Dated: December 26, 2022.

J.B. Gunning,

Captain, U.S. Coast Guard, Captain of the Port Sector Corpus Christi.

[FR Doc. 2022–28471 Filed 12–29–22; 8:45 am]

BILLING CODE 9110–04–P

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 385

[Docket No. 21–CRB–0001–PR (2023–2027)]

Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV)

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Royalty Judges publish final regulations that set rates and terms applicable during the period from January 1, 2023 through December 31, 2027, for the statutory license for making and distributing phonorecords of nondramatic musical works.

DATES:

Effective date: January 1, 2023.

Applicability date: These rates and terms are applicable during the period from January 1, 2023 through December 31, 2027.

FOR FURTHER INFORMATION CONTACT: Anita Brown, Program Specialist, (202) 707–7658, *crb@loc.gov*.

SUPPLEMENTARY INFORMATION:

Background

On August 31, 2022, the Copyright Royalty Judges (Judges) [1] received a motion stating that several participants, (Settling Parties),[2] had reached a partial settlement (Settlement) regarding the rates and terms under section 115 of the Copyright Act, namely, for Licensed Activity (as defined in 37 CFR part 385, subpart A [3]) presently addressed in subparts C & D of 37 CFR part 385 together with certain regulations of general application (*e.g.,* definitions and late fee provisions) applicable to the subpart C & D Configurations presently addressed in 37 CFR part 385, subpart A, for the 2023–2027 rate period [4] and seeking approval of that partial settlement. *See Motion to Adopt Settlement of Statutory Royalty Rates and Terms for Subpart C and D Configurations,* Docket No. 21–CRB–0001–PR (2023–2027) at 1 (eCRB 27222) [5] (Motion). The Settling Parties state that ''the settlement [ ] represents the consensus of both licensees and licensors representing the vast majority of the market for rights under section 115 for Subpart C & D Configurations.'' [6] Motion at 3.

On September 26, 2022, the Judges issued ''Order 63 to File Certification or Provide Settlement Agreements'' (eCRB 27253) (Order 63), which ordered the Settling Parties to certify that the Motion and the Proposed Regulations annexed to the Motion represent the full agreement of the Settling Parties, *i.e.,* that there are no other related agreements and no other clauses. Order 63 further ordered that if such other agreements or clauses exist, the Settling Parties shall file them.

On September 26, 2022, the Settling Parties filed a ''Joint Response to George Johnson's Motion to Compel Production of Settlement and CRB Order 63'' (eCRB 27257) (Joint Response).[7] Portions of the Joint Response, which were submitted as Restricted, are responsive to Order 63. On October 6, 2022, the Settling Parties filed a ''Joint Submission of Settling Participants Regarding Settlement Agreement'' (eCRB 27278) (Joint Submission) which removed the Restricted designation to the ''Settlement Agreement'' attached as Exhibit A to the Joint Submission. However, the Joint Response and the Joint Submission did not completely and adequately respond to Order 63.

On October 3, 2022, Google and NMPA filed ''Google and NMPA's Joint Notice of Lodging'' (eCRB 27275) (Joint Notice of Lodging), which indicated that those two parties found Order 63 unclear regarding what is meant by ''related agreements.'' Google and NMPA offered that they broadly construed Order 63's reference to ''related agreements'' to include certain letter agreements executed between Google, on the one hand, and certain music publishers and the NMPA, on the other hand, on or around the execution date of the settlement agreement. Google and NMPA indicated they will ''lodge'' such letter agreements concurrently with their Joint Notice of Lodging. Google and NMPA also indicated that they do not believe that the letter agreements are substantively related to the Settlement, and that the letter agreements simply concern Google's allocation practices to avoid double payments arising from certain direct agreements. On October 7, 2022, Google and NMPA submitted ''Google and NMPA's Joint Notice of Public Lodging'' which included public versions of letter agreements. (eCRB 27279).

On October 17, 2022, the Judges issued ''Order 64 to File Settlement Agreements and Provide Certification'' (eCRB 27284) (Order 64), which clarified the scope of Order 63 and ordered the Settling Parties to:

(1) *file* (not ''lodge'') any supplemental written agreements between Service Participants, on the one hand, and Copyright Owners and/or their affiliates, including copyright owners that they represented in this proceeding, on the other hand, that represent consideration for, or are contractually related to, the Settlement referenced in the Motion.

(2) file a detailed description of any supplemental oral agreements between Service Participants, on the one hand, and Copyright Owners and/or their affiliates, including copyright owners that they represented in this proceeding, on the other hand, that represent consideration for, or are contractually related to the Settlement referenced in the Motion, through a certification or certifications from individuals with direct knowledge of any such supplemental oral agreements.

(3) file a certification or certifications from a person or persons with first-hand knowledge stating that there are no other agreements, written or oral, beyond the Settlement, the Settlement Agreement and the filed supplemental written or oral agreements responsive to this order.

(4) explain in a supplemental brief why the remaining restricted portions of the Joint Response, apart from Exhibit A, from which the Restricted designation has been removed, would, if disclosed, interfere with the ability of the Producer to obtain like information in the future.

---

[1] The Copyright Royalty Judges as an institution are occasionally referenced herein as the Copyright Royalty Board (CRB).

[2] The participants who filed the motion are the National Music Publishers' Association (NMPA) and Nashville Songwriters Association International (NSAI, and collectively with NMPA, the Copyright Owners), on the one hand, and the music services, Amazon.com Services LLC, Apple Inc., Google LLC, Pandora Media, LLC, and Spotify USA Inc. (collectively, Service Participants) on the other hand.

[3] The definition of ''licensed activity,'' as the term is used in subparts C and D of 37 CFR part 385, means the delivery of musical works, under voluntary or statutory license, via Digital Phonorecord Deliveries in connection with Interactive Eligible Streams, Eligible Limited Downloads, Limited Offerings, mixed Bundles, and Locker Services. (37 CFR 385.2).

[4] The Motion refers to the rate period as ''the full time period addressed by the Proceeding.'' Motion at 1.

[5] eCRB reference numbers may be used to access relevant documents through the Copyright Royalty Board website.

[6] The Settling Parties indicate that participant George Johnson does not agree to the settlement and that participants David Powell and Brian Zisk should be dismissed because they did not file a Written Direct Statement. Motion at 3 and n. 1. Mr. Johnson filed an opposition to the motion (eCRB. No. 27239) on September 6 which the Judges consider relevant to this proposed rule.

[7] George Johnson's ''Corrected Motion to Compel Parties to Immediately Submit Actual Signed Proposed Settlement Agreement for Subpart C with Any MOUs or Side Deals here in Phonorecords IV'' was filed on September 20, 2022. (eCRB 27249).

On October 26, 2022, the Settling Parties filed a ''Joint Response to Order 64'' (eCRB 27290) (Joint Response 2).

In response to item #1 above, Joint Response 2 noted that the October 6, 2022, Joint Submission removed the Restricted designation to the ''Settlement Agreement'' and attached it within Exhibit A to Joint Response 2. In Joint Response 2, Google and NMPA also filed the aforementioned letter agreements as Exhibit B to Joint Submission 2.[8] Joint Response 2 also included the Settling Parties' representation that other than the Settlement Agreement itself, there are no other agreements responsive to Order 64.

In response to item #2 above, Joint Response 2 stated that there are no supplemental oral agreements responsive to Order 64.

In response to item #3 above, Joint Response 2 included Exhibits C–1 through C–7, certifications from a representative of each of the Settling Parties with first-hand knowledge of the Settlement Agreement and negotiations, which collectively attest that there are no other agreements, written or oral, responsive to Order 64 beyond the agreements provided as part of Joint Response 2.

In response to item #4 above, Joint Response 2 noted that the Settling Parties do not believe that there is any reason why any restricted portions of the Joint Response need to remain restricted. Therefore, the Settling Parties filed, concurrently with Joint Response 2, a revised version of the Joint Response that removes all redactions, entitled ''[Revised to Remove Redactions] Joint Response to George Johnson's Motion to Compel Production of Settlement and CRB Order 63.'' (eCRB 27289) (Revised Joint Response).

The Settling Parties offered that through Joint Response 2, and the related submissions referenced therein, the Judges have all materials necessary to publish the proposed rates and terms for public comment. The Settling Parties noted the necessary public comment and objection period, as well as potential consequences to the industry if rates and terms are not effective in time to be operationalized for the beginning of 2023, and therefore request that the Judges publish the proposed rates and terms for public comment as soon as possible.[9] Proposed regulations implementing the Settlement are attached to Joint Response 2.

On November 7, 2022, the Judges published the Settlement in the **Federal Register** and requested comments from the public. 87 FR 66976 (Nov. 7, 2022). Comments were due by December 7, 2022. The Judges received 20 comments from interested parties.[10] One participant, George Johnson (GEO) filed two comments opposing Settlement 2.[11]

Statutory Standard and Precedent

Pursuant to section 801(b)(7)(A) of the Copyright Act, the Judges have the authority to adopt settlements between some or all of the participants to a proceeding at any time during a proceeding. This section states that the Judges shall: (1) provide an opportunity to comment on the agreement to non-participants who would be bound by the terms, rates, or other determination set by the agreement; and (2) provide an opportunity to comment and to object to participants in the proceeding who would be bound by the terms, rates, or other determination set by the agreement. *See* section 801(b)(7)(A). The Judges may decline to adopt the agreement as a basis for statutory terms and rates for participants not party to the agreement if any participant objects and the Judges conclude that the agreement does not provide a reasonable basis for setting statutory terms or rates. *Id.*

Regardless of the comments of interested parties or participants, the Judges are not compelled to adopt a settlement to the extent it includes provisions that are inconsistent with the statutory license. *See* Review of Copyright Royalty Judges Determination, 74 FR 4537, 4540 (Jan. 26, 2009) (error for Judges to adopt settlement without threshold determination of legality); *see also* Review of Copyright Royalty Judges Determination, 73 FR 9143, 9146 (Feb. 19, 2008) (error not to set separate rates as required under sections 112 and 114 when parties' unopposed settlement combined rates in contravention of those statutory sections).[12]

As the Register of Copyrights (Register) observed in the 2009 review of the Judges' decision, nothing in the statute precludes rejection of any portions of a settlement that would be contrary to provisions of the applicable license or otherwise contrary to the statute. 74 FR 4540. In the instance under review by the Register, the settlement agreement purported to alter the date(s) for payment of royalties granting licensees a longer period than section 115 provided. *Id.* at 4542. The Register also noted that nothing in the statute relating to adoption of settlements precludes the Judges from considering comments of non-participants ''which argue that proposed [settlement] provisions are contrary to statutory law.'' *Id.* at 4540.

Summary of Non-Participant Comments

The comments of interested parties in this proceeding overlapped in significant aspects and are summarized as follows.

Comments in Support

The following commenters all express support for adoption of the Settlement. Black Music Action Coalition (BMAC) and Music Artists Coalition (MAC); Songwriters of North America (SONA); The Recording Academy; The Music Publishers Association of the United

[8] Joint Response 2 reiterated Google and NMPA's view that the letter agreements are not substantively related to the Settlement, and that the letter agreements simply concern Google's allocation practices to avoid double payments arising from certain direct agreements.

[9] The Judges are aware of the participants' and the public's interest in timely implementation of rates and terms, and note that the submission of partial agreements, and related materials as restricted, has been a source of unfortunate delay in consideration of the proposed settlement of statutory royalty rates and terms for subpart C and D configurations.

[10] Word Collections' Eric Goldberg (eCRB 27370); Word Collections' Jeff Price (eCRB 27369); Black Music Action Coalition (BMAC) and Music Artists Coalition (MAC) (eCRB 27369); Songwriters of North America (SONA) (eCRB 27367); The Recording Academy (eCRB 27365); The Music Publishers Association of the United States (MPA) (eCRB 27364); Eugene ''Lambchops'' Curry (eCRB 27357); Songwriters Guild of America, Inc. (SGA), Society of Composers & Lyricists (SCL), and Music Creators North America (MCNA), and the individual music creators Rick Carnes and Ashley Irwin (together Independent Music Creators) (eCRB 27358); Helienne Lindvall, David Lowery and Blake Morgan (together Writers) (eCRB 27356); Abby North (eCRB 27355); Gwendolyn Seale (eCRB 27354); Austin Texas Musicians (eCRB 27353); Michelle Shocked (eCRB 27352);; The Association of Independent Music Publishers (AIMP) (eCRB 27349); Production Music Association (PMA) (eCRB 27340); Ross Golan (eCRB 27336); William Evans (eCRB 27333); The 100 Percenters (eCRB 27329); and The Church Music Publishers Association of the United States (CMPA) (eCRB 27326); and Upward Bound Music Company (eCRB 27317).

[11] On September 6, 2022, before the Judges published the Settlement for comment, GEO filed a *Response in Opposition to the Subpart C Proposed Settlement* (eCRB 27239) (GEO Opposition). On November 7, 2022, after the Judges published the Settlement for comment, GEO filed *Comments and Second Response in Opposition to the Subpart C Proposed Settlement in Phonorecords IV* (eCRB 27371) (GEO Second Opposition), which objects to adoption of the Settlement and included in an Exhibit GEO's prior *Response in Opposition to the Subpart C Proposed Settlement.* GEO also states his desire to join (entirely or partially) with several commenters that oppose aspects of the Settlement.

[12] The Register found that a ''paucity of evidence'' in the record to support a determination of separate rates for the separate licenses ''does not dispatch the . . . Judges' statutory obligations.'' Review of Copyright Royalty Judges Determination, 73 FR 9143, 9145 (Feb. 19, 2008). The Register noted that the Judges have subpoena power to compel witnesses to appear and give testimony. *Id.*

States (MPA); The Association of Independent Music Publishers (AIMP); Production Music Association (PMA); Ross Golan; The 100 Percenters; and The Church Music Publishers Association of the United States (CMPA).

These commenters express generally positive assessment of the Settlement. However, several of these comments, while supportive of adoption of the Settlement, take issue with the current extent of regulation of musical works and with aspects of the rate setting process, which are beyond the scope of the Judges' consideration of the Settlement.

Comments in Opposition

Word Collections' Eric Goldberg offers a series of comparisons of historical mechanical per play rates to the growth in 115 licensed music services' Subscriber Counts, Service Revenue, and Total Content Costs (''meaning the amount paid to labels for sound recording rights''). Mr. Goldberg also presents predictions of mechanical per play rates over the *Phonorecords IV* rate period under the terms of the Settlement. His analysis is intended to support his view that, as a matter of equity, the headline rates (applicable to service revenue) should be increased further to give songwriters parity with the music services and record labels who depend upon the songwriters' creative works of authorship. Word Collections' Eric Goldberg at 1–6.

Word Collections' Jeff Price reiterates aspects of the comment from Word Collections' Eric Goldberg, advancing the notion that any increase realized by songwriters and musical work owners under the settlement would not keep pace with the cost of living, inflation, or with the benefits realized by music services or sound recording copyright owners. Mr. Price offers that a headline rate of 25% combined with the elimination of several deductions from attributable revenue would properly compensate songwriters and copyright owners. Word Collections' Jeff Price at 6–7.

Mr. Price states that his comment is intended to provide information to the Judges regarding the NMPA and who it represents when taking into consideration the proposed Settlement. Mr. Price offers that NMPA represents less than 2% of U.S. (and rest of the world) music publishers and suggests that NMPA's interests are not aligned with 98% of music publishers. Mr. Price goes on to indicate that major labels, Sony, Universal and Warner, control equity positions in music services, and that these three entities own and/or control the major record labels, the associated sound recordings, the major music publishers, and the associated musical composition copyrights. Mr. Price offers that the intertwined relationships create conflicts of interest. Specifically, Mr. Price points to conflicts of interests that were noted in relationship to a prior proposed settlement in this proceeding, and a suggested conflict of interest in relationship to SoundExchange (the designated collective for royalties under specific statutory licenses for sound recordings). Word Collections' Jeff Price at 1–2.

Mr. Price suggests that the NMPA and or its members have self-negotiated to some degree to determine what musical work copyright owners should be paid in the future. Word Collections' Jeff Price at 2. Mr. Price then addresses issues surrounding the scope or availability of the section 115 license, in relation to certain licensees, suggesting that in the future there may be an informative and robust market for willing buyer willing seller negotiations for mechanical. *Id.* at 2–6.

Songwriters Guild of America, Inc. (SGA), Society of Composers & Lyricists (SCL), and Music Creators North America (MCNA), and the individual music creators Rick Carnes and Ashley Irwin (together Independent Music Creators) [13] comment in opposition, asking the Judges to modify or reject the Settlement in its present form as a necessity for providing economic justice for music creators. Independent Music Creators at 2. Independent Music Creators opine that the Settlement represents insufficient and unreasonable limited increases in streaming rates over the next five years, especially in light of anticipated inflation. *Id.* at 10. Independent Music Creators acknowledge that the Settlement includes elements other than a headline percentage of revenue, and that these other elements, such as the total content cost (TCC) component and fixed per subscriber elements, have increased far more than the headline rate. However, Independent Music Creators criticize these details as complex ancillary terms, which lack plain language explanations. Furthermore, Independent Music Creators offer that the possibility of increases in licensees' subscription revenue that may positively impact mechanical royalties under the settlement, or offset inflationary losses, are at best speculative and at worst specious. *Id.* at 12. They instead voice preference for an approach based on cost of living adjustment principles, including what they offer as a necessary application of cost of living adjustments to royalty pools within the existing greater than/lesser of rate structure. *Id.*

Independent Music Creators warn of conflicts and complications surrounding the streaming royalty rate negotiations, and potential self-dealing. They offer their suspicion that major music publisher-affiliated record companies exercised undue influence on the Settlement. *Id.* at 14. Independent Music Creators criticize music publishers' silence regarding the traditional ratio of label versus publisher share of revenue, and point to the opinions of Merck Mercuriadis, an executive at the music publisher, Hipgnosis, that major music publishers are not free to do what's in the best interests of their constituency, because they're owned and controlled by their respective major recorded music companies. *Id.* at 15.

Ultimately, Independent Music Creators do not indicate that specific undue influence or conflicts of interest impacted the Settlement but suggest that the possibility raises questions as to whether the Settlement can reliably be shown to have been arrived at with adequate and unconflicted representation of music creator and publisher interests, and whether the results reached following such negotiations are reasonable. *Id.* at 17. Independent Music Creators also urge that the Judges address (1) whether the Settling Parties should be required to explain in plain language how their streaming royalty rate settlement terms will avoid catastrophic losses in value due to inflation over the next five years; (2) whether a cost of living adjustment provision is warranted, as such provisions have been included in several other recently negotiated rate agreements approved by the CRB, and; (3) whether the proposed settlement agreement was negotiated with adequate and unconflicted representation of music creator and publisher interests, leading to results that provide a reliably reasonable basis for the setting of fair and equitable statutory streaming rates and terms. *Id.* at 18.

Songwriters Helienne Lindvall, David Lowery, and Blake Morgan (Writers) [14] support the Settlement as far as it goes

[13] The Independent Music Creators' state that their comments are endorsed by Alliance for Women Film Composers (AWFC), Screen Composers Guild of Canada (SCGC), Songwriters Association of Canada (SAC), Asia-Pacific Music Creators Alliance (APMA), Music Answers (M.A.), Fair Trade Music International (FTMI), Pan-African Composers and Songwriters Alliance (PACSA), and Alliance of Latin American Composers & Authors (AlcaMusica).

[14] Writers' comment was submitted by Christian L. Castle as Counsel.

but with some reservations. Writers at 1. Writers express concern that inflation may diminish the rates for copyright owners. They argue that the lack of a cost of living adjustment within the rate structure is wrong and arbitrary, particularly since they do not perceive any justification has been given. Writers dispute the view that because copyright owners receive a share of revenue from the statutory licensees that increasing revenue from increases in subscription prices or number of subscribers will accrue to copyright owners benefit. They argue that a cost of living adjustment would provide more effective protection against inflation. Writers suggest that the Judges could add a new step in the proposed settlements regulations, where a cost of living adjustment would be applied after the per work royalty allocation is determined. *Id.* at 5–7.

Writers posit that the rate calculation formula in the Settlement is unduly complex. While Writers acknowledge some compelling reasons as to why complexity developed, they refer to the calculation of streaming mechanicals set forth in the Settlement as mind-numbing in complexity. They go on to allege that the complexity is nonsensical. *Id.* at 8–11.[15]

Writers then address late fees, which they deem similar to credit card interest. They argue that late fees should be treated as an additional royalty payment under any publishing agreement. Otherwise, the Writers allege, a late fee might be treated as a catalog-wide penalty and that a copyright owner collecting the late fee could argue should be retained for its own account, without attribution to specific works or songwriters. *Id.* at 12.

Writers argue for the clarification of the ''overtime adjustment'' language such that the long-song adjustment is a bonus and not a penalty. They cite to the version of section 115 that was in force prior to the enactment of the MMA for the principle that copyright owners should not bear the cost of the long song bonus through a reduction in the statutory rates that may otherwise be applicable to songs that fall below the overtime adjustment. *Id.* at 13–15.

Writers request that the Judges address the possibility that the Settlement would allow licensees to include activity in the denominator (in step 4) that should not be there (such as podcasts or spoken word recordings). They offer that once such undue plays are included in that denominator it is very difficult to remove these non-royalty bearing tracks and restate all earnings. *Id.* at 15–16.

Abby North expresses some favorable views toward the settlement, but offers her criticism of the delays in the final implementation of rate setting proceedings, in the current proceeding and others. She takes issue with the lack of transparency regarding to submissions related to the Settlement and resulting delays. Abby North at 1. Ms. North states that the section 115 rates and terms must include a cost of living adjustment and that the Settling Parties should agree to including such adjustments. She disputes that music services' subscription prices and number of subscribers would provide an organic cost of living adjustment. *Id.* at 2.

Gwendolyn Seale, a music lawyer who represents songwriters, offers comments on her own behalf opposing the settlement. Ms. Seale takes issue with adoption of the Settlement as it would thwart application of the willing buyer, willing seller rate setting standard that would have been applied in a determination made by the Judges absent settlement. Gwendolyn Seale at 2–3. She also alleges that the Settlement is unduly complex and results in troubling trends in resulting the per play allocations. *Id* at 3–4.

Ms. Seale suggests that while the Judges may not be able to fix the rate formula, the Judges should integrate a cost of living adjustment to be applied to the ''payable royalty pool.'' She suggests adding a cost of living adjustment at the end-result following all of the greater and lesser of calculations and the removal of the performance royalties from the ''all-in royalty pool.'' *Id.* at 5. Ms. Seale also takes issue with several procedures and delays occurring within the proceeding process. *Id* at 3, 5–6.

Michelle Shocked submits comments that ''agree with Participant George Johnson's September 6, 2022 objections for the same following reasons.'' Michelle Shocked at 1–4. Those objections from George Johnson are set forth in the next section below. In addition, Ms. Shocked raises issues about certain music services' alleged lack of compliance with the section 115 license and other alleged piracy of her works. *Id.* at 4–6.

Austin Texas Musicians request that the Judges include a cost of living adjustment. Austin Texas Musicians at 1. Eugene ''Lambchops'' Curry, William Evans and Upward Bound Music Company do not pointedly address the Settlement, but instead propose various alternative rates ranging from 0.12 cent per stream to $3.00 per stream. Eugene Curry at 1–2; William Evans at 1; Upward Bound at 1–3.

Mr. Johnson's Opposition to the Settlement

Proceeding participant George Johnson (GEO) objects to the Settlement in part because, in his view, it suffers from the same issues that the Judges found to be a basis for their March 30, 2022 withdrawal and refusal to adopt another proposed settlement, namely that a) the settlement has no inflation adjustment for what he deems to be a static rate; b) it suffers from same self-dealing and conflicts of interest concerns; and c) the settlement may possibly be related to an undisclosed side deal. GEO Second Opposition at 15.

While GEO refers to the Settlement offer as the bare minimum, he also asserts that the 15.35% percent of revenue element within the Settlement for 2027 is too low, and that 20% to 25% would be a reasonable percent of revenue element. GEO Second Opposition at 29, 13. GEO maintains that the 15.1% percent of revenue element within the Settlement for 2023 is not an increase in value, and that the 15.1% to 15.35% percent of revenue elements for the rate period is essentially a static rate, which GEO indicates is in tension with the Judges' March 30, 2022 withdrawal and refusal to adopt another proposed settlement. *Id.* GEO questions why neither the percent of revenue element nor the per-subscriber elements are indexed for inflation, suggesting that is also in tension with the Judges' March 30, 2022 decision. *Id.*

GEO expresses concern that adoption of the Settlement may thwart application of the willing buyer, willing seller rate setting standard that would have been applied in a determination made by the Judges absent settlement. *Id.* at 14.

GEO also includes several broad criticisms regarding value realized by investors in affected businesses as well as the salaries of executives at such businesses. *Id.* at 15. He adds accusations of price fixing and antitrust concerns across the music business. *Id.* at 16. GEO suggests that the Settlement does not adequately account for revenue that licensees may realize through their sale of data and advertising. *Id.*

GEO alleges that Google and NMPA's Joint Notice of Public Lodging, filed to update their response to Order 63 to File Certification or Provide Settlement Agreements, shows that ''the 3 record labels'' are using direct licenses for themselves with music services while using the CRB process to price-fix all of

[15] Writers also take issue with a number of procedures in CRB proceedings, which are beyond the scope consideration of the settlement at issue.

their competitors. *Id.* at 17–18, 20–21. GEO suggests that major publishers' direct licenses reflect different rates and terms than the statutory rates proposed in the Settlement. He also claims that non-disclosure agreements prevent anyone from knowing the rates and terms in those direct licenses. *Id.* at 18.

GEO attempts to compare the Settlement to a vaguely referenced direct deal involving Sony from 2011, covering unspecified rights with an unknown party, which apparently is not in the record of this proceeding. GEO's cryptic reference to a 2011 deal for unspecified rights is apparently meant to suggest that there might be additional undisclosed consideration in relation to the Settlement. *Id.* at 19–20.

GEO also includes alternative rate proposals and urges the Judges to abolish what he refers to as a ''free limited download loophole'' or a ''free and unlimited limited downloads loophole.'' *Id* at 2, 3. GEO further addresses this matter as an element within his WDS which proposes to plug the free and unlimited limited downloads loophole. *Id.* at 2, 11–15.[16]

Judges' Analysis and Conclusions

Chapter 8 of the Copyright Act encourages parties to enter into settlement negotiations, ultimately the decision as to whether a contested settlement should be approved on motion is subject to the Judges' discretion, informed by the submissions of the Settling Parties and the commenters, and by the Judges' application of the law to the facts. Section 801(b)(7)(A) is clear that the Judges have the authority to adopt settlements between some or all of the participants to a proceeding at any time during a proceeding, so long the relevant parties are given an opportunity to comment and object. 17 U.S.C. 801(b)(7)(A). The Judges may decline to adopt the agreement as a basis for statutory terms and rates for participants not party to the agreement if any participant objects and the Judges conclude that the agreement does not provide a reasonable basis for setting statutory terms or rates. *Id.* at 801(b)(7)(A).

The Judges provided the requisite opportunity for comment and received GEO's opposition as well as the above-noted comments for and against the Settlement. Having considered these submissions in their entirety, the Judges find no persuasive legal or economic arguments that convince the Judges to reject the proposed settlement reached voluntarily between the Settling Parties.

Only one *participant* in this proceeding, GEO, objected to the Settlement. As shown by the foregoing synopsis, however, GEO's objections did not come to the Judges in a vacuum. The statute requires publication of a settlement proposal and solicitation of comments from interested parties—parties who would be bound by the proposed rates and terms. Interested parties' comments are filed in the record of the proceeding and the Judges analyze those comments even though the Judges do not base rejection of a settlement solely on negative comments from non-participants.

From the perspective of some independent songwriters and copyright owners, the proposed rates might seem inadequate. The Judges recognize that several commenters proposed alternative rates that they prefer, including alternative methods for inserting inflation adjustments. However, while the Judges may decline to adopt a settlement, the Judges are not empowered to modify the Settlement, such as by adding requested adjustments. The Settlement is what is before the Judges for consideration, not alternative rates or proposals for alternative procedures.[17] The Judges specifically recognize that some comments take issue with existing aspects of participation in rate proceedings before the Judges.[18] Additionally, the present settlement consideration process is not the forum to fully consider and address matters involving statements of account,[19] an area which the U. S, Copyright Office and the Judges share an interest.[20]

While there may be dispute as to the extent to which the Copyright Owners as Settling Parties represent the copyright owner community overall, the Judges accept that the Copyright Owners have an interest in the vast majority of the uses of rights under section 115 for Subpart C & D Configurations. Furthermore, the Judges accept that the proposed rates and terms were negotiated on behalf of the vast majority of parties that historically have participated in section 115 proceedings before the Judges. The Settling Parties clearly concluded that the rates and terms were acceptable to both sides. Furthermore, as addressed below, the negotiations occurred absent several of the aspects that led the Judges to refuse to adopt a separate proposed settlement.

The facts and analysis that led the Judges to conclude that another proposed settlement in this proceeding did not provide a reasonable basis for setting statutory rates and terms are distinguishable from those surrounding the Settlement before them now. In the current consideration of the Settlement, the mechanical rates represent an increase from prior rates across significant steps of the rate setting formula, including the headline rate applicable to service revenue, the percentage of Total Content Costs, and fixed per subscriber elements within the Settlement, *e.g.* Royalty Floors. In other words, the rates do not remain unchanged. They are not frozen, despite the fact that they retain a rate *structure,* that some do not favor. The Judges clarify that they do not consider the structure of the Settlement to be unreasonable, and that they have found similar structure appropriate in other proceedings.

While some songwriters or copyright owners may be confused by the royalties or statements of account, the price discriminatory structure and the associated levels of rates in settlement do not appear gratuitous, but rather designed, after negotiations, to establish a structure that may expand the revenues and royalties to the benefit of copyright owners and music services alike, while also protecting copyright owners from potential revenue diminution. This approach and the resulting rate setting formula is not unreasonable. Indeed, when the market

[16] GEO's opposition to the ''free and unlimited limited downloads loophole'' may, on its face, appear somewhat vague. However, GEO's proposal appears to relate to an issue and proposal raised more precisely in Copyright Owners' WDS, intended to close a hole in the terms that could be seen as leaving some uses without a rate. Restricted Downloads have been defined as any downloads that are not permanent, including Eligible Limited Downloads. However, past regulations (and seemingly those set forth in the Settlement) do not provide a rate for Restricted Downloads. Copyright Owners' WDS proposed revising the definitions to maintain the allowance for zero rate Restricted Downloads solely in connection with Purchased Content Locker Services and set a rate for other Restricted Downloads equal to the penny rate for Permanent Downloads. Copyright Owners WDS at 23–24.

[17] Concerns about enforcement of infringement of licensable works or eligibility for the section 115 license are also outside the scope of the consideration of the Settlement.

[18] Certain of the procedural issues raised by commenters have been addressed in part through a recent response to an inquiry from the Senate Judiciary Committee. *See, https://www.crb.gov/docs/CRB-Response-2022-11-25-Letter-to-Senators-FINAL.pdf.*

[19] Absent specific briefing in relation to any requested clarification or correction, the Judges interpret the regulations to clarify that Plays in the denominator (in step 4) is limited to Covered Activity, as used in the regulatory definitions and references to the term as defined section 115(e)(7).

[20] The Judges specifically find that the application and allocation of the overtime adjustment and late fees as set forth in the Settlement is not unreasonable. The Judges further observe that allocation of late fees may be addressed through the contracts between songwriters and their publishers.

itself is complex, 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. The Judges also observe that one of the benefits of a collective entity (the MLC in this case) is that it possesses the expertise and resources to identify and explain how royalties are computed and distributed.

In the current consideration of the Settlement, the Judges ordered disclosure of relevant supplemental agreements. The Judges took appropriate steps to ensure that such agreements have been properly revealed to the Judges and to the public. This is an important distinction from the Judges' consideration a settlement where related agreements were hidden or opaque.[21]

The issue of potential conflicts of interest remains to some degree, as some publishers represented by NMPA have cross ownership relationships with record labels, some of which have or had equity interests with music services. However, as the Judges have repeatedly observed, conflicts are inherent if not inevitable in the existing composition of certain negotiating parties. No party opposing the Settlement has presented persuasive evidence of misconduct or conduct that would sufficiently indicate that rates or terms are inconsistent with those that would be set in an effectively competitive market. The corporate relationships alone do not suffice as probative evidence of wrongdoing or of rates or terms that are inconsistent with the performance of an effectively competitive market. Indeed, the Judges have observed zealous advocacy throughout the proceeding, which has appeared to affect the settlement, thus mitigating the effect of any possible collusion such as suggested in the comments and the objection. The Judges, therefore, do not find that present alleged conflicts present sufficient reason to doubt the reasonableness of the settlement at issue as a basis for setting statutory rates and terms.

The Judges do not conclude that the Settlement agreement, reached voluntarily between the Settling Parties, fails to provide a reasonable basis for setting statutory terms and rates for licensing nondramatic musical works to manufacture and distribute phonorecords. The entirety of the record before the Judges, including the arguments GEO and other commenters presented, is insufficient for the Judges to determine that the agreed rates and terms are unreasonable.

In making this finding, the Judges are not indicating that arguments for differing approaches to address inflation in the Settlement are entirely without merit. However, the Judges find some of the proposals for cost of living adjustments advanced in the comments to be questionable. In short, the Judges do not find it unreasonable, in this case, for the Settlement to not include yearly adjustments for inflation.

In making this finding, the Judges observe the broad increases within the Settlement, including the headline percentage rate applicable to Service Revenue, the percentage of Total Content Costs, and each of the fixed per subscriber elements. The Judges find that the structure and increases are a reasonable approach to providing an organic cost of living adjustment. The Judges also observe that agreements such as the Settlement are arrived upon in part to avoid costly and uncertain litigation, which would involve a number of disputed issues. Securing specific inflation adjustments is but one of several provisions that may be bargained for, and treatment of that issue is bound-up with the entirety of the parties' negotiated compromises. In this context, the Judges find no persuasive reason to determine that the absence of yearly inflation adjustments is unreasonable or should otherwise justify a rejection of the Settlement. The Judges also note that while the willing buyer willing seller standard was not expressly applied as it would be in a full proceeding, the operable rate standard exists as a relevant factor surrounding the Settlement.

The Judges also reviewed the Settlement with regard to whether any portions would be contrary to provisions of the applicable license or otherwise contrary to the statute, pursuant to the Register's prior rulings. *See, e.g.,* Review of Copyright Royalty Judges Determination, 74 FR 4537, 4540 (Jan 26, 2009). Upon such review, the Judges see no basis to conclude that the Settlement is contrary to law. Therefore, the Judges adopt the proposed regulations that codify the Settlement.[22]

The Judges adopt the proposed rates and terms industry-wide for Subparts C and D Configurations.

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. Revise subpart A to read as follows:

Subpart A—Regulations of General Application

Sec.

§ 385.1 General.

(a) *Scope.* This part establishes rates and terms of royalty payments for the use of nondramatic musical works in making and distributing of physical and digital phonorecords in accordance with the provisions of 17 U.S.C. 115. This subpart contains regulations of general application to the making and distributing of phonorecords subject to the section 115 license.

(b) *Legal compliance.* Licensees relying on the compulsory license detailed in 17 U.S.C. 115 shall comply with the requirements of that section, the rates and terms of this part, and any other applicable regulations. This part describes rates and terms for the compulsory license only.

(c) *Interpretation.* This part is intended only to set rates and terms for situations in which the exclusive rights of a Copyright Owner are implicated and a compulsory license pursuant to 17 U.S.C. 115 is obtained. Neither 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

[21] As the Judges have noted, the submission of partial agreements, and related materials as restricted, has been a source of unfortunate delay in consideration of the proposed settlement of statutory royalty rates and terms for subpart C and D configurations.

[22] The Judges observe that GEO appears to have requested a rate setting for activity that may not be addressed in the Settlement, which he describes as an ''unlimited limited download.'' The Judges intend to request additional briefing from the Participants as to whether and how this proceeding may address such activity.

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.

Unless otherwise specified, capitalized terms in this part shall have the same meaning given to them in 17 U.S.C. 115(e). 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 in 17 U.S.C. 115(d)(4)(A)(i), and any related regulations, 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.

Artificial Accounts are accounts that are disabled or terminated for having engaged in User Manipulation or other fraudulent activity and for which any subscription revenues are refunded or otherwise not received by the Service Provider.

Bundle means a combination of a Subscription Offering providing Eligible Interactive Streams and/or Eligible Limited Downloads and one or more other products or services having more than token value, purchased by End Users in a single transaction (*e.g.,* where End Users make a single payment without separate pricing for the Subscription Offering component).

Bundled Subscription Offering means a Subscription Offering providing Eligible Interactive Streams and/or Eligible Limited Downloads included within a Bundle.

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 that is an Interactive Stream as defined in 17 U.S.C. 115(e)(13).

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 up to six members of the same family or household 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 usage does not exceed 45 days per subscriber per one-year period, which days may be nonconsecutive;

(3) In connection with the Offering, the Service Provider complies with the recordkeeping requirements in § 385.4 or superseding Copyright Office recordkeeping requirements;

(4) The Free Trial Offering is made available to the End User free of any charge; and

(5) The Service Provider offers the End User periodically during the trial an opportunity to subscribe to, and/or auto-renews the End User into, 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 subparts C and D of this part, means Covered Activity, under voluntary or statutory license, in the form of Eligible Interactive Streams, Eligible Limited Downloads, and Restricted Downloads.

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 an Offering providing Licensed Activity consisting of Eligible Interactive Streams or Eligible Limited Downloads that meets all of the following criteria:

(1) The Offering is made available to End Users only in combination (*i.e.,* the Offering is not available on a standalone basis) with one or more products or services (including services subject to other subparts) of more than token value as part of one transaction for which End Users make a payment without receiving pricing for the Offering separate from the product(s) or service(s) with which it is made available.

(2) The Offering is made available by a Service Provider that also offers End Users a separate, standalone Subscription Offering.

(3) The Offering offers End Users less functionality relative to that separate, standalone Subscription Offering. Such lesser functionality may include, but is not limited to, limitations on the ability of End Users to choose to listen to specific sound recordings on request or a limited catalog of sound recordings.

(4) Where an Offering could qualify or be considered as either a Bundled Subscription Offering or a Mixed Service Bundle, such Offering shall be deemed a Mixed Service Bundle for the purpose of calculating and paying royalties under subpart C of this part.

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 caused by User Manipulation.

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) The Service Provider is in compliance with the recordkeeping requirements of § 385.4 or superseding Copyright Office recordkeeping requirements;

(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—

(2) 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

(3) In the case of physical phonorecords:

(i) 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

(ii) 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.

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. (1) Subject to paragraphs (2) through (5) of this definition and subject to GAAP, Service Provider Revenue shall mean, for each Offering subject to subpart C of this part:

(i) All revenue from End Users recognized by a Service Provider for the provision of the 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 the 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 Streams 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 (1), (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 a Bundled Subscription Offering to End Users, 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 of Service Provider Revenue shall be as follows:

(i) For Bundled Subscription Offerings where both (a) each component of the Bundle is a product or service of the Service Provider (including Affiliates) and (b) the Service Provider (including Affiliates) makes the Bundle available to End Users directly, then the revenue from End Users deemed to be recognized by the Service Provider for the purpose of paragraph (1) of this definition shall be the aggregate of the retail price paid for the Bundle (*i.e.,* all components for one retail price) multiplied by a fraction where the numerator is the standalone retail price of the Subscription Offering component in the Bundle and the denominator is the sum of the standalone retail prices of each of the components in the Bundle (*e.g.,* if a Service Provider sells the Subscription Offering component on a standalone basis for $10/month and a separate product and/or service on a standalone basis for $5/month, then the fraction shall be $10 divided by $15, *i.e.,* ⅔, resulting in Service Provider Revenue of $8,000 if the aggregate of the retail price paid for the Bundle is $12,000).

(ii) For Bundled Subscription Offerings where either one or more components of the Bundle are not products or services of the Service Provider (including Affiliates) or the Service Provider (including Affiliates) does not make the Bundle available to End Users directly, then the revenue from End Users deemed to be recognized by the Service Provider for the purpose of paragraph (1) of this definition shall be the revenue recognized by the Service Provider from the Bundle multiplied by a fraction where the numerator is the standalone retail price of the Subscription Offering component in the Bundle and the denominator is the sum of the standalone retail prices of each of the components of the Bundle. Notwithstanding the preceding sentence, where the Service Provider does not recognize revenue for one or more components of the Bundle, then the standalone price(s) of the component(s) for which revenue is not recognized shall not be included in the calculation of the denominator of the fraction described in this sub-paragraph (*e.g.,* where a Bundle of three services, each with a standalone price of $20/month, sells for $50/month, and the Service Provider recognizes $30,000 of revenue from the provision of only two of those services, one of which is a Subscription Offering, then the fraction shall be $20 divided by $40, *i.e.,* ½, resulting in Service Provider Revenue of $15,000).

(iii) For the calculations in paragraphs (5)(i) and (ii) of this definition, in the event that 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. If no reasonably comparable product or service exists in the U.S., then the Service Provider may use another good faith, reasonable measure of the market value of the component.

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 chapter 14 of title 17, United States Code, 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 a person identified in paragraph (1) through (3).

Standalone 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).

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 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 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 means an Offering for which End Users are required to pay a fee to have access to the Offering for defined subscription periods of 3 years or less (in contrast to, for example, a service where the basic charge to users is a payment per download or per play), whether the End User makes payment for access to the Offering on a standalone basis or as part of a Bundle.

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.

User Manipulation means any behavior that artificially distorts the number of Plays, including, but not limited to, the use of manual (*e.g.,* click farms) or automated (*e.g.,* bots) means.

§ 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 17 U.S.C. 115(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.

§ 385.4 Recordkeeping for promotional or free trial non-royalty-bearing uses.

(a) *Effect of Copyright Office recordkeeping regulations.* Unless and until the Copyright Office promulgates superseding regulations concerning recordkeeping for promotional or free trial non-royalty-bearing uses subject to this part, the recordkeeping provisions in this section shall apply to Service Providers.

(b) *General.* A Service Provider 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.

(c) *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.

(d) *Availability of records.* If the Mechanical Licensing Collective requests information concerning zero rate Offerings, the Service Provider shall respond to the request within an agreed, reasonable time.

■ 3. Revise subpart C to read as follows:

Subpart C—Eligible Interactive Streaming, Eligible Limited Downloads, Standalone Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Locker Services, and Other Delivery Configurations

Sec.
385.20 Scope.
385.21 Royalty rates and calculations.

§ 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 Standalone 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.

(b) *Rate calculation.* Royalty payments for Licensed Activity in this subpart shall be calculated as provided in this paragraph (b). If a Service Provider makes available different Offerings, royalties must be calculated separately with respect to each Offering taking into consideration Service Provider Revenue, TCC, subscribers, Plays, expenses, and Performance Royalties associated with each Offering. A Service Provider shall not be required to subject the same portion of Service Provider Revenue, TCC, subscribers, Plays, expenses, or Performance Royalties to the calculation of royalties for more than one Offering in an Accounting Period.

(1) *Step 1: Calculate the all-in royalty for the Offering.* For each Accounting Period, the all-in royalty for each Offering in this subpart with the exception of Mixed Service Bundles shall be the greater of:

(i) The applicable percent of Service Provider Revenue, as set forth in Table 1 to this paragraph (b)(1), and

(ii) The result of the TCC Prong Calculation for the respective type of Offering as set forth in Table 2 to this paragraph (b)(1). For Mixed Service Bundles, the all-in royalty shall be the result of the TCC Prong Calculation as set forth in Table 2.

TABLE 1 TO PARAGRAPH (b)(1)

Royalty year:	2023	2024	2025	2026	2027
Percent of Service Provider Revenue	15.1	15.2	15.25	15.3	15.35

TABLE 2 TO PARAGRAPH (b)(1)

Type of offering	TCC prong calculation
Standalone Non-Portable Subscription Offering—Streaming Only	The lesser of (i) 26.2% of TCC for the Accounting Period or (ii) the aggregate amount of 60 cents per subscriber for the Accounting Period.
Standalone Non-Portable Subscription Offering—Mixed	The lesser of (i) 26.2% of TCC for the Accounting Period or (ii) the aggregate amount of 60 cents per subscriber for the Accounting Period.
Standalone Portable Subscription Offering	The lesser of (i) 26.2% of TCC for the Accounting Period or (ii) the aggregate amount of $1.10 per subscriber for the Accounting Period.
Free nonsubscription/ad-supported services free of any charge to the End User.	26.2% of TCC for the Accounting Period.
Bundled Subscription Offering	24.5% of TCC for the Accounting Period.
Mixed Service Bundle	26.2% of TCC for the Accounting Period.
Purchased Content Locker Service	26.2% of TCC for the Accounting Period.
Standalone Limited Offering	26.2% of TCC for the Accounting Period.
Paid Locker Service	26.2% 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 Royalties 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, provided that if the Service Provider is not capable of tracking Play information, including because of bona fide limitations of the available technology for Offerings of that nature or of devices useable with the Offering, the 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, and

further provided that, if the Service Provider is also not capable of utilizing a manner consistent with a methodology used for making royalty payment allocations for the use of individual sound recordings, the Service Provider may use an alternative, good faith methodology that is reasonable, identifiable, and implemented consistently.

(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 paragraph (d) of this section.

(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 the Mechanical Licensing Collective by dividing the payable royalty pool determined in step 3 for the Offering by the total number of Plays of all musical works through the Offering during the Accounting Period (other than Plays subject to subpart D of this part) to yield a per-Play allocation, and multiplying that result by the number of Plays of each musical work (other than Plays subject to subpart D of this part) through the Offering during the Accounting Period. For purposes of determining the per-work royalty allocation in all calculations under step 4 in this paragraph (b)(4) only (*i.e.,* after the payable royalty pool has been determined), for sound recordings of musical works with a playing time of over 5 minutes, each Play shall be counted as provided in paragraph (c) of this section. Notwithstanding the foregoing, if the Service 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—EachPlay = 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) *Royalty floors for specific types of Offerings.* The following royalty floors for use in step 3 in paragraph (b)(3) of this section shall apply to the respective types of Offerings:

(1) *Standalone non-portable Subscription Offerings—streaming only.* Except as provided in paragraphs (d)(4) and (6) of this section with respect to Standalone Limited Offerings, 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 Eligible Interactive Streams are originally transmitted while the device has a live network connection, the royalty floor for use in step 3 in paragraph (b)(3) of this section is the aggregate amount of 18 cents per subscriber per Accounting Period.

(2) *Standalone non-portable Subscription Offerings—mixed.* Except as provided in paragraphs (d)(4) and (6) of this section with respect to Standalone Limited Offerings, 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 Eligible Interactive Streams or Eligible Limited Downloads are originally transmitted, the royalty floor for use in step 3 in paragraph (b)(3) of this section is the aggregate amount of 36 cents per subscriber per Accounting Period.

(3) *Standalone portable Subscription Offerings.* Except as provided in paragraphs (d)(4) and (6) of this section with respect to Standalone Limited Offerings, 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 for use in step 3 in paragraph (b)(3) of this section is the aggregate amount of 60 cents per subscriber per Accounting Period.

(4) *Bundled Subscription Offerings.* In the case of a Bundled Subscription Offering, the royalty floor for use in step 3 in paragraph (b)(3) of this section is the aggregate amount of 33 cents per Accounting Period for each Active Subscriber. Notwithstanding the foregoing, solely where the Licensed Activity provided as part of a Bundled Subscription Offering would qualify as a Standalone Limited Offering if offered on a standalone basis, the royalty floor for use in step 3 in paragraph (b)(3) of this section is the aggregate amount of 25 cents per Accounting Period for each Active Subscriber.

(5) *Mixed Service Bundles.* In the case of a Mixed Service Bundle, the royalty floor for use in step 3 in paragraph (b)(3) of this section is the aggregate amount of 25 cents per Accounting Period for each Active Subscriber.

(6) *Other Offerings.* A Standalone Limited Offering, a Paid Locker Service, a Purchased Content Locker Service, and a free nonsubscription/ad-supported service free of any charge to the End User shall not be subject to a royalty floor in step 3 in paragraph (b)(3) of this section.

(e) *Computation of per-subscriber rates and royalty floors.* For purposes of this section, to determine the per-subscriber rates in step 1 in paragraph (b)(1) of this section and the royalty floors in step 3 in paragraph (b)(3) of this section, as applicable to any particular Offering, the total number of subscribers for the Accounting Period shall be calculated by taking all End Users who were subscribers for a complete Accounting Period, prorating in the case of End Users who were subscribers for only part of an Accounting Period (such proration may take into account the subscriber's billing period), 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, subscribers shall be determined with respect to Active Subscribers. The product of the total number of subscribers 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 components of the royalty calculation for the Accounting Period. A Family Plan subscription shall be treated as 1.75 subscribers per Accounting Period, prorated in the case of a Family Plan subscription in effect for only part of an Accounting Period. A Student Plan subscription shall be treated as 0.5

subscribers per Accounting Period, prorated in the case of a Student Plan subscription in effect for only part of an Accounting Period. A Bundled Subscription Offering containing a Family Plan with one or more Active Subscriber(s) shall be treated as having 1.75 Active Subscribers. A Bundled Subscription Offering containing a Student Plan with an Active Subscriber shall be treated as having 0.5 Active Subscribers. For the purposes of calculating per-subscriber rates and royalty floors under this section, Artificial Accounts shall not be counted as subscribers, Active Subscribers, or End Users.

■ 4. Revise subpart D to read as follows:

Subpart D—Promotional Offerings, Free Trial Offerings and Certain Purchased Content Locker Services

Sec.
385.30 Scope.
385.31 Royalty rates.

§ 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, 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.

David P. Shaw,

Chief Copyright Royalty Judge.

David R. Strickler,

Copyright Royalty Judge.

Steve Ruwe,

Copyright Royalty Judge.

Approved by:

Dr. Carla D. Hayden,

Librarian of Congress.

[FR Doc. 2022–28316 Filed 12–29–22; 8:45 am]

BILLING CODE 1410–72–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 39

RIN 2900–AR71

Statutory Increase in Operations and Maintenance Grant Funding

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its regulations that govern Federal grants to establish, expand, improve, or operate and maintain veterans' cemeteries. This final rule implements new statutory amendments to increase the maximum amount of grants to States and Tribal Organizations to operate and maintain veterans' cemeteries as authorized by section 2206 of the ''Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020'' (the Act). Effective on January 5, 2021, the maximum amount of operation and maintenance grants increased from $5 million to $10 million. This final rule implements that statutory change. Additionally, VA is revising the date by which the list of approved pre-applications is prioritized for fiscal year funding from August 15 to October 1 each year.

DATES: This rule is effective December 30, 2022.

FOR FURTHER INFORMATION CONTACT: George Eisenbach, Director of Veterans Cemetery Grants Program, National Cemetery Administration (41E), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420. Telephone: (202) 632–7369. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION: This final rule amends 38 CFR part 39 to conform with statutory amendments made by section 2206 of Public Law 116–315, the ''Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020'' (the Act). The Act amended Section 2408(f)(2) of title 38, United States Code (U.S.C.) to increase the maximum amount of grants VA could award for operating and maintaining Veterans' cemeteries from $5 million to $10 million.

To implement this authority, VA is revising regulatory text to replace ''$5 million'' with ''$10 million'' every place it appears in 39 CFR 39.3 and 39.80. Specifically, VA is revising the information for Priority Group 4 operation and maintenance grants in existing 38 CFR 39.3(c) to update the reference to the maximum grant awards to be made in any fiscal year from $5 million to $10 million. Similarly, we are revising the grant award information in § 39.80(a)(2) and (b) to clarify that operations and maintenance grants for Priority Group 4 projects must not result in a payment of more than $10 million.

In § 39.3(d), VA is replacing ''By August 15 of each year'' with ''By October 1 of each year'' to align the date for finalizing the prioritization of preapplications to the beginning of the fiscal year in which the associated final grant applications will be eligible for award. The August 15 date is not required by statute, but instead was a self-imposed deadline for finalizing the priority listing of preapplications when the grant program was first established. Since then, the number of preapplications has grown, and VA needs the additional time to conduct the final prioritization. VA publishes this date in regulation to ensure transparency and awareness of the process within the interested grant community.

Preapplications are accepted and evaluated on a rolling basis; however, only those preapplications that were received on or before July 1 of the current fiscal year are eligible for consideration in the prioritization process for the upcoming/next fiscal year. The preapplication process serves as a means to determine whether the proposed project conforms to statutory and regulatory requirements. If the preapplication is conforming, VA notifies the State or Tribal Organization that the preapplication has been found to meet the requirements, and the proposed project is included in the prioritization.

This change from August 15 to October 1 for finalizing the prioritization list expands VA's timeframe for conducting the prioritization of preapplications by approximately 45 calendar days. This does not affect a grant applicant's ability or opportunity to submit a final grant application for the fiscal year in which it is eligible for award and does not affect timeframes for awarding grants. Applicants may begin preparing final grant applications at any time and may submit the final application at any time. The October 1 date is merely the announcement of the priority of proposed projects based on preapplications and reflects the order in which those projects will be awarded and funded. Additionally, publishing this date in regulation is primarily informational for grant applicants and is not related to any subsequent deadlines that would affect applicants. VA works with grant applicants throughout the