

## Proposed Amendments to the Regulations

Accordingly, 26 CFR part 300 is proposed to be amended as follows:

### PART 300—USER FEES

■ **Paragraph 1.** The authority citation for part 300 continues to read as follows:

**Authority:** 31 U.S.C. 9701.

#### § 300.0 [Amended]

■ **Par. 2.** Section 300.0 is amended by removing paragraph (b)(9) and redesignating paragraphs (b)(10) through (12) as paragraphs (b)(9) through (11).

■ **Par. 3.** Section 300.4 is amended by revising paragraphs (b) and (d) to read as follows:

#### § 300.4 Enrolled agent special enrollment examination fee.

\* \* \* \* \*

(b) *Fee.* The fee for taking the enrolled agent special enrollment examination is \$99 per part, which is the cost to the government for overseeing the development and administration of the examination and is in addition to the fees charged by the administrator of the examination.

\* \* \* \* \*

(d) *Applicability date.* This section applies to registrations for the enrolled agent special enrollment examination that occur on or after [DATE 30 DAYS AFTER PUBLICATION OF THE FINAL RULE IN THE **Federal Register**].

#### § 300.9 [Removed]

■ **Par. 4.** Section 300.9 is removed.

#### §§ 300.10 through 300.12 [Redesignated as §§ 300.09 through 300.11]

■ **Par. 5.** Redesignate §§ 300.10 through 300.12 as §§ 300.09 through 300.11.

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

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## LIBRARY OF CONGRESS

### Copyright Office

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

[Docket No. 2021-6]

### Copyright Claims Board: Initiation of Proceedings and Related Procedures

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The U.S. Copyright Office is issuing a notice of proposed rulemaking to establish procedures governing the initial stages of a proceeding before the Copyright Claims Board. The proposed rule provides requirements regarding the filing of a claim, the Board's compliance review of the claim, service, issuance of notice of the claim, the respondent's opt-out election, responses, and counterclaims. The Office intends to initiate subsequent rulemakings regarding additional procedures.

**DATES:** Initial written comments must be received no later than 11:59 p.m. Eastern Time on October 29, 2021. Written reply comments must be received no later than 11:59 p.m. Eastern Time on November 15, 2021.

**ADDRESSES:** For reasons of government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions for submitting comments are available on the Copyright Office website at <http://copyright.gov/rulemaking/case-act-implementation/initiating-proceedings/>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below for special instructions.

#### FOR FURTHER INFORMATION CONTACT:

Kevin R. Amer, Acting General Counsel and Associate Register of Copyrights, by email at [kamer@copyright.gov](mailto:kamer@copyright.gov), or Whitney Levandusky, Supervisory Attorney-Advisor, by email at [wlev@copyright.gov](mailto:wlev@copyright.gov). Both can be reached by telephone at 202-707-8350.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On December 27, 2020, the President signed into law the Copyright Alternative in Small-Claims Enforcement (“CASE”) Act of 2020.<sup>1</sup> The CASE Act directs the Copyright Office to establish the Copyright Claims Board (“CCB” or “Board”), a voluntary, alternative forum to federal court for parties to seek resolution of copyright disputes that have a low economic value (“small copyright claims”).<sup>2</sup> The CCB’s

<sup>1</sup> Public Law 116-260, sec. 212, 134 Stat. 1182, 2176 (2020).

<sup>2</sup> See, e.g., H.R. Rep. No. 116-252, at 18-20 (2019); S. Rep. No. 116-105, at 7-8 (2019). Note, the CASE Act legislative history cited is for H.R. 2426 and S. 1273, the CASE Act of 2019, a bill nearly identical to the CASE Act of 2020. See H.R. 2426, 116th Cong. (2019); S. 1273, 116th Cong. (2019). In

creation does not displace or limit a party’s ability to bring small copyright claims in federal court, but rather provides a more accessible alternative forum to decide those claims.<sup>3</sup> The CCB has authority to hear copyright infringement claims, claims seeking a declaration of noninfringement, and misrepresentation claims under section 512(f) of title 17.<sup>4</sup> Participation in the CCB is voluntary for all parties,<sup>5</sup> and all determinations are non-precedential.<sup>6</sup> On March 26, 2021, the Copyright Office published a notification of inquiry (“NOI”) inviting public comment on various aspects of the CCB’s operations, which the Office noted would be established through a series of rulemakings.<sup>7</sup> Congress directed that the CCB begin operations by December 27, 2021, though the Register may for good cause extend that deadline by not more than 180 days.<sup>8</sup>

The CASE Act directs the Register of Copyrights to establish the regulations by which the CCB will conduct its proceedings, subject to the provisions of chapter 15 and relevant principles of law under title 17.<sup>9</sup> In this notice, the Office proposes procedures related to the filing of a claim, the CCB’s subsequent review of the claim to ensure that it complies with statutory requirements and the Office’s regulations (referred to in this rulemaking as the CCB’s “compliance review”), service, issuance of notice of the claim, the respondent’s opt-out election, responses, and counterclaims. The Office will issue proposed rules

developing the CASE Act, Congress drew on model legislation in the Office’s 2013 policy report, *Copyright Small Claims*, <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>. Congress also incorporated the Office’s report and supporting materials into the statute’s legislative history. H.R. Rep. No. 116-252, at 19; S. Rep. No. 116-105, at 2.

<sup>3</sup> H.R. Rep. No. 116-252, at 17; S. Rep. No. 116-105, at 2-3, 9.

<sup>4</sup> 17 U.S.C. 1504(c)(1)-(3). The CCB cannot issue injunctive relief, but can require that an infringing party cease or mitigate its infringing activity in the event such party agrees and the agreement is reflected in the proceeding’s record. *Id.* at 1504(e)(2)(A)(i), (e)(2)(B). This provision also applies to parties making knowing material misrepresentations under section 512(f). *Id.* at 1504(e)(2)(A)(ii).

<sup>5</sup> See *id.* at 1504(a); H.R. Rep. No. 116-252, at 17, 21; S. Rep. No. 116-105, at 3, 11.

<sup>6</sup> H.R. Rep. No. 116-252, at 21-22, 33; S. Rep. No. 116-105, at 14.

<sup>7</sup> 86 FR 16156 (Mar. 26, 2021). Comments received in response to the March 26, 2021 NOI are available at <https://www.regulations.gov/document/COLC-2021-0001-0001/comment>. References to these comments are by party name (abbreviated where appropriate), followed by “Initial NOI Comments” or “Reply NOI Comments,” as appropriate.

<sup>8</sup> Public Law 116-260, sec. 212(d), 134 Stat. at 2199.

<sup>9</sup> 17 U.S.C. 1506(a)(1).

related to later stages of a proceeding in subsequent rulemakings.

### A. Initiating a Claim

To initiate a proceeding before the CCB, a claimant shall, “subject to such additional requirements as may be prescribed in regulations established by the Register of Copyrights,” file a claim that “(1) includes a statement of material facts in support of the claim; (2) is certified under [17 U.S.C. 1506(y)(1)]; and (3) is accompanied by a filing fee in such amount as may be prescribed in regulations established by the Register of Copyrights.”<sup>10</sup> The legislative history states that the Office should establish a process that is “accessible especially for *pro se* parties and those with little prior formal exposure to copyright laws.”<sup>11</sup>

Parties provided comments on several matters relating to the contents of a claim. Commenters emphasized the need for plain language,<sup>12</sup> suggested that the forms should be available, at a minimum, in English and Spanish,<sup>13</sup> and encouraged the use of fillable forms.<sup>14</sup> The Office agrees with these suggestions, and intends to use plain-language fillable forms throughout various stages of CCB proceedings, including for the filing of a claim.

The Office proposes that to initiate a proceeding, a claimant must: First, complete a claim form provided by the CCB; second, complete an initial notice form, also provided by the CCB; and, finally, submit the completed forms and required filing fee through the Board’s electronic filing and document management system. A claimant who is

unable to use the electronic filing and document management system may initiate a proceeding by using printed forms and alternative submission instructions. In addition to the statutory requirements to submit the claim and filing fee to the CCB, the Office is proposing that the claimant be required to submit a completed initial notice form with the claim form. This proposal allows a Copyright Claims Attorney to review the initial notice and address any issues during compliance review, and issue the signed notice under Copyright Office seal upon approving the claim.<sup>15</sup>

The proposed rule sets forth the required information for the claim form. It generally requires the claimant to identify the parties, the claim asserted under section 1504(c), and the harms experienced as a result of the dispute subject to the proceeding. Then, the claimant must identify certain facts relevant to the claim and provide a statement describing the dispute in more detail. The claimant will be asked to be as detailed as possible, but, as contemplated by Congress, the CCB will “construe liberally” any information in the claim to satisfy regulatory requirements during claim review.<sup>16</sup>

The Office received one substantive comment arguing that the claim should require more than is required by notice pleading as set forth in the Federal Rules of Civil Procedure.<sup>17</sup> Such a heightened pleading standard, however, would go against congressional intent. The legislative history explains that “many of the terms and processes used in the [CASE] Act are drawn from preexisting, related state and federal statutory language, the Federal Rules of Civil Procedure, and established case law,” and emphasizes that the CCB is intended to be “an efficient, effective, and voluntary alternative” to litigation.<sup>18</sup> As a general rule, therefore, practice before the CCB should be less complex than practice in the federal courts, and certainly not more complex. Further, to the extent there are statements in the claim that clearly do not state facts upon which relief can be granted, the CCB anticipates that the compliance review process typically will resolve such issues. Finally, the claimant must certify that the information provided in the claim form

is “accura[te] and truthful[.]”<sup>19</sup> to the best of the certifying party’s knowledge.

The proposed rule also allows optional documentation to be attached to the claim form, including copies of the works involved. While some commenters suggested that additional documentation should be a requirement for filing a claim and serving notice,<sup>20</sup> the Office believes that requiring such information at the initial claim stage would discourage claimants from initiating a proceeding and would be more burdensome than the requirements for litigation in the federal courts. Documentary evidence will be a focus of the standard requests for production that the Office will propose in a future rulemaking addressing discovery.

The proposed rule does not address matters relating to the layout or presentation of questions on the form, as the Office seeks to preserve the flexibility to adjust those items as circumstances warrant. The Office intends to make proposed forms available in advance of the CCB’s commencement of operations.

### B. Review of the Claim by Officers and Attorneys

#### 1. Compliance Review

After the claimant files a claim, the claim “shall be reviewed by a Copyright Claims Attorney to ensure that the claim complies with [chapter 15] and applicable regulations.”<sup>21</sup> If the claimant is proceeding “*pro se*,” *i.e.*, they are not represented by an attorney, the claim and assertions are to be “construed liberally in favor of adjudicating applicable claims and defenses.”<sup>22</sup>

If the claim is found to comply with the statute and regulations, the CCB shall notify the claimant and provide instructions to proceed with service of the claim.<sup>23</sup> If the claim is found not to comply, the CCB is required to provide the claimant with a notice of deficiency and an opportunity to file an amended claim within 30 days after receiving the notice.<sup>24</sup> The amended claim is then reviewed, and the claimant is either notified of the sufficiency of the claim or directed to file an additional amended complaint in that 30-day period. This second amended complaint is reviewed a final time, with the CCB

<sup>10</sup> *Id.* at 1506(e).

<sup>11</sup> H.R. Rep. No. 116–252, at 17; *see also* S. Rep. No. 116–105, at 9–10.

<sup>12</sup> Sen. Dick Durbin, Sen. John Kennedy & Rep. Hakeem Jeffries Initial NOI Comments at 1 (stating that CCB forms should be “user-friendly, with simplified forms and guidance provided in such a way that parties will not feel compelled to hire an attorney to understand and assist them with the process”) (emphasis omitted); Am. Bar Ass’n Intell. Prop. L. Sec. (“ABA–IPL”) Reply NOI Comments at 2; Patreon Initial NOI Comments at 2.

<sup>13</sup> Am. Intell. Prop. L. Ass’n (“AIPLA”) Initial NOI Comments at 2; Copyright Alliance, Am. Photographic Artists, Am. Soc’y for Collective Rights Licensing, Am. Soc’y of Media Photographers, The Authors Guild, CreativeFuture, Digital Media Licensing Ass’n, Graphic Artists Guild, Indep. Book Pubs. Ass’n, Music Creators N. Am., Nat’l Music Council of the United States, Nat’l Press Photographers Ass’n, N. Am. Nature Photography Ass’n, Prof. Photographers of Am., Recording Academy, Screen Actors Guild–Am. Fed. of Television and Radio Artists, Soc’y of Composers & Lyricists, Songwriters Guild of Am. & Songwriters of N. Am. (“Copyright Alliance, et al.”) Initial NOI Comments at 10; Engine Initial NOI Comments at 3; Niskanen Center Initial NOI Comments at 2.

<sup>14</sup> Copyright Alliance, et al. Initial NOI Comments at 11; Coalition of Visual Artists Initial NOI Comments at 5–8; ABA–IPL Reply NOI Comments at 2.

<sup>15</sup> The Office has modeled the procedures governing issuance of the initial notice on those pertaining to issuance of a summons under Rule 4 of the Federal Rules of Civil Procedure. *See* H.R. Rep. No. 116–252 at 22.

<sup>16</sup> *Id.*

<sup>17</sup> Google Initial NOI Comments at 1 (referring to Federal Rule of Civil Procedure 12).

<sup>18</sup> H.R. Rep. No. 116–252, at 23.

<sup>19</sup> 17 U.S.C. 1506(y).

<sup>20</sup> *See, e.g.*, Ben Vient Initial NOI Comments at 2; Copyright Alliance, et al. Initial NOI Comments at 13; Univ. of Mich. Library Initial NOI Comments at 1.

<sup>21</sup> 17 U.S.C. 1506(f)(1).

<sup>22</sup> H.R. Rep. No. 116–252, at 22.

<sup>23</sup> 17 U.S.C. 1506(f)(1)(A).

<sup>24</sup> *Id.* at 1506(f)(1)(B).

either clearing the claim for service or, upon confirmation of noncompliance by a Copyright Claims Officer, dismissing the claim without prejudice. The CCB shall also dismiss without prejudice any proceeding in which the claimant fails to file an amended complaint within the 30-day window. Counterclaims are subject to the same compliance review.<sup>25</sup>

The statute describes the compliance review process in some detail. Here, the Office proposes a limited number of regulations to clarify the scope of review. The proposed rule provides that a Copyright Claims Attorney shall review a claim to determine whether the allegations “clearly do not state a claim upon which relief can be granted.” This standard echoes the standard set forth in the Federal Rules of Civil Procedure,<sup>26</sup> but is meant to be less exacting than that governing a motion to dismiss. The Office believes that this approach is in the best interest of all parties: The claimant has the opportunity to state its case; the respondent has a better understanding of the allegations involved in the claim and will be in a stronger position to consider participation; and the CCB will avoid the administrative burden associated with hearing overbroad or clearly implausible claims. The Office is also proposing to incorporate an examination standard from the *Compendium of U.S. Copyright Office Practices*, which stipulates that while the Office does not conduct factual investigations, it may take administrative notice of facts generally known as established and may use that knowledge during compliance review.<sup>27</sup> Finally, as suggested by one commenter,<sup>28</sup> the proposed rule clarifies that the CCB’s clearance of a claim for notice is not an endorsement of the facts and statements asserted in the claim.

## 2. Dismissal for Unsuitability

Under the statute, the CCB must dismiss a claim or counterclaim without prejudice if it “concludes that the claim or counterclaim is unsuitable for determination . . . including on account of any of the following . . . [t]he failure to join a necessary party; . . . [t]he lack of an essential witness, evidence, or expert testimony; [or] [t]he determination of a relevant issue of law or fact that could exceed either the number of proceedings the [CCB] could

reasonably administer or the subject matter competence of the [CCB].”<sup>29</sup> The issue of unsuitability may be taken up by the Board at any time during the proceedings, whether during compliance review or thereafter.<sup>30</sup>

The Office did receive suggestions as to particular claims that should be considered unsuitable.<sup>31</sup> At this time, however, the proposed regulation addresses only the procedural matter of how the issue of unsuitability will be addressed. The Office proposes that the issue of unsuitability may be raised by the Board or by any party to the proceeding. Upon consideration of the matter, the Board may issue an order dismissing the claim without prejudice, after which the claimant has an opportunity to request reconsideration and the respondent has an opportunity to respond. In proposing this approach, the Office seeks to strike an appropriate balance between maximizing parties’ opportunity to be heard and preserving the Board’s authority to dismiss claims that it determines to be unsuitable for determination.

## C. Service of Initial Notice

Once the claimant receives notification that the claim is compliant, the claimant must, not later than ninety days from receiving notification, file with the CCB proof of service on the respondent in order to proceed with the claim.<sup>32</sup> To effectuate service, the claimant “shall cause notice of the proceeding and a copy of the claim to be served on the respondent”<sup>33</sup> as prescribed by the statute and regulations.

### 1. Content of Initial Notice

To ensure that respondents are provided with proper notice of the claims asserted against them, the statute details elements that must be included in the initial notice accompanying the claim. In addition, the Office is required to create a prescribed initial notice form and is vested with regulatory authority to specify further requirements to be included in the notice.

At a minimum, the initial notice must describe the CCB and the nature of a CCB proceeding, so that *pro se* parties understand the process.<sup>34</sup> The initial notice must include “a clear and prominent explanation of the respondent’s right to opt out of the proceeding and the rights the

respondent waives if [they] do [ ] not.”<sup>35</sup> In particular, it must include a prominent statement that by not opting out of a CCB proceeding within sixty days of receiving the notice, the respondent “loses the opportunity to have the dispute decided by a court created under article III of the Constitution of the United States” and “waives the right to a jury trial regarding the dispute.”<sup>36</sup>

In the NOI, the Office requested comment on “additional regulatory requirements to help ensure that the initial notice conveys a clear explanation of the CCB, deadlines associated with the pending claim, the ability and method for the respondent to opt out of the proceeding, and the benefits and consequences of participating or declining to do so.”<sup>37</sup> The Office provided examples of various approaches by federal and state courts,<sup>38</sup> and invited parties to provide specific language to be included on the form or sample forms.<sup>39</sup> The Office asked whether the notice should include a docket number and links to the CCB’s website for relevant public information, and encouraged parties to suggest additional educational information “while being mindful that the notice must remain easy to understand and avoid overwhelming respondents.”<sup>40</sup>

In response, commenters suggested a number of additional features to be included. Some proposed that the notice include not only information such as the respondent’s name, phone number, address, email address, and other contact information, but also information about the claim itself and background information about the CCB.<sup>41</sup> Others suggested that the notice

<sup>25</sup> H.R. Rep. No. 116–252, at 22; *see also* 17 U.S.C. 1506(g)(1).

<sup>26</sup> 17 U.S.C. 1506(g)(1).

<sup>27</sup> 86 FR at 16159.

<sup>28</sup> Admin. Off. of the U.S. Cts., Summons in a Civil Action (June 2012), <https://www.uscourts.gov/sites/default/files/ao440.pdf> (form AO 440); Clerk for the Circuit Court of Cook County, Summons (Dec. 2020), [http://www.cookcountyclerkofcourt.org/Forms/pdf\\_files/CCG0001.pdf](http://www.cookcountyclerkofcourt.org/Forms/pdf_files/CCG0001.pdf) (form CCG 0001 A) (as of Sept. 14, 2021, Cook County Clerk of Court website was inaccessible); New Jersey Courts, Small Claims Summons and Return of Service (Sept. 2018), [https://njcourts.gov/forms/10534\\_appendix\\_xi\\_a2.pdf](https://njcourts.gov/forms/10534_appendix_xi_a2.pdf).

<sup>29</sup> 86 FR at 16159.

<sup>30</sup> *Id.*

<sup>31</sup> Copyright Alliance, et al. Initial NOI Comments at 11. However, the same comment observed that the notice “should provide only the essential information about the process because providing too much information could overwhelm the Respondent.” *Id.* at 12. Another commenter suggested that the notice include the “legal name of the Plaintiff, a physical address, and a telephone number by which a live person can be called by the

Continued

<sup>25</sup> *Id.* at 1506(f)(2).

<sup>26</sup> Fed. R. Civ. P. 12(b)(6).

<sup>27</sup> U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices*, Third Edition sec. 602.4(C) (3d ed. 2021).

<sup>28</sup> Elec. Frontier Found. (“EFF”) Initial NOI Comments at 2.

<sup>29</sup> 17 U.S.C. 1506(f)(3).

<sup>30</sup> *Id.*

<sup>31</sup> *See, e.g.*, EFF Initial NOI Comments at 3.

<sup>32</sup> 17 U.S.C. 1506(g).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1506(g)(1).

include explanations of copyright law,<sup>42</sup> fair use,<sup>43</sup> and other defenses.<sup>44</sup> Multiple commenters argued that the notice should not include elements of infringement or defenses, but should simply state that there are defenses available and include a link to the Copyright Office web page with information about fair use and other defenses that would be typically raised.<sup>45</sup> Many agreed that the notice should address the pros and cons of opting out, with several noting that the Board should do so clearly, concisely, and in a disinterested way.<sup>46</sup>

The Office appreciates parties' comments on this issue and proposes that the initial notice to the respondent be provided in a form that includes the information required by the statute as well as additional basic information about the claim and the parties. The Office envisions a notice that, as is the case with summonses issued by federal courts, is clear and concise and is easy to understand. The Office also envisions that the notice will bear the Office's seal, the CCB's logo, and other indicia to identify it as an official document issued by the federal government.

The Office received a number of suggestions related to substantive claim information that should be attached to the notice, including evidence of infringement<sup>47</sup> and a picture of the allegedly infringing work.<sup>48</sup> The Office believes that for efficiency and clarity, substantive information should be included in or attached to the claim, which sets forth the facts at issue, rather than the notice, which sets forth the procedural implications of the claim. The initial notice is similar to a summons, and with a few exceptions

Respondent during normal business hours to discuss the claim." Ryan Fountain Initial NOI Comments at 1.

<sup>42</sup> Anthony Davis Jr. & Katherine Luce Initial NOI Comments at 2.

<sup>43</sup> Patreon Initial NOI Comments at 3.

<sup>44</sup> Copyright Alliance Initial NOI Comments at 11.

<sup>45</sup> See, e.g., AIPLA Initial NOI Comments at 2; Copyright Alliance, et al. Initial NOI Comments at 18.

<sup>46</sup> See, e.g., Public Knowledge, Re:Create, Ctr. for Democracy & Tech., R St. Inst., Org. for Transformative Works ("Public Knowledge, et al.") Initial NOI Comments at 14 ("The notice language needs to describe the opt-out process clearly, concisely, and in a manner that is comprehensible to a lay audience."); Google Initial NOI Comments at 1 ("To the extent that the Office intends to give respondents information on the possible consequences of opting out, it will be important to communicate the associated uncertainty in a clear and disinterested way."); Authors Alliance Initial NOI Comments at 3 (asserting among other things that "the notice should also describe situations for which the tribunal may not be a suitable venue for dispute resolution").

<sup>47</sup> Ben Vient Initial NOI Comments at 2.

<sup>48</sup> Computer & Comms's Indus. Assoc. & internet Assoc. ("CCIA & IA") Initial NOI Comments at 3.

(such as the caption, docket number, and names and addresses of the parties), every notice issued by the Board will be identical. And, for the reasons stated above, the Office has included documentary evidence as an optional attachment to the claim rather than a requirement.

The proposed rule prescribes that claimants use an initial notice form provided by the Board, with most of the content prepared by the Board for use in all initial notices. Claimants will fill in certain information, such as the names, addresses, and contact information for the claimant and the respondent. The rule does not require that the claimant provide a telephone number or email address in the initial notice. Although the Office recognizes the benefits of providing means through which the parties may communicate to discuss the merits of a claim and to discuss settlement, the Office also recognizes that such information might implicate privacy or other interests. The Office invites comments on this proposed approach.

In addition to basic information about the parties, the notice form would require the claimant to identify the nature of the claims being asserted—*i.e.*, whether the claim is for copyright infringement, a declaration of noninfringement, or misrepresentation in connection with a notification or a counter notification served on an online service provider under section 512 of title 17.

The notice would also include the information required by 17 U.S.C. 1506, including a brief description of the CCB and its proceedings, a statement advising the respondent of the right to opt out of the proceeding, how to opt out, and the consequences of doing so (including the statements required by 17 U.S.C. 1506(g)(1)(A) and (B)). It is the Office's intention that the latter statement be concise, clear, and objective.

The notice will also direct the respondent (as well as the claimant) to further information that will be made available on the Office or CCB websites pertaining to copyright law, including exclusive rights, infringement, and exceptions and limitations, as well as further information on CCB proceedings. Information will be provided on how to access the Board's electronic filing and document management system, which will also give respondents a means to confirm that the notice relates to a genuine legal proceeding.

## 2. Service of Process and Designated Agents

Under the statute, any individual who is not a party to the proceeding and is older than 18 years of age may effectuate service,<sup>49</sup> and both service and waiver of service may only occur within the United States.<sup>50</sup> Choosing how to effectuate service, however, depends on the nature of the respondent. The statute includes separate rules of service for individuals and corporations, partnerships, and unincorporated associations, including those organizations using designated service agents.<sup>51</sup> No claims can be brought "by or against a Federal or State governmental entity."<sup>52</sup>

Service on an individual<sup>53</sup> may be effectuated by using procedures analogous to those in the Federal Rules of Civil Procedure.<sup>54</sup> Service can be accomplished by "complying with State law for serving a summons in an action brought in courts of general jurisdiction in the State where service is made."<sup>55</sup> Service can also be accomplished by "leaving a copy of the notice and claim at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there."<sup>56</sup> Finally, service on an individual can be accomplished by "delivering a copy of the notice and claim to an agent designated by the respondent to receive service of process or, if not so designated, an agent authorized by appointment or by law to receive service of process."<sup>57</sup>

Like individuals, corporations, partnerships, or unincorporated associations can be served "by complying with State law for serving a summons in an action brought in courts of general jurisdiction in the State where service is made."<sup>58</sup> These organizations can also be served by delivering the notice and claim to "an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process in an action brought in courts of general jurisdiction in the State

<sup>49</sup> 17 U.S.C. 1506(g)(3).

<sup>50</sup> *Id.* at 1506(g)(9).

<sup>51</sup> *Id.* at 1506(g)(4)–(5).

<sup>52</sup> *Id.* at 1504(d)(3).

<sup>53</sup> For a minor or an incompetent individual, service can be effectuated only by "complying with State law for serving a summons or like process on such an individual in an action brought in the courts of general jurisdiction of the State where service is made." *Id.* at 1506(g)(8); see also *id.* at 1506(g)(4).

<sup>54</sup> See Fed. R. Civ. P. 4(e).

<sup>55</sup> 17 U.S.C. 1506(g)(4)(A).

<sup>56</sup> *Id.* at 1506(g)(4)(C).

<sup>57</sup> *Id.* at 1506(g)(4)(D).

<sup>58</sup> *Id.* at 1506(g)(5)(A)(i).

where service is made.”<sup>59</sup> Under the statute, such corporations, partnerships, or unincorporated associations may elect to receive CCB claim notices via a designated service agent. The Office is required to establish regulations governing this designated service agent option and to “maintain a current directory of service agents that is available to the public for inspection, including through the internet.”<sup>60</sup> The Office may charge these organizations a fee to maintain the designated service agent directory.<sup>61</sup>

In the NOI, the Office requested comments specifically related to the designated service agent directory. The Office encouraged commenting parties to review the Office’s designated agent directory for online service providers, created pursuant to the Digital Millennium Copyright Act (“DMCA”), and to discuss to what extent the Office should use the DMCA database as a model.<sup>62</sup> The Office also invited comments on how the system should indicate corporate parent-subsidiary relationships, and on fees. In addition, the Office noted its general authority to establish additional regulations governing service throughout a CCB proceeding,<sup>63</sup> and requested comment on any issues that should be considered related to that authority.

The Office received a number of comments regarding the ability of a corporate parent to act as a designated agent on behalf of a subsidiary. The majority of commenters who addressed the issue encouraged the designation of one agent for the corporate parent and all subsidiary firms.<sup>64</sup> Commenters also recommended that service agents be able to choose their method of service,<sup>65</sup> and some argued that after an eligible entity has designated a service agent, the only effective means of service that should be allowed is through the identified service agent in the database.<sup>66</sup> The Office appreciates these comments and finds them to be generally consistent with the statutory text. The proposed rule allows a

submitter to provide the same designated agent information for multiple companies, partnerships, or unincorporated associations, but a separate submission would be required for each entity. A designated agent submission is required to include identifying information for the business, including contact information, principal place of business, and for corporations, the state of incorporation, any associated state file or registration number, and all other states in which the corporation is registered to do business. Organizations may also list up to five alternate names under which they are doing business, *i.e.*, trade names. The names provided will be used for indexing the designation, and the business contact information will not be on public view.

The submission must also include contact information for the service agent and the designating entity’s consent to service by mail. An entity submitting a designation may also elect to accept service by email in addition to mail. In such cases, the email address of the designated service agent will be included in the public directory.

Although some parties suggested that the Office should require periodic renewal of the designated agent listing,<sup>67</sup> the Office has not included such a requirement in the proposed rule. It is true that, in the context of the designated agent databases for online service providers under the DMCA, the Office implemented a renewal requirement to “encourage effective compliance with the requirements of [17 U.S.C.] 512(c)(2).”<sup>68</sup> That provision reflects the statutory requirement that a service provider must designate an agent with the Copyright Office to be eligible for statutory safe harbor provisions.<sup>69</sup> Here, designating a service agent is not a statutory requirement for service on a corporation, partnership, or unincorporated association, but an administrative convenience.<sup>70</sup> In addition, the claimant may effectuate service by alternative means. While the Office accepts the possibility that corporations, partnerships, or unincorporated associations may not keep current their designations, service

on the agent who is designated in the directory shall be valid unless the designating entity cancels or amends the designation. The Office believes that this should offer sufficient incentive to parties to keep their designations current.

Finally, the proposed rule provides that if the CCB determines that a designation does not qualify, or if it has reason to believe the submitter does not have authority to make the designation, CCB staff will notify the submitter that the designation will be removed. The submitter will then have ten days to respond. If the submitter does not respond, or the CCB determines that the response is insufficient, the entry will be removed from the directory.

The proposed rule also provides requirements for service of materials filed after the initial notice and claim. The proposed rule has a general requirement for service through the CCB’s electronic filing management system or by other means of electronic service, and establishes such service methods as the default. Unrepresented parties, however, may be excused from electronic service and instead receive service by mail or in-person delivery. The same structure is proposed for filing documents beyond the initial notice and claim: parties who are excused from using the electronic filing and document management system may file documents by email, mail, hand delivery, or courier delivery.

#### D. Waiver of Service

As an alternative to serving notice of the claim on a respondent, the statute allows the claimant to request waiver of service. The claimant must send the request for waiver of service to the respondent “by first class mail or by other reasonable means,” and return of the acceptance of waiver must be at no cost to the respondent.<sup>71</sup> The claimant’s waiver request must be in writing, include a notice of the proceeding and a copy of the claim, state the date the request was sent, and provide the respondent thirty days to respond.<sup>72</sup> The personal service waiver, if accepted by respondent, does not constitute a waiver of the respondent’s right to opt out of the proceeding.<sup>73</sup>

The Office received one comment specifically addressing waiver, expressing concern regarding the use of “intimidating or misleading language.”<sup>74</sup> The Office intends to

<sup>59</sup> *Id.* at 1506(g)(5)(A)(ii). If the service agent is “one authorized by statute and the statute so requires,” the claimant must also mail a copy of the notice and claim to the respondent. *Id.*

<sup>60</sup> *Id.* at 1506(g)(5)(B).

<sup>61</sup> *Id.*

<sup>62</sup> 86 FR at 16160.

<sup>63</sup> 17 U.S.C. 1506(j).

<sup>64</sup> Amazon Initial NOI Comments at 3; CGIA & IA Initial NOI Comments at 3; Google Initial NOI Comments at 1.

<sup>65</sup> Amazon Initial NOI Comments at 3; Google Initial NOI Comments at 1–2.

<sup>66</sup> Motion Picture Ass’n, Recording Indus. Ass’n of Am. & Software and Info. Ass’n of Am. (“MPA, RIAA & SIA”) Initial NOI Comments at 5; Verizon Initial NOI Comments at 4.

<sup>67</sup> Copyright Alliance, et al. Initial NOI Comments at 15–16.

<sup>68</sup> 81 FR 75695, 75698 (Nov. 1, 2016).

<sup>69</sup> 17 U.S.C. 512(c)(2) (“The limitations on liability established in this subsection apply . . . only if the service provider has designated an agent to receive notification of claimed infringement . . . and by providing [the following information] to the Copyright Office . . .”).

<sup>70</sup> *Id.* at 1506(g)(5)(B) (“A corporation, partnership, or unincorporated association . . . may elect to designate a service agent to receive notice of a claim against it.”).

<sup>71</sup> *Id.* at 1506(g)(6).

<sup>72</sup> *Id.* at 1506(g)(6)(A)–(B).

<sup>73</sup> *Id.* at 1506(g)(7)(A).

<sup>74</sup> Engine Initial NOI Comments at 4.

require a standard form provided by the CCB for requesting waiver of service. The form will provide the basic information regarding the proceeding, clarify that the form is not a formal service of summons and does not waive the respondent's right to opt out of the proceeding, and describe the effect of agreeing or declining to waive service. The claimant can request waiver by mailing the request, claim, initial notice, and envelope with postage prepaid to the respondent. The respondent will have thirty days from the date the request is sent to waive service, and may return the signed waiver form by mail or by email, if the claimant includes an email address in the request. If the respondent accepts waiver of service, and further does not opt out, respondent will have an additional thirty days to file a response beyond the time for response typically set by the CCB. If the respondent does not waive service, the claimant must complete service with sufficient time to file the proof of service with the CCB.

#### E. Second Notice

In addition to the notice served by the claimant on the respondent, the CCB is required to issue a second notice to the respondent if the respondent has not already opted out or filed a response. The statute requires that the Register promulgate regulations "providing for a written notification to be sent by, or on behalf of, the Copyright Claims Board to notify the respondent of a pending proceeding."<sup>75</sup> Similar to the claimant's initial notice, this notice must "include information concerning the respondent's right to opt out of the proceeding, the consequences of opting out and not opting out, and a prominent statement that, by not opting out within 60 days after the date of service . . . the respondent loses the opportunity to have the dispute decided by a court created under article III of the Constitution of the United States" and "waives the right to a jury trial regarding the dispute."<sup>76</sup> This second notice supplements the initial notice served by the claimant and is intended to facilitate understanding of the official nature of the documents and proceeding, encourage a respondent to review the materials, and overall, increase the likelihood that a respondent engages with the asserted claim and knowingly elects to proceed or opt out of the CCB proceeding.

In the NOI, the Office sought comment on the second notice, including "its content and how to

ensure that recipients understand that it is an official Federal Government notification."<sup>77</sup> The Office also requested input on the method of service—specifically, whether the second notice should be sent "by or on behalf of" the CCB, whether the second notice should be posted to the online filing system or delivered by mail or email, and how delivery should be documented.<sup>78</sup>

Commenters suggested that the second notice should be substantially the same as the first, with a prominent warning that this is the second and final notice with an explanation of the impact of not opting out.<sup>79</sup> Parties also recommended that the CCB issue the second notice via U.S. mail.<sup>80</sup> The Office agrees with these comments and proposes that the second notice closely mirror the initial notice, specifically with regard to the description of the CCB, the consequences of opting out, the process of opting out, and accessing legal assistance. The Office proposes to issue the second notice by mail, but also to deliver a second copy via email to the designated service agent of a respondent that is a corporation, partnership, or unincorporated association that has indicated in the designated service agent directory that it will accept email service.

The Office has also proposed that the second notice be issued no later than twenty days after the claimant files proof of service or waiver of service. The CCB will not issue a second notice if the respondent has opted out. The Office anticipates that the respondent will have at least thirty days between the receipt of the second notice and the end of the opt-out period, given that the claimant has seven days to file proof after effectuating service or obtaining waiver, and the Office will issue the second notice no more than twenty days after that. Delays in the claimant's filing of proof of service or waiver may constitute good cause for extending the opt-out or response period.

#### F. Opt-Out Procedures

Once the respondent receives notice of the claim, the respondent has sixty days to opt out of the proceeding before the CCB, although the CCB can extend that period in the interests of justice, such as for a delay in the receipt of a second notice due to a claimant's failure to file proof of service in a timely

manner.<sup>81</sup> If a respondent does not timely opt out, the proceeding will become active and the respondent will be bound by the CCB's determination.<sup>82</sup> If the respondent does opt out, the proceeding will be dismissed without prejudice.<sup>83</sup>

The Office solicited general input regarding opt-out, in particular, the form and process of a written opt-out notice.<sup>84</sup> Commenters were consistent that the opt-out process should be quick and easy to exercise, and that respondents should be provided both online and mail options for opting out.<sup>85</sup> Parties proposed different approaches for the online opt-out process. Suggestions included the creation of a QR code,<sup>86</sup> a button on the CCB home page,<sup>87</sup> and providing a verification key code for security.<sup>88</sup> The Office appreciates parties' comments on this issue and proposes an opt-out notification form that asks for the docket number of the claim, identifying information regarding the respondent, and a signed affirmation that the person affirming is the respondent identified in the claim (or a representative of that respondent) and that the respondent will not be participating in the CCB proceeding. This notification can be submitted either online using a form on the CCB's website or through the mail, or via hand delivery or commercial courier. The Office has included the suggestion that an online opt-out be accompanied by a verification code provided in the initial notice and second notices, and will continue to consider the remaining suggestions regarding online opt-out as it develops its form, website, and online filing system. The CCB will include in the initial and second notice instructions for completing opt-out election online, as well as by using a paper opt-out form.

The proposed rule clarifies various issues related to the scope and effect of opting out. In particular, the rule requires that each respondent to a proceeding independently opt out, and that an opt-out will be effective against duplicate claims but not unrelated

<sup>81</sup> 17 U.S.C. 1506(aa)(1), 1507(b)(2)(A).

<sup>82</sup> *Id.* at 1506(i).

<sup>83</sup> *Id.*

<sup>84</sup> 86 FR at 16161.

<sup>85</sup> *See, e.g.*, Copyright Alliance, et al. Initial NOI Comments at 17–18; EFF Initial NOI Comments at 2–3; Engine Initial NOI Comments at 5–6; Internet Archive Initial NOI Comments at 1–2; MPA, RIAA & SIIA Initial NOI Comments at 8; Public Knowledge, et al. Initial NOI Comments at 14.

<sup>86</sup> Engine Initial NOI Comments at 5; Niskanen Ctr. Initial NOI Comments at 4.

<sup>87</sup> Public Knowledge, et al. Initial NOI Comments at 13–14.

<sup>88</sup> Copyright Alliance, et al. Initial NOI Comments at 12.

<sup>77</sup> 86 FR at 16159.

<sup>78</sup> 17 U.S.C. 1506(h).

<sup>79</sup> Authors Alliance Initial NOI Comments at 4; Niskanen Ctr. Initial NOI Comments at 4.

<sup>80</sup> AIPLA Initial NOI Comments at 3. Copyright Alliance, et al. Initial NOI Comments at 14.

<sup>75</sup> 17 U.S.C. 1506(h).

<sup>76</sup> *Id.* at 1506(h)(1).

claims. The Office recognized that “Congress did not establish a blanket opt-out for any entities other than libraries and archives,”<sup>89</sup> and yet the Office also recognizes that the result of an opt-out is a dismissal without prejudice, leaving a claimant open to file substantially the same claim again. The proposed rule is crafted in light of the Office’s inability to impose a blanket opt-out, but still seeks to avoid subjecting a respondent to refiled claims.

Not included in this proposed rule is a specific mechanism for a respondent to revoke an opt-out for a particular claim. The Office recognizes that there may be situations where respondents may wish to change their minds and opt in to a proceeding that was previously filed with the CCB and dismissed due to a prior opt-out election.<sup>90</sup> The Office welcomes comment on whether the regulatory text should include a provision permitting a respondent to give the CCB notice of an intention to participate after an initial opt-out, and, if so, any suggestions for regulatory language to govern this process.

The Office also solicited comments regarding whether it should create a publicly accessible list of entities or individuals who have opted out of particular proceedings.<sup>91</sup> At present, given the limited time before the anticipated commencement of CCB operations and the need to focus on establishing the core proceedings of the CCB, the proposed rule does not provide for a public list of prior opt outs. The Office may, however, revisit this issue in the future.

### G. Response

A respondent who decides not to opt out of the proceeding must file a response to the claim with the CCB. The response may include “legal or equitable defense[s] under this title or otherwise available under law”<sup>92</sup> in response to the claim. A respondent who timely waives service has an additional thirty days to file a response in addition to any deadlines set forth by the CCB.<sup>93</sup> The statute is otherwise silent as to the timing of a response filing, and a proceeding is considered active prior to the filing of any

response.<sup>94</sup> Given that a scheduling order must be sent out “upon confirmation that a proceeding has become an active proceeding”<sup>95</sup>—*i.e.*, upon the filing of proof of service and the passing of the opt-out window—the Office understands this requirement to mean that any response timeline is to be set forth after the proceeding becomes active and should be included in the scheduling order. Accordingly, the scheduling order issued by the CCB “upon confirmation that a proceeding has become an active proceeding” will include a thirty-day deadline from the date of the scheduling order for filing the response. If the respondent has waived service, thereby availing itself of an extra thirty days to respond to the claim, the order will require that the response be filed within sixty days of the date of the scheduling order.

The Office proposes that to respond to a claim, the respondent must complete the appropriate form provided by the CCB and submit the completed form through the Board’s electronic filing and document management system. If a respondent is unable to use the electronic filing and document management system, it may submit a response by following alternative submission instructions provided in the form or by the CCB. In addition to identifying information and certification, the form will ask for short statements from the respondent disputing the facts of the claim and describing the dispute or the reasons claimant’s claim has no merit from its point of view. As discussed below, the respondent will be able to raise counterclaims. For infringement claims, the form will allow the respondent to identify relevant defenses. In contrast to the Federal Rules of Civil Procedure,<sup>96</sup> however, the proposed regulation does not provide that a defense that is not asserted in a response is waived by the respondent. At this early stage of the proceeding, such a rigid application of pleading requirements would impose an unjustifiable burden on respondents, especially those who are representing themselves. A subsequent rulemaking will address the appropriate stage at which defenses must be raised.

The proposed rule also allows optional documentation to be attached to the response form, including copies of the works involved in the claim. In requesting this information, the Office is

seeking to provide respondents with the opportunity to meaningfully respond during the initial stage of the proceeding.

For the response, the Office is particularly interested in comments on an appropriate presentation of possible defenses available to the respondent, any instructional or educational material that would assist the respondent in constructing its response, and any other suggestions that would enhance the respondent’s ability to be meaningfully heard and the claimant to be on notice of defenses.<sup>97</sup> With respect to defenses, the Office seeks comment on whether providing a list of defenses (or a link to lists of defenses) that are commonly pleaded in copyright infringement suits would be productive at this, or any, stage in the case, and how to ensure that a respondent understands the defenses available and only asserts those that are applicable.

### H. Counterclaims

The CCB may also hear counterclaims that either “arise[] under section 106 or section 512(f) and out of the same transaction or occurrence that is the subject of a claim of infringement, . . . a claim of noninfringement, . . . or a claim of misrepresentation,”<sup>98</sup> or “arise[] under an agreement pertaining to the same transaction or occurrence that is the subject of a claim of infringement . . . if the agreement could affect the relief awarded to the claimant.”<sup>99</sup> Any asserted counterclaim is subject to the same compliance review applicable to an initial claim<sup>100</sup> and is subject to dismissal for unsuitability.<sup>101</sup>

The Office proposes that the information required to assert a counterclaim should closely mirror the information required to assert a claim. A counterclaim must be filed at the time of the response, unless the Board, for good cause, permits it to be asserted later in the proceeding. This approach resembles the general requirement of asserting a compulsory counterclaim in federal court.<sup>102</sup> In proposing this approach, the Office is seeking to maintain an efficient, orderly procedure that provides parties sufficient notice as to the issues involved in the proceeding.

The requirements for responding to a counterclaim largely mirror the requirements for responding to a claim, including that a failure to file a response

<sup>89</sup> 86 FR at 16161.

<sup>90</sup> For example, a claimant could file a federal lawsuit after the respondent opts out of a CCB claim. The statute contemplates that the parties could agree to a CCB proceeding in lieu of further litigation. *See* 17 U.S.C. 1504(d)(2).

<sup>91</sup> 86 FR at 16161.

<sup>92</sup> 17 U.S.C. 1504(c)(5).

<sup>93</sup> *Id.* at 1506(g)(7)(B).

<sup>94</sup> *Id.* at 1506(i). A proceeding is deemed active when “proof of service has been filed by the claimant and the respondent does not submit an opt-out notice to the [CCB] within [the] 60-day period.” *Id.*

<sup>95</sup> *Id.* at 1506(k).

<sup>96</sup> Fed. R. Civ. P. 12(h).

<sup>97</sup> H.R. Rep. No. 116–252, at 22.

<sup>98</sup> 17 U.S.C. 1504(c)(4)(B)(i).

<sup>99</sup> *Id.* at 1504(c)(4)(B)(ii).

<sup>100</sup> *Id.* at 1506(f)(2).

<sup>101</sup> *Id.* at 1506(f)(3).

<sup>102</sup> Fed. R. Civ. P. 13(a).

will constitute default. The triggering event for responding to a counterclaim, however, is the notification by a Copyright Claims Attorney that the counterclaim is compliant,<sup>103</sup> rather than the issuance of a scheduling order. When a respondent files a counterclaim, a Copyright Claims Attorney must conduct the same compliance review that occurs after the filing of an initial claim. If the counterclaim is found to be compliant, the Board will provide notification of compliance, which will begin the counterclaim respondent's thirty-day period to respond. The Board then will issue a new scheduling order updating the prior due dates as appropriate.

The proposed rule does not provide a mechanism for the respondent to the counterclaim to opt out of the proceeding. The Office encourages comment on this issue, including as to whether such a process is permitted under the statute. The Office notes that Congress did not set forth a procedure for opting out of a counterclaim, in contrast to the detailed procedure set forth for the respondent's initial ability to opt out. It also is noteworthy that Congress has limited allowable counterclaims to those arising from the same transaction or occurrence, and has further limited such claims to those implicating copyright or an agreement affecting the relief to be awarded to the claimant.<sup>104</sup> Accordingly, there arguably should be no surprise for the claimant when a counterclaim is asserted. For example, a claimant who brings an action before the CCB seeking a declaration of noninfringement of a work could reasonably expect a counterclaim for infringement of that same work. As the claimant has already voluntarily submitted to, and in fact requested, the CCB to take up the general issue at hand, having an opt-out procedure for counterclaims potentially could constitute an inefficient use of time and resources.

### I. Fees

The Register has general authority to set fees for Copyright Office services,<sup>105</sup> and is specifically directed to set certain fees related to CCB proceedings.<sup>106</sup> Here, the Office sets forth proposed fees relating to the CCB rules included in this notice. The Office will propose additional fees in subsequent

rulemakings for the services addressed in those proceedings.

#### 1. Fee for Filing a Claim

To commence a proceeding before the CCB, a claim must be accompanied "by a filing fee in such amount as may be prescribed in regulations established by the Register of Copyrights."<sup>107</sup> The Office is given upper and lower limits to the filing fees it may assess: "the sum total of" filing fees must not be less than \$100 or exceed the "cost of filing an action in a district court of the United States,"<sup>108</sup> currently \$402.<sup>109</sup> The Office understands the "sum total of" filing fees to consist of the two filing fees indicated in the statute: The filing fee for the initial claim<sup>110</sup> and the filing fee to request review of a final determination by the Register.<sup>111</sup> The amount of fees must "further the goals of the Copyright Claims Board."<sup>112</sup>

The Office proposes an initial claim filing fee of \$100 in the interest of facilitating access to the CCB. Given Congress's goal of ensuring that the CCB be accessible to the widest constituency possible,<sup>113</sup> the Office believes it is appropriate to keep the fee at the statutory minimum.

The Senate Report proposed in a footnote that the Office consider a two-tiered fee structure, with an initial fee assessed when the claim is filed and a second fee assessed after the claim becomes active.<sup>114</sup> After consideration, the Office has not included such a framework in the proposed rule. First, it is not clear that the Office has the statutory authority to split fees in this way. While the statute expressly provides for a fee to initiate a claim,<sup>115</sup> it does not require a separate fee for a proceeding to become active.<sup>116</sup> Furthermore, if the Office were to establish a system in which it charged less than \$100 for the first tier, and the claimant did not move on to the second tier, the total filing fees would not reach

the statutory floor. The Office invites comment on these issues.

For similar reasons, the Office does not currently propose a fee for a counterclaim. In contrast to the statutory provisions relating to a claim, the CASE Act contains no express authorization for the Office to charge fees for a counterclaim. The Office also notes that fees for counterclaims are not required in federal district court, although some state courts do assess such fees.<sup>117</sup> The Office welcomes comment on this matter as well.

#### 2. Fee for Designated Service Agents

As part of its authority to maintain a directory of service agents, the Office "may require . . . corporations, partnerships, and unincorporated associations designating . . . service agents to pay a fee to cover the costs of maintaining the directory."<sup>118</sup> As discussed in the NOI,<sup>119</sup> the designated service agent directory will be similar in nature to the Office's existing DMCA designated agent directory. The fee for adding an entry to the DMCA designated agent directory is \$6.<sup>120</sup> This amount was selected, despite an estimated \$52 operating cost, in part due to the elastic nature of demand for the DMCA directory.<sup>121</sup> The Office anticipates that the demand for the CCB designated service agent directory will be similarly elastic, if not more, given that participation in the designated service agent directory is not a statutory requirement. The proposed rule accordingly sets a \$6 fee for designation of a service agent for CCB purposes. The Office believes that setting the fee at this low level will encourage participation by corporations, partnerships, and unincorporated associations, which in turn will produce a robust database that benefits claimants and respondents alike.

### List of Subjects

#### 37 CFR Part 201

Copyright, General provisions.

#### 37 CFR Part 220

Claims, Copyright, General.

<sup>117</sup> See, e.g., Maryland Courts, District Court of Maryland Cost Schedule DCA-109, (rev. 2018), <https://www.courts.state.md.us/sites/default/files/import/district/forms/acct/dca109.pdf> (assessing \$18.00 for a small claims cross claim); Superior Court of California, Statewide Civil Fee Schedule (2014), <https://www.courts.ca.gov/documents/filingfees.pdf> (assessing fees for the answer or other first paper filed by a party other than plaintiff).

<sup>118</sup> 17 U.S.C. 1506(g)(5)(B).

<sup>119</sup> 86 FR 16160.

<sup>120</sup> 37 CFR 201.3(c)(23).

<sup>121</sup> Booz Allen Hamilton, 2017 Fee Study Report 26 (2017), [https://www.copyright.gov/rulemaking/feestudy2018/fee\\_study\\_report.pdf](https://www.copyright.gov/rulemaking/feestudy2018/fee_study_report.pdf).

<sup>107</sup> *Id.* at 1506(e)(3).

<sup>108</sup> *Id.* at 1510(c).

<sup>109</sup> The statutory fee for filing suit in a federal district court is \$350, 28 U.S.C. 1914(a), and an additional fee of \$52 is charged as an administrative fee by the Judicial Conference of the United States. *Id.*

<sup>110</sup> 17 U.S.C. 1506(e).

<sup>111</sup> *Id.* at 1506(x).

<sup>112</sup> *Id.* at 1501(c).

<sup>113</sup> H.R. Rep. No. 116-252, at 17; S. Rep. No. 116-105, at 9-10.

<sup>114</sup> S. Rep. No. 116-105, at 4 n.4.

<sup>115</sup> 17 U.S.C. 1506(e)(3).

<sup>116</sup> *Id.* at 1506(i) ("If proof of service has been filed by the claimant and the respondent does not submit an opt-out notice to the Copyright Claims Board within that 60-day period, the proceeding shall be deemed an active proceeding.")

<sup>103</sup> 17 U.S.C. 1506(f)(2) (stating that when the Copyright Claims Attorney finds a counterclaim to be compliant, "the counterclaimant and such other parties shall be so notified").

<sup>104</sup> *Id.* at 1504(c)(4).

<sup>105</sup> *Id.* at 708.

<sup>106</sup> *Id.* at 1501(1).

37 CFR Part 222  
 Claims, Copyright.  
 37 CFR Part 223  
 Claims, Copyright.  
 37 CFR Part 224  
 Claims, Copyright.

**Proposed Regulations**

For the reasons stated in the preamble, the U.S. Copyright Office

proposes to amend Chapter II, Subchapters A and B, of title 37 Code of Federal Regulations to read as follows:

**Subchapter A—Copyright Office and Procedures**

**PART 201—GENERAL PROVISIONS**

■ 1. The authority citation for part 201 continues to read as follows:

**Authority:** 17 U.S.C. 702.

TABLE 4 TO PARAGRAPH (g)

■ 2. In § 201.3, revise the section heading and add paragraph (g) to read as follows:

**§ 201.3. Fees for registration, recordation, and related services, special services, and services performed by the Licensing Section and the Copyright Claims Board.**

\* \* \* \* \*

(g) *Copyright Claims Board fees.* The Copyright Office has established the following fees for specific services related to the Copyright Claims Board:

Copyright claims board fees	Fees (\$)
(1) Filing a claim before the Copyright Claims Board .....	100
(2) Designation of a service agent by a corporation, partnership, or unincorporated association under 17 U.S.C. 1506(g)(5)(B), or amendment of designation .....	6
(3) [Reserved] .....	

**Subchapter B—Copyright Claims Board and Procedures**

■ 3. Add part 220 to read as follows:

**PART 220—GENERAL PROVISIONS**

Sec.

220.1 Definitions.

**Authority:** 17 U.S.C. 702, 1510.

**§ 220.1. Definitions.**

For purposes of this subchapter:

An *initial notice* means the notice of a proceeding that accompanies a claim or counterclaim in a Copyright Claims Board proceeding as described in 17 U.S.C. 1506(g).

A *second notice* means the notice of a proceeding sent by the Copyright Claims Board as described in 17 U.S.C. 1506(h).

■ 4. Add part 222 read as follows:

**PART 222—PROCEEDINGS**

Sec.

222.1 [Reserved]

222.2 Initiating a proceeding; the claim.

222.3 Content of initial notice to respondent.

222.4 Second notice by or on behalf of the Board.

222.5 Service; designated service agents.

222.6 Waiver of service.

222.7 Response.

222.8 Counterclaim.

222.9 Response to counterclaim.

**Authority:** 17 U.S.C. 702, 1510.

**§ 222.1 [Reserved]**

**§ 222.2 Initiating a proceeding; the claim.**

(a) *Initiating a proceeding.* A claimant may initiate a proceeding before the Copyright Claims Board by submitting the following information through the electronic filing system—

(1) A claim, using a form provided on the Copyright Claims Board’s website;  
 (2) A completed initial notice, using the form provided on the Copyright Claims Board’s website; and  
 (3) The filing fee set forth in 37 CFR 201.3.

(b) *Electronic filing requirement.* Except as provided, otherwise in this paragraph, to submit the claim and filing fee, the claimant must be a registered user of the Board’s electronic filing system. A claimant who is unable to use the electronic filing system and submits the certification provided for in 37 CFR 222.5(e)(2)(ii) may initiate a proceeding by using printed forms and alternate submission instructions provided by the Copyright Claims Board.

(c) *Contents of the claim.* The claim shall include:

(1) A caption, providing the name(s) of the claimant(s) and respondent(s);  
 (2) Identification of the claims asserted against the respondent(s), which shall consist of at least one of the following:

(i) A claim for infringement of an exclusive right in a copyrighted work provided under 17 U.S.C. 106;

(ii) A claim for a declaration of noninfringement of an exclusive right in a copyrighted work provided under 17 U.S.C. 106; or,

(iii) A claim under 17 U.S.C. 512(f) for misrepresentation in connection with—

(A) A notification of claimed infringement; or

(B) A counter notification seeking to replace removed or disabled material;

(3) The name(s) and address(es) of the claimant(s);

(4) The name(s) and address(es) of the respondent(s);

(5) For a claim asserted under paragraph (b)(2)(i) of this section—  
 (i) Whether the claimant is the legal or beneficial owner of rights in a work protected by copyright and, if there are any co-owners, their names;

(ii) The following information for each work at issue in the claim:

(A) The title of the work;

(B) The author(s) of the work;

(C) If a copyright registration has issued for the work, the registration number and effective date of registration;

(D) If an application for copyright registration has been submitted but a registration has not yet issued, the service request number (SR number) and application date; and

(E) The work of authorship’s category, as set forth in 17 U.S.C. 102 for each work at issue, or, if the claimant is unable to determine the applicable category, a brief description of the nature of the work.

(iii) A statement describing the facts relating to the alleged infringement, including, to the extent known:

(A) Which exclusive rights as set forth in 17 U.S.C. 106 are at issue;

(B) The beginning date of the alleged infringement;

(C) The name(s) of the person(s) or organization(s) alleged to have infringed the work;

(D) The facts leading the claimant to believe the work has been infringed;

(E) Whether the alleged infringement has continued up to the date the claim was filed, or, if it has not, the date the alleged infringement ceased;

(F) Where the alleged act(s) of infringement occurred; and

(G) If the claim of infringement is asserted against an online service

provider as defined in 17 U.S.C. 512(k)(1)(B) for infringement by reason of the storage of or referral or linking to infringing material that may be subject to the limitations on liability set forth in subsection 17 U.S.C. 512(b), (c), or (d), an affirmation that the claimant has previously notified the service provider of the claimed infringement in accordance with 17 U.S.C. 512(b)(2)(E), (c)(3), or (d)(3), as applicable, and that the service provider failed to remove or disable access to the material expeditiously upon the provision of such notice;

(6) For a claim asserted under paragraph (b)(2)(ii) of this section—

(i) The name of the party who is asserting that the claimant has infringed a copyright;

(ii) The following information for each work alleged to have been infringed, to the extent known to the claimant:

(A) The title;

(B) If a copyright registration has issued for the work, the registration number and effective date of registration;

(C) If an application for copyright has been submitted, but a registration has not yet issued, the service request number (SR number) and registration application date; and

(D) The work's category, as set forth 17 U.S.C. 102, or, if the claimant is unable to determine which category is applicable, a brief description of the nature of the work;

(iii) A brief description of the activity at issue in the claim, including:

(A) Any exclusive rights as set forth in 17 U.S.C. 106 that may be implicated;

(B) The beginning and ending dates of the activities at issue;

(C) Whether the activities at issue have continued to the date the claim was filed;

(D) The name(s) of the person(s) involved in the activities at issue; and

(E) Where the activities at issue occurred;

(iv) A brief statement describing the reasons why the claimant believes that no infringement occurred, including any relevant history or agreements between the parties and whether any exceptions and limitations as set forth in 17 U.S.C. 107 through 122 are implicated;

(7) For a claim asserted under paragraph (b)(2)(iii) under this section—

(i) The sender of the notification of claimed infringement;

(ii) The recipient of the notification of claimed infringement;

(iii) The date the notification of claimed infringement was sent;

(iv) If a counter notification was sent in response to the notification—

(A) The sender of the counter notification;

(B) The recipient of the counter notification;

(C) The date the counter notification was sent; and

(D) A description of the counter notification;

(v) The words in the notification or counter notification that allegedly constituted a misrepresentation;

(vi) An explanation of why the identified words allegedly constituted a misrepresentation; and

(vii) An explanation of how the alleged misrepresentation caused harm to the claimant(s);

(8) A statement describing and estimating the monetary harm suffered by the claimant(s) as a result of the alleged activity. For claims of infringement, this statement may address the copyright owner's actual damages and the profits received by respondent(s) that are attributable to the alleged infringement;

(9) Whether the claimant requests that the proceeding be conducted as a "smaller claim" under 17 U.S.C. 1506(z) and 37 CFR part 226, and would accept a limitation on total damages of \$5,000 if the request is granted; and

(10) A certification under penalty of perjury that the information provided in the claim is accurate and truthful to the best of the certifying party's knowledge. The certification shall include the typed, printed, or handwritten signature of the claimant(s), and if the signature is handwritten it shall be accompanied by a typed or printed name.

(d) *Additional matter.* The claimant may also include, as attachments to or files accompanying the claim:

(1) A copy of the certificate of copyright registration for a work that is the subject of the proceeding;

(2) A copy of the allegedly infringed work. This copy may also be accompanied by additional information, such as a hyperlink, that shows where the allegedly infringed work has been posted;

(3) A copy of the allegedly infringing material. This copy may also be accompanied by additional information, such as a hyperlink, that shows any allegedly infringing activity;

(4) A copy of the notification of claimed infringement that is alleged to contain the misrepresentation;

(5) A copy of the counter notification that is alleged to contain the misrepresentation; and

(6) Any other exhibits that play a significant role in setting forth the facts of the claim.

### § 222.3 Content of initial notice to respondent.

(a) *Content of initial notice.* The initial notice to the respondent shall be prepared using a form made available by the Copyright Claims Board that shall—

(1) Include on the first page a caption that identifies the parties and includes the docket number assigned by the Board;

(2) Be addressed to the respondent;

(3) Identify the claimant and provide a mailing address and other contact information for the claimant or, if the claimant is represented by counsel, the claimant's counsel;

(4) Advise the respondent that a legal proceeding has been commenced by the claimant(s) in the Board against the respondent;

(5) Identify the nature of the claims asserted against the respondent, which shall consist of at least one of the following:

(i) A claim for infringement of an exclusive right in a copyrighted work provided under 17 U.S.C. 106;

(ii) A claim for a declaration of noninfringement of an exclusive right in a copyrighted work provided under 17 U.S.C. 106 ; and

(iii) A claim under 17 U.S.C. 512(f) for misrepresentation in connection with a notification of claimed infringement or a counter notification seeking to replace removed or disabled material;

(6) Describe the Board, including that it is a three-member tribunal within the Copyright Office that has been established by law to resolve certain copyright disputes in which the total monetary recovery does not exceed \$30,000;

(7) State that the respondent has the right to opt out of participating in the proceeding, and that the consequence of opting out is that the proceeding will be dismissed without prejudice and the claimant will have to determine whether to file a lawsuit in a federal district court;

(8) State that if the respondent does not opt out within 60 days from the day the respondent received the initial notice, the consequences are that the proceeding will go forward and the respondent will—

(i) Lose the opportunity have the dispute decided by the federal court system, created under Article III of the Constitution of the United States; and

(ii) Waive the right to have a trial by jury regarding the dispute;

(9) State that the notice is in regard to an official government proceeding and provide information on how to access the docket of the proceeding in the Board's electronic filing system;

(10) Provide information on how to become a registered user of the Board's electronic filing system;

(11) State that parties may represent themselves in the proceeding, but note that a party may wish to consult with an attorney or with a law school clinic, and provide reference to pro bono (free) resources which may be available and are listed on the Board's website;

(12) Include the name, address, email address, and telephone number of the claimant(s) or, if a claimant is represented by counsel, of the claimant's counsel;

(13) Indicate where other pertinent information concerning proceedings before the Board may be found on the Board's website;

(14) Provide direction on how a respondent may opt out of the proceeding, either online or by mail; and

(15) Include any additional information that the Board may determine should be included.

(b) Following notification from the Board pursuant to section 17 U.S.C. 1506(f)(1)(A) to proceed with service of the claim, the respondent shall cause the initial notice, the claim, the paper opt-out notification form, and any other documents required by the direction of the Board to be served with the initial notice and the claim, upon each respondent as prescribed in 37 CFR 222.5(a) and 17 U.S.C. 1506(g). The copy of the claim that is served shall be the copy that is, at the time of service, available on the Board's electronic filing system.

#### **§ 222.4 Second Notice by or on behalf of the Board.**

(a) *Content of second notice.* The second notice to the respondent shall:

(1) Include on the first page a caption identifying the parties and the docket number;

(2) Be addressed to the respondent, using the address that appeared in the initial notice;

(3) Include the claimant identification and contact information from the initial notice;

(4) Advise the respondent that a legal proceeding has been commenced by the claimant(s) in the Copyright Claims Board against the respondent;

(5) Identify the nature of the claims asserted against the respondent, which shall consist of at least one of the following:

(i) A claim for infringement of an exclusive right in a copyrighted work provided under 17 U.S.C. 106;

(ii) A claim for a declaration of noninfringement of an exclusive right in a copyrighted work provided under 17 U.S.C. 106; and

(iii) A claim under 17 U.S.C. 512(f) for misrepresentation in connection with—

(A) A notification of claimed infringement; or

(B) A counter notification seeking to replace removed or disabled material.

(6) State that the respondent has the right to opt out of participating in the proceeding, and that the consequence of opting out is that the proceeding will be dismissed without prejudice and the claimant will have to determine whether to file a lawsuit in a federal district court;

(7) State that if the respondent does not opt out within 60 days from the day the respondent received the initial notice, the consequences are that the proceeding will go forward and the respondent will—

(i) Lose the opportunity have the dispute decided by the federal court system, created under Article III of the Constitution of the United States; and

(ii) Waive the right to have a trial by jury regarding the dispute;

(8) Provide information on how to access the docket of the proceeding in the Board's electronic filing system;

(9) Provide information on how to become a registered user of the Board's electronic filing system;

(10) State that parties may represent themselves in the proceeding, but note that a party may wish to consult with an attorney or with a law school clinic, and provide reference to pro bono (free) resources which may be available and are listed on the Board's website;

(11) Include the name, address, email address, and telephone number of the claimant(s) or, if a claimant is represented by counsel, of the claimant's counsel;

(12) Indicate where other pertinent information concerning proceedings before the Board may be found on the Board's website;

(13) Provide direction on how a respondent may opt out of the proceeding, either by online or by mail; and

(14) Include any additional information that the Board may determine should be included.

(b) *Timing of second notice.* The Board shall issue the second notice in the manner prescribed by 37 CFR 222.5 no later than 20 days after the claimant files proof of service or a completed waiver of service with the Board unless the respondent has already submitted an opt-out notification pursuant to 37 CFR 223.1.

#### **§ 222.5 Service; designated service agents.**

(a) *Service of initial notice, claim, and related documents—*(1) *Timing of*

*service.* A claimant or counterclaimant may proceed with service of a claim or counterclaim only after the claim or counterclaim is reviewed by a Copyright Claims Officer and found to comply with this part and 17 U.S.C. chapter 15.

(2) *Service methods.* Service of the initial notice, the claim, and other documents required by this part or the Copyright Claims Board to be served with the initial notice and claim shall be made as provided under 17 U.S.C. 1506(g), as supplemented by this section. If service is made upon a service agent designated under 17 U.S.C. 1506(g)(5)(B), service shall be made by certified mail or by any other method that the entity that has designated the service agent has stated, in its designation under § 222.5(b)(7), that it will accept.

(3) *Filing of proof of service.* (i) No later than seven calendar days after service of the initial notice and all accompanying documents under paragraph (a)(2) of this section, a claimant shall file a completed proof of service form through the Board's electronic filing system. The proof of service form shall be located on the Board's website.

(ii) The claimant's failure to comply with the filing deadline in paragraph (a)(1) of this section may constitute exceptional circumstances justifying an extension of the 60-day period in which a respondent may deliver an opt-out notification to the Board under 17 U.S.C. 1506(i).

(b) *Designated service agents.* (1) A corporation, partnership, or unincorporated association that is entitled under 17 U.S.C. 1506(g)(5)(B) to designate a service agent to receive notice of a claim shall submit the designation electronically through the Copyright Claims Board's designated service agent directory, which shall be available on the Board's website.

(2) A service agent designation shall be accompanied by the fee set forth in 37 CFR 201.3.

(3) Each corporation, partnership, or unincorporated association that submits a service agent designation may include up to five trade names that function as alternate business names (*i.e.*, "doing business as" or "d/b/a" names) under which a registered corporation, partnership, or unincorporated association is doing business. Related or affiliated corporations, partnerships, or unincorporated associations that are separate legal entities (*e.g.*, parent and subsidiary companies) must file separate service agent designations, although a submitter may designate the same service agent for multiple

corporations, partnerships, or unincorporated associations.

(4) To complete the designation, the person submitting the designation will be required to make a certification, under penalty of perjury, that the submitter is authorized by law to make the designation on behalf of the corporation, partnership, or unincorporated association.

(5) The designated service agent submission shall include:

(i) The legal name, business address, email, and telephone number of the corporation, partnership, or unincorporated association;

(ii) The principal place of business of the corporation, partnership, or unincorporated association;

(iii) For corporations, the state of incorporation, any associated state file or registration number, and all other states in which the corporation is registered to do business;

(iv) Up to five trade names of the corporation, partnership, or unincorporated association, as described by paragraph (b)(3) of this section;

(v) The name, business address (or, if the agent does not have a business address, the address of the residence of), email, and telephone number of the designated service agent;

(vi) The submitter's name, email, and telephone number; and

(vii) The corporation, partnership, or unincorporated association's service method election, as described in paragraph (b)(7) of this section.

(6) The designation shall be indexed under the names of each corporation, partnership, or unincorporated association for which an agent has been designated and shall be made available on the Board's website. The business address, email, and telephone number of the corporation, partnership, or unincorporated association provided under paragraph (b)(5)(i) of this section will not be made publicly available on the designated service agent directory website, but such information will be made available to Board staff.

(7)(i) A corporation, partnership, or unincorporated association that designates a service agent shall, as a condition of designating a service agent, consent to receive service upon the agent by means of certified mail. It may also indicate in its designation that it consents to receive service by email.

(ii) If a corporation, partnership, or unincorporated association indicates that it consents to receive service by email, the designated service agent's email address will be displayed on the designated service agent directory.

(iii) In cases where the designation states that service may be made by email, the person submitting the designation shall affirm under penalty of perjury that the corporation, partnership, or unincorporated association for which the agent has been designated waives the right to personal service by means other than email and that the person making the designation has the authority to waive that right on behalf of the corporation, partnership, or unincorporated association.

(iv) The corporation, partnership, or unincorporated association's service agent's place of business or, if there is no place of business, the address of the service agent's residence, must be located within the United States.

(8) A corporation, partnership, or unincorporated association may amend a designation of a service agent by following directions on the Board's website.

(i) Such amendment shall be accompanied by the fee set forth in 37 CFR 201.3.

(ii) The requirements found in paragraph (b) of this section shall apply to the service agent designation amendment.

(9) After a corporation, partnership, or unincorporated association submits a service agent designation, such designation will be made available on the public designated service agent directory after payment has been remitted and the Board has reviewed the submission to determine whether the submission qualifies for the designated agent provision. The review may include confirmation that the submission was authorized.

If the Board determines that a submitted service agent designation does not qualify under this section or if it has reason to believe that the submitter was not authorized by law to make the designation on behalf of the corporation, partnership, or unincorporated association, it will notify the submitter that it intends not to add the record to the directory, or that it intends to remove (or not approve) the record from the directory and will provide the submitter ten calendar days to respond. If the submitter fails to respond, or if, after reviewing the response, the Board determines that the submission does not qualify for the designated service agent directory, the entity will not be added to, or will be removed from, the directory.

(c) *Waiver of personal service.* Waiver of personal service may be completed by following the procedures in 37 CFR 222.6.

(d) *Service of other documents.* All documents other than those identified in paragraph (a) of this section must be served in accordance with this paragraph.

(1) *Service by the Copyright Claims Board.*

(i) Except as provided in paragraph (d)(1)(ii) of this section, the Board shall serve one copy of all orders, notices, decisions, rulings on motions, and similar documents issued by the Board upon each party in accordance with paragraph (d)(3) of this section.

(ii)(A) The Board shall serve the second notice required under 17 U.S.C. 1506(h), along with a copy of the paper opt-out notification form, by sending them via certified mail to the respondent at the address provided—

(1) In the designated service agent directory, if the respondent is a corporation, partnership, or unincorporated association that has designated a service agent; and otherwise

(2) By the claimant in the claim.

(B) The Board shall also serve the second notice by email if an email address for the respondent has been provided in the designated service agent directory or by the claimant.

(2) *Service by a party.* Unless these regulations or the Board provides otherwise, each party to a proceeding shall serve on every other party each of the following documents in the manner prescribed in paragraph (d)(3) of this section:

(i) Any document filed by the respondent other than an opt-out notification;

(ii) Any document filed by the claimant following the service of the initial notice and the claim;

(iii) A discovery document required to be served on a party;

(iv) A party submission filed with the Board pursuant to 17 U.S.C. 1506(m);

(v) A written notice of appearance or any similar document; and

(vi) Any other document permitted to be filed by the Board.

(3) *Service of other documents: How made.*—(i) *Service on whom.*

(A) If a party is represented by an attorney or authorized representative, service under this rule must be made on the attorney or authorized representative unless the Board orders service on the party.

(B) If a party is not represented, service under this rule must be made on the party.

(ii) *Service in general.* (A) A document is served under this paragraph by sending it to a registered user by filing it with the Board's electronic filing system or sending it by

other electronic means that the person to be served consented to in writing. For these service methods, service is complete upon filing or sending, respectively, but is not effective if the filer or sender learns that it did not reach the person to be served.

(B) A party who is not represented by counsel and who submits a certification pursuant to 37 CFR 222.5(e)(2)(ii) and serves that certification upon the other parties by one of the methods set forth in paragraphs (d)(1), (2), or (3) of this section may be excused from serving documents and receiving service of documents electronically by the means set forth in paragraph (d)(3)(ii)(A) of this section. Service of a document by or upon such a person shall be accomplished by—

(1) Mailing it to the person's last known address, in which event service is complete upon mailing it to the person;

(2) Emailing it to the person, if the person has consented to receive service by email;

(3) Handing it to the person;

(4) Leaving it at the person's office with a clerk or other person in charge or in a conspicuous place in the office;

(5) Leaving it at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there.

(e) *Filing—(1) Required filings and certificate of service.* Other than service of the initial notice and claim, any document that is required to be served—together with a certificate of service in cases where a certificate of service is required—must be filed with the Board within a reasonable time after service, but no later than thirty days after service was completed. Notwithstanding the above, unless the Board orders otherwise, discovery requests and responses must not be filed unless they are used in the proceeding, as needed, in relation to discovery disputes or submissions on the merits.

(2) *How filing is made—in general.* (i) A document is filed by submitting it electronically to the Board's electronic filing system.

(ii) A party who is not represented by counsel may be excused from the requirements set forth in 37 CFR 222.5(e)(1) by submitting a statement to the Board certifying under penalty of perjury that the party is unable to use the Board's electronic filing system or that doing so would cause an undue hardship. The party must submit this statement on a form obtained from the Board. A party who submits such a statement may, file a document by—

(A) Email, to an email address as directed by the Board;

(B) Mail, by placing it in an envelope addressed to Copyright Claims Board, Library of Congress, James Madison Memorial Building, 101 Independence Avenue SE, Washington, DC 20559–6000 or P.O. Box 71380, Washington, DC 20024–1380, with postage prepaid, and depositing it with the United States Postal Service or major commercial carrier, such as UPS or FedEx, for delivery;

(C) Hand delivery by a private party between the hours of 8:30 a.m. and 5:00 p.m. to the Copyright Office Public Information Office, Room LM–401 in the James Madison Memorial Building of the Library of Congress, in an envelope addressed as follows: Copyright Claims Board, U.S. Copyright Office, Library of Congress, James Madison Memorial Building, 101 Independence Avenue SE, Washington, DC 20559; or,

(D) Hand delivery by a commercial courier (excluding FedEx, UPS, and similar courier services); the envelope must be delivered to the Congressional Courier Acceptance Site (CCAS) located at Second and D Street NE, Washington, DC, addressed as follows: Copyright Claims Board, Library of Congress, James Madison Memorial Building, 101 Independence Avenue SE, Washington, DC 20559–6000.

(3) *Certificate of service.* (i) Except as provided in paragraph (e)(2) of this section, every document filed with the Board and required to be served upon all parties must be accompanied by a certificate of service signed by (or on behalf of) the party making the service.

(ii) For any filing that occurs after the filing of a response, no certificate of service is required when a document is served by filing it with the Copyright Claims Board's electronic filing system.

#### § 222.6 Waiver of service.

(a) *Content of waiver of service request.* The request for waiver of service form shall:

(1) Bear the name of the Copyright Claims Board;

(2) Include on the first page and waiver page the caption identifying the parties and the docket number;

(3) Be addressed to the respondent;

(4) Contain the date of the request;

(5) Notify the respondent that a legal proceeding has been commenced by the claimant(s) in the Board against the Respondent;

(6) Advise that the form is not a summons or official notice from the Board;

(7) Request that respondent waive formal service of summons by signing the enclosed waiver;

(8) State that a waiver of personal service shall not constitute a waiver of the right to opt out of the proceeding.

(9) Describe the effect of agreeing or declining to waive service;

(10) Include a waiver of personal service provided by the Board for respondent to sign that includes:

(i) An affirmation that the respondent is waiving service;

(ii) An affirmation that waiving service does affect respondent's ability to opt out of the proceeding;

(iii) An affirmation that respondent understands the requirement to opt out within 60 days of receiving the request;

(iv) The name, address, email address, and telephone number of the respondent; and

(v) The typed, printed, or handwritten signature of the respondent, and if the signature is handwritten it shall be accompanied by a typed or printed name.

(b) *Delivery of request for waiver of service.* A claimant may request that a respondent waive personal service as provided by 17 U.S.C. 1506(g)(6) by delivering, via first class mail, the following to the respondent:

(1) A completed waiver of personal service form provided on the Board's website;

(2) The documents described in 37 CFR 222.3, including the initial notice and the claim; and

(3) An envelope, with postage prepaid and addressed to the claimant.

(c) *Completing waiver of service.* The respondent may complete waiver of service by returning the signed waiver form in the postage prepaid envelope to claimant by mail or, if the claimant also provides an email address to which the waiver of personal service form may be returned, by means of an email to which a copy of the signed form is attached. Waiving service does affect respondent's ability to opt out of proceedings.

(d) *Timing of completing waiver.* The respondent has 30 days from the date on which the request was sent to return the waiver form.

#### § 222.7 Response.

(a) *Filing a response.* A respondent who does not opt out within 60 days after receiving the initial notice shall begin participation before the Board by submitting a response through the electronic filing system using the response form provided by the Board, and serving the response form in the manner set forth in 37 CFR 222.5(d). Except as provided in this paragraph, to submit the response, the respondent must be a registered user of the electronic filing system. A respondent who is unable to use the electronic

filing system and submits the certification provided for in 37 CFR 222.5(e)(2)(ii) may file a response by using printed forms and alternate submission instructions provided by the Board.

(b) *Content of response.* The response shall include:

(1) A caption identifying the parties and the docket number assigned by the Board;

(2) The name, address, phone number, and email of each respondent filing the response;

(3) A short statement, if applicable, disputing any facts asserted in the claim;

(4) For claims brought under 17 U.S.C. 1504(c)(1), a statement describing in detail the dispute regarding the alleged infringement, including any defenses as well as any reason why the Respondent believes there was no copyright infringement, including whether any exceptions and limitations as set forth in 17 U.S.C. 107 through 122 that are implicated;

(5) For claims brought under 17 U.S.C. 1504(c)(2), a statement describing in detail the dispute regarding the alleged infringement, including reasons why the respondent believes there was copyright infringement;

(6) For claims brought under 17 U.S.C. 1504(c)(3), a statement describing in detail the dispute regarding the alleged misrepresentation and an explanation of why the respondent believes the identified words do not constitute misrepresentation;

(7) Any counterclaims; and

(8) A certification under penalty of perjury that the information provided in the response is accurate and truthful to the best of the certifying party's knowledge. The certification shall include the typed, printed, or handwritten signature of the respondent(s), and if the signature is handwritten it shall be accompanied by a typed or printed name.

(c) *Additional matter.* The respondent may also include, as attachments to or files that accompany the Response:

(1) A copy of the certificate of copyright registration for a work that is the subject of the proceeding;

(2) A copy of the allegedly infringed work. This copy may also be accompanied by additional information, such as a hyperlink, that shows where the allegedly infringed work has been posted;

(3) A copy of the allegedly infringing material. This copy may also be accompanied by additional information, such as a hyperlink, that shows any allegedly infringing activity;

(4) A copy of the notification of claimed infringement that is alleged to contain the misrepresentation;

(5) A copy of the counter notification that is alleged to contain the misrepresentation; and

(6) Any other exhibits that play a significant role in setting forth the facts of the response.

(d) *Timing of response.* The respondent has 30 days from the issuance of the scheduling order to submit a response. If the respondent waived service, the respondent has an additional 30 days to submit the response.

(e) *Failure to file response.* A failure to file a response within the required timeframe will constitute a default under 17 U.S.C. 1506(u), and the Board will begin proceedings in accordance with 37 CFR 227.

#### § 222.8 Counterclaim.

(a) *Asserting a counterclaim.* Any party can assert a counterclaim falling under the jurisdiction of the Board that—

(1) Arises out of the same transaction or occurrence as the initial claim; or

(2) Arises under an agreement pertaining to the same transaction or occurrence that is subject to an initial claim of infringement, if the agreement could affect the relief awarded to the claimant.

(b) *Electronic filing requirement.* A party may submit a counterclaim through the electronic filing system using the response form or counterclaim form provided by the Board, and serving the counterclaim as provided in § 222.5. Except as otherwise provided in this paragraph, to submit the counterclaim, the respondent must be a registered user of the electronic filing system. A respondent who is unable to use the electronic filing system and submits the certification provided for in 37 CFR 222.5(e)(2)(ii) may submit a counterclaim by using printed forms and alternate submission instructions provided by the Board.

(c) *Content of counterclaim.* The counterclaim shall include:

(1) The name of the party against whom the counterclaim is asserted;

(2) An identification of the counterclaim, which shall consist of at least one of the following:

(i) A claim for infringement of an exclusive right in a copyrighted work provided under 17 U.S.C. 106;

(ii) A claim for a declaration of noninfringement of an exclusive right in a copyrighted work provided under 17 U.S.C. 106; and

(iii) A claim under 17 U.S.C. 512(f) for misrepresentation in connection with—

(A) A notification of claimed infringement; or

(B) A counter notification seeking to replace removed or disabled material.

(3) For a counterclaim asserted under paragraph (b)(2)(i) of this section—

(i) Whether the counterclaimant is the legal or beneficial owner of rights in a work protected by copyright and, if there are any co-owners, their names;

(ii) The following information for each work at issue in the claim:

(A) The title of the work;

(B) The author(s) of the work;

(C) If a copyright registration has issued for the work, the registration number and effective date of registration;

(D) If an application for copyright has been submitted but a registration has not yet issued, the service request number (SR number) and registration application date; and

(E) The work's category, as set forth in 17 U.S.C. 102, or, if the counterclaimant is unable to determine which category is applicable, a brief description of the nature of the work;

(iii) A statement describing the facts relating to the alleged infringement, including, to the extent known:

(A) Which exclusive rights as set forth in 17 U.S.C. 106 are at issue;

(B) The beginning date of the alleged infringement;

(C) The name(s) of the person(s) or organization(s) alleged to have infringed the work;

(D) The nature of the alleged infringement;

(E) Whether the alleged infringement has continued up to the date the claim was filed, or, if it has not, the date the alleged infringement ceased;

(F) Where the alleged act(s) of infringement occurred; and

(G) If the claim of infringement is asserted against an online service provider as defined in 17 U.S.C. 512(k)(1)(B) for infringement by reason of the storage of or referral or linking to infringing material that may be subject to the limitations on liability set forth in subsection 17 U.S.C. 512(b), (c), or (d), an affirmation that the counterclaimant has previously notified the service provider of the claimed infringement in accordance with 17 U.S.C. 512(b)(2)(E), (c)(3), or (d)(3), as applicable, and that the service provider failed to remove or disable access to the material expeditiously upon the provision of such notice;

(4) For a counterclaim asserted under paragraph (b)(2)(ii) of this section—

(i) The name of the party who is asserting that the counterclaimant has infringed a copyright;

(ii) The following information for each work alleged to have been

infringed, if that information is known to the counterclaimant:

- (A) The title;
- (B) If a copyright registration has issued for the work, the registration number and effective date of registration;
- (C) If an application for copyright has been submitted, but a registration has not yet issued, the service request number (SR number) and registration application date; and
- (D) The work's category, as set forth 17 U.S.C. 102, or, if the counterclaimant is unable to determine which category is applicable, a brief description of the nature of the work;
- (iii) A brief description of the activity at issue in the claim, including:
  - (A) Any exclusive rights as set forth in 17 U.S.C. 106 that may be implicated;
  - (B) The beginning and ending dates of the activities at issue;
  - (C) Whether the activities at issue have continued to the date the claim was filed;
  - (D) The name(s) of the person(s) involved in the activities at issue; and
  - (E) Where the activities at issue occurred;
- (iv) A brief statement describing the reasons why the counterclaimant believes that no infringement occurred, including any relevant history or agreements between the parties and whether any exceptions and limitations as set forth in 17 U.S.C. 107 through 122 are implicated;
- (5) For a counterclaim asserted under paragraph (b)(2)(iii) of this section—
  - (i) The sender of the notification of claimed infringement;
  - (ii) The recipient of the notification of claimed infringement;
  - (iii) The date the notification of claimed infringement was sent;
  - (iv) If a counter notification was sent in response to the notification—
    - (A) The sender of the counter notification;
    - (B) The recipient of the counter notification;
    - (C) The date the counter notification was sent; and
    - (D) A description of the counter notification;
    - (v) The words in the notification or counter notification that allegedly constituted a misrepresentation;
    - (vi) An explanation of why the identified words allegedly constituted a misrepresentation; and
    - (vii) An explanation of how the alleged misrepresentation caused harm to the counterclaimant(s);
  - (6) A statement describing the harm suffered by the counterclaimant(s) as a result of the alleged activity. For claims of infringement, this statement may

include a description of the profits attributable to the alleged infringement received by the counterclaimant(s) against whom the counterclaim is asserted.

- (7) A statement describing the relationship between the initial claim and the counterclaim; and
  - (8) A certification under penalty of perjury that the information provided in the counterclaim is accurate and truthful to the best of the certifying party's knowledge. The certification shall include the typed, printed, or handwritten signature of the counterclaimant(s), and if the signature is handwritten it shall be accompanied by a typed or printed name.
    - (d) *Additional matter.* The counterclaimant may also include, as attachments to or files that accompany the counterclaim:
      - (1) A copy of the certificate of copyright registration for a work that is the subject of the proceeding;
      - (2) A copy of the allegedly infringed work. This copy may also be accompanied by additional information, such as a hyperlink, that shows where the allegedly infringed work has been posted;
      - (3) A copy of the allegedly infringing material. This copy may also be accompanied by additional information, such as a hyperlink, that shows any allegedly infringing activity;
      - (4) A copy of the notification of claimed infringement that is alleged to contain the misrepresentation;
      - (5) A copy of the counter notification that is alleged to contain the misrepresentation; and
      - (6) Any other exhibits that play a significant role in setting forth the facts of the counterclaim.
    - (e) *Timing of counterclaim.* A counterclaim must be served and filed at the time of the response unless the Board, for good cause, permits a counterclaim to be asserted at a subsequent time.
- § 222.9 Response to counterclaim.**
- (a) *Filing a response to a counterclaim.* Within 30 days following the Board's issuance of notification that a counterclaim is compliant in accordance with 37 CFR part 224, a claimant against whom a counterclaim has been asserted ("counterclaim respondent") shall serve a response to the counterclaim in the manner set forth in 37 CFR 222.5(d) and shall file the response to the counterclaim with the Board in the manner set forth in 37 CFR 222.5(e).
  - (b) *Content of response to a counterclaim.* The response to a counterclaim shall include:

- (1) A caption identifying the parties and the docket number;
- (2) The name, address, phone number, and email address of each counterclaim respondent filing the response;
- (3) A short statement, if applicable, disputing any facts asserted in the counterclaim;
- (4) For counterclaims brought under 17 U.S.C. 1504(c)(1), a statement describing in detail the dispute regarding the alleged infringement, including any defenses as well as any reason why the counterclaim respondent believes there was no infringement of copyright, including any exceptions and limitations as set forth in 17 U.S.C. 107 through 122 that are implicated;
- (5) For counterclaims brought under 17 U.S.C. 1504(c)(2), a statement describing in detail the dispute regarding the alleged infringement, including reasons why the counterclaim respondent believes there is infringement of copyright;
- (6) For counterclaims brought under 17 U.S.C. 1504(c)(3), a statement describing in detail the dispute regarding the alleged misrepresentation and an explanation of why the counterclaim respondent believes the identified words do not constitute misrepresentation; and
- (7) A certification under penalty of perjury that the information provided in the response to the counterclaim is accurate and truthful to the best of the certifying party's knowledge. The certification shall include the typed, printed, or handwritten signature of the Counterclaim Respondent(s), and if the signature is handwritten it shall be accompanied by a typed or printed name.
  - (c) *Additional matter.* The counterclaim respondent may also include, as attachments to or files that accompany the counterclaim response:
    - (1) A copy of the certificate of copyright registration for a work that is the subject of the proceeding;
    - (2) A copy of the allegedly infringed work. This copy may also be accompanied by additional information, such as a hyperlink, that shows where the allegedly infringed work has been posted;
    - (3) A copy of the allegedly infringing material. This copy may also be accompanied by additional information, such as a hyperlink, that shows any allegedly infringing activity;
    - (4) A copy of the notification of claimed infringement that is alleged to contain the misrepresentation;
    - (5) A copy of the counter notification that is alleged to contain the misrepresentation; and

(6) Any other exhibits that play a significant role in setting forth the facts of the counterclaim response.

(d) *Failure to file counterclaim response.* A failure to file a counterclaim response within the required timeframe will constitute a default under 17 U.S.C. 1506(u), and the Board will begin proceedings in accordance with 37 CFR 227.

## PART 223—OPT-OUT PROVISIONS

■ 5. The authority citation for part 223 continues to read as follows:

**Authority:** 17 U.S.C. 702, 1510.

■ 6. Revise § 223.1 to read as follows:

### § 223.1 Respondent's opt-out.

(a) *Effect of opt-out on particular proceeding.* A respondent may opt out of a proceeding before the Board pursuant to 17 U.S.C. 1506(i) following the procedures set forth in this regulation. A respondent's opt out will result in the dismissal of the claim without prejudice.

(b) *Content of opt-out notification.* The respondent's opt-out notification shall include:

(1) The docket number assigned by the Board and contained in either the *initial notice* served by the claimant or the second notice;

(i) The respondent's name;

(ii) The respondent's address;

(2) The respondent's affirmation that the respondent will not appear before the Board with respect to the claim served by the claimant;

(3) A certification under penalty of perjury that the individual completing the notification is the respondent identified in the claim served by the claimant; and

(4) The typed, printed, or handwritten signature of the respondent, and if the signature is handwritten, it shall be accompanied by a typed or printed name.

(c) *Process of opting out.* Upon being properly served with a notice and claim, a respondent may complete the opt-out process by—

(1) Completing and submitting the online opt-out notification form identified in the initial notice and second notice and made available on the Board's website. An online opt-out is not complete unless a confirmation code provided with the initial notice or second notice is included in the submission; or,

(2) Completing the paper opt-out notification form included with the initial notice and second notice and delivering it to the Board, by one of the methods described in 37 CFR 222.5(e)(ii)(A) through (D).

(d) *Timing of opt-out.* The respondent has 60 days from the date of service or waiver of service to provide notice of its opt-out election. When the last day of that period falls on a weekend or a Federal holiday, the ending date shall be extended to the next Federal work day.

(1) When opting out via the online form under paragraph (c)(1) of this section, the respondent's opt out notification must be completed by midnight Eastern Time on the last day of the opt out period.

(2) When opting out under paragraph (c)(2) of this section, the respondent's opt out notification must be postmarked, dispatched by a commercial carrier, courier, or messenger, or hand delivered to the Office no later than the 60 day deadline.

(e) *One opt-out per respondent.* In claims involving multiple respondents, each respondent who elects to opt out must separately complete the opt-out process.

(f) *Confirmation of opt-out.* When a respondent has completed the opt-out process, the Board will notify all parties to the proceeding.

(g) *Effect of opt-out on refiled claims.* If the claimant attempts to refile a claim against the same respondent(s), covering the same acts and the same theories of recovery after the respondent's initial opt-out notification, the Board will apply the prior opt-out election and dismiss the claim.

(h) *Effect of opt-out on unrelated claims.* The respondent's opt-out for a particular claim will not be construed as an opt-out for claims involving different acts or different theories of recovery.

■ 7. Add part 224 to read as follows:

## PART 224—REVIEW OF CLAIMS BY OFFICERS AND ATTORNEYS

Sec.

224.1 Compliance review.

224.2 Dismissal for unsuitability.

**Authority:** 17 U.S.C. 702, 1510.

### § 224.1 Compliance review.

(a) *Compliance review by Copyright Claims Attorney.* Upon the filing of a claim or counterclaim with the Board, a Copyright Claims Attorney shall review the claim for compliance as provided in this section.

(b) *Substance of compliance review.* The Copyright Claims Attorney shall review the claim or counterclaim for compliance with all legal and formal requirements for a claim or counterclaim before the Board, including:

(1) The provisions set forth under this subchapter;

(2) The requirements set forth in 17 U.S.C. 1504(c), (d), and (e)(1); and

(3) Whether the allegations in the claim or the counterclaim clearly do not state a claim upon which relief can be granted.

(c) *Issuing finding.* Upon completing a compliance review, the Copyright Claims Attorney will notify the party that submitted the document in accordance with 37 CFR 222.5 and 17 U.S.C. 1506(f) by—

(1) Informing the claimant or counterclaimant that the claim or counterclaim has been found to comply with the applicable statutory and regulatory requirements and instructing the claimant to proceed with service under 37 CFR 222.5 and 17 U.S.C. 1506(e); or

(2) Informing the claimant or counterclaimant that the claim or counterclaim, respectively, does not comply with the applicable statutory and regulatory requirements and identifying the noncompliant issue(s) according to the procedure set forth in 17 U.S.C. 1506(f).

(d) *Clearance is not endorsement.* The finding that a claim or counterclaim complies with the applicable statutory and regulatory requirements does not constitute a determination as to the validity or of the allegations asserted or other statements made in the claim or counterclaim.

(e) *No factual investigations.* For the purpose of the compliance review, the Copyright Claims Attorney shall accept the facts stated in the claim or counterclaim materials, unless they are contradicted by information provided elsewhere in the materials or in the Board's records. The Copyright Claims Attorney will not conduct an investigation or make findings of fact; however, the Copyright Claims Attorney may take administrative notice of facts or matters that are well known to the general public, and may use that knowledge during review of the claim or counterclaim.

### § 224.2 Dismissal for unsuitability.

(a) *Review by Copyright Claims Attorney.* During the review of the claim under 37 CFR 224.1, the Copyright Claims Attorney shall review the claim or counterclaim for unsuitability on grounds set forth in 17 U.S.C. 1506(f)(3). If the Copyright Claims Attorney concludes that the claim should be dismissed for unsuitability, the Copyright Claims Attorney shall recommend to the Copyright Claims Board that the Board dismiss the claim and shall set forth the basis for that conclusion.

(b) *Dismissal by the Board for unsuitability.* (1) If, upon recommendation by a Copyright Claims Attorney as set forth in paragraph (a) of this section or at any other time in the proceeding upon the suggestion of a party or on its own initiative, the Board determines that a claim or counterclaim should be dismissed for unsuitability under 17 U.S.C. 1506(f)(3), the Board shall issue an order stating its intention to dismiss the claim without prejudice.

(2) Within 30 days following issuance of an order under paragraph (b) of this section, the claimant or counterclaimant may request that the Board reconsider its determination. The respondent or counterclaim respondent may file a response within 30 days following service of the claimant's request.

(3) Following the expiration of the time for the respondent or counterclaim respondent to submit a response, the Board shall render its final decision whether to dismiss the claim for unsuitability.

Dated: September 15, 2021.

**Kevin R. Amer,**

*Acting General Counsel and Associate Register of Copyrights.*

[FR Doc. 2021-20303 Filed 9-28-21; 8:45 am]

**BILLING CODE 1410-30-P**

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 13

#### RIN 2900-AR11

#### Fiduciary Bond

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) proposes to amend its regulations that govern fiduciary activities. More specifically, the proposed amendments would revise specific procedures to exempt a VA-appointed fiduciary who is also serving as a court-appointed fiduciary from posting multiple bonds and to also exempt a VA-appointed fiduciary that is also a State agency with existing, State-mandated liability insurance or a blanket bond from having to obtain an additional bond payable to the Secretary of Veterans Affairs.

**DATES:** Comments must be received by VA on or before November 29, 2021.

**ADDRESSES:** Comments may be submitted through [www.Regulations.gov](http://www.Regulations.gov). Comments should indicate that they are submitted in response to RIN 2900-AR11—Fiduciary Bond. Comments received

will be available at [www.regulations.gov](http://www.regulations.gov) for public viewing, inspection or copies.

**FOR FURTHER INFORMATION CONTACT:**

David Klusman, Lead Program Analyst, Pension and Fiduciary Service (21PF), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Ave. NW, Washington, DC 20420; (202) 632-8863. (This is not a toll-free number).

**SUPPLEMENTARY INFORMATION:** VA administers a fiduciary program for beneficiaries who, as a result of injury, disease, the infirmities of advanced age, or being less than 18 years of age, cannot manage their own VA benefits. Under this program, VA oversees these vulnerable beneficiaries, and appoints and oversees fiduciaries who manage these beneficiaries' benefits. VA's current statutory authority for this program is in 38 U.S.C. chapters 55 and 61.

VA is authorized to issue payments to and supervise fiduciaries acting on behalf of beneficiaries under 38 U.S.C. 5502. In 2004, Congress amended 38 U.S.C. chapters 55 and 61 to add new provisions which, among other things, authorize VA to conduct specific investigations regarding the fitness of individuals to serve as fiduciaries and reissue certain benefits misused by fiduciaries. In relevant part, the law provides that any certification of a person as a fiduciary shall be made on the basis of "the furnishing of any bond that may be required by the Secretary." 38 U.S.C. 5507(a)(3). On its face, this statutory language provides VA with authority to decide whether to require a bond.

Under certain circumstances, if a fiduciary misuses benefits, the law requires that the Secretary pay the beneficiary an amount equal to the amount of benefits that were misused. 38 U.S.C. 6107. In 2018, VA amended its fiduciary program regulations to implement current law. Fiduciary Activities, 83 FR 32716 (July 13, 2018).

As stated above, in some cases, fiduciaries are required to obtain a surety bond in order to protect the beneficiaries' benefits. However, there is conflicting information in VA regulations pertaining to bond requirements for fiduciaries. Specifically, 38 CFR 14.709 provides that VA's general policy is to require a surety bond that follows State laws and court rules from a court-appointed individual fiduciary. Further, the regulation indicates approved alternative methods to a corporate surety bond and authorizes the acceptance of a lesser degree of protection of funds under certain

circumstances. However, 38 CFR 13.230, which was promulgated in 2018 when VA amended its fiduciary program regulations, requires that any bond furnished by a fiduciary "[c]ontain a statement that the bond is payable to the Secretary of Veterans Affairs." 38 CFR 13.230(d)(3)(ii). VA's final rule that amended 38 CFR part 13 went into effect on August 13, 2018. 83 FR 32716. When it was promulgated, VA explicitly stated that "[w]e intend to issue uniform rules for all VA-appointed fiduciaries, such as allowable fees, surety bond requirements and appropriate investments, to include fiduciaries who also serve as court-appointed guardians for beneficiaries." *Id.* at 32727. The rule noted that "VA's fiduciary regulations will result in a gradual discontinuance of the current practice of recognizing a court-appointed guardian or fiduciary for purposes of receiving VA benefits on behalf of a VA beneficiary" and that, "VA will establish a national standard for appointing and overseeing fiduciaries." *Id.* at 32735. VA noted in the final rule that, "[b]ased on our experience in administering the program, the risks of not requiring all fiduciaries, with the [general] exception of spouses, to furnish a surety bond significantly outweigh any burden on a prospective fiduciary." *Id.* at 32727. VA set forth a number of factors that weigh in favor of requiring a bond: (1) It serves as a screening tool for VA to use in confirming qualification for appointment—in other words, if a fiduciary cannot obtain a bond because the bonding company considers the risk of fund exploitation too high, VA will not appoint the prospective fiduciary; (2) it is consistent with VA's oversight obligations, which include deterring fiduciary misuse of benefits; and (3) it puts a fiduciary on notice that he or she is liable to a third party for any payment on the bond. *Id.* With the 2018 amendment, VA also promulgated additional bond requirements under § 13.230(d) in order to protect a beneficiary's interests if a fiduciary misuses funds, including a requirement that the bond be payable to the Secretary. More recently, in January 2021, Congress enacted Public Law 116-315, which amended 38 U.S.C. 6107(b), to require VA to reissue misused funds to all beneficiaries, regardless of whether VA negligence was involved.

Under current § 13.410(c), VA must attempt to recoup any misused benefits, either from the surety company or, if no bond is in place, from the fiduciary directly. VA then must reissue any recouped benefits to the beneficiary's fiduciary successor to the extent they