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DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

19 CFR Part 4

[CBP Dec. 18-16]

RIN 1651-AB32

Civil Monetary Penalty Adjustments for Inflation

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: Final rule.

SUMMARY: This rule adjusts for inflation the amounts that U.S. Customs and Border Protection (CBP) can assess as civil monetary penalties for the following two violations – transporting passengers coastwise for hire by certain vessels (known as Bowaters vessels) that do not meet specified conditions; and employing a vessel in a trade without a required Certificate of Documentation. These adjustments are being made in accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act) which was enacted on November 2, 2015. Other CBP civil penalty amounts were adjusted pursuant to this 2015 Act in rule documents published in the *Federal Register* on July 1, 2016; January 27, 2017; December 8, 2017; and April 2, 2018, but the adjustments for these two civil penalties were inadvertently left out of those documents.

DATES: This rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The adjusted penalty amounts will be applicable for penalties

assessed after [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] if the associated violations occurred after November 2, 2015.

FOR FURTHER INFORMATION CONTACT: Millie Gleason, Office of Field Operations, U.S. Customs and Border Protection. Phone: (202) 325-4291.

SUPPLEMENTARY INFORMATION:

I. Statutory and Regulatory Background

On November 2, 2015, the President signed into law the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114-74 section 701 (Nov. 2, 2015)) (2015 Act).¹ The 2015 Act amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note) (1990 Inflation Adjustment Act) to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect. The 2015 Act required agencies to: (1) adjust the level of civil monetary penalties with an initial “catch-up” adjustment through issuance of an interim final rule (IFR) and (2) make subsequent annual adjustments for inflation. Through the “catch-up” adjustment, agencies were required to adjust the maximum amounts of civil monetary penalties to more accurately reflect inflation rates. The 2015 Act directed the Office of Management and Budget (OMB) to issue guidance to agencies on implementing the initial “catch-up” adjustment. The 2015 Act required that agencies publish their IFRs in the *Federal Register* no later than July 1, 2016 and that the adjusted amounts were to take effect no later than August 1, 2016.

For the subsequent annual adjustments, the 2015 Act requires agencies to increase the penalty amounts by a cost-of-living adjustment. The 2015 Act directs OMB to provide guidance to agencies each year to assist agencies in making the annual

¹ The 2015 Act was enacted as part of the Bipartisan Budget Act of 2015, Pub. L. 114-74 (Nov. 2, 2015).

adjustments. The 2015 Act requires agencies to make the annual adjustments no later than January 15 of each year and to publish the adjustments in the *Federal Register*.

The Department of Homeland Security (DHS) undertook a review of the civil penalties that DHS and its components administer to determine which penalties would need adjustments. On July 1, 2016, DHS published an IFR adjusting the civil monetary penalties with an initial “catch-up” adjustment, as required by the 2015 Act. *See* 81 FR 42987. DHS calculated the adjusted penalties based upon nondiscretionary provisions in the 2015 Act and upon guidance issued by OMB on February 24, 2016.² The adjusted penalties were effective for civil penalties assessed after August 1, 2016 (the effective date of the IFR) where the associated violations occurred after November 2, 2015 (the date of enactment of the 2015 Act).³ On January 27, 2017, DHS published a final rule adopting as final the civil monetary penalty adjustment methodology from the IFR and making the 2017 annual inflation adjustment pursuant to the 2015 Act and upon guidance OMB issued to agencies on December 16, 2016.⁴ *See* 82 FR 8571. On April 2, 2018, DHS published a final rule making the 2018 annual inflation adjustment pursuant to the 2015 Act and the guidance OMB issued to agencies on December 15, 2017.⁵ *See* 83 FR 13826.

² OMB, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, February 24, 2016.
<https://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2016/m-16-06.pdf>.

³ DHS published a correction to the IFR on August 23, 2016 to correct one amendatory instruction. *See* 81 FR 57442.

⁴ OMB, Implementation of the 2017 annual adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, December 16, 2016.
https://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2017/m-17-11_0.pdf.

⁵ OMB, Implementation of Penalty Inflation Adjustments for 2018, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, December 15, 2017.
<https://www.whitehouse.gov/wp-content/uploads/2017/11/M-18-03.pdf>.

As discussed in Section II below, several civil monetary penalties assessed by CBP and subject to the 2015 Act were inadvertently omitted from these DHS rulemakings.

II. CBP Penalties

CBP assesses or enforces penalties under various titles of the United States Code (U.S.C.) and the Code of Federal Regulations (CFR). These penalties include civil monetary penalties for certain violations of title 8 of the CFR pursuant to the Immigration and Nationality Act of 1952,⁶ as well as certain civil monetary penalties for customs violations for laws codified in title 19 of the U.S.C. and the CFR. CBP assesses many of the title 19 penalties under the Tariff Act of 1930, as amended, and as discussed in the IFR preamble at 81 FR 42987, the 2015 Act specifically exempts Tariff Act penalties from the inflation adjustment requirements in the 2015 Act. For that reason, DHS did not list those penalties in the tables of CBP penalty adjustments in the DHS rulemakings. There are also various other monetary penalties found throughout the U.S.C. and CFR which CBP may seek to issue or enforce but which were not included in the tables because they fall within the purview of another Department or Agency for purposes of the 2015 Act.⁷

Several non-Tariff Act penalties that are assessed by CBP were inadvertently omitted from the DHS rulemakings. On December 8, 2017, CBP published a rule,

⁶ Pub. L. 82-414, as amended (INA). The INA contains provisions that impose penalties on persons, including carriers and aliens, who violate specified provisions of the INA. While CBP is responsible for enforcing various provisions of the INA and assessing penalties for violations of those provisions, all the penalty amounts CBP can assess for violations of the INA are set forth in one section of title 8 of the CFR—8 CFR 280.53. For a complete list of the INA sections for which penalties are assessed, in addition to a brief description of each violation, see the IFR preamble at 81 FR 42989-42990.

⁷ For example, CBP may enforce the Clean Diamond Trade Act penalty set forth in 19 U.S.C. 3907, which falls within the purview of the Department of the Treasury. See 31 CFR part 501, app. A.

correcting for three penalties that had been omitted from the DHS rulemakings for the following three violations – transporting passengers between coastwise points in the United States by a non-coastwise qualified vessel; towing a vessel between coastwise points in the United States by a non-coastwise qualified vessel; and dealing in or using an empty stamped imported liquor container after it has already been used once. *See* 82 FR 57821.

However, two additional non-Tariff Act penalties that are assessed by CBP were inadvertently omitted from the DHS rulemakings and the CBP correction rulemaking. The first is a penalty set forth at 46 U.S.C. 12118(f)(3) for transporting passengers coastwise for hire by certain vessels (known as Bowaters vessels) that do not meet specified conditions. This penalty is incurred if a vessel that is used primarily in manufacturing or mineral industries and owned by a Bowaters corporation transports passengers for hire except as a service for a parent or subsidiary of the corporation owning the vessel or under a bareboat charter to a corporation otherwise qualifying as a citizen of the United States.⁸ The conditions under which a vessel identified as a Bowaters vessel under the authority of 46 U.S.C. 12118 may transport passengers coastwise for hire are detailed in 46 U.S.C. 12118(d)(2) and 19 CFR 4.80(d). The penalty amount is only set forth in the statute and is not reflected in the CBP regulations. The second is a penalty for employing a vessel in a trade without a required Certificate of Documentation pursuant to 19 U.S.C. 1706a and 19 CFR 4.80(i). A Certificate of

⁸ The term “Bowaters corporation” is defined in 46 U.S.C. 12118(a)(1). It means a corporation that has filed a certificate under oath with the Secretary of Homeland Security stating that the corporation meets the conditions set forth in 46 U.S.C. 12118(a)(1)(A)-(F). Among other things, the corporation must be incorporated under the laws of the United States or a State, the majority of the officers and directors must be citizens of the United States, and it must buy or produce in the United States at least 75 percent of the raw materials used or sold in its operations.

Documentation is form CG-1270 issued by the U.S. Coast Guard. This form is required for the operation of a vessel in certain trades. *See* 19 CFR 4.0(c) and 46 CFR part 67.

This final rule adjusts these penalty amounts using the same civil monetary penalty adjustment methodology that DHS announced in the IFR (81 FR 42987) and finalized in the DHS final rule (82 FR 8571), and detailed below.

III. Inflation Adjustment Methodology Required by 2015 Act

A. Overview

The 2015 Act provides a new method for calculating inflation adjustments. The new method differs substantially from the methods that agencies used in the past when conducting inflation adjustments pursuant to the 1990 Inflation Adjustment Act. The new method is intended to more accurately reflect inflation. Previously, when agencies conducted adjustments to civil penalties, they did so under rules that required significant rounding of figures. For example, an agency would round a penalty increase that was greater than \$1,000, but less than or equal to \$10,000, to the nearest multiple of \$1,000. While this allowed penalties to be kept at round numbers, it meant that agencies would often not increase penalties at all if the inflation factor was not large enough. Furthermore, increases to penalties were capped at 10 percent, which meant that longer periods without an inflation adjustment could cause a penalty to rapidly lose value in real terms. Over time, the formula used in the 1990 Inflation Adjustment Act calculations frequently caused penalties to lose value relative to actual inflation. The 2015 Act removed these rounding rules, and instead instructs agencies to round penalties to the nearest \$1. While this creates penalty values that are no longer round numbers, it does

ensure that agencies will increase penalties each year to a figure commensurate with the actual calculated inflation.

To better reflect the original impact of civil penalties, the 2015 Act “resets” the inflation calculations by excluding prior inflationary adjustments under the Inflation Adjustment Act. To do this, the 2015 Act requires agencies to identify, for each penalty, the year that Congress originally enacted the maximum penalty level/range of minimum and maximum penalty levels or the year that the agency last adjusted the penalty amount other than pursuant to the Inflation Adjustment Act, and the corresponding penalty amount(s). The 2015 Act then requires agencies to perform an initial “catch-up” adjustment, using the original amounts of civil penalties as a baseline, so that the 2016 penalty levels are equal, in real terms, to the penalty amounts as they were originally established. The 2015 Act also requires agencies to make subsequent annual adjustments to increase the penalty amounts by a cost-of-living adjustment.

B. Catch-Up Adjustment

This section sets forth the initial “catch-up” adjustment for the two civil monetary penalties assessed by CBP that were inadvertently omitted from the DHS rulemakings and CBP correction rulemaking. The catch-up adjustments for these two penalties are listed in Table 1 below. This table shows how DHS would have initially increased the penalties pursuant to the 2015 Act. The table contains the following information:

- In the first column (penalty name), we provide a description of the penalty.
- In the second column (citation), we provide the statutory cite from the United States Code (U.S.C.) and the regulatory cite from the Code of Federal Regulations (CFR).

- In the third column (current penalty), we list the existing penalty in effect on November 2, 2015.

- In the fourth column (baseline penalty (year)), we provide the amount and year of the penalty as enacted by Congress or as last changed through a mechanism other than pursuant to the Inflation Adjustment Act, whichever is later.

- In the fifth column (2016 multiplier), we list the multiplier used to adjust the penalty pursuant to the initial OMB catch-up guidance. The multiplier is determined by the year of enactment or last adjustment of the penalty. The multiplier is based upon the Consumer Price Index (CPI-U) for the month of October 2015, not seasonally adjusted.

- In the sixth column (preliminary new penalty), we list the amount obtained by multiplying the Baseline Penalty from column 4 with the Multiplier from column 5. This amount will be the catch-up adjustment amount, if, in accordance with the 2015 Act, this level does not increase penalty levels by more than 150 percent of the corresponding levels in effect on November 2, 2015.

- In the seventh column (adjusted 2016 penalty), we provide the number for the penalty as it would have been adjusted for 2016. To derive this number, we compare the preliminary new penalty with the current penalty from column 3. The adjusted new penalty is the lesser of either the preliminary new penalty or an amount equal to 150 percent more than the current penalty.

Table 1– U.S. Customs and Border Protection Civil Penalties Initial Catch-Up Adjustments

Penalty Name	Citation	Current penalty	Baseline penalty* (year)	2016 Multiplier**	Preliminary new penalty [2016 multiplier × baseline penalty]	Adjusted 2016 penalty [increase capped at 150% more than current penalty]
Penalty for transporting passengers coastwise for hire by certain vessels (known as Bowaters vessels) that do not meet specified conditions	46 U.S.C. 12118(f)(3)	\$200	\$200 (1958)	8.22969	\$1646	\$500
Penalty for employing a vessel in a trade without a required Certificate of Documentation	19 U.S.C. 1706a 19 CFR 4.80(i)	\$500	\$500 (1980)	2.80469	\$1402	\$1250

*The amount of the penalty and the year when the penalty was established or last adjusted in statute or regulation other than pursuant to the Inflation Adjustment Act of 1990.

**OMB, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Table A: 2016 Civil Monetary Penalty Catch-Up Adjustment Multiplier by Calendar Year, February 24, 2016. <https://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2016/m-16-06.pdf>.

C. 2017 Adjustments

This table shows how DHS would have made the 2017 annual inflation adjustment for the two civil monetary penalties assessed by CBP that were inadvertently omitted from the DHS rulemakings and CBP correction rulemaking, pursuant to the 2015 Act and the guidance OMB issued to agencies on December 16, 2016.⁹ In Table 2 below, we show: 1) the civil penalty (or penalties) name, 2) the penalty statutory and/or regulatory citation, 3) the penalty amount as it would have been adjusted in 2016 (See Table 1), 4) the cost-of-living adjustment multiplier for 2017 that OMB provided in its December 16, 2016 guidance, and 5) the 2017 adjusted penalty.

Table 2– U.S. Customs and Border Protection Civil Penalties 2017 Adjustments

Penalty Name	Citation	Adjusted 2016 Penalty (See Table 1)	2017 Multiplier*	Adjusted 2017 Penalty
Penalty for transporting passengers coastwise for hire by certain vessels (known as Bowaters vessels) that do not meet specified conditions	46 U.S.C. 12118(f)(3)	\$500	1.01636	\$508
Penalty for employing a vessel in a trade without a required Certificate of Documentation	19 U.S.C. 1706a 19 CFR 4.80(i)	\$1250	1.01636	\$1270

*OMB, Implementation of the 2017 annual adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, December 16, 2016.
https://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2017/m-17-11_0.pdf.

⁹ See footnote 4.

D. 2018 Adjustments

This final rule also makes the 2018 annual inflation adjustment pursuant to the 2015 Act and the guidance OMB issued to agencies on December 15, 2017.¹⁰ Pursuant to 28 U.S.C. 2461 note sec. 6, as amended by the 2015 Act, the penalty amounts adjusted by this final rule will be applicable for penalties assessed after [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] where the associated violation occurred after November 2, 2015 (i.e., the date the 2015 Act was signed into law). Consistent with OMB guidance, the 2015 Act does not change previously assessed penalties that the agency is actively collecting or has collected.

In Table 3 below, we show: 1) the civil penalty (or penalties) name, 2) the penalty statutory and/or regulatory citation, 3) the penalty amount as it would have been adjusted in 2017 (See Table 2), 4) the cost-of-living adjustment multiplier for 2018 that OMB provided in its December 15, 2017 guidance, and 5) the new 2018 adjusted penalty.

Additionally, we have made conforming edits to the regulatory text for the new adjusted penalty amounts in 19 CFR 4.80(i). Because the 46 U.S.C. 12118 penalty is not included in 19 CFR 4.80(d), there are no conforming edits to be made to the regulatory text. However, this penalty is listed in Table 3 for informational purposes.

¹⁰ See footnote 5.

Table 3– U.S. Customs and Border Protection Civil Penalties 2018 Adjustments

Penalty Name	Citation	Adjusted 2017 Penalty (See Table 2)	2018 Multiplier*	New penalty as adjusted by this final rule
Penalty for transporting passengers coastwise for hire by certain vessels (known as Bowaters vessels) that do not meet specified conditions	46 U.S.C. 12118(f)(3)	\$508	1.02041	\$518**
Penalty for employing a vessel in a trade without a required Certificate of Documentation	19 U.S.C. 1706a 19 CFR 4.80(i)	\$1270	1.02041	\$1296

* OMB, Implementation of Penalty Inflation Adjustments for 2018, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, December 15, 2017.

<https://www.whitehouse.gov/wp-content/uploads/2017/11/M-18-03.pdf>.

**No applicable conforming edit to regulatory text.

IV. Administrative Procedure Act

The Administrative Procedure Act (APA) generally requires agencies to publish a notice of proposed rulemaking in the *Federal Register* (5 U.S.C. 553(b)) and to provide interested persons with the opportunity to submit comments (5 U.S.C. 553(c)). The APA also requires agencies to provide a delayed effective date (of not less than 30 days) for substantive rules. 5 U.S.C. 553(d). The 2015 Act, however, specifically instructed that agencies are to make the required annual adjustments notwithstanding section 553 of title 5 of the U.S.C.

DHS is promulgating this final rule to ensure that the amounts for civil penalties that CBP assesses or enforces that were inadvertently omitted from the DHS rulemakings reflect the statutorily mandated ranges as adjusted for inflation. The 2015 Act provides a clear nondiscretionary formula for adjustment of the civil penalties; DHS and CBP have been charged only with performing ministerial computations to determine the amounts of

adjustments for inflation to civil monetary penalties. Additionally, although the 2015 Act requires publication of an IFR to take effect not later than August 1, 2016, that date has passed and publishing a separate IFR to account for these inadvertently omitted penalty adjustments would cause unnecessary delay. Further, this final rule merely applies the adjustment methodology that DHS provided for public comment in the 2016 IFR and finalized in the 2017 final rule. DHS finds that it is unnecessary to seek further public comment regarding the application of the finalized methodology to these two penalties. For these reasons, and as specified in the 2015 Act, DHS finds good cause to promulgate these CBP civil monetary penalty adjustments as a final rule and finds that the prior public notice-and-comment procedures and delayed effective date requirements of the APA are unnecessary and do not apply to this rule.

As described in Section I above, the 2015 Act requires agencies to make annual adjustments to civil monetary penalties no later than January 15 of each year and to publish the adjustments in the *Federal Register*. DHS will make future annual inflation adjustments required pursuant to the 2015 Act by final rule notwithstanding the notice-and-comment and delayed effective date requirements of the APA, as required by the 2015 Act. For future annual adjustments, DHS will update the penalty amounts by applying a cost-of-living adjustment multiplier pursuant to OMB guidance. DHS will publish a final rule that provides a table with the adjusted penalty amounts and that updates the numbers in the regulatory text accordingly. DHS will incorporate the two CBP penalties adjusted in this final rule into such future annual adjustment final rules.

V. Regulatory Analyses

A. Executive Orders 12866, 13563, and 13771

Executive Orders 12866 (“Regulatory Planning and Review”) and 13563 (“Improving Regulation and Regulatory Review”) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13771 (“Reducing Regulation and Controlling Regulatory Costs”) directs agencies to reduce regulation and control regulatory costs and provides that “for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.”

OMB has not designated this rule a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it. As this rule is not a significant regulatory action it is not subject to the requirements of Executive Order 13771. *See* OMB’s Memorandum, “Guidance Implementing Executive Order 13771, Titled ‘Reducing Regulation and Controlling Regulatory Costs’” (April 5, 2017) at Q2.

This final rule makes nondiscretionary adjustments to existing civil monetary penalties in accordance with the 2015 Act and OMB guidance.¹¹ DHS therefore did not consider alternatives and does not have the flexibility to alter the adjustments of the civil monetary penalty amounts as provided in this rule. To the extent this final rule increases

¹¹ See footnotes 2 and 4.

civil monetary penalties, it would result in an increase in transfers from persons or entities assessed a civil monetary penalty to the government.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act applies only to rules for which an agency publishes a notice of proposed rulemaking pursuant to 5 U.S.C. 553(b). See 5 U.S.C. 601-612. The Regulatory Flexibility Act does not apply to this final rule because a notice of proposed rulemaking was not required for the reasons stated above.

C. Unfunded Mandates Reform Act

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

D. Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this final rule, because this final rule does not trigger any new or revised recordkeeping or reporting.

VI. Signing Authority

The signing authority for this document falls under 19 CFR 0.2(a). Accordingly, this document is signed by the Secretary of Homeland Security.

List of Subjects in 19 CFR Part 4

Exports, Freight, Harbors, Maritime carriers, Oil pollution, Reporting and recordkeeping requirements, Vessels.

Amendments to the Regulations

For the reasons stated in the preamble, CBP amends 19 CFR part 4 as follows:

PART 4--VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The authority citation for part 4 continues to read in part as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624, 2071 note; 46 U.S.C. 501, 60105.

* * * * *

Sections 4.80, 4.80a, and 4.80b also issued under 19 U.S.C. 1706a; 28 U.S.C. 2461 note; 46 U.S.C. 12112, 12117, 12118, 50501-55106, 55107, 55108, 55110, 55114, 55115, 55116, 55117, 55119, 56101, 55121, 56101, 57109; Pub. L. 108-7, Division B, Title II, § 211;

* * * * *

2. Revise § 4.80(i) to read as follows:

§ 4.80 Vessels entitled to engage in coastwise trade.

* * * * *

(i) Any vessel, entitled to be documented and not so documented, employed in a trade for which a Certificate of Documentation is issued under the vessel documentation laws (see §4.0(c)), other than a trade covered by a registry, is liable to a civil penalty of \$500 for each port at which it arrives without the proper Certificate of Documentation on or before November 2, 2015, and \$1296 for each port at which it arrives without the

proper Certificate of Documentation after November 2, 2015 (19 U.S.C. 1706a, as adjusted by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015). If such a vessel has on board any foreign merchandise (sea stores excepted), or any domestic taxable alcoholic beverages, on which the duty and taxes have not been paid or secured to be paid, the vessel and its cargo are subject to seizure and forfeiture.

Claire M. Grady,
Under Secretary for Management and Senior
Official Performing the Duties of the Deputy
Secretary.

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