities authorized, the identity of the Offering or Offerings for which the zero-rate is authorized (including the internet address if applicable), and the beginning and end date of each zero rate Offering.

(b) *Retention of records.* A Service Provider claiming zero rates shall maintain the records required by this section for no less time than the Service Provider maintains records of royalty-bearing uses involving the same types of Offerings in the ordinary course of business, but in no event for fewer than five years from the conclusion of the zero rate Offerings to which they pertain.

(c) *Availability of records.* If a Copyright Owner or agent requests information concerning zero rate Offerings, the Licensee shall respond to the request within an agreed, reasonable time.

Subpart B—Physical Phonorecord Deliveries, Permanent Downloads, Ringtones, and Music Bundles

§ 385.10 Scope.

This subpart establishes rates and terms of royalty payments for making and distributing phonorecords, including by means of Digital Phonorecord Deliveries, in accordance with the provisions of 17 U.S.C. 115.

§ 385.11 Royalty rates.

(a) *Physical phonorecord deliveries and Permanent Downloads.* For every physical phonorecord and Permanent Download the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied in the phonorecord or Permanent Download shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.

(b) *Ringtones.* For every Ringtone the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied therein shall be 24 cents.

(c) *Music Bundles.* For a Music Bundle, the royalty rate for each element of the Music Bundle shall be the rate required under paragraph (a) or (b) of this section, as appropriate.

Subpart C—Eligible Interactive Streaming, Eligible Limited Downloads, Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Locker Services, and Other Delivery Configurations

§ 385.20 Scope.

This subpart establishes rates and terms of royalty payments for Eligible Interactive Streams and Eligible Limited Downloads of musical works, and other reproductions or distributions of musical works through Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Paid Locker Services, and Purchased Content Locker Services provided through subscription and nonsubscription digital music Service Providers in accordance with the provisions of 17 U.S.C. 115, exclusive of Offerings subject to subpart D of this part.

§ 385.21 Royalty rates and calculations.

(a) *Applicable royalty.* Licensees that engage in Licensed Activity covered by this subpart pursuant to 17 U.S.C. 115 shall pay royalties therefor that are calculated as provided in this section, subject to the royalty floors for specific types of services

described in § 385.22, provided, however, that Promotional Offerings, Free Trial Offerings, and certain Purchased Content Locker Services shall instead be subject to the royalty rates provided in subpart D of this part.

(b) *Rate calculation.* Royalty payments for Licensed Activity in this subpart shall be calculated as provided in this paragraph (b). If a Service Provider includes different Offerings, royalties must be calculated separately with respect to each Offering taking into consideration Service Provider Revenue and expenses associated with each Offering.

(1) *Step 1: Calculate the all-in royalty for the Offering.* For each Accounting Period, the all-in royalty for each Offering under this subpart shall be the greater of the applicable percent of Service Provider Revenue, as set forth in table 1 to this paragraph (b)(1), and the result of the TCC Prong Calculation for the respective type of Offering, as set forth in table 2 to this paragraph (b)(1):

TABLE 1 TO PARAGRAPH (b)(1)

Royalty year	2018	2019	2020	2021	2022
Percent of Service Provider Revenue	11.4	12.3	13.3	14.2	15.1

TABLE 2 TO PARAGRAPH (b)(1)

Type of offering	TCC prong calculation
Standalone Non-Portable Subscription Offering—Streaming Only	The lesser of 22% of TCC for the Accounting Period and 50 cents per subscriber per month.
Standalone Non-Portable Subscription Offering—Mixed	The lesser of 21% of TCC for the Accounting Period and 50 cents per subscriber per month.
Standalone Portable Subscription Offering	The lesser of 21% of TCC for the Accounting Period and 80 cents per subscriber per month.
Bundled Subscription Offering	21% of TCC for the Accounting Period.
Free nonsubscription/ad-supported services free of any charge to the End User.	22% of TCC for the Accounting Period.
Mixed Service Bundle	21% of TCC for the Accounting Period.
Purchased Content Locker Service	22% of TCC for the Accounting Period.
Limited Offering	21% of TCC for the Accounting Period.
Paid Locker Service	20.65% of TCC for the Accounting Period.

(2) *Step 2: Subtract applicable Performance Royalties.* From the amount determined in step 1 in paragraph (b)(1) of this section, for each Offering of the Service Provider, subtract the total amount of Performance Royalty that the Service Provider has expensed or will expense pursuant to public performance licenses in connection with uses of musical works through that Offering during the Accounting Period that constitute Licensed Activity. Although this amount may be the total of the Service Provider's payments for that Offering for the Accounting Period, it will be less than the total of the Performance Royalties if the Service Provider is also engaging in public performance of musical works that does not constitute Licensed Activity. In the case in which the Service Provider is also engaging in the public performance of musical works that does not constitute Licensed Activity, the amount to be subtracted for Performance Royalties shall be the amount allocable to Licensed Activity uses through the relevant Offering as determined in relation to all uses of musical works for which the Service Provider pays Performance Royalties for the Accounting Period. The Service Provider shall make this allocation on the basis of Plays of musical works or, where per-play information is unavailable because of bona fide technical limitations as described in step 4 in paragraph (b)(4) of this section, using the same alternative methodology as provided in step 4.

(3) *Step 3: Determine the payable royalty pool.* The payable royalty pool is the amount payable for the reproduction and distribution of all musical works used by the Service Provider by virtue of its Licensed Activity for a particular Offering during the Accounting Period. This amount is the greater of:

(i) The result determined in step 2 in paragraph (b)(2) of this section; and

(ii) The royalty floor (if any) resulting from the calculations described in § 385.22.

(4) *Step 4: Calculate the per-work royalty allocation.* This is the amount payable for the reproduction and distribution of each musical work used by the Service Provider by virtue of its Licensed Activity through a particular Offering during the Accounting Period. To determine this amount, the result determined in step 3 in paragraph (b)(3) of this section must be allocated to each musical work used through the Offering. The allocation shall be accomplished by dividing the payable royalty pool determined in step 3 for the Offering by the total number of Plays of all musical works through the Offering during the Accounting Period (other than Plays subject to subpart D of this part) to yield a per-Play allocation, and multiplying that result by the number of Plays of each musical work (other than Plays subject to subpart D of this part) through the Offering during the Accounting Period. For purposes of determining the per-work royalty allocation in all calculations under this paragraph (b)(4) only (*i.e.,* after the payable royalty pool has been determined), for sound recordings of musical works with a playing time of over 5 minutes, each Play shall be counted as provided in paragraph (c) of this section. Notwithstanding the foregoing, if the Service Provider is not capable of tracking Play information because of bona fide limitations of the available technology for Offerings of that nature or of devices useable with the Offering, the per-work royalty allocation may instead be accomplished in a manner consistent with the methodology used for making royalty payment allocations for the use of individual sound recordings.

(c) *Overtime adjustment.* For purposes of the calculations in step 4 in paragraph (b)(4) of this section only, for sound recordings of musical works with a playing time of over 5 minutes, adjust the number of Plays as follows:

(1) 5:01 to 6:00 minutes—Each Play = 1.2 Plays.

(2) 6:01 to 7:00 minutes—Each Play = 1.4 Plays.

(3) 7:01 to 8:00 minutes—Each Play = 1.6 Plays.

(4) 8:01 to 9:00 minutes—Each Play = 1.8 Plays.

(5) 9:01 to 10:00 minutes—Each Play = 2.0 Plays.

(6) For playing times of greater than 10 minutes, continue to add 0.2 Plays for each additional minute or fraction thereof.

(d) *Accounting.* The calculations required by paragraph (b) of this section shall be made in good faith and on the basis of the best knowledge, information, and belief at the time payment is due, and subject to the additional accounting and certification requirements of 17 U.S.C. 115(c)(2)(I) and (d)(4)(A)(i) and part 210 of this title. Without limitation, statements of account (where applicable) shall set forth each step of the calculations with sufficient information to allow the assessment of the accuracy and manner in which the payable royalty pool and per-play allocations (including information sufficient to demonstrate whether and how a royalty floor pursuant to § 385.22 does or does not apply) were

determined and, for each Offering reported, also indicate the type of Licensed Activity involved and the number of Plays of each musical work (including an indication of any overtime adjustment applied) that is the basis of the per-work royalty allocation being paid.

(e) *Computation of subscriber months in TCC Prong Calculation.* In connection with the TCC Prong Calculation in step 1 in paragraph (b)(1) of this section for an Accounting Period, to the extent applicable, the total number of subscriber-months for the Accounting Period shall be calculated, taking all End Users who were subscribers for complete calendar months, prorating in the case of End Users who were subscribers for only part of a calendar month, and deducting on a prorated basis for End Users covered by an Offering subject to subpart D of this part. The product of the total number of subscriber-months for the Accounting Period and the specified number of cents per subscriber shall be used as the subscriber-based component (if any) in step 1 for the Accounting Period.

§ 385.22 Royalty floors for specific types of Offerings.

(a) *In general.* The following royalty floors for use in step 3 of § 385.21(b)(3)(ii) shall apply to the respective types of Offerings.

(1) *Standalone Non-Portable Subscription Offering—Streaming Only.* Except as provided in paragraph (a)(4) of this section, in the case of a Subscription Offering through which an End User can listen to sound recordings only in the form of Eligible Interactive Streams and only from a non-portable device to which those Streams are originally transmitted while the device has a live network connection, the royalty floor is the aggregate amount of 15 cents per subscriber per month.

(2) *Standalone Non-Portable Subscription Offering—Mixed.* Except as provided in paragraph (a)(4) of this section, in the case of a Subscription Offering through which an End User can listen to sound recordings either in the form of Eligible Interactive Streams or Eligible Limited Downloads but only from a non-portable device to which those Streams or Eligible Limited Downloads are originally transmitted, the royalty floor is the aggregate amount of 30 cents per subscriber per month.

(3) *Standalone Portable Subscription Offering.* Except as provided in paragraph (a)(4) of this section, in the case of a Subscription Offering through which an End User can listen to sound recordings in the form of Eligible Interactive Streams or Eligible Limited Downloads from a portable device, the royalty floor is the aggregate amount of 50 cents per subscriber per month.

(4) *Bundled Subscription Offering.* In the case of a Bundled Subscription Offering, the royalty floor is the aggregate amount of 25 cents per month for each Active Subscriber.

(b) *Computation of royalty floors.* For purposes of paragraph (a) of this section, to determine the royalty floor, as applicable to any particular Offering, the total number of subscriber-months for the Accounting Period shall be calculated by taking all End Users who were subscribers for complete calendar months, prorating in the case of End Users who were subscribers for only part of a calendar month, and deducting on a prorated basis for End Users covered by an Offering subject to subpart D of this part, except in the case of a Bundled Subscription Offering, subscriber-months shall be determined with respect to Active Subscribers. The product of the total number of subscriber-months for the Accounting Period and the specified number of cents per subscriber (or Active Subscriber, as the case may be) shall be used as the subscriber-based component of the royalty floor for the Accounting Period. A Family Plan shall be treated as 1.5 subscribers per month, prorated in the case of a Family Plan subscription in effect for only part of a calendar month. A Student Plan shall be treated as 0.50 subscribers per month, prorated in the case of a Student Plan End User who subscribed for only part of a calendar month.

Subpart D—Promotional Offerings, Free Trial Offerings and Certain Purchased Content Locker Services

§ 385.30 Scope.

This subpart establishes rates and terms of royalty payments for Promotional Offerings, Free Trial Offerings, and certain Purchased Content Locker Services provided by subscription and nonsubscription digital music Service Providers in accordance with the provisions of 17 U.S.C. 115.

§ 385.31 Royalty rates.

(a) *Promotional Offerings.* For Promotional Offerings of audio-only Eligible Interactive Streams and Eligible Limited Downloads of sound recordings embodying musical works that the Sound Recording Company authorizes royalty-free to the Service Provider, the royalty rate is zero.

(b) *Free Trial Offerings.* For Free Trial Offerings for which the Service Provider receives no monetary consideration, the royalty rate is zero.

(c) *Certain Purchased Content Locker Services.* For every Purchased Content Locker Service for which the Service Provider receives no monetary consideration, the royalty rate is zero.

(d) *Unauthorized use.* If a Copyright Owner or agent of the Copyright Owner sends written notice to a Licensee stating in good faith that a particular Offering subject to this subpart differs in a material manner from the terms governing that Offering, the Licensee must within 5 business days cease Streaming or otherwise making available that Copyright Owner's musical works and shall withdraw from the identified Offering any End User's access to the subject musical work.

Dated: July 3, 2023.

David P. Shaw,
Chief Copyright Royalty Judge

David R. Strickler,
Copyright Royalty Judge

Steve Ruwe,
Copyright Royalty Judge

Approved by:

Carla D. Hayden,
Librarian of Congress.

[FR Doc. 2023–14925 Filed 8–9–23; 8:45 am]

BILLING CODE 1410–72–P

Reader Aids

Federal Register

Vol. 88, No. 153

Thursday, August 10, 2023

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LIST OF PUBLIC LAWS

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